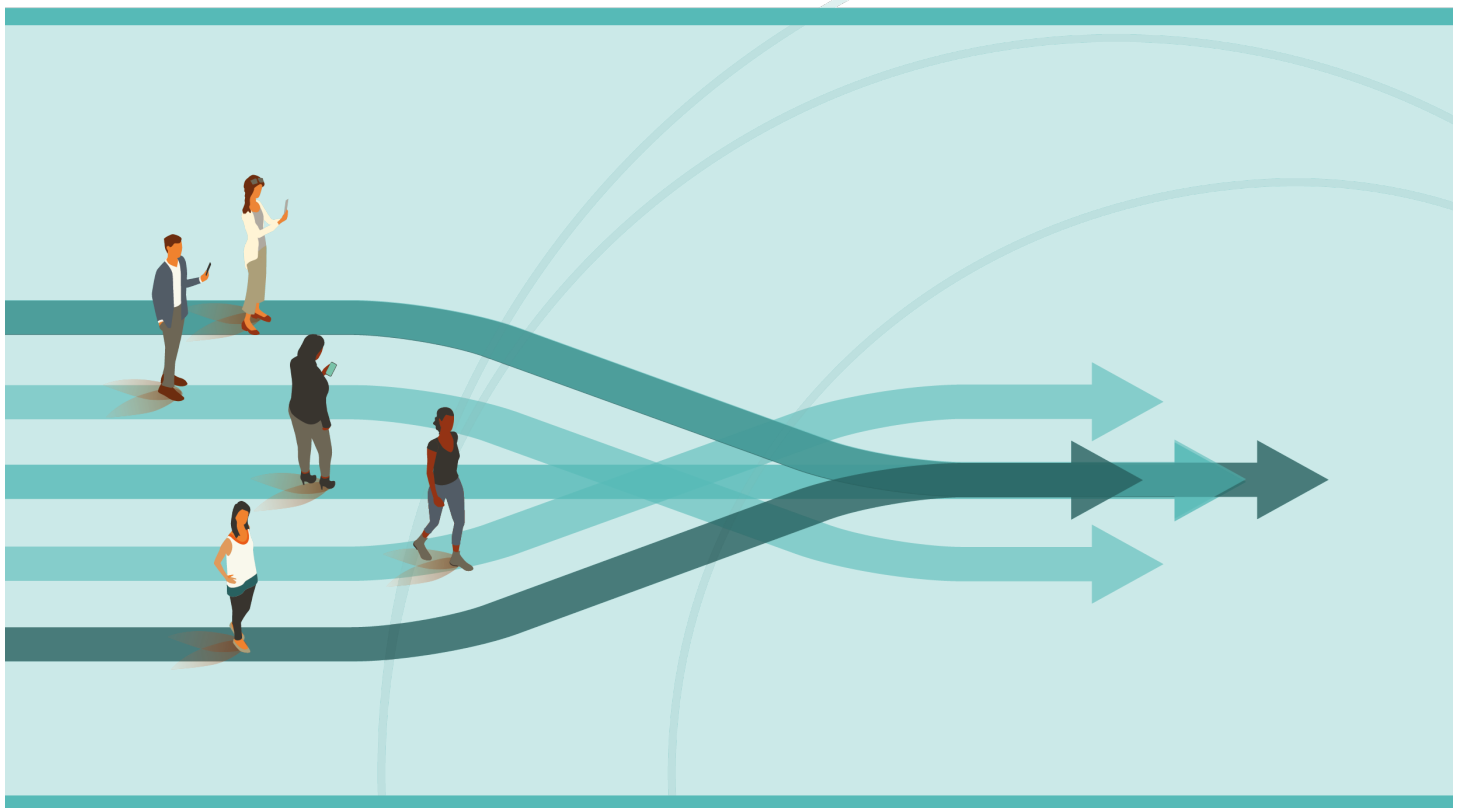




Government
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Function

Procurement Act 2023

Guidance: Devolved Contracting Authorities



October 2024

Guidance on Devolved Contracting Authorities

What are devolved contracting authorities?

1. Procurement is largely a devolved matter in Wales and Scotland and a transferred matter in Northern Ireland which means that the Welsh Government, Scottish Government and Northern Ireland Executive (respectively) have the power to determine the rules by which certain procurements are conducted and contracts managed. The relevant provisions in the Procurement Act 2023 (Act) set out to what extent the Act applies to reserved, devolved and transferred procurement in England, Wales, Northern Ireland and Scotland.
2. 'Reserved matters' are those areas over which the UK government retains sole responsibility, as set out in the legislation governing the devolution settlements, and generally are areas which have cross-UK impact, such as defence.
3. An authority is a 'devolved Welsh authority' if it is a devolved Welsh authority within the meaning given by section 157A of the Government of Wales Act 2006.
4. Contracting authorities which are not devolved authorities under section 157A of the Government of Wales Act 2006 may also be treated as a devolved Welsh authority for the purposes of the Act as follows:
 - a. section 111(2) provides that a contracting authority that is a public undertaking or private utility (see section 2(2)) is to be treated as a devolved Welsh authority for the purposes of the Act if it operates wholly or mainly¹ in relation to Wales and its activities are wholly or mainly ones which do not relate to 'reserved matters' (see paragraph 2 above); and
 - b. section 111(3) provides that other contracting authorities are to be treated as devolved Welsh authorities for the purposes of the Act if their functions are wholly or mainly exercisable in relation to Wales and are wholly or mainly ones which do not relate to reserved Welsh matters.
5. An authority which is not a public undertaking or private utility is a 'transferred Northern Ireland authority' if its functions are exercisable only in or as regards Northern Ireland and are wholly or mainly functions that do not relate to reserved or excepted matters² (within the meaning given by the Northern Ireland Act 1998) (section 112(2)).
6. A contracting authority that is a public undertaking or private utility (see section 2(2)) is to be treated as a transferred Northern Ireland authority for the purposes of the Act if it operates only in or as regards Northern Ireland and its activities do not wholly or mainly relate to reserved or excepted matters (section 112(3)).

¹ In the context of the Act and this guidance, 'wholly or mainly' can be interpreted as meaning 50% or more.

² Under the Northern Ireland devolution settlement, reserved matters can be legislated for by the Northern Ireland Assembly with the consent of the Secretary of State for Northern Ireland and excepted matters can only be legislated for by the UK Government.

7. An authority is a 'devolved Scottish authority' if its functions are exercisable only in or as regards Scotland, and either none of its functions relate to reserved matters, or some do and some do not (section 2(6)).
8. A contracting authority that is a public undertaking or private utility is to be treated as a 'devolved Scottish authority', for the purposes of the Act, if it operates only in or as regards Scotland, and either none of its activities relate to reserved matters or some of its activities relate to reserved matters and some do not (section 2(7)).
9. If a contracting authority is neither a devolved Welsh authority, a transferred Northern Ireland authority nor a devolved Scottish authority, it will be referred to in this guidance as a reserved authority. Contracting authorities unclear as to their devolution status under the Act should seek legal advice.
10. A 'devolved Welsh procurement arrangement' is a procurement arrangement in which:
 - a. if the arrangement is a framework, the framework was awarded by a devolved Welsh authority;
 - b. if the arrangement is a dynamic market, the dynamic market was established by a devolved Welsh authority;
 - c. if the procurement is being carried out by a centralised procurement authority, that centralised procurement authority is a devolved Welsh authority; or
 - d. if the procurement is a joint procurement, a devolved Welsh authority is designated the lead authority in the tender or transparency notice (section 114(2)).
11. A 'transferred Northern Ireland procurement arrangement' is a procurement arrangement in which:
 - a. if the arrangement is a framework, the framework was awarded by a transferred Northern Ireland authority;
 - b. if the arrangement is a dynamic market, the dynamic market was established by a transferred Northern Ireland authority;
 - c. if the procurement is being carried out by a centralised procurement authority, that centralised procurement body is a transferred Northern Ireland authority; or
 - d. if the procurement is a joint procurement, a transferred Northern Ireland authority is designated the lead authority in the tender or transparency notice (section 114(3)).
12. A 'devolved Scottish procurement arrangement' is a procurement arrangement in which:
 - a. if the arrangement is a framework, the framework was awarded by a devolved Scottish authority;

- b. if the arrangement is a dynamic market, the dynamic market was established by a devolved Scottish authority;
 - c. if the procurement is being carried out by a centralised procurement authority or equivalent, that centralised procurement body is a devolved Scottish authority; or
 - d. if the procurement is a joint procurement, a devolved Scottish authority is designated the lead authority in the tender or transparency notice (section 114(4)).
13. A procurement arrangement is reserved if it is neither a devolved Welsh procurement arrangement, a transferred Northern Ireland procurement arrangement nor a devolved Scottish procurement arrangement (section 114(5)).
14. 'Scottish procurement legislation' is:
- a. the Procurement Reform (Scotland) Act 2014;
 - b. the Public Contracts (Scotland) Regulations 2015;
 - c. the Utilities Contracts (Scotland) Regulations 2016;
 - d. the Concession Contracts (Scotland) Regulations 2015; and
 - e. any legislation which modifies or replaces that legislation (section 115(4)).

What is the legal framework that governs devolved authorities' application of the Act?

15. The Act extends to England and Wales, Scotland and Northern Ireland (section 126). Section 2(5)(a) provides that 'devolved Scottish authorities' are included in the list of 'excluded authorities' to which the Act does not apply.
16. While the Welsh Government and Northern Ireland Executive have agreed (respectively) that 'devolved Welsh authorities' (as defined in section 111) and 'transferred Northern Ireland authorities' (as defined in section 112) should be regulated by the Act, there are some differences in the rules that apply, which are set out in the Act. The Welsh Government has also made its own procurement regulations resulting in some differences in that respect also; for example, there are differences in the content that must be included in notices published under the Act. The Welsh Government produces its own guidance on the Act and devolved Welsh authorities should refer to that guidance for further information.
17. Contracting authorities carrying out a procurement under a devolved or transferred procurement arrangement are bound by the rules that apply to the contracting authority establishing the procurement arrangement. For example, a contracting authority based in Sheffield that is named as a contracting authority permitted to use a framework established by Cardiff Council must comply with regulations made by the Welsh Ministers and any devolved Welsh provisions in the Act when awarding call-off contracts under that framework.

What has changed?

18. Procurement in England, Wales, Northern Ireland and Scotland that was of a type regulated by the previous legislation is regulated by the Act for all procurements that commence after entry into force of the Act (see guidance on transitional and saving arrangements). Scottish procurement legislation (see paragraph 14 above) will continue to apply to procurement by devolved Scottish authorities.

Key points and policy intent

Welsh devolved authorities and procurement arrangements

19. For devolved Welsh authorities and procurements carried out under a devolved Welsh procurement arrangement (defined in section 114(2)), there are certain exemptions or differences from the general rules in the Act. For example, the national procurement policy statement (NPPS) (see section 13) does not apply to a procurement carried out under a devolved Welsh procurement arrangement or by a devolved Welsh authority, except in relation to a procurement under a reserved procurement arrangement. Instead, the Wales procurement policy statement (see section 14) applies to devolved Welsh authorities (except in relation to procurement under a reserved procurement arrangement or transferred Northern Ireland procurement arrangement) and a procurement carried out under a devolved Welsh procurement arrangement.
20. Some examples of “reserved matters” in relation to Wales would include prisons and offender management, job search and support, and certain health, safety and medicine matters. Further information regarding reserved matters in relation to Wales is provided in Schedule 7A (Reserved Matters) to the Government of Wales Act 2006. The Welsh Parliament also published a helpful summary in September 2020, which can be accessed using the following link: <https://senedd.wales/how-we-work/our-role/powers/>.
21. Reserved authorities in England, Wales, Scotland and Northern Ireland and transferred authorities in Northern Ireland will be required to follow the rules applicable to Welsh devolved authorities if they participate in a devolved Welsh procurement arrangement.

Transferred Northern Ireland authorities and procurement arrangements

22. For transferred Northern Ireland authorities and procurements carried out under a transferred Northern Ireland procurement arrangement (defined in section 114(3)) there are certain exemptions or differences from the general rules in the Act. For example, the NPPS does not apply to a procurement carried out under a transferred Northern Ireland procurement arrangement or by a transferred Northern Ireland authority (except in relation to a procurement under a reserved procurement arrangement).
23. Reserved authorities in England, Wales, Scotland and Northern Ireland and devolved authorities in Wales will be required to follow the rules applicable to transferred Northern Ireland authorities if they participate in a transferred Northern Ireland procurement arrangement.

Devolved Scottish authorities

24. Devolved Scottish authorities are generally excluded from the application of the Act. However, sections 2(5) and 115A, which are amended or inserted into the Act by regulation 47 of the Procurement Regulations 2024 (the regulations), provide that some provisions of the Act may apply to devolved Scottish authorities. Where a devolved Scottish authority awards a contract jointly with a contracting authority which is regulated by the Act (that is to say, a reserved contracting authority, a devolved Welsh authority or a transferred Northern Ireland authority), the Act applies in its entirety. Where devolved Scottish authority acting on its own or in conjunction with one or more other devolved Scottish authorities awards a contract under a framework, dynamic market (or similar arrangements) awarded or established by a reserved, devolved Welsh or transferred Northern Ireland contracting authority, Schedule 9A (which is also inserted into the Act by regulation 47) lists those sections of the Act that apply.
25. These provisions ensure that contracting authorities subject to Scottish procurement legislation can continue to take advantage of commercial arrangements put in place by (and with) contracting authorities subject to the Act. There is a shared interest in ensuring that collaboration can continue, as it did under the previous legislation, for the purposes of cooperation and achieving value for money; and that access to such commercial arrangements is not restricted by which regime the contracting authority is subject to.
26. The Scottish Government intends to make its own regulations to disapply, where appropriate, Scottish procurement legislation in order to permit devolved Scottish authorities to procure under the Act. It also intends to legislate to ensure that contracting authorities that are not devolved Scottish authorities can access commercial arrangements established under Scottish procurement legislation.

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