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Welsh Government

**Number: WG47937**

Welsh Government  
Consultation Document

# Wales Consultation on Public Procurement Secondary Legislation: Part 2

Date of issue: 17 July 2023

Action required: Responses by 23.45 on 25 August 2023.

Mae'r ddogfen hon ar gael yn Gymraeg hefyd / This document is also available in Welsh  
Rydym yn croesawu gohebiaeth a galwadau ffôn yn Gymraeg / We welcome correspondence and telephone calls in Welsh



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## **Introduction**

The Welsh Government is consulting on the draft secondary legislation required to implement the new public procurement regime established by the Procurement Bill. This is a technical consultation, split into 2 parts. This second part refers predominantly to the transparency notices which allow contracting authorities to progress procurement processes through the procurement lifecycle in an open, transparent and informative manner.

These notices are as follows:

- Pipeline Notice
- Planned Procurement Notice
- Preliminary Market Engagement Notice
- Tender Notice
- Utilities Dynamic Market /Dynamic Market Notice, including Qualifying Utilities Dynamic Market Notice
- Transparency Notice
- Procurement Termination Notice
- Contract Award Notice
- Contract Details Notice
- Payments Compliance Notice
- Contract Performance Notice
- Contract Change Notice
- Contract Termination Notice

The order in which the notices appear in this consultation document broadly follows the order in which they will be used/required as a procurement progresses from initiation to award and beyond.

In addition, this consultation covers a number of other matters that feature in the draft Statutory Instrument (SI) which relate to transparency. These other matters are:

- Central Digital Platform;
- Central Digital Platform: Supplier Information (which will enable suppliers to submit core information once only)
- Unique Identifiers (the unique identifiers for organisations, procedures and notices that the digital platform requires to operate effectively)
- Assessment Summary



The consultation also seeks views on the proposed use of a power in the Bill which would exempt private utilities from the requirement to publish a preliminary market engagement notice.

This consultation document sets out the context and policy intent for each of these notices and information requirements. It does not go into detail, for example, about the information that must be entered for each notice. This is contained in the draft SI itself which must be read in conjunction with this document in order to be able to respond to the questions set out below.

Finally, the consultation explains the approach for transitioning to the new regime and how this will be managed for procurements that have already commenced or were awarded under existing regulations. The consultation seeks views on the proposed approach to transitional arrangements for procurements already underway at the time that the new regime enters into force, and this approach is set out in this document. We are not seeking views on the detailed drafting for transitional provisions and this is therefore not contained within the draft SI, although it will be included within the final SI to be laid in the Senedd.

Although we do not propose to consult on drafting for consequential amendments stemming from the Bill, the consultation sets out the position on other legislation that will need to be amended in order for the full provisions of the Bill to take effect (for example a number of amendments will be needed so that references to the Public Contracts Regulations in other legislation refer instead to the new Procurement Act).

Mandatory Questions seek to understand whether the technical detail of the drafting is accurate and appropriate and will be scored on a scale from 'Strongly Agree' to 'Strongly Disagree'.

The Welsh Government and the UK government have worked closely on the development of their respective statutory instruments (SI) to ensure there is maximum alignment between the legislation and to minimise any risk of potential divergence. It is also important that the timetables for laying the SIs are aligned which is a key reason for mirroring the timing of this consultation with UK government's.

This consultation will use the draft SI that has been developed by the UK Government.

The draft SI being prepared by the Welsh Government will mirror the provisions contained within the UK government's SI as much as possible, other than in the few areas where there are derogations or Wales-specific differences. Also, the SI being developed by the Welsh Government will be available in both Welsh and English.



It should be noted that the key areas of Wales-specific differences in the regulations covered by this second part of the consultation are:

- Publication of Modifications – Following the publication of a Contract Change Notice, the UK draft SI requires contracting authorities to publish modifications to contracts for any contract valued over £5m. This requirement does not apply to Welsh contracting authorities (WCAs) unless a WCA modifies a contract awarded following a procurement under a reserved procurement arrangement. Respondents are asked to be aware of this when responding to these questions.
- Contract Details Notice – For contracts valued over £5m, the UK draft SI requires contracting authorities to publish the contract. This requirement will not apply to WCAs unless a WCA awards a contract following a procurement under a reserved procurement arrangement. Respondents are asked to be aware of this when responding to these questions.
- There is a section included on below threshold contracts which is not included in the UK draft SI. The Welsh draft SI will include some amendments to the values for below threshold contracts and additional requirements related to the Central Digital Platform Supplier Registration System. Respondents are therefore encouraged to respond to these questions.
- The UK government's draft SI includes a list of contracting authorities which are specified as defence authorities. This list will not form part of the Welsh draft SI and should therefore be disregarded by respondents. Central Digital Platform - The UK is developing a digital platform for the publication and provision of public procurement notices and documentation. For Wales, notices will need to be published on Sell2Wales, which will in turn feed into this system and will also be available on Sell2Wales itself.

### **Background to the legislation**

Over £8 billion is spent on public procurement each year in Wales, accounting for almost a third of all public sector expenditure. Improving the way public procurement is regulated can drive innovation and resilience, and deliver benefits across Wales by supporting our local economy and saving the taxpayer money.

Procurement is one of the most important levers we have to support the more equal, more sustainable and more prosperous Wales we all want to see over the next few years. The Procurement Bill helps deliver the Welsh Government's Programme for Government aspirations in relation to procurement whilst providing certainty and stability for organisations who conduct business across the borders.



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The changes being introduced as a result of the Procurement Bill will make public procurement more accessible to businesses including our SMEs, will deliver greater value for money for Welsh taxpayers, and will maximises opportunities to deliver social, environmental, economic and cultural outcomes for Wales.

Under the new regime, everyone will have access to public procurement data. Citizens will be able to scrutinise spending decisions. Suppliers will be able to identify new opportunities to bid and collaborate sooner in the process, making it easier for Welsh SMEs to plan and get ready. Contracting authorities will also be able to analyse the market and benchmark their performance against others, for example on their spend with Welsh SMEs.

## **The Consultation**

**We invite you to respond to the questions in this consultation by completing the survey by 23:45 on 25<sup>th</sup> August 2023.**

This consultation seeks feedback on the secondary legislation that sits under the Procurement Bill. The consultation is split into 2 parts with the first part of the process focusing on subjects which require specific detail in secondary legislation. That part of the consultation was released on 19 June and closes on 28 July and can be accessed at <https://www.gov.wales/wales-consultation-on-public-procurement-regulations-part-1>. This second part predominantly relates to the transparency provisions and notices that will be used by Welsh Contracting Authorities to comply with the legal requirements under the Bill. It also includes information on the proposed approach to transitional arrangements for procurements already underway at the time that the new regime enters into force and the position on other legislation that will need to be amended in order for the full provisions of the Bill to take effect.

This consultation is detailed and technical and requires understanding of the current procurement regime. Except for where explicitly requested, views are not sought on the policy intent itself which has already been subject to consultation via the Green Paper and has been established by the Bill, but on whether the information provided is appropriately reflected in the drafting of the regulations.

Mandatory Questions will ask respondents to state to what extent they agree or disagree with the question posed under each section. There are 29 questions of this nature. Respondents will have an opportunity to explain their reasoning where they have indicated that they disagree or strongly disagree as their response. Comments should be limited to whether this intent has been translated into the draft Statutory Instrument and on whether the drafting causes any inconsistencies, gaps or overlaps with provisions elsewhere in the



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draft SI or the Bill. The exceptions to this are the section on Transitional Provisions and supplementary questions on the preliminary market engagement notice, qualifying utilities dynamic market notice and contract award notice where the questions relate to the policy intent or approach set out in this consultation. In addition, there are 2 questions relating to the Welsh Language.

### **Next steps**

Following consideration of responses to both parts of the consultation, the final version of the secondary legislation will be laid in the Senedd, combining the provisions contained within the 2 consultations into one single instrument.

The UK government has committed to providing a minimum of 6 months' advance notice of go-live of the new regime and we expect that the laying of the secondary legislation would be the earliest point that this notice would be given.

Therefore, subject to the outcomes of this consultation, we expect that the new regime will go live during autumn 2024.

### **How to respond**

If you are not responding via the online questionnaire, Please return this completed response form to [ProcurementReform.ConsultationPart2@Gov.wales](mailto:ProcurementReform.ConsultationPart2@Gov.wales) / [DiwygioCaffael.YmgynghoriadRhan2@Llyw.cymru](mailto:DiwygioCaffael.YmgynghoriadRhan2@Llyw.cymru) or

Chief Operating Officer's Group  
Commercial Procurement Division  
Procurement Reform Team  
Welsh Government  
Cathays Park  
Cardiff  
CF10 3NQ

When responding to the consultation Please provide details of your name, organisation and whether you are responding as an Individual or on behalf of an organisation.

Responses to the consultation must be received by 23.45 on 25/08/23.





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Please consider and answer all Mandatory questions, choosing where indicated one of the following responses:

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree
- N/A

For those Mandatory questions where you have answered disagree or strongly disagree, please provide further information on this in the follow up question with a free text box.

Please keep to the maximum character count allowed (Maximum of 2000 characters). Any additional characters received above this limit will not be considered.

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous in these circumstances, please tick the box where indicated on the Consultation response form.

### **Further information and related documents**

Large print, Braille and alternative language versions of this document are available on request.

### **Contact details**

For further information:

Chief Operating Officer's Group  
Commercial Procurement Division  
Procurement Reform Team  
Welsh Government  
Cathays Park  
Cardiff  
CF10 3NQ

Email: [ProcurementReform.ConsultationPart2@Gov.wales](mailto:ProcurementReform.ConsultationPart2@Gov.wales) /  
[DiwygioCaffael.YmgynghoriadRhan2@Llyw.cymru](mailto:DiwygioCaffael.YmgynghoriadRhan2@Llyw.cymru)

This document is also available in Welsh.



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## **UK General Data Protection Regulation (UK GDPR)**

The Welsh Government will be data controller for Welsh Government consultations and for any personal data you provide as part of your response to the consultation.

Welsh Ministers have statutory powers they will rely on to process this personal data which will enable them to make informed decisions about how they exercise their public functions. The lawful basis for processing information in this data collection exercise is our public task; that is, exercising our official authority to undertake the core role and functions of the Welsh Government. (Art 6(1)(e))

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about or planning future consultations. In the case of joint consultations this may also include other public authorities. Where the Welsh Government undertakes further analysis of consultation responses then this work may be commissioned to be carried out by an accredited third party (e.g. a research organisation or a consultancy company). Any such work will only be undertaken under contract. Welsh Government's standard terms and conditions for such contracts set out strict requirements for the processing and safekeeping of personal data.

In order to show that the consultation was carried out properly, the Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. If you do not want your name or address published, please tell us this in writing when you send your response. We will then redact them before publishing.

You should also be aware of our responsibilities under Freedom of Information legislation and that the Welsh Government may be under a legal obligation to disclose some information.

If your details are published as part of the consultation response then these published reports will be retained indefinitely. Any of your data held otherwise by Welsh Government will be kept for no more than 3 years.

## **Your rights**

Under the data protection legislation, you have the right:

- to be informed of the personal data held about you and to access it
- to require us to rectify inaccuracies in that data
- to (in certain circumstances) object to or restrict processing
- for (in certain circumstances) your data to be 'erased'
- to (in certain circumstances) data portability



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- to lodge a complaint with the Information Commissioner's Office (ICO) who is our independent regulator for data protection

For further details about the information the Welsh Government holds and its use, or if you want to exercise your rights under the UK GDPR, please see contact details below:

Data Protection Officer:

Welsh Government

Cathays Park

CARDIFF

CF10 3NQ

e-mail: [dataprotectionofficer@gov.wales](mailto:dataprotectionofficer@gov.wales)

The contact details for the Information  
Commissioner's Office are:

Wycliffe House

Water Lane

Wilmslow

Cheshire SK9 5AF

Tel: 0303 123 1113

Website: <https://ico.org.uk/>

## **Subjects for consultation and associated questions**

### **Pipeline Notice (Included at regulation 33 of the draft SI)**

The purpose of the pipeline notice is to provide the market with advance notice of anticipated public contract opportunities with an estimated value of more than £2 million which a contracting authority proposes to enter into in the forthcoming 18 months. This gives suppliers the opportunity to track potential opportunities, enabling them to determine if they wish to bid. This will be of particular benefit to small and medium-sized enterprises (SMEs) and voluntary, community and social enterprises (VCSEs) by providing them with time to plan for future work, ensuring a competitive and vibrant market. The draft SI outlines the information which is required in a pipeline notice.

The notice must be published within 56 days of the first day of the relevant financial year and will include such details as the nature of what is to be procured, when it is expected to be advertised, and when it is thought that the delivery will commence.

While the pipeline notice is intended to provide suppliers with an indication of contracting authorities' plans, it is important to note that contracting authorities are not held to the information in the notice which could change over time and is intended to be updated to improve fidelity.

Private utilities are not required to publish a pipeline notice.

**MANDATORY QUESTION 1:** To what extent do you agree or disagree that the pipeline notice, as described in the draft SI, will usefully provide advance notice to suppliers of forthcoming contracting opportunities?

**QUESTION 2:** If you answered disagree or strongly disagree to Question 1 please explain why you do not believe this delivers the policy intent.

## **Planned Procurement Notice (Included at regulation 11 of the draft SI)**

The planned procurement notice is designed to give as much advance information to the market as possible to enable potentially interested suppliers to determine if the upcoming procurement is something that they wish to bid for, and to have the maximum time for preparation. Publication of this notice may take place at any time before publication of the tender notice. If publication of this notice occurs at least 40 days (and no longer than one year) before publication of the tender notice then the notice is a 'qualifying' planned procurement notice and the contracting authority may, if they choose to, benefit from reduced tender time periods of a minimum of ten days.

All contracting authorities (including utilities) are able to publish a planned procurement notice in relation to any type of procurement for a public contract covered by the Procurement Bill.

The planned procurement notice was not described as a separate notice in the UK government's Green Paper consultation, as it was integrated in the planning and pipeline notice. Following stakeholder engagement, the UK government decided to split out this notice in order to underline its specific purpose to furnish the market with advance information and provide the opportunity to reduce tendering timelines.

**MANDATORY QUESTION 3:** To what extent do you agree or disagree that the contents of the notice described in the draft SI provide the information needed by suppliers to determine their interest in the upcoming procurement that is the subject of the notice?

**QUESTION 4:** If you answered disagree or strongly disagree to Question 3 please explain why you do not believe this delivers the policy intent.

## **Preliminary Market Engagement Notice (Included at regulation 12 of the draft SI)**

We want to encourage more contracting authorities to conduct preliminary market engagement. Whilst this is not mandatory, the information gathered during this stage can be invaluable for the contracting authority as they clarify their requirements, assess the market's capacity and develop their procurement strategy.

Clause 17 of the Bill makes provision for contracting authorities to publish a preliminary market engagement notice when this engagement will be or has been conducted.

The notice can be used to invite suppliers to participate in preliminary market engagement and/or notify the market this engagement has taken place.

Publication of the preliminary market engagement notice should take place prior to publishing a tender notice. If engagement has been conducted but a preliminary market engagement notice has not been published, the reasons for not publishing it must be captured in the tender notice.

Although the decision not to publish a preliminary market engagement notice is solely at the discretion of the contracting authority, this decision must be taken in the context of their obligations in clauses 12 (covered procurement: objectives) and 16 (preliminary market engagement) of the Bill.

## **Private Utilities (Included in regulation 35 of the draft SI)**

In the draft SI, the UK government have included a draft amendment to dis-apply the preliminary market engagement notice requirements in clause 17 of the Bill for private utilities. This uses the power in the Bill at clause 120 to amend the Act for the purpose of reducing the regulation of private utilities.

The UK government is consulting on this proposed amendment on behalf of reserved private utilities and transferred Northern Ireland authorities.

The Welsh Government will similarly be using their powers in the Procurement Bill to amend Bill provisions to dis-apply the preliminary market engagement notice requirements for private utilities, and are consulting on this proposed amendment on behalf of devolved Welsh authorities.

Private utilities will be encouraged to use the notice, but where they choose not to do so, we would not expect them to explain this.

**MANDATORY QUESTION 5:** To what extent do you agree or disagree that the notice as set out in the draft SI delivers the policy intention of encouraging the use of preliminary market engagement in an open and transparent way?

**QUESTION 6:** If you answered disagree or strongly disagree to Question 5 please explain why you do not believe this delivers the policy intent

MANDATORY QUESTION 7: To what extent do you agree or disagree that private utilities should be exempted from the preliminary market engagement notice requirements in clause 17 of the Bill?

QUESTION 8: If you answered disagree or strongly disagree to Question 7 please explain your reasoning

### **Tender Notice (Included in regulations 13 to 17 of the draft SI)**

The Bill requires contracting authorities to publish a tender notice in order to advertise and commence a competitive tendering procedure. This is to ensure that suppliers and citizens have visibility of what the contracting authority is going to market to procure. For suppliers this allows them to determine if they wish to take part in the procurement, for citizens it allows them to see the process by which contracts are being tendered and for which goods and services.

A tender notice will act as an invitation to submit a tender for the contract under the open procedure and, could act as an invitation to tender or an invitation for suppliers to submit a request to participate under the competitive flexible procedure. In either case it must be published on the central digital platform via Sell2Wales see p26. The Bill requires contracting authorities to provide any associated tender documentation in conjunction with the tender notice and in accordance with the rules that govern its use. The tender notice is not applicable in the case of direct award, where the transparency notice plays a similar role.

Whilst the Bill gives contracting authorities significant freedom to choose a procedure that will best deliver their requirement, they must set out the process to be followed at the outset. Whilst there is some limited scope to modify these, contracting authorities must follow the processes set out in their tender notices and failure to do so will leave them at risk of challenge.

These requirements apply to frameworks in the same way that they apply to any procurement procedure, with the addition of some framework-specific requirements including:

- identification of all contracting authorities that may award contracts under the framework during its term;
- identification of the nature, scope and overall maximum estimated value of the works, services or supplies that may be awarded under the framework;
- stipulation of whether the framework is an open framework or a closed framework;
- clarification whether contracting authorities intend to appoint a maximum number of suppliers to the framework and, if so, what this maximum number is or, alternatively, to give a range.

Tender notices are also required in respect of certain below-threshold contracts, where the contracting authority is making the opportunity publicly available: the draft SI makes provision for the requirements which attach to these.

MANDATORY QUESTION 9: To what extent do you agree or disagree that the tender notice as set out in the draft SI enables a contracting authority to effectively advertise and commence a competitive procedure?

QUESTION 10: If you answered disagree or strongly disagree to Question 9 please explain why you do not believe this delivers the policy intent.

### **Utilities Dynamic Market and Dynamic Market Notice, (Included in regulation 18 of the draft SI)**

The Procurement Bill replaces dynamic purchasing and qualification systems with a single new commercial purchasing tool called a Dynamic Market (DM). DMs can be used and established by contracting authorities, including utilities. Utilities can also establish and use a Utilities Dynamic Market (UDM) for the purpose of the award of utility contracts. DMs and UDMs are generally very similar with slight differences such as the basis of charging fees.

A dynamic market notice is required to be published at various times relating to the establishment of a DM or UDM, its operation and, except in the case of a UDM established by a private utility only, when it ceases to operate (a notice is not required when a UDM set up by a private utility ceases to operate). This notice does not outline the requirements for public contracts awarded by reference to a DM or UDM.

The policy intention is for DMs and UDMs to be more flexible than frameworks, with no restrictions on their duration, and with new suppliers able to be admitted throughout their life.

### **Qualifying Utilities Dynamic Market Notice (Included in regulation 18 of the draft SI)**

A Utilities Dynamic Market (UDM) is established for the purpose of the awarding of utility contracts by utilities. A UDM can be established either by reference to a Dynamic Market (DM) notice or a Qualifying Utilities Dynamic Market (QUDM) notice.

The purpose of a QUDM notice, like the DM notice, is to notify suppliers of the intention to establish a UDM, as well as to provide details in regards to its establishment, modification and termination. A QUDM notice differs from a DM notice, in that it must provide as much of the information which would be required in a tender notice for the award of a contract by reference to the UDM in question as is available at the time the QUDM notice is published.

Additionally, the QUDM notice indicates to the market that when a procurement is commenced by reference to the resultant UDM in future, only members of the UDM will be notified of any future opportunities to bid for a public contract. This means that there is no requirement to **publish** a tender notice. Instead, a tender notice must be issued to members of the market only and may be provided to suppliers that have applied for membership of the market (or part of the market) but have yet to be accepted or rejected.



The tender notice will need to include further details relevant to the specific procurement in question and must include any details that are ordinarily required for a tender notice that have not already been provided in the QUDM notice.

The UK government response to the Green Paper consultation proposed that the new regime would maintain the effect of qualification systems as a separate tool for utilities under similar terms to the Utilities Contracts Regulations to maintain how utilities currently operate. The disapplication of the requirement to publish a tender notice for contracts awarded by reference to a UDM established using a QUDM notice, is how that effect has been implemented in the new regime.

**MANDATORY QUESTION 11:** To what extent do you agree or disagree that the DM notice as set out in the draft SI permits a contracting authority to effectively create a dynamic market (including a utilities dynamic marketplace) for the future award of public contracts.

**QUESTION 12:** If you answered disagree or strongly disagree to Question 11 please explain why you do not believe this delivers the policy intent .

**MANDATORY QUESTION 13:** To what extent do you agree or disagree that the QUDM notice as set out in the draft SI permits a contracting authority to effectively create a utilities dynamic marketplace that maintains the effect of a qualification system under the existing rules?

**QUESTION 14:** If you answered disagree or strongly disagree to Question 13 please explain why you do not believe this delivers the policy intent

### **Transparency Notice (Included in regulation 19 of the draft SI)**

The Bill stipulates that a contracting authority must publish a transparency notice before awarding a contract under direct award provisions. The function of the transparency notice is to inform the market that a contracting authority intends to direct award a contract and to ensure that there is transparency relating to this decision. It provides an opportunity for interested parties to scrutinise whether grounds for direct award are being applied correctly.

This notice is similar in its purpose to the 'voluntary ex-ante transparency (VEAT) notice' under the EU regime. However, where the VEAT is published voluntarily and triggers a standstill period just before a contract is entered into, the transparency notice is mandated (except for direct award: user choice contracts). It is used in conjunction with the contract award notice, which is required prior to the contracting authority entering into the contract and will (in most cases) start the standstill period.

There is no set time period between the publication of the transparency notice and the publication of the contract award notice.

MANDATORY QUESTION 15: To what extent do you agree or disagree that the transparency notice as set out in the draft SI will provide visibility of upcoming procurements to be awarded using the direct award procedure?

QUESTION 16:. If you answered disagree or strongly disagree to Question 15 please explain why you do not believe this delivers the policy intent

## **Procurement Termination Notice (Included in regulation 27 of the draft SI)**

The procurement termination notice informs the market that a contracting authority has decided not to proceed with a procurement. It is only necessary to publish this notice if a tender notice or transparency notice had been published for the procurement.

Each time a tender or transparency notice is published to initiate a procurement, it creates a data record of the lifetime of that procurement and any resulting contract. Failing to confirm a procurement has been terminated will result in suppliers not being aware of a cancellation and incomplete data and inaccurate records permanently remaining on the central platform, which is unhelpful for anyone monitoring and using this data. A procurement termination notice is required to ensure that the data record and the full story of the procurement is concluded.

A procurement termination notice is a new concept included within the regulations to provide detailed information to the market and suppliers so they understand the intentions of the contracting authority have changed, reducing bid costs for suppliers and providing increased market certainty. It applies to all procurements except those initiated by private utilities.

**MANDATORY QUESTION 17:** To what extent do you agree or disagree that the contents of the termination notice, as set out in the draft SI, provide greater transparency about procurement processes that have not resulted in a contract?

**QUESTION 18:** If you answered disagree or strongly disagree to Question 17 please explain why you do not believe this delivers the policy intent

## **Assessment Summary (Included in regulation 21 of the draft SI)**

The assessment summary has the same function as what is currently known as the standstill letter (often referred to as the debrief letter). The Bill requires that an assessment summary must be provided to any supplier that submitted an assessed tender in relation to a competitive procurement under clause 19 of the Bill. An assessment summary is not mandated when awarding a call-off contract under a framework, as the call-off is awarded in accordance with the procedure set out in the framework itself (not under clause 19), although its provision is to be encouraged.

The draft SI details what needs to be included in the assessment summary document. The assessment summary will provide a supplier, that submitted an assessed tender, (defined in clause 50 of the Bill), with the scores their tender was awarded as a result of the final assessment process at the end of the procurement procedure which determines the Most Advantageous Tender and an explanation, making reference to the bid content, as to why particular scores were given against each criterion.

Each supplier that submitted an assessed tender will privately receive the assessment summary pertaining to their bid and, if they are unsuccessful, they will also receive a copy of the winning supplier's assessment summary. That copy will be redacted, in accordance with clause 94 of the Bill, to protect any sensitive information.

The provision of this information will give the supplier an understanding of why their bid was successful or unsuccessful.

Assessment summaries must be provided at the same time to all suppliers that submitted an assessed tender, and before the contract award notice (which commences the standstill period) can be published.

As well as ensuring suppliers continue to receive an explanation as to why they did or did not win the contract, the draft SI aims to drive more consistency across assessment summaries regardless of which contracting authority has provided the information, by clearly indicating what needs to be addressed and reducing the potential for differing interpretations.

It also aims to reduce the time it takes to create the summaries (compared to the time taken to draft standstill letters) by removing the obligation to make direct comparisons between the successful and an unsuccessful bid in order to indicate the relative advantages between them. Instead, the advantages will be evident from reading the successful supplier's assessment summary alongside the unsuccessful supplier's summary. This gives contracting authorities the opportunity to use information already generated during the assessment process and enables summaries to be drafted once only, rather than revising information for each unsuccessful supplier.

The draft SI does not require the contracting authority to provide any additional feedback that may help suppliers improve future tenders, but guidance will continue to encourage this, where it is feasible.

**MANDATORY QUESTION 19:** To what extent do you agree or disagree that the contents of the assessment summary (along with the provision of the successful supplier's assessment summary) will provide adequate information to suppliers so that they can reasonably understand why they did or did not win the contract while reducing the time it takes for contracting authorities to provide this information?

**QUESTION 20:** If you answered disagree or strongly disagree to Question 19 please explain why you do not believe this delivers the policy intent

## **Contract Award Notice (Included in regulation 20 of the draft SI)**

The contract award notice notifies the market of the outcome of a procurement process and alerts the market to the fact that a contract is about to be entered into. In the majority of cases, it starts a standstill period which allows a window for challenges to the award decision before the contract is signed. This notice can also inform the market if a contracting authority decides to not proceed with one or more lots in a procurement process after the closure of the tendering period.

It is not permissible to enter into a contract awarded following a competitive tender procedure without having first published the contract award notice and issuing the assessment summaries in relation to tenders included in the final assessment. The contract award notice will require contracting authorities to confirm the date on which the assessment summaries were provided.

The requirement to publish a contract award notice is the same for frameworks as it is for any other contract and is required for the setup of both open and closed frameworks. However, there are certain contracts outlined in the Bill for which the contracting authority is not required to publish a contract award notice. These are:

- direct award: user choice contracts;
- call-off contracts awarded under defence and security frameworks; and
- (regulated) below threshold contracts

## **Private Utilities**

A contract award notice is required for call-off contracts awarded through any other framework. Although not yet captured in the draft SI, we intend to make provision, in line with our international obligations, to cover contract award notices published by private utilities. As part of this, we will require a reduced version of the contract award notice for contracts awarded under a framework for private utilities. This intent will be reflected in the final version of the SI, subject to views received in this consultation.

**MANDATORY QUESTION 21:** To what extent do you agree or disagree that the contract award notice as set out in the draft SI will be a suitable vehicle for alerting the market to the contracting authority's intent to enter into a public contract and triggering the standstill period?

**QUESTION 22:** If you answered disagree or strongly disagree to Question 21 please explain why you do not believe this delivers the policy intent

**MANDATORY QUESTION 23:** To what extent do you agree or disagree that it is appropriate for private utilities to publish a reduced version of the contract award notice for contracts awarded under a framework?

QUESTION 24: If you answered disagree or strongly disagree to Question 23 please explain your reasoning

**Contract Details Notice (Included in regulations 22,23,24 25 and 26 of the draft SI)**

This notice serves to tell interested parties that the contract has been entered into. It must therefore always follow the contract award notice and any associated standstill period. Contract details notices are also required in relation to certain below-threshold contracts, although no standstill period attaches to those contracts.

The purpose of the notice is to inform suppliers and the public that the contracting authority has entered into a contract as the result of procurement procedure. In accordance with the Bill (clause 53) this must be published within 30 days of the contract being signed (120 days if the contract is a light touch contract). For notifiable regulated below threshold contracts they must be published within a reasonable time.

For contracts valued over £5 million, the UK draft SI requires contracting authorities to publish the contract within 90 days (180 days if the contract is a light touch contract). This requirement will not apply to Welsh contracting authorities (WCAs) unless a WCA awards a contract following a procurement under a reserved procurement arrangement. Respondents are asked to be aware of this when responding to these questions.

The contract details notice is also where the contracting authority should, where relevant, record information on at least 3 Key Performance Indicators (KPIs) for each contract in accordance with clause 52(1) of the Bill.

This notice is also required upon the establishment of a framework. This will tell interested parties which suppliers are on the framework what the core terms and conditions of both the overarching framework agreement and any subsequent call-off contracts are. Additionally, framework 'call-offs' will publish this notice to inform interested parties that the call off contract has commenced.

The requirement does not apply to contracts awarded by private utilities or to direct award: user choice contracts.

**MANDATORY QUESTION 25:** To what extent do you agree or disagree that the contents of the Contract Details Notice, as set out in the draft SI, will give the required level of transparency of the existence and substance of government contracts?

QUESTION 26: If you answered disagree or strongly disagree to Question 25 please explain why you do not believe this delivers the policy intent

## **Payments Compliance Notice (Included in regulation 28 of the draft SI)**

The Bill is strengthening payment legislation to ensure that the public sector is held to account for its own performance. The Bill requires contracting authorities to publish specified information every 6 months, detailing how quickly they have paid their suppliers.

By creating a repository of government payment information, we aim to increase transparency of public sector payment performance, and make external scrutiny of that performance easier.

The Payments Compliance Notice is intended to replace and strengthen regulation 113(7) of the Public Contracts Regulations 2015. The goal is to move the public sector publishing requirements on payment performance closer to those in the private sector, creating more direct comparability.

This notice does not apply to private utilities or contracts awarded by schools, nor does it apply to concession contracts.

The principal differences between the new regime and the old, are:

- the switch to 6 monthly reporting rather than annual,
- the requirement to measure from the point an invoice is received, rather than the point it is validated,
- the additional requirements to provide average payment days
- the number of invoices received but not paid in the period, and
- the requirement for sign off by a finance director.

**MANDATORY QUESTION 27:** To what extent do you agree or disagree that the payments compliance notice provides the transparency necessary to hold the public sector to account for its performance in paying suppliers on time?

**QUESTION 28:** If you answered disagree or strongly disagree to Question 27 please explain why you do not believe this delivers the policy intent.

## **Contract Performance Notice (Included in regulation 29 of the draft SI)**

The contract performance notice fulfils 2 functions: recording both the performance of the supplier against the published KPIs and information relating to any serious breach of contract. It is not a requirement for both KPI performance and a serious breach of contract to be published on one notice; this information can be published over multiple contract performance notices.

Before entering into a public contract with an estimated value of more than £5 million, a contracting authority will usually be required to set at least 3 KPIs in respect of the contract. There will also be a separate requirement to publish KPIs in the Contract Details Notice. However, a contracting authority may decide that KPIs are not relevant to a contract, if it considers that the supplier's performance cannot be appropriately assessed through such indicators – in this case there is no obligation to set and publish KPIs.

KPIs are not required to be published in any case for certain types of contract. These are:

- frameworks
- utilities contracts awarded by private utilities
- concession contracts
- light touch contracts.

The requirement to publish information relating to a serious breach of contract does not apply to private utilities or in relation to light touch contracts.

The publication of KPIs and breach of contract/failure to perform information provides transparency to both contracting authorities and the public on supplier performance. This therefore provides contracting authorities with an objective source of information as to which suppliers are subject to the discretionary exclusion grounds for breach of contract and poor performance, and will allow them to better exercise their discretion in respect of this ground as a result.

**MANDATORY QUESTION 29:** To what extent do you agree or disagree that the contract performance notice will provide adequate information about a supplier's performance on a contract?

**QUESTION 30:** If you answered disagree or strongly disagree to Question 29 please explain why you do not believe this delivers the policy intent

**MANDATORY QUESTION 31:** To what extent do you agree or disagree that the contract performance notice will provide adequate information relating to a serious breach of contract by a supplier?

**QUESTION 32:** If you answered disagree or strongly disagree to Question 31 please explain why you do not believe this delivers the policy intent.

### **Contract Change Notice (Included in regulation 30 of the draft SI)**

The Procurement Bill sets out that a contracting authority must publish a Contract Change Notice (CCN) for a 'convertible contract' (as defined in section 74(1) of the Bill) or before modifying a public contract.

The intention behind CCNs is to make the important decisions taken during the lifetime of larger contracts more transparent and open to scrutiny by interested parties. Modifications that may occur during the life of the contract can affect the value, duration, requirements and other elements of the contract.

In the current regime, there is little information available during the implementation phase of contract management. This notice seeks to address this in the future.



UKG require contracting authorities to publish modified contracts for any modified contract valued over £5 million. This requirement will not apply to Welsh contracting authorities (WCAs) unless a WCA modifies a contract awarded following a procurement under a reserved procurement arrangement. Respondents are asked to be aware of this when responding to these questions.

A contract change notice in the new regime can cover multiple contracts that all stem from the same procurement process. This could happen, for example, if a contract is divided into lots with multiple awards, but they all still result from the same tender notice.

A CCN is not required for modifications to certain types of contracts, as follows:

- defence and security contracts
- light touch contracts
- contracts awarded by a private utility.

**MANDATORY QUESTION 33:** To what extent do you agree or disagree that the contents of the contract change notice will provide greater transparency of the proper management of government contracts?

**QUESTION 34:** If you answered disagree or strongly disagree to Question 33 please explain why you do not believe this delivers the policy intent

### **Contract Termination Notice (Included in regulation 31 of the draft SI)**

The function of the contract termination notice is to inform stakeholders that a contract has been terminated and to ensure that the data record is kept up to date. Currently it is unclear whether contracts have actually terminated or been extended.

The use of the contract termination notice will allow more scrutiny by placing a 'flag' for interested parties highlighting the end of the contract and allow for greater analysis of the value for money of the whole contract. It will also provide probity for decisions made during the lifetime of a contract and ensure that there is greater clarity over contract changes that might have been made, such as, for example, extensions to the contract duration.

The contract termination notice will also function to fulfil the requirement in clause 71 'Assessment of contract performance' that authorities must publish certain information when a supplier has breached a public contract and that breach results in termination of the contract. This is intended to ensure there is a public record of which suppliers are subject to the discretionary exclusion ground relating to breach of contract, both for transparency purposes but also to make it easier for authorities to apply the ground. The notice must be published before the end of the period of 30 days beginning with the day on which a public contract is terminated. The requirement to publish a contract termination notice does not apply to private utilities or in relation to a direct award: user choice contract.

MANDATORY QUESTION 35: To what extent do you agree or disagree that the contents of the contract termination notice, as set out in the draft SI, will give greater clarity and transparency about which government contracts are still in force?

QUESTION 36: If you answered disagree or strongly disagree to Question 35 please explain why you do not believe this delivers the policy intent

### **Central Digital Platform (Included in regulation 5 of the draft SI)**

Under the new procurement regime, the Cabinet Office is developing a central digital platform for the publication of public procurement notices and documentation. For Wales, notices will need to be published on Sell2Wales, which will in turn feed into this system and will also be available on Sell2Wales itself. By creating this central digital platform, UK wide procurement information will be held in one place, generating clarity for suppliers and fairer and open competition as well as meeting related requirements in international trade agreements and providing the opportunity for meaningful analysis of public procurement data at an aggregated level.

The central digital platform will enable UK-wide notice information and documents to be accessible by electronic means, free of charge and through a single point of access. The draft SI provides information about the operation of the platform and sets out requirements for contracting authorities' interaction with it. Where contracting authorities are required to publish notices and/or documents, this will be done through the central digital platform via Sell2Wales for Welsh Contracting Authorities. Publication has been successful when the notice will be publicly viewable on the platform or the contracting authority receives confirmation that the notice or document has been successfully submitted to the platform.

The new UK-wide digital platform will be capable of being used to publish information relating to below threshold procurements (including where this information is required by the Bill (clause 87) and where the contracting authority has elected to publish notices) as well as all other procurements subject to the new regime (covered procurements). Though for Welsh Contracting Authorities this will be done via Sell2Wales in most cases.

In the event of the central digital platform not being available for publication to take place, the contracting authority can publish on an alternative platform including Sell2Wales; conditions for such a platform are further detailed in the draft SI. Subsequently, once the central digital platform is available again for publication, Sell2Wales will send it to the online system however it is the contracting authority's responsibility to ensure this happens.

MANDATORY QUESTION 37: To what extent do you agree or disagree that the SI drafting provides clarity about the operation of the central digital platform?

QUESTION 38: If you answered disagree or strongly disagree to Question 37 please explain why you do not believe this delivers the policy intent

MANDATORY QUESTION 39: To what extent do you agree or disagree that the workaround procedure provides a viable alternative in the event of a failure in the central digital platform?

QUESTION 40: If you answered disagree or strongly disagree to Question 39 please explain why you do not believe this delivers the policy intent

**Central Digital Platform: Supplier Information (Included in regulations 6 to 10 of the draft SI)**

Before a supplier participates in a covered procurement, the draft SI requires contracting authorities to ensure suppliers are registered on the platform and confirm they have submitted their core supplier information (as set out in the draft SI) to the platform. Where a contracting authority requires any of this core supplier information it must in the first instance obtain it from the platform unless the supplier provides updated or corrected information (after the tendering period) otherwise than via the platform.

The purpose of the central digital platform is to reduce the time taken by suppliers to access public procurement opportunities by ensuring that common data can be submitted more efficiently and effectively. This is of real benefit to all businesses, but especially small and medium enterprises (SMEs).

In line with a 'tell us once' approach, this will enable suppliers to bid for public sector opportunities without having to duplicate core information with each bid they submit. Suppliers will be responsible for ensuring that the information they authorise to be submitted from the central digital platform to the procurement team as part of their tender is current and correct at the end of the tendering period. If a supplier's information changes during the course of a procurement they can withdraw and then resubmit their bid until the tendering period ends. Suppliers will also have the ability to update their information outside of any formal tendering process.

The central digital platform will create a package of information which the contracting authority receives as the tendering period closes. This means that they will have some of the information needed when it comes to publishing later notices. It will assist them in undertaking due diligence and determining if the supplier is excluded or excludable.

MANDATORY QUESTION 41: To what extent do you agree or disagree that the information required by the draft SI to be obtained via the central digital platform will save duplication and re-submission time by suppliers bidding for multiple government contracts?

QUESTION 42: If you answered disagree or strongly disagree to Question 41 please explain why you do not believe this delivers the policy intent.

MANDATORY QUESTION 43: To what extent do you agree or disagree that use of the Central Digital Platform: Supplier Information should be made mandatory during the tendering period and that 'until the end of the tendering period' contracting authorities may only use the registered core supplier information submitted to the platform?

QUESTION 44: If you answered disagree or strongly disagree to Question 43 please explain your reasoning.

### **Unique Identifiers (Included in regulation 4 of the draft SI)**

In order to ensure that published data is correctly attributed to specific parties and processes, all contracting authorities, suppliers and procurement procedures (and their individual notices) will have a unique identifier on the central digital platform. Contracting authorities will be required to include these unique identifiers in all procurements when publishing notices and other information (including payment data) to the central digital platform. This supports the publication and use of data on the platform.

A unique identifier for all information published by all contracting authorities in relation to the contracting authority, the supplier and the procurement prevents duplication of records on the central digital platform and will link together all records associated with each procurement (and each supplier and contracting authority), facilitating tracking and analysis.

Where a supplier already has a unique identifier from an official register, such as Companies House, for example, it can utilise the same identifier for the central digital platform. Or where an identifier does not already exist for the supplier elsewhere, the platform can create one.

The draft SI defines the different types of identifiers to be used and sets out how these are generated, provided and used.

Suppliers bidding for Welsh opportunities will be required to obtain a Unique Identifier via the Central Platforms Supplier Registration System before they are able to submit their bids.

MANDATORY QUESTION 45: To what extent do you agree or disagree that the provisions on unique identifiers will enable tracking of procurement data?

QUESTION 46: If you answered disagree or strongly disagree to Question 45 please explain why you do not believe this delivers the policy intent

## **Transitional Provisions (Details not included in the Consultation draft SI)**

The Bill contains a power (clause 1243) to make transitional, transitory or saving provision for the commencement of the Act. Regulations will establish the transitional arrangements for procurements already underway at the time that the new regime enters into force. The intent is that the new procurement regime will cause as little disruption as possible for contracts already awarded under the present regulations or procurements that have started but not yet been awarded when the new regime comes into effect.

The fundamental principle is that procurements that 'start' after the effective date of the new legislation must be conducted by reference to the new regime only. Whilst those that have started under the Public Contracts Regulations (PCR) 2015, the Utilities Contracts Regulations (UCR) 2016, or the Concession Contracts Regulations (CCR) 2016 (the 'old regime') should continue to rely on those regulations. In practical terms, 'starting' a competitive procurement under the old regime could mean:

- submitting a notice for the purpose of inviting tenders, requests to be selected to tender or to negotiate, or requests to participate in relation to a contract or framework agreement;
- publishing an advertisement seeking offers or expressions of interest in relation to such a contract or framework agreement;
- contacting a person in order to seek an offer or expression of interest in relation to such a contract or framework agreement;
- contacting a person in order to respond to an unsolicited offer or expression of interest in relation to such a contract or framework agreement;
- entering into such a contract or concluding such a framework agreement.

For non-competitive contracts it is more difficult to determine whether a procurement has 'started' under the old regime because there is no mandatory noticing. Any non-competitive procurement entered into later than 3 months after implementation date will be subject to the rules of the new regime, unless a Voluntary Ex-Ante Transparency Notice (VEAT) has already been published for the procurement.

Procurements that have been started under the old regime will continue to the end of the contracting lifecycle for that process; that is to say the procurement and resulting contract continue to operate under the old regime until:

- the termination of the contract that is awarded as the result of a process under the old regime, or,
- the decision is reached that no award is to be made; or
- for a framework, the termination of the last call off contract to finish as a result of an award made within the life of that framework; or
- for Dynamic Purchasing Systems (DPS), the termination of the last contract awarded by reference to the DPS within its lifetime, or

- for a Qualification System (QS), the end of the last contract awarded by reference to the QS within its lifetime or where it has an unlimited duration, the end of the last contract by reference to the QS before its termination.

Therefore, frameworks, DPS and QS set up under the relevant old procurement regimes will remain compliant routes to market, assuming that they were set up lawfully, i.e. it will be permissible to award contracts through these commercial tools set up under the old regime until they expire, are replaced, or cease to exist.

The register of commercial tools (which will provide a list of frameworks and Dynamic Markets) will only record frameworks or dynamic markets set up under the new regime.

To support an orderly transition, some additional principles have been set that take into consideration the differences between old and new regimes, for example:

- If a contracting authority has commenced or completed pre-market engagement under the old regime but had not advertised prior to the new regime coming into force, they will not need to rewind the process and start the engagement over again, with a pre-market engagement notice. Instead, it will be able to explain the position on pre-market engagement in its tender notice.
- If a contracting authority has published a Prior Information Notice without inviting expressions of interest or taking other steps outlined above which constitute the start of a procurement, then the contract will be let under the new regime.
- Under the new regime, a payment compliance notice should be published within 30 days of the end of each 6 month period. However, it is expected that the digital capability to publish Payment Compliance Notices will not be available until later in 2024, therefore there will be an exception of the period immediately following the coming into force of the new regime.
- It is also likely that the contract performance notice will not be available until later in 2024 and therefore any relevant reporting will be delayed.

Please note that further guidance will be provided that will fully explain all transitional arrangements.

**MANDATORY QUESTION 47:** To what extent do you agree or disagree with the approach to transitional arrangements set out in this consultation?

**QUESTION 48:** If you answered disagree or strongly disagree to Question 47 please explain your reasoning

## **Consequential Amendments (Details not included in the Consultation Draft SI)**

The Procurement Bill (clause 123) allows an appropriate authority (including the Welsh Ministers) to make regulations that amend other legislation as a consequence of provisions of the Bill. This is necessary to ensure that other legislation that contains references to public procurement are updated for consistency with the Procurement Act. For example, the power will be used to remove references in other legislation to the Public Contracts Regulations 2015 which will be repealed by the Procurement Act and replace them with references to relevant parts of that Act instead.

Amendments will need to be made to the Public Contracts Regulations 2015 within the Social Partnership and Public Procurement (Wales) Act and numerous regulations, for example the Agriculture Support (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2021 and regulation 18 of the Equality Act 2010 (Statutory Duties) (Wales). Although these updates will be made by statutory instrument we are not providing a draft for consultation as the provisions are purely technical in nature.

## **Below threshold contracts (Wales only) (Details not included in the Consultation Draft SI)**

As detailed in Consultation Part 1, International Obligations determine which organisations are listed as Central Government Authorities (CGA's) in the Procurement Bill.

A “notifiable below-threshold contract” is defined at clause 87(4) of the Bill. The Welsh Ministers have reconsidered the threshold for Central Government Authorities set out in this clause and intend to introduce regulations to change it to £24,000 including VAT. This is because £12,000 was considered too low due to the potential administrative burden it would create for smaller Central Government Authorities.

For Sub Central Bodies this figure will remain as £30,000 including VAT as this aligns with previous Welsh policies regarding advertising below threshold Contracts.

For Wales, suppliers will be required to register on the Central Platform's Supplier Registration System (SRS) in order to bid for notifiable below threshold contracts. This registration process will require suppliers to only complete their basic supplier information such as company number, address and contact details. This requirement has not been included in the UK draft SI but will be in the Welsh draft SI so that suppliers can be allocated a unique identifier which will ensure a single supplier record exists for all supplier spend and notices. It will thereby help to improve transparency, data availability and ensure Welsh suppliers have access to opportunities advertised on the central digital platform.

MANDATORY QUESTION 49: To what extent do you agree or disagree to the amendment to the threshold amounts to be used for Below Threshold Contracts for CGAs?

QUESTION 50: If you answered disagree or strongly disagree to Question 49 please explain your reasoning

MANDATORY QUESTION 51: To what extent do you agree or disagree that requiring suppliers to register on the Central Platform's Supplier Registration System for notifiable below threshold tenders will improve transparency, data consistency and commercial data availability?

QUESTION 52: If you answered disagree or strongly disagree to Question 51 please explain why you do not believe this delivers the policy intent

MANDATORY QUESTION 53: To what extent do you agree or disagree that contracting authorities should be required to collect basic supplier information only via the Central Platform's Supplier Registration System?

QUESTION 54: If you answered disagree or strongly disagree to Question 53 please explain your reasoning

## **Welsh Language**

The Welsh Government has a statutory duty when consulting to seek your views on the effects of our policies, legislation and initiatives on the Welsh language. This is to ensure we consider any effects our policies have on, firstly, not treating the Welsh language less favourably than English and secondly, promoting opportunities to use the Welsh language in line with our vision as set out in the Welsh language strategy, Cymraeg 2050, to see a million Welsh speakers and increased use of the language.

The Welsh Government and the UK government have worked closely on the development of their respective statutory instruments to ensure there is maximum alignment between the legislation and to minimise any risk of potential divergence. Whilst this consultation uses the draft statutory instrument that has been developed by the UK government, the Welsh SI (when published) will be available bilingually in accordance with Senedd Cymru Standing Orders.

MANDATORY Question 55: We would like to know your views on the effects that the proposed Secondary Legislation would have on the Welsh language, specifically on opportunities for people to use Welsh and on treating the Welsh language no less favourably than English.



What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

MANDATORY Question 56: Please also explain how you believe the proposed technical detail of the drafting could be formulated or changed so as to have positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language, and no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.