

**National Assembly for Wales**  
Enterprise and Business Committee

Influencing the Modernisation  
of EU Procurement Policy

May 2012



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## Enterprise and Business Committee

The Committee was established on 22 June 2011 with a remit to examine legislation and hold the Welsh Government to account by scrutinising its expenditure, administration and policy, encompassing economic development; transport and infrastructure; employment; higher education and skills; and research and development, including technology and science.

## Task and Finish Group

The Committee established a task and finish group of five Members to investigate and seek to influence the reform of European Union (EU) public procurement policy. The group members were Julie James (Chair), Byron Davies, Eluned Parrott, David Rees and Leanne Wood. The group met informally in private from December 2011 until May 2012.

## Current Committee membership



**Nick Ramsay (Chair)**  
Welsh Conservatives  
Monmouth



**Byron Davies**  
Welsh Conservatives  
South Wales West



**Keith Davies**  
Welsh Labour  
Llanelli



**Dafydd Elis-Thomas**  
Plaid Cymru  
Dwyfor Meirionnydd



**Julie James**  
Welsh Labour  
Swansea West



**Alun Ffred Jones**  
Plaid Cymru  
Arfon



**Eluned Parrott**  
Welsh Liberal Democrats  
South Wales Central



**David Rees**  
Welsh Labour  
Aberavon



**Ken Skates**  
Welsh Labour  
Clwyd South



**Joyce Watson**  
Welsh Labour  
Mid and West Wales

The following Member was also a member of the Committee during this inquiry:



**Leanne Wood**  
Plaid Cymru  
South Wales Central

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## Chair's foreword

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Public procurement is an important driver for economic growth and employment. This inquiry has shown how the creative use of public sector procurement can help maximise the impact of public spending in Wales.

The European Commission's proposals for reforming and modernising public procurement policy give Wales an important opportunity to look at its existing procurement regime and tackle any weaknesses, including investigating any barriers for Welsh businesses trying to access the market.

This report is in two parts – part one highlights issues that we believe should be taken into account during negotiations on the new EU Directives on procurement, and how they are transposed into Welsh regulations. Importantly we identified the EU proposal to create a single national 'oversight body' for procurement in the UK as a breach of the principle of subsidiarity, which did not recognise devolution. The Lisbon Treaty of the European Union allows national parliaments to challenge legislative proposals if they are considered to breach the subsidiarity principle: that action at Union level should "add value" and be undertaken only where the objectives cannot be delivered by action at local, national or regional level. This is the first time the National Assembly for Wales has raised a concern under the 'early warning mechanism' for 'regional parliaments' within the Lisbon Treaty.

Part 2 of the report focuses on the Welsh public procurement sector. The overriding conclusion is that the current EU procurement rules themselves are not a problem, but it is how they are being applied that is significant. The Welsh Government's Community Benefits policy clearly points the way to achieving social and environmental policy objectives through procurement, and it has begun the process well, but it must be more widely applied across public sector contracting authorities in Wales, with a concerted effort to bring all of them up to the standard of the best.

We identify the '3 Cs' necessary to ensure an efficient and effective Welsh procurement sector – creativity, competency and capacity. The scale of ambition for the public procurement sector must be far

greater, and strategic leadership is essential to raising the status of procurement, both as a profession, and in terms of what it can achieve.

The Committee welcomes the Welsh Government's review of public procurement policy, conducted by John McClelland CBE. Our report makes a number of recommendations for consideration alongside the review, and we look forward to the Welsh Government's response and the outcome of the review. We will also continue to closely monitor developments with the European Commission's proposals to modernise EU procurement policy.

The Committee is very grateful to all those who gave their time and expertise to assist this inquiry.

Julie James AM

Chair - Task and Finish Group on EU Procurement Policy

## The Committee's Recommendations

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The Committee's recommendations to the Welsh Government are listed below, in the order that they appear in this report. Please refer to the relevant pages of the report to see the supporting evidence and conclusions:

**Recommendation 1.** The Welsh Government to continue to make representations to the UK Government and the European Commission to evaluate the impact of the Remedies Directive across EU Member States and regions and to take swift and appropriate action based on the findings; and to give consideration to how the Remedies Directive interacts with the provisions of the Draft Directives on Procurement. (Page 17)

**Recommendation 2.** The Welsh Government to seek assurances from the UK Government that implementing regulations to transpose the procurement Directives into law in Wales will give sufficient scope to support the Welsh Government's public procurement policy objectives. (Page 17)

**Recommendation 3.** The Welsh Government to provide Welsh local authorities and other public contracting authorities with strong guidance on achieving the appropriate balance between risk management and creativity in public procurement, in particular around procurement below the EU thresholds, to ensure that broader policy objectives are met. As one example, the guidance should help maximise the opportunities for protected employment. (Page 19)

**Recommendation 4.** The Welsh Government's procurement review to evaluate the efficacy of existing measures to address the procurement skills gap, build capacity and share existing best practice, including examining the range of accredited professional qualifications available, and the extent to which outside expertise and mentoring can help. (Page 22)

**Recommendation 5.** The review commissioned by the Welsh Government into 'Maximising the Impact of Welsh Government Procurement Policy' should investigate how to raise the profile and status of procurement expertise within public sector contracting authorities in Wales; to integrate procurement specialists more closely

into corporate strategic planning and decision-making processes; and to improve senior decision makers' understanding of public procurement as a tool to meet their public sector duty to promote wellbeing and targets for sustainable economic growth. (Page 23)

**Recommendation 6.** The Welsh Government to consider, in conjunction with the findings of its commissioned review of procurement policy, whether the Welsh planning policy model could be adapted to public procurement, i.e. setting an overarching policy statement or strategy that public sector contracting authorities are required to follow, and which is supplemented by technical advice notes and procedural guidance circulars. (Page 24)

**Recommendation 7.** The Welsh Government to use the review of procurement policy as an opportunity to assess whether Value Wales has the necessary mandate, structural and governance arrangements, and resources to drive change across all Welsh public sector contracting authorities; and to ensure that appropriate enforcement measures are introduced to speed up the pace of change. (Page 24)

**Recommendation 8.** The Welsh Government to work with the local government sector to prioritise standardisation of the contract standing order procurement rules for local authorities, and to seek greater consistency of procurement rules, including financial rules, in other parts of the Welsh public sector. (Page 25)

**Recommendation 9.** The Welsh Government to prioritise putting in place an integrated IT system to support SQUiD and accelerate implementation of the XChange Wales e-procurement programme across Wales. (Page 26)

**Recommendation 10.** The Welsh Government to outline what steps it is taking to ensure that reliable data is available to assess how many companies winning public procurement contracts in Wales are Welsh businesses capable of generating long-term benefits to the local economy and job market, as opposed to companies whose primary base is outside Wales, and to raise awareness of this issue with contracting authorities. (Page 26)

**Recommendation 11.** The Welsh Government to include in its review of public procurement policy a review of the measures it is taking to encourage strong dialogue between public contracting authorities and businesses in Wales to improve mutual understanding of how public

procurement can be used as a tool to boost the Welsh economy.  
(Page 27)

**Recommendation 12.** The Welsh Government to undertake robust evaluation of the outcomes of collaborative procurement exercises in Wales; to compare the outcomes with collaborative models used in other parts of the UK; and to communicate and apply the lessons learnt within the Welsh public sector. (Page 29)

**Recommendation 13.** The Welsh Government to prioritise measures to increase awareness of its Community Benefits policy among Welsh public sector contracting authorities, as well as contracting authorities and contractors operating in key areas of non-devolved spend in Wales, including transport and other infrastructure. (Page 30)

## Introduction

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1. On 22 September 2011 the Enterprise and Business Committee agreed to conduct a short inquiry whereby a rapporteur group investigated, and sought to influence, the current EU debate on the modernisation of public procurement policy. An initial phase of public consultation, to understand the key concerns of Welsh stakeholders regarding existing procurement regulations, closed on 1 November 2011. The terms of reference of the task and finish group are at Annex A.
2. The European Commission published draft proposals for three new directives<sup>1</sup> relating to procurement on 20 December 2011. The proposals to modernise the public procurement legislative framework are one of twelve key priority actions identified in the Single Market Act adopted in April 2011<sup>2</sup> to boost growth and confidence in the European Single Market. The task and finish group focused in particular on assessing the extent to which the proposal for a draft directive on public procurement (COM(2011)896) addressed Welsh concerns about public procurement, with the potential for the Committee to feed views into Brussels (and to the Welsh and UK Governments).
3. The EU Directives on procurement provide the legislative framework for public procurement throughout the EU, and are implemented by UK regulations (the Public Contracts Regulations 2006) that apply in England, Wales and Northern Ireland. Value Wales is the Welsh Government's procurement arm, supporting public sector organisations in Wales with their procurement activities.
4. Between January and March 2012 the group met informally in private to discuss the implications of the proposals with the Welsh Minister for Finance and officials from Value Wales, UK Cabinet Office officials, and procurement specialists from the Wales Audit Office, Welsh local government, NHS Wales, higher education, the construction sector and small businesses. Members are also grateful for evidence from Professor Kevin Morgan of Cardiff University, and from officers of Birmingham City Council and Coventry City Council on their approach to the challenges of the EU procurement rules.

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<sup>1</sup> Proposal for a directive on procurement by entities operating in the water, energy,

<sup>2</sup> Single Market Act – Twelve levers to boost growth and strengthen confidence (COM(2011)206).

5. The task and finish group identified five areas of focus for its inquiry: simplification of the procurement regime; access for small and medium-sized enterprises (SMEs) and third sector organisations; scope for pursuing environmental and social policy objectives; contracting authorities' experience of how procurement is operating in Wales; and support and guidance available.

6. A number of issues were identified that are specific to the EU draft directive on public procurement, and these are detailed in part 1 of this report. Crucially though, significant issues relating to the Welsh procurement sector and procurement practice in Wales more generally were uncovered. For the most part these lie outside the scope of any changes to current EU procurement rules, and are detailed in Part 2 of the report.

## **Part 1: EU proposal for a draft directive on public procurement**

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7. The overall aim of the proposals, to create a simplified and more flexible set of procurement rules aimed at fostering innovation and economic growth, is welcomed. Measures to improve access to the market for small and medium-sized enterprises (SMEs) are vital to Wales where micro-businesses form over 94 per cent of the business sector.

### **Simplification**

8. The Committee supports the Welsh Government view that certain proposed simplification measures are welcome, including

- reducing the documentation needed during selection stage;
- an increased possible use of negotiation through the competitive procedure with negotiation and prior publication; and
- support for increasing use of e-procurement.

9. However it is concerned that other measures, in particular the proposal to change the rules for Part A and Part B services<sup>3</sup>, and to establish a single national oversight body in each Member State, will counteract this simplification drive. Shorter timescales for expressions of interest and tender return might also serve to disadvantage smaller suppliers in Wales, especially those considering consortia bidding.

### **Flexibility of Procurement Procedures**

10. The proposals to allow increased dialogue with suppliers through the new ‘innovation partnership’ procedure, the competitive process with negotiation, and the simplified rules on competitive dialogue are all welcome. However there are grave concerns about the proposed Article 24.1 – permitting only partial transposition of Directives by the Member State. Should the UK Government decide not to transpose all possible procurement procedures into UK regulations, this could

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<sup>3</sup> Only “Part A” or “priority” services are fully caught by UK Regulations on procurement. “Part B” or “residual” services are caught by a lesser regime – generally these are services considered to largely be of interest only to bidders located in the Member State where the contract is to be performed, currently including health and social services; education services; recreational, cultural and sporting services; hotel and restaurant services; and legal services.

reduce the scope both for innovation and for the securing of social and environmental benefits by negotiation and improved dialogue with suppliers.

11. The group has already referred this matter to the Welsh Government and the UK Parliamentary committees scrutinising these European proposals, to be taken into account during negotiations and parliamentary scrutiny. The Welsh Minister has in turn taken the matter up with the UK Government. Welsh MEPs have also been notified.

### **National Oversight Body**

12. The Assembly has similarly raised concerns about the proposal in Article 84 for a single 'national oversight body' for the Member State. This is seen as potentially breaching the principles of subsidiarity and proportionality, and it does not recognise devolution. The Assembly's Constitutional and Legal Affairs Committee also agreed with the UK Government's view that the proposal was a breach of subsidiarity, and Welsh views are included in a Reasoned Opinion issued to the European institutions by the UK national parliament – the House of Commons - on 7 March. This is the first occasion that the National Assembly for Wales has raised a subsidiarity concern under the 'early warning mechanism' introduced by the Lisbon Treaty. The relevant correspondence is at Annex B.

13. While representatives of the construction sector in Wales have pointed to the need for better monitoring, and consistent and appropriate application of the procurement rules, there is insufficient detail in the proposals to assess positive benefits from the proposals as drafted, and most Welsh stakeholders told the group they are extremely wary of the potential for an added layer of bureaucracy.

14. Contracting authorities raised the issue that a new regulatory body could slow down the procurement process, as challenges to individual procurements wait to be resolved – an issue of critical importance where, for example, clinical items are being purchased. As the proposals stand, it is suggested that the increased bureaucratic burden outweighs the positive aspects of the proposed body, such as providing a source of advice, dispute resolution and the dissemination of good practice.

## **Thresholds**

15. Despite fairly widespread support for raising the current thresholds for applying the EU procurement regulations, the Commission's proposals provide for thresholds to remain the same. The ability to raise these thresholds is curtailed because they are aligned with thresholds set out in the multilateral Government Procurement Agreement (GPA) that is negotiated through the World Trade Organisation. It is therefore welcome that provision has been made in the draft proposals for future review of the EU thresholds, every two years from 2014.

16. There was some evidence from the local authority sector that greater unity between the different thresholds for good and services, and for works, could be beneficial. It was noted that a volume of contracts let for refurbishment work in Wales were below the current threshold for works. It was stressed though, that if procurement thresholds were raised, then contracts below threshold should still be advertised, as there were many businesses in Wales wanting to bid for them.

## **Removing the distinction between Part A and Part B Services**

17. The group raised concerns about the proposal to abolish Part B services and introduce a new regime for 'social and other specific services' (Article 74), including personal care services.

18. However, evidence has been ambiguous on this point, with several witnesses from contracting authorities stating that their practice had been to subject all services procurement to the full procurement regime regardless of whether the services fall into Part A or Part B. This is not good practice - application of the full range of procurement rules to contracts without good reason is a significant barrier to SME's and microbusinesses trying to access the market. Concern that procurement specialists are taking an overly risk-averse approach to applying the current rules is dealt with in more detail in part 2 of this report.

19. The removal of the distinction between Part A and Part B services also raises the particular problem of circularity when it comes to seeking procurement legal advice. Following the removal of the distinction, the full application of the directive must be extended to a number of services that were not previously covered, such as legal

advice. If, for example, procurement legal advice is required, it therefore seems that this must be procured with the full weight of the procurement regime, and without the very advice the authority is seeking to obtain. This would seem to be a new problem, introduced by the abolition of the distinction between Part A and Part B services.

### **Lots**

20. The proposals to encourage contracting authorities to split contracts into smaller lots, and to make it possible to limit the number of lots that can be awarded to one tenderer, thereby increasing the potential for SME's to participate, are welcomed. However, some witnesses sounded a note of caution, warning that the obligation for contracting authorities to provide a reason for not dividing a contract into lots could potentially open up a new area of legal challenge.

### **Achieving social and environmental policy objectives**

21. Broadly speaking, witnesses welcomed the apparent clarification of the extent to which social and environmental policy objectives could be achieved using public procurement. However, witnesses suggested that they found it hard to evaluate the extent to which the Draft Directives were an improvement on the current directives in this respect. The Committee notes that the Welsh Government is seeking legal opinion on the extent to which the proposals support the aims of economic and social policy in Wales, including the Welsh Government's Community Benefits policy.

### ***Reserved contracts***

22. The extension of reserved contracts to cover disadvantaged people and not only those with a disability is welcomed. Members were told that the Welsh Government was the first in the UK to make use of the provision under Article 19 of the current procurement Directives to reserve contracts for supported businesses, and a Value Wales survey identified 21 supported businesses offering services procured by the public sector. However the decision by the UK Government on 7 March to remove grant funding to Remploy, and the proposal for subsequent closure of seven of the nine Remploy businesses in Wales, will significantly reduce the scope for the public sector to 'reserve' contracts, leaving only twelve other supported businesses operating in Wales.

## ***Sustainable Development***

23. The Committee hopes that the new Directives will lead to a lighter and more flexible set of procurement regulations that support sustainable development objectives. Members heard some good examples of sustainable development measures being built into procurement planning in Wales, and explored the possibility of the new regulations giving more flexibility to allow ‘carbon footprint’ clauses to be built into the evaluation criteria for contracts.

### **Need for clarification**

24. The lack of clarity on the implications of the proposals for meeting environmental and social policy objectives also applies to other significant elements of the proposals as currently drafted, such as what the new procurement procedures offer, and the proposed governance arrangements. The Committee hopes that the proposals will become clearer in negotiation and that the Welsh Government will keep it informed of significant developments as these negotiations continue throughout 2012.

### **The Remedies Directive**

25. The Remedies Directive was identified as a major problem for the procurement sector by a number of stakeholders. The number of legal challenges under the Remedies Directive appears far less in Wales than in Northern Ireland so far, and NHS Wales showed that the attitude taken by contracting authorities to dealing robustly with legal challenges was important, i.e. challenging back by rebutting the claim, and only rolling back procedures to the point at which a challenge has been made. In the health sector it was pointed out that a delay in procurement could have implications for clinical safety.

26. Local government procurement officers noted that fear of challenge under the Remedies Directive has impeded the promotion of innovative procurement practices, though the anticipation of challenge is often greater than the challenges that actually take place. This is particularly a problem where procurement personnel are positioned a long way down the chain of command within the contracting authority.

27. The Remedies Directive can act as a barrier to efficiency and innovation, and the Committee therefore urges the European Commission to evaluate its impact across EU Member States and

regions, to take swift and appropriate action based on the findings, and to consider the Remedies Directive alongside the Draft Procurement Directives.

**Recommendation 1: The Welsh Government to continue to make representations to the UK Government and the European Commission to evaluate the impact of the Remedies Directive across EU Member States and regions and to take swift and appropriate action based on the findings; and to give consideration to how the Remedies Directive interacts with the provisions of the Draft Directives on Procurement.**

### **Transposition of the Directives**

28. The current EU Procurement Directives are transposed into UK legislation by the Public Contracts Regulations 2006, which apply to England, Wales and Northern Ireland. A recent report on the procurement sector in Scotland<sup>4</sup> argues that the Scottish regulations, which are in almost all respects identical to those in place elsewhere in the UK, hamper the progressive use of procurement. The report states that the regulations were drafted at UK level with a focus on minimising the business burden, rather than achieving wider social, economic or environmental policy objectives.

**Recommendation 2: The Welsh Government to seek assurances from the UK Government that implementing regulations to transpose the procurement Directives into law in Wales will give sufficient scope to support the Welsh Government's public procurement policy objectives.**

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<sup>4</sup> Cuthbert, Jim and Margaret (2012), The Jimmy Reid Foundation, Using Our Buying Power to Benefit Scotland – the case for change.

## Part 2: The Welsh Procurement Sector

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29. One clear message from the inquiry is that regardless of efforts to make the procurement rules simpler and more flexible, the current rules are not the real issue. It is possible to pursue a progressive and innovative procurement policy within the current procurement regime – the real issue is how the rules are interpreted and applied.

### Managing Risk

30. The group explored the perception noted by some stakeholders that the UK procurement sector has a more risk averse culture than that of other Member States. There appears to be some evidence that the UK, and in particular Wales, is more risk averse in how it applies the rules.

31. Professor Kevin Morgan of Cardiff University identified several reasons for greater risk aversion at the UK level. He pointed to a deep-seated H.M. Treasury culture of ‘value for money’ being defined in narrow economic terms. It was also noted that the UK business community appears to be more litigious than that of some other continental countries, and the unintended consequence of the Remedies Directive had also been to deepen the risk-averse culture.

32. This culture is even more pronounced in Wales because of fundamental issues about capacity, creativity and competence. Professor Morgan stated that:

“People are creative when they feel that their skills are valued, when there is talent there to be encouraged and to explore. Trial and error is part of creativity. Creativity is linked to competence, and this is the fundamental problem in Wales. Our competence is more challenged in Wales because our skills deficit is more pronounced.”

33. Professor Morgan stated that the procurement regulations enabled as much as they constrained and were only a problem in that they could be perceived to be a barrier. He saw this perception as being a big problem amongst public servants in Wales, with narrow cost accounting and a risk-averse interpretation of procurement rules being applied in its dealings with social enterprises. More pressure could be put on civil servants and public bodies in Wales to be more

creative and less risk averse. It is clear that attitudes and approach to risk management vary across Welsh local authorities.

34. Members were interested in exploring the innovative approach adopted by Coventry City Council to purchase services for homeless people. The Council has approved an 18 month trial of commissioning services to be delivered cost-effectively through a grant-funded consortium of local third sector service providers called 'Here to Help'. The consortium is a company limited by guarantee, and enables local voluntary sector organisations, including some smaller agencies, to work collaboratively together to compete more effectively against larger, national commercial organisations, thus helping to keep a strong, local provider base in the city. The organisations in the consortium can work together either to provide grant funded services or as a company in formal procurement exercises. The approach takes account of the requirements of EU procurement rules, and has been advertised through a voluntary OJEU notice. The risks and opportunities have been considered in the context of the Council's wellbeing powers and duty to have regard to the social value of its contracts. The commissioning approach has full commitment of politicians and officers from the chief executive to finance and legal services and the service area.

**Recommendation 3: The Welsh Government to provide Welsh local authorities and other public contracting authorities with strong guidance on achieving the appropriate balance between risk management and creativity in public procurement, in particular around procurement below the EU thresholds, to ensure that broader policy objectives are met. As one example, the guidance should help maximise the opportunities for protected employment.**

### **Driving Creativity**

35. Professor Morgan specialises in public procurement of food – an area where it is possible to legally build social clauses into contracts that create conditions more likely to favour procurement from local suppliers. This is something that works very effectively in Italy, where contracting authorities work within the rules, but their starting point is to achieve multiple social “*values* for money” rather than being driven by a narrowly framed definition of ‘value for money’ based purely on economic cost.

### **When in Rome ...**

A creative approach to procurement of school meals is described in 'The School Food Revolution: Public Food and the Challenge of Sustainable Development' by Professor Kevin Morgan and Dr Roberta Sonnino.<sup>5</sup> Italian public authorities have used the school meals service as a tool to reinforce healthy eating habits, and in Rome a system was designed "with the potential to deliver the widest economic, environmental and social benefits of sustainable development."

The system had sophisticated weighting towards cooperatives and social enterprises, and towards organic food. While specifying local food in a contract is illegal, it is possible to specify qualities of food, such as organic, protected designations of origin, freshness and time to market, that send a clear message that public bodies want local food suppliers. This is a creative way to put social values into action in the procurement process.

36. Members heard some examples of good creative work, and proactive approaches to public procurement, such as Cardiff Metropolitan University's work on food procurement for the higher education sector, but these examples are not widespread across all Welsh public sector contracting authorities.

### **Addressing the Skills Gap**

37. A significant skills deficit in the Welsh procurement sector was identified. There are not enough properly qualified officers. According to Professor Kevin Morgan of Cardiff University, the recognised 'McClelland benchmark'<sup>6</sup> states there should be one skilled procurement professional for every £15m of spend. According to recent data Wales has 106 procurement officers with a Chartered Institute of Purchasing and Supply (CIPS) qualification – the internationally recognised professional body for procurement specialists. Applying the McClelland benchmark would specify that Wales should have 174 skilled professionals. There is significant variation in the procurement expertise available in higher education institutions in Wales – one institution has a team of eight dedicated

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<sup>5</sup> Morgan, Kevin and Sonnino, Roberta (2008), The School Food Revolution: Public Food and the Challenge of Sustainable Development.

<sup>6</sup> Review of Procurement in Scotland – Report and recommendations, by John. F. McClelland CBE. Scottish Government Publication, March 2006; ISBN 0 7559 4999 4

procurement staff, whilst four institutions have none and instead used shared service arrangements with other local institutions.

38. The Committee welcomes efforts by the Welsh Government to address the skills gap across the public sector, for example through the 'Home Grown Talent' project funded through the European Social Fund in the Convergence area of West Wales and the Valleys. However the Convergence funding region does not cover all Welsh local authorities, and although sharing best practice can help to spread the benefit, overall the evidence points to a strong need to ensure consistency across the whole of Wales.

39. The Committee also sounds a note of caution in concentrating only on CIPS-accredited qualifications. It notes that in some areas of significant spend, such as construction and social care, procurement is done by people without CIPS qualifications. There is a need to consider other educational routes and training methods, and to include training on procurement issues into professional development in all sectors to build capacity.

40. Increasing the total number of qualified professionals will not be enough to generate the creativity and expertise needed within the sector. There also needs to be better sharing of good practice amongst all professionals. The group heard of examples of problems with contracts that were due to incorrect application of the current rules, not the rules themselves.

41. Approaches to procurement will vary according to the goods, services or works required – a case of 'horses for courses' - and stakeholders stressed the importance of adequate planning and having an appropriate procurement strategy in place in each case, within which the regulations then fit according to the need. Drawing up an incorrect specification can tie the hands of contracting authorities and/or lead to legal challenge later in the process, but strategic planning was identified as the key to avoiding these problems arising.

42. More guidance is clearly needed to ensure that contracting authorities are always acting as an 'intelligent client', and more opportunities must be created to bring procurement specialists together, and inject the benefits of external expertise into the sector, to strengthen the knowledge base.

**Recommendation 4: The Welsh Government’s procurement review to evaluate the efficacy of existing measures to address the procurement skills gap, build capacity and share existing best practice, including examining the range of accredited professional qualifications available, and the extent to which outside expertise and mentoring can help.**

### **Status of Procurement**

43. The status of procurement within public sector contracting authorities is not high enough and despite the focus on value for money it is questionable whether public bodies know enough about their own internal procurement practices. Public procurement is a key driver of economic growth but its importance is not sufficiently well recognised across the Welsh public sector. The profile of procurement needs to be raised and it must be moved from being a back-room function to a boardroom function. Within public sector contracting authorities the relationship between procurement professionals, legal advisers, financial advisers and budget holders, and their relative roles in decision-making, are critical. Legal advice can either support creative procurement approaches within the rules or lead to an over-cautious approach driven by fear of litigation. Enhancing the status of procurement professionals will help re-balance things in favour of more strategic and creative approaches to purchasing decisions. Increasing the skills and capability of procurement professionals will also help them to earn respect and greater influence within their individual organisations.

### **Strategic Leadership**

44. Greater strategic leadership is needed from government and within contracting authorities and supporting bodies to promote creative procurement approaches and best practice, and build procurement into wider strategic objectives to stimulate the local economy, create training and employment opportunities and generate other long-term community benefits. Value Wales recognised that examples of good procurement practice had not just involved the procurement team pushing the policy, but the legal team, project manager and budget holder also understanding the policy objectives.

## **Procuring Economic Growth**

Birmingham City Council, as part of a group of authorities and partners in the West Midlands Economic Inclusion Panel, has focused on what can be done collectively through procurement influence to support growth in the local economy, and the development of local supply chains within the scope of EU procurement law. It has taken a toolkit approach, and with legal expertise has developed a framework within which it can start to condition how much the people who supply goods and services do so through the local economy. Over £5 billion of spending has gone through the framework already. An 'e-Bay for businesses' has been developed called FindItInBirmingham.com, to support the development of local supply chains and create an environment that supports SME's, and which larger companies will tap into. £3.7 billion of private sector deals have gone through the online portal and 10,000 companies are registered. A striking element of the West Midlands collaborative approach is that regional leadership is driving the initiative, embedding a shared common purpose of boosting employment and economic growth throughout the region.

45. Greater recognition is needed of the Welsh Government's role in setting an overarching policy for public procurement in Wales that contracting authorities across the Welsh public sector are required to adopt and respond to quickly. Taking a policy approach to procurement similar to that for planning policy, with the requirement to act on technical advice notes, could lead to the kind of modal shift in culture and behaviour that is required in all public sector contracting authorities. Consideration should also be given to encouraging public sector contracting authorities to have a high level procurement strategy in place to implement Welsh Government procurement policy objectives.

**Recommendation 5: The review commissioned by the Welsh Government into 'Maximising the Impact of Welsh Government Procurement Policy' should investigate how to raise the profile and status of procurement expertise within public sector contracting authorities in Wales; to integrate procurement specialists more closely into corporate strategic planning and decision-making processes; and to improve senior decision makers' understanding of public procurement as a tool to meet their public sector duty to promote wellbeing and targets for sustainable economic growth.**

**Recommendation 6: The Welsh Government to consider, in conjunction with the findings of its commissioned review of procurement policy, whether the Welsh planning policy model could be adapted to public procurement, i.e. setting an overarching policy statement or strategy that public sector contracting authorities are required to follow, and which is supplemented by technical advice notes and procedural guidance circulars.**

46. During the course of the inquiry it became known that procurement activity by Welsh heritage body CADW did not fall within the ambit of the procurement arm of the Welsh Government, Value Wales. The Committee believes this anomaly has been addressed, but it raised the important question of whether Value Wales had a strong enough mandate to drive progressive procurement policy and practice across the whole Welsh public sector. The Welsh Government's review of public procurement policy in Wales is a timely opportunity to assess whether Value Wales has the mandate, structural and governance arrangements and resources it needs for the job. In evidence Value Wales clearly felt it did not have the tools to enforce good practice. The Committee would like the Welsh Government to look at what enforcement measures, such as grant conditions, can be put in place to deal with a situation where there is evidence that a contracting authority is not following good practice.

**Recommendation 7: The Welsh Government to use the review of procurement policy as an opportunity to assess whether Value Wales has the necessary mandate, structural and governance arrangements, and resources to drive change across all Welsh public sector contracting authorities; and to ensure that appropriate enforcement measures are introduced to speed up the pace of change.**

#### **Consistent good practice**

47. There is not enough consistency of practice across the procurement sector in Wales – this message came through strongly from stakeholders, especially economic operators. Business representatives noted confusion where different contracting authorities within Wales placed different requirements on those bidding for contracts. These divergent approaches were cited as a barrier to SMEs engaging with public procurement.

48. There is some very good practice in Wales – the Church Village bypass project was cited by several stakeholders as a leading example of securing long-term community benefits. However, best practice is not being shared widely enough to bring all contracting authorities up to the standards of the best. Local government procurement officers noted work currently underway to bring more consistency to procurement procedures between local authorities by standardising the contract standing order procurement rules, which include the financial rules and regulations. The Higher Education Purchasing Consortium noted that higher education institutions within Wales had their own distinct procurement procedures within the framework of EU procurement law.

**Recommendation 8: The Welsh Government to work with the local government sector to prioritise standardisation of the contract standing order procurement rules for local authorities, and to seek greater consistency of procurement rules, including financial rules, in other parts of the Welsh public sector.**

49. More must be done to ensure that good practice is shared across local authority boundaries and between contracting authorities in all parts of the public sector, including through peer support and mentoring. This is another area where strong strategic leadership from the Welsh Government and Welsh Local Government Association is critical.

50. Helpful procurement tools, such as the Supplier Qualification Information Database 'SQUiD' introduced by Value Wales to simplify the pre-qualification process for bidders, should be used by all contracting authorities. Business representatives welcomed the introduction of SQUiD, but stated that it should be used consistently to maximise its potential benefits. The I2I 'Can Do' toolkit for targeted recruitment and training in the housing sector is another good example. It is important to ensure the consistent use of approved procurement tools right across the public sector.

51. E-procurement in general is helpful both for contracting authorities and economic operators, but it needs to be applied in a consistent and joined-up way between contracting authorities. The view from local government was that Wales has been moving ahead of other European regions in its use of e-procurement, but that the

business community needed to be fully engaged in order for the initiative to be successful.

**Recommendation 9: The Welsh Government to prioritise putting in place an integrated IT system to support SQUiD and accelerate implementation of the XChange Wales e-procurement programme across Wales.**

#### **Improving access for SMEs**

52. To assess the extent to which Welsh companies are winning public procurement contracts in Wales it is important to have reliable data on how many 'Welsh' businesses are companies with a satellite office in Wales, but an invoice address which indicates they primarily operate outside Wales. The Committee notes that the Minister for Finance undertook in plenary session on 21 February to pursue this matter.

**Recommendation 10: The Welsh Government to outline what steps it is taking to ensure that reliable data is available to assess how many companies winning public procurement contracts in Wales are Welsh businesses capable of generating long-term benefits to the local economy and job market, as opposed to companies whose primary base is outside Wales, and to raise awareness of this issue with contracting authorities.**

#### ***Pre-procurement dialogue with the business sector***

53. Measures to encourage pre-procurement dialogue with economic operators will also help contracting authorities to know their market better and minimise the risk of inadvertently excluding smaller companies with the potential to deliver services from bidding for business. The UK Government is committed to publishing 'pipelines' in different sectors to create greater transparency about upcoming opportunities to bid for business, and the Committee notes the Welsh Government's intention to publish the draft Wales Infrastructure Investment Plan to identify and prioritise future investment and provide a rolling pipeline of approved investments.

54. Evidence from the small business sector pointed to a 'box-ticking' approach by larger contractors to engaging with local companies through 'meet the buyer' events. These types of events can put an extra burden on small businesses in terms of the investment of time,

without necessarily bringing the benefits of winning local sub-contracts.

55. The Committee also notes efforts by the Welsh Government to facilitate ‘meet the buyer’ events to publicise contract opportunities for Welsh companies in other parts of the UK, for example for London 2012 and Crossrail. However there was not sufficient evidence that all Welsh contracting authorities, including local authorities, have meaningful engagement with and understanding of the local business sector. The Federation of Small Businesses said:

“The meeting point is that, if we can spend this money locally, we will have a sustainable business community and education sector and a healthy economy...that can only be done by generally engaging the local authorities or other procurers with small businesses; it cannot be done as a tick-box exercise over a congealed bacon sandwich in a hotel.”

**Recommendation 11: The Welsh Government to include in its review of public procurement policy a review of the measures it is taking to encourage strong dialogue between public contracting authorities and businesses in Wales to improve mutual understanding of how public procurement can be used as a tool to boost the Welsh economy.**

### ***Use of Frameworks and Supply Chain Management***

56. The group heard evidence of ineffective use of framework contracts – contracting authorities may use them as a shortcut to ensure compliance with the rules but with the result that Welsh companies are excluded from being able to bid for the business. Contracting authorities need to be encouraged to use these frameworks intelligently, with a developed awareness of their potential impact upon the local market and local supply chains.

57. Welsh firms must also be assisted to access framework contracts in greater numbers. Representatives of the construction sector noted that the use of framework contracts can lead to Welsh companies losing out on local work, and that further guidance from the Welsh Government to both contracting authorities and companies would be welcomed.

58. The lessons learnt exercise reviewing the awarding of two frameworks to deliver the 21<sup>st</sup> Century Schools programme pointed to the importance of effective planning of procurement strategies to ensure that indigenous contractors can access framework agreements, and supporting SME's participation, including by supporting collaborative consortia arrangements. The Committee would like to see robust evaluation and communication of the outcomes of future collaboration exercises in Wales.

### ***Lotting versus Aggregating***

59. In line with existing good practice, contracting authorities should be encouraged, where practicable, to award contracts in sizes that can be accessed by SMEs, therefore facilitating the entrance of local business to the market.

60. The inquiry explored the tension between aggregating contracts to save money and splitting contracts into smaller lots to provide more opportunities for SMEs. The UK Government noted that different approaches with regards to aggregating and "lotting" should be used depending on the nature of the contract concerned.

61. Anecdotal evidence was received from a business representative of an instance where a contracting authority paid more for a service procured through aggregation than they would have done had they awarded a direct contract for that service individually. In this example, a local supplier was unsuccessful in bidding for work from the contracting authority, but later delivered the service, at a higher price, as a subcontractor on behalf of the successful bidder. It needs to be considered, therefore, whether aggregation will in fact deliver savings in individual instances. This example highlights the tension that exists between contracting authorities opting for the certainty and legal simplicity of a straightforward contract with a larger supplier which then sub-contracts, and accepting the lesser legal certainty and increased contract management responsibilities attached to taking a greater interest in sub-contracts and local supply chains.

### **Collaborative approaches**

62. There is much more scope for co-operative working in the procurement sector in Wales and the Welsh Government could consider whether adopting a shared service approach would be a better way to achieve both efficiencies and wider policy objectives.

63. The Committee notes the business case being prepared for the establishment of a National Procurement Service in Wales, to handle around 20 per cent of common and repetitive public sector spend on commodities through a ‘once for Wales’ approach. Members received assurances from Value Wales that an economic impact exercise would be undertaken to ensure that this approach did not lead to cost savings at the detriment of long-term sustainable economic growth and jobs.

64. The example of Birmingham City Council’s approach to procurement demonstrates the clear benefits of collaboration through the West Midlands Economic Inclusion Panel. The inquiry found that evidence of the benefits of collaboration between local authorities in Wales had not yet clearly emerged, and there is concern that if the benefits cannot be seen then this may start to discourage future efforts. Effective collaboration exercises also rely on the sharing of best practice.

**Recommendation 12: The Welsh Government to undertake robust evaluation of the outcomes of collaborative procurement exercises in Wales; to compare the outcomes with collaborative models used in other parts of the UK; and to communicate and apply the lessons learnt within the Welsh public sector.**

### **Promoting social and environmental policy objectives**

65. The Group has heard that, though the current Directives allow for social and environmental policy objectives to be advanced through public procurement, use of this provision is currently limited within Wales. Possible reasons for this have already been highlighted: a lack of skilled and creative procurement officers, risk aversion within contracting authorities and a lack of shared best practice.

66. A community benefits policy is helpful but it must be applied consistently to ensure a real long-term legacy. This was a point emphasised by representatives of the construction sector, who noted that community benefits clauses were sometimes used in tokenistic ways that do not offer meaningful benefit to the local area:

“You need to be looking beyond whether the company has donated to the local football team...once those shirts have worn out, what is left? We need to be looking at how to develop

the local children so that they gain the skills that will enable them to do the jobs. That would mean that Welsh companies and people could then deliver the more complicated jobs.”

67. Where social clauses are applied, for example days of training or numbers of apprenticeships to be provided, they need to be adequately policed by the contracting authority.

68. Government and public bodies must also be ahead of the game in ensuring community benefits are taken into account by big contractors and in areas of spend that are non-devolved, for example with Network Rail and future plans for electrification, where there appears to be low awareness of the Welsh Government’s Community Benefits policy.

**Recommendation 13: The Welsh Government to prioritise measures to increase awareness of its Community Benefits policy among Welsh public sector contracting authorities, as well as contracting authorities and contractors operating in key areas of non-devolved spend in Wales, including transport and other infrastructure.**

## Annex A - Terms of reference

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The Committee agreed that following publication of the European Commission proposals for the reform of public procurement legislation, the task and finish group would explore how the proposed changes could impact upon public procurement in Wales, and how they could address issues such as:

- 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, e.g. social and environmental policies;
- complexity and flexibility within the public procurement system.

The Committee invited views on the following questions:

- how effectively were the current procurement Regulations working in Wales, both from a supplier/contractor and purchasing authority perspective?
- how would the proposed changes to the relevant EU Directives impact upon public procurement in Wales, including the following issues:
  - SME (including social enterprise) involvement in public procurement;
  - the use of public procurement to advance other (e.g. social and environmental) policy objectives;
  - the complexity and flexibility of existing procurement rules;
  - value for money for the purchasing authority?
  - how should the EU procurement Directives and the implementing regulations and codes of practice in Wales be modernised to meet the needs of Welsh suppliers/contractors and purchasing authorities, and maximise the capacity of Welsh companies to meet the challenges of the procurement rules? In particular how should regulations and/or guidance be re-framed for contracts falling below the procurement thresholds set by EU Directives?

## **Annex B - Letter from Enterprise and Business Committee to Minister for Finance**

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Y Pwyllgor Menter a Busnes  
Enterprise and Business Committee

Jane Hutt AM  
Minister for Finance and Leader of the House  
Welsh Government

15 February 2012

Dear Minister

### **EU Procurement Task and Finish Group**

On Thursday 2<sup>nd</sup> February the Enterprise and Business Committee agreed to write to raise concerns about two aspects of the European Commission draft proposal for a directive on public procurement<sup>7</sup>, replacing Directive 2004/18.

The Committee's legal adviser drew the attention of the Committee to the final paragraph of Article 24.1 which would permit only partial transposition of the Directive in relation to procurement procedures: *"Member States may decide not to transpose into national law the competitive procedure with negotiation, the competitive dialogue and the innovation partnership procedure."*

The Committee's Task and Finish Group is still in the process of holding informal discussions with Welsh stakeholders on the possible implications of the draft proposals for Welsh contracting authorities and suppliers. However, the group is clearly concerned that should the UK Government decide not to transpose all possible procurement procedures into national law, this could reduce the scope both for innovation and for the securing of social and environmental benefits by negotiation.

The group has not had sufficient time to discuss this issue fully with the Cabinet Office, but it would seem that the matter could be resolved either by removing the discretion of the Member State from the Directive, by persuading the UK Government to fully transpose all the

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<sup>7</sup> Document reference COM(2011) 895 final

procedures provided for in the Directive, or by obtaining a designation to enable Wales to transpose separately (as Scotland already does).

It would be helpful for the Committee to ascertain the views of the Welsh Government on this issue.

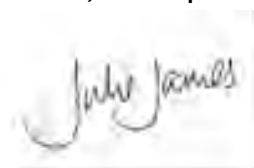
Secondly, as you are already aware, the Task and Finish Group has concerns regarding the implications of Article 84 of the draft directive, to establish a single 'national oversight body' for each Member State. The UK Government's explanatory memorandum notes that this may infringe the principles of subsidiarity and/or proportionality, and that the new proposals seem to be *"unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body..."* The Task and Finish Group is concerned that as currently drafted, Article 84 does not recognise devolution, is too prescriptive, and it is unclear whether such a body would have positive benefits, or would simply add an extra layer of (possibly costly) bureaucracy to the procurement regime.

It is the role of the Assembly's Constitutional and Legal Affairs Committee to consider the legal implications of this particular proposal, and to flag up any concerns arising from a subsidiarity check with the relevant European Committees of the UK Parliament. However, as the proposals are currently already under scrutiny in those parliamentary Committees, I am copying this letter to the respective Chairs, with a request that, if at all possible, they explore these matters with the UK Government in the course of that scrutiny.

Yours sincerely



Nick Ramsay AM  
Chair, Enterprise and Business Committee



Julie James AM  
Chair, Task and Finish Group on EU Procurement policy, Enterprise and Business Committee

**Copied to:**

Mr William Cash MP  
Chairman, European Scrutiny Committee  
House of Commons

Baroness O’Cathain,  
Chair, EU Sub-Committee B – Internal Market, Energy and Transport  
House of Lords

David Melding AM,  
Chair, Constitutional and Legal Affairs Committee  
National Assembly for Wales

Edwina Hart MBE OStJ AM  
Minister for Business, Enterprise, Technology and Science  
National Assembly for Wales

# Annex C - Constitutional and Legal Affairs Committee Subsidiarity Report

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Cynulliad  
Cenedlaethol  
Cymru  
National  
Assembly for  
Wales



## Constitutional and Legislative Affairs Committee Subsidiarity Report

### Proposal for a Directive of the European Parliament and of the Council on Public Procurement

This report is laid following consideration by the Committee under Standing Order 21.8 of aspects of the proposed directive drawn to its attention by the Procurement Task and Finish Group of the Enterprise and Business Committee. The report will form the basis of representations to be made to the relevant committees of the House of Commons and the House of Lords under Standing Order 21.9.

#### Legal Context

1. The principle of subsidiarity is enshrined in Article 5 of the Treaty on European Union:

*“Article 5*

*(ex Article 5 TEC)*

*1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*

*2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*

*3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in*

*so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

*The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.*

*4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*

*The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. EN C 83/18 Official Journal of the European Union.”*

2. Its application is governed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality, the relevant part of which for our purpose is the first paragraph of Article 6:

*“Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.” [Our emphasis.]*

### **Commission Proposals**

3. On the 20<sup>th</sup> December 2011, the Commission published its proposal for a new Directive on Public Procurement. This proposal has been the subject of detailed consideration by the Procurement Task and Finish Group of the National Assembly’s Enterprise and Business Committee. As part of that consideration, the Group considered the Explanatory Memorandum prepared by the UK Government for the

Parliamentary Committees on European issues. In its consideration of subsidiarity, the Memorandum stated as follows:

*“SUBSIDIARITY*

*29. The Government is concerned that aspects of the proposal for national oversight bodies may infringe the principles of subsidiarity and/or proportionality. These proposals, which had not been foreshadowed in the Commission’s Green Paper or otherwise consulted on, would require the UK to allow its national oversight body to ‘seize’ the jurisdiction currently exercisable by British courts of law to determine disputes about compliance with the procurement rules, where a violation is detected by the oversight body in the course of its monitoring and legal advisory work (see the final paragraph of article 84(3) of the proposed directive). This is a truly judicial function, the exercise of which could affect the rights of second and third parties as well as the contracting authority (these may include not only an unsuccessful complaining supplier, but a successful supplier with which the contracting authority has entered into a contract, as the jurisdiction would enable such a contract to be declared ‘ineffective’).*

*30. The various other functions of the oversight body, as they appear from article 84(3), are primarily administrative or regulatory. The proposal would therefore require the UK to combine in a single body a mixture of administrative, regulatory and judicial functions, with the power to take over, in particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court under Part 9 of the Public Contracts Regulations 2006 (SI 2006/5 as amended) which implements Directive 89/665/EEC (as amended) which addresses remedies for breach of the procurement rules. The latter directive respected the diversity of legal traditions among Member States by allowing each Member State the flexibility to determine the bodies it regards as suitable to exercise the judicial function of resolving disputes between suppliers and contracting authorities.*

*31. The new proposal seems to the Government to be unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body and in requiring that this body be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 89/665/EEC. In this respect, the proposal may call into*

*question the practical viability of continuing in the UK to confer a role on the courts concurrently with the proposed hybrid oversight body. More widely, this aspect of the proposal may set an unwelcome precedent of interference with how Member states structure their judicial systems in accordance with national legal traditions. In particular, it may accord insufficient respect for the Common Law tradition in which judicial and administrative/regulatory functions tend to be more clearly separated than in some other traditions which prevail in other parts of the EU.”*

4. The ‘national oversight body’ would be set up under Articles 84-86 of the draft Directive. Article 84, which sets out the proposed function, is annexed to this report for ease of reference. From our perspective the crucial wording appears in the very first sentence “Member States shall appoint a **single** independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body').” The Commission proposal contains the following explanation –

*“National oversight bodies: The evaluation has shown that not all Member States are consistently and systematically monitoring the implementation and functioning of the public procurement rules. This compromises the efficient and uniform application of European Union law. The proposal provides therefore that Member States designate a single national authority in charge of monitoring, implementation and control of public procurement. Only a single body with overarching tasks will ensure an overview of main implementation difficulties and will be able to suggest appropriate remedies to more structural problems. It will be in the position to provide immediate feedback on the functioning of the policy and the potential weaknesses in national legislation and practice, thus contributing to the quick identification of solutions and the improvement of the procurement procedures.”*

5. The normal distinction between Directives and Regulations in terms of European legislation is that the former specify what is to be done, leaving the Member States with discretion as to how that is done. Regulations on the other hand are directly applicable, even if some implementing legislation, such as enforcement arrangements, is left to the Member States. In this case, the Directive purports to tell the Member States how the oversight requirements are to be met, and in particular by specifying that it is to be done by a single body.

6. The UK Government has already identified that such an approach would breach the principle of subsidiarity by requiring an administrative body to carry out functions that would normally be carried out by the courts in the UK.

**We agree with that assessment and support the objection to the requirement for a national oversight body because it breaches the principle of subsidiarity in that way.**

7. The proposal also fails to have regard to the principle of devolution in imposing the duties on a single body. It fails to reflect the way in which separate implementing regulations have hitherto been made in Scotland, and the way in which extensive administrative and advisory functions in relation to procurement in Wales are exercised by or on behalf of Welsh Ministers. This should be contrasted with Article 87 which deals with the provision of assistance to contracting authorities and businesses. Article 87.4 provides specifically –

*“For the purposes of paragraphs 1, 2 and 3, Member States may appoint a single body or several bodies or administrative structures. Member States shall ensure due coordination between those bodies and structures.”*

8. Article 84 does not currently provide the degree of flexibility provided by Article 87. Witnesses to the Task and Finish Group had mixed views on the desirability of the proposed new arrangements. In general, representatives of public bodies have regarded this as an additional degree of bureaucracy, whilst the construction sector skills council considered that a national oversight body in Wales might be helpful to monitor application of the regulations.

**The Committee has therefore concluded that even if a national oversight body were to be established for the purposes of reporting under Article 84.2, Member States should be able to take account of their own constitutional structures. Such arrangements could be made by inserting into Article 84 the degree of flexibility provided for in Article 87. That would at least mitigate the degree to which Article 84 breaches the principle of subsidiarity.**

## ANNEXE

### “Article 84

#### Public oversight

1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body'). Member States shall inform the Commission of their designation. All contracting authorities shall be subject to such oversight.

2. The competent authorities involved in the implementation activities shall be organised in such a manner that conflicts of interests are avoided. The system of public oversight shall be transparent. For this purpose, all guidance and opinion documents and an annual report illustrating the implementation and application of rules laid down in this Directive shall be published.

The annual report shall include the following:

(a) an indication of the success rate of small and medium-sized enterprises (SMEs) in public procurement; where the percentage is lower than 50 % in terms of values of contracts awarded to SMEs, the report shall provide an analysis of the reasons therefore;

(b) a global overview of the implementation of sustainable procurement policies, including on procedures taking into account considerations linked to the protection of the environment, social inclusion including accessibility for persons with disabilities, or fostering innovation;

(c) information on the monitoring and follow-up of breaches to procurement rules affecting the budget of the Union in accordance with paragraphs 3 to 5 of the present article;

(d) centralized data about reported cases of fraud, corruption, conflict of interests and other serious irregularities in the field of public procurement, including those affecting projects cofinanced by the budget of the Union.

3. The oversight body shall be responsible for the following tasks:

- (a) monitoring the application of public procurement rules and the related practice by contracting authorities and in particular by central purchasing bodies;
- (b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;
- (c) issuing own-initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;
- (d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;
- (e) drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;
- (f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting authorities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;
- (g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.

The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of Directive

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.

4. Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the oversight body shall act as a specific contact point for the Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.

The Commission may in particular refer to the oversight body the treatment of individual cases where a contract is not yet concluded or a review procedure can still be carried out. It may also entrust the oversight body with the monitoring activities necessary to ensure the implementation of the measures to which Member States are committed in order to remedy a violation of Union public procurement rules and principles identified by the Commission.

The Commission may require the oversight body to analyse alleged breaches to Union public procurement rules affecting projects co-financed by the budget of the Union. The Commission may entrust the oversight body to follow-up certain cases and to ensure that the appropriate consequences of breaches to Union public procurement rules affecting projects co-financed are taken by the competent national authorities which will be obliged to follow its instructions.

5. The investigation and enforcement activities carried out by the oversight body to ensure that contracting authorities' decisions comply with this Directive and the principles of the Treaty shall not replace or prejudge the institutional role of the Commission as guardian of the Treaty. When the Commission decides to refer the treatment of an individual case pursuant to paragraph 4, it shall also retain the right to intervene in accordance with the powers conferred to it by the Treaty.

6. Contracting authorities shall transmit to the national oversight body the full text of all concluded contracts with a value equal to or greater than

(a) 1 000 000 EUR in the case of public supply contracts or public service contracts;

(b) 10 000 000 EUR in the case of public works contracts.

7. Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, the oversight body shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts referred to in paragraph 6. Access to certain parts of the contracts may be refused where their disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Access to the parts that may be released shall be given within a reasonable delay and no later than 45 days from the date of the request.

The applicants filing a request for access to a contract shall not need to show any direct or indirect interest related to that particular contract. The recipient of information should be allowed to make it public.

8. A summary of all the activities carried out by the oversight body in accordance with paragraphs 1 to 7 shall be included in the annual report referred to in paragraph 2.”



Liz Lucas, Head of Procurement	Caerphilly County Borough Council
Paul Charkiwi, 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

*8 February 2012*

Professor Kevin Morgan	Cardiff University
Rhodri Jones, Chair	Wales Construction Federation Alliance
Richard Jenkins, Director	Federation of Master Builders Wales
Philip Avery, Operations Executive	National Federation of Builders Wales
Wyn Pritchard, Director	Construction Skills Wales
Ruth James, North Wales Construction Forum, Commercial Manager	Jones Bros Civil Engineering
Clive Webb, South West Wales Construction Forum, Commercial Manager	Boyes Rees Architects
Robert Williams, South East Wales Construction Forum, Managing Director	WRW Construction Ltd.
Pete Fahy, Head of Strategic Commissioning	Coventry City Council

*23 February 2012*

Iestyn Davies, Head of  
External Affairs

Federation of Small Businesses

Debbie Scott, Director

Groundsolve Ltd.

Howard Allaway,  
Procurement Manager

Higher Education Purchasing Consortium  
Wales

Rhidian Morgan, Head of  
Procurement

South West Wales Higher Education  
Procurement Partnership

Mark Barrow, Strategic  
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*14 March 2012*

Alison Standfast, Deputy  
Director of Procurement

Value Wales

Nick Sullivan, Head of  
Policy and Capability

Value Wales

Kerry Wilson, Head of  
Procurement

Value Wales

## Consultation Responses

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The following people and organisations responded to the Committee's public consultation. All responses can be viewed in full at <http://www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?Ild=1672>

<i>Organisation</i>	<i>Reference</i>
Institution of Civil Engineers	01
Richard Gaunt	02
British Medical Association	03
Wales Construction Federation Alliance	04
Wales Co-Operative Centre	05
Wales Council for Voluntary Action	06
Welsh Language Board	07
Peter Davies	08
North Wales Construction Forum	09
Rathbone Cymru	10
The South East Wales Construction Forum	11
Chartered Institute of Housing (CIH) Cymru and i-2-i	12
National Regeneration Panel	13