



Llywodraeth Cymru
Welsh Government

GUIDANCE

WPPN 02/20 Partnership working and procurement: a practice note for local housing authorities

WPPN 02/20 provides local housing authorities (LHAs) with information to help their decision making about working in partnership with registered social landlords (RSLs) to deliver Housing Revenue Account development programmes.

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Well-being of Future Generations Act's well-being goals supported by this WPPN



- A prosperous Wales

- A more equal Wales
- A globally responsible Wales

1. Point to note

This guidance note should not be treated as definitive legal advice and LHAs should seek their own legal advice on proposed partnership working arrangements with RSLs.

2. Issues addressed

This guidance note has been produced by the Welsh Government to provide local housing authorities (LHAs) with information to support decision making about working in partnership with registered social landlords (RSLs) in order to deliver their Housing Revenue Account (HRA) development programmes.

3. Dissemination and scope

WPPN 02/20 is directly applicable to all Welsh local housing authorities (LHAs) and should be circulated (for information) within your organisation, particularly drawing it to the attention of those delivering their HRA development programmes.

4. Background information in relation to the EU

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Procurement Directives and the Public Contract Regulations 2015 (PCR 2015)

Currently, the United Kingdom is bound to comply with both European Union (EU) Directives and also agreements entered into by the EU with other countries. As such, the purpose of the EU Procurement Directives is to ensure open and transparent competition for European public contracts, to support the free market and help ensure value for money in public purchasing.

For contracts over a threshold value, which varies depending on what is being purchased, the EU Directives require that opportunities are advertised in the Official Journal of the European Union (“OJEU”); they also require that contracts are awarded in accordance with certain standard procedural rules, for example on timescales for the contracting process, advertising, information that potential suppliers should provide, and the basis on which bids may be assessed. Welsh Public Sector bodies are also bound by Treaty principles that prohibit discrimination between economic operators and require that procurement procedures ensure equal treatment and are transparent. The UK officially left the EU on the 31 December 2019 and the transition period will end on the 31st December 2020, which will have no immediate impact on the PCR 2015. There may be procurement reform in the future but at the end of the transition period the PCR 2015 will still stand. A statutory instrument has been laid before the UK Parliament which will address some of the inoperable aspects of the PCR 2015, such as advertising in the OJEU. The UK government has developed a replacement e-notification system called Find a Tender Service (FTS) to replace the OJEU/TED at the end of the transition period.

For WPS bodies in the UK the rules are those set out in the PCR 2015, which implements the 2014 Public Contracts Directive. Procurement within the meaning of the PCR 2015 is expressly defined as:

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“ the acquisition by means of a public contract of works, supplies or services by one or more WPS bodies from economic operators chosen by those WPS bodies, whether or not the works, supplies or services are intended for a public purpose. ”

The PCR 2015 sets out the procedures that WPS bodies are required to follow in letting a public contract and establishes thresholds above which the full extent of those regulations apply. More information regarding the current thresholds is available via this link.

Provisions are included within the PCR 2015, which expressly state that a procurement should not be designed with the intention of excluding it from the scope of the PCR 2015 or of artificially narrowing competition. In addition to complying with existing duties of proportionality, transparency, equal treatment and non-discrimination, when complying with the PCR 2015 WPS bodies must always ensure decision making is made in a proportionate and reasonable manner in accordance with public law principles.

The decisions of public bodies have always been subject to public law challenge by way of judicial review. Whilst LHAs are public bodies and so subject to judicial review, the status of RSLs has not been as clear cut. In *R (on the application of Weaver) v London & Quadrant Housing Trust* [2009] EXCA Civ 587, the Court of Appeal held that a decision made by a housing association in relation to the termination of a tenancy was an act of a public nature which would render the housing association a public authority, and therefore, amenable to judicial review.

The procurement requirements set out in the PCR 2015 apply to bodies that are 'Welsh Public Sector bodies'. The definition of WPS bodies is wide and includes national, regional and local government, and any other body subject to public law.

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Regulation 2 of the PCR 2015 states that any legal entity is subject to the PCR 2015 if it is a body governed by public law which has all the following characteristics:

- “a. it is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- b. it has legal personality; and
- c. it has one or more of the following characteristics:
 - i. it is financed, for the most part, by the state, regional or local authorities, or by other bodies governed by public law;
 - ii. it is subject to management supervision by those authorities or bodies; or
 - iii. it has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.”

RSLs are usually “bodies governed by public law” (i.e. WPS bodies) for the purpose of the PCR 2015.

This means that all procurement activity undertaken by LHAs and RSLs needs to follow the full procedures set out in the PCR 2015, unless the procurement falls below the thresholds shown in paragraph 7 (a procurement may still be needed if there is cross-border interest in the contract) or where the contract is subject to an exemption, such as one of those exemptions included in Regulation 12 of the PCR 2015.

5. Regulation 12 Exemption to the PCR 2015

Regulation 12(7) of the PCR 2015 provides an exemption to the requirement to

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publish a contract notice and undertake a regulated tender where a contract is concluded exclusively between 2 or more WPS bodies and where all of the following conditions are fulfilled:

- the contract establishes or implements a co-operation between the participating WPS bodies with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common
- the implementation of that co-operation is governed solely by considerations relating to the public interest, and
- the participating WPS bodies perform on the open market less than 20% of the activities concerned by the co-operation (the "Regulation 12 Exemption").

The PCR 2015 does not provide a specific definition of "public services" but the Public Contracts Directive 2014/24/EU (the "Directive") provides the following in Paragraph 33

“ ...all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities need not necessarily be identical; they might also be complementary. ”

This position has also been confirmed by an Advocate General's opinion (ISE v Stadt Köln Case C-796/18), which stated that co-operation which relates to activities in support of a public service is sufficient where the ancillary activity is of such fundamental importance to the public service that the public service could not be performed without it.

The development of social housing by a LHA and a RSL could therefore be

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covered by and equate to public services within the meaning of the Directive (and therefore the PCR 2015). Any arrangement that a LHA and a RSL puts in place in relation to this collaboration would also need to be governed solely by "considerations relating to the public interest".

However, if more than 20% of the activities which relate to the co-operation were to be performed on the open market the Regulation 12 Exemption would not apply and the LHA would need to follow Part 2 of the PCR 2015 in full.

When deciding how to calculate the percentage of the activities undertaken, the previous 3 years total turnover is used, or, if this is not available, an alternative activity based measure such as 3 years of costs connected with the service, supply or works (see [Crown Commercial Service Guidance note](#)). WPS bodies must keep robust evidence of the value estimates.

As an example, if a LHA plans to deliver social housing by regenerating an estate in co-operation with a RSL solely due to public interest considerations and it plans to do this by clearing existing social rented homes and re-developing the estate with a more diverse mix of tenures in the area (for example 20% open market sales and 20% of shared ownership), it would need to estimate:

1. the value of the 20% open market sales and
2. the value of the share of the shared ownership properties that would be owned privately, and
3. the value of the properties retained for 'traditional' social housing.

If the value of "1)" and "2)" was 20% or more of the total value of "1)", "2)" and "3)" then the Regulation 12(7) Exemption would not be available and, instead, the LHA would need to undertake a full procurement to appoint a development partner to deliver its objectives.

6. Examples of partnership working with RSLs

This section provides common examples of areas where LHAs and RSLs could work together, to assist LHAs accelerate the delivery of the HRA development programme whilst being mindful of their obligations under the PCR 2015.

6.1. LHA uses a RSL as a development manager

This sort of arrangement could meet the requirements of the Regulation 12 Exemption if it can be shown that each limb in Regulation 12(7) is satisfied, although this will need to be determined on a case by case basis.

If the purpose of the arrangement is akin to a standard services contract, the Regulation 12(7) Exemption would be unlikely to apply and the LHA would need to procure in accordance with the PCR 2015. If the scheme is below threshold, the arrangement will not be subject to the PCR 2015 but may be subject to a Treaty principles tender. Even if the agreement is below threshold and a Treaty principles tender is not required to be undertaken, the LHA will have its own Standing Orders to ensure best value and these will need to be followed in appointing a development manager.

6.2. LHA purchases properties Off the Shelf (OTS) from a RSL partner

In this situation a RSL owns, or has an option to purchase a site, and approaches the relevant LHA offering to build the site out with the LHA purchasing the properties from the RSL when the development has been completed. This arrangement would not usually satisfy the three limbs in the Regulation 12 Exemption. Instead, the contracting authorities could consider whether the arrangement falls under Regulation 32(2)(b)(iii) of the PCR 2015,

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which would enable the LHA to negotiate with the RSL without publishing a call for competition in the OJEU or seeking tenders. However, the use of Regulation 32 is strictly interpreted and is only available in exceptional circumstances. Its use will need to be assessed on a case by case basis and the LHA will need to ensure it has a detailed audit trail supporting the use of Regulation 32. If the circumstances are genuinely exceptional such that Regulation 32(2)(b)(iii) applies, the LHA will need to assure itself that it is achieving value for money in this arrangement. It may instead be possible to proceed with this option on the basis of an exempt land transaction, although there is significant case law in this area and each agreement will need to be looked at on a case by case basis.

6.3. LHA looks to share risk on the development of a site

In this situation the LHA would provide the land or other resources and the RSL would put in its skill and experience so that both parties take a benefit in terms of each taking homes, etc. The risk share arrangement would allow social rented homes to be constructed on the site for the LHA and the RSL, and also the construction of a number of homes for sale or partial sale.

The contractual vehicle to deliver such an arrangement would normally be a development agreement. This is a well-known type of contract which includes matters such as:

- the land transfers which will take place (these may be either at the start of the construction period or once the works have been completed);
- who gets which units;
- any payments that need to be made by either party (if any);
- any pre-conditions to the land transfers (e.g. obtaining finance and/or planning consent, and/or design approval by the Council);
- obligations re: obtaining planning consent and other necessary consents;
- obligations re: adoption of highways and services;
- construction obligations – number of units, design, roads and services,

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- standards and quality, programme for completion;
- handover and certification process;
- governance processes; and
- contractual rights (e.g. rectification plans, liquidated damages for delay, termination, limits of liability, etc.).

If the proposed arrangement does not satisfy each of the three limbs in the Regulation 12 Exemption, then the development agreement will need to be procured in accordance with the PCR 2015. Whilst some development agreements are exempt land transactions or concessions, other development agreements may fall within the definition of a public works contract and need to be procured in accordance with PCR 2015 if above threshold.

6.4. Partnering arrangement

In this situation the LHA would enter into a strategic partnership agreement with a RSL, similar to those commonly entered into between NHS bodies and Councils for joint provision of health and social care services and which are known as "section 33 arrangements". This kind of arrangement may meet the requirements of the Regulation 12 Exemption if all of the limbs in Regulation 12(7) can be shown to be met.

Such an arrangement would have an over-arching contract (a "Partnership Agreement") which would set out:

- the public services that the parties will work together to perform;
- the overriding public interest considerations and nature of the co-operation;
- the governance structure;
- the contributions that each will make to the partnership (whether financial, office space/premises, experience, etc.);
- the process for bringing forward and approving specific schemes. The Partnership Agreement works like an umbrella agreement and may not have

defined schemes at the outset, or there may be some identified schemes, with the ability to bring others in later;

- duration of the partnership;
- responsibilities for ensuring that percentage of activities is monitored, as well as the process for terminating the arrangement if the 20% is exceeded; and
- liabilities of each party for losses and on expiry/termination of the partnership.

There would need to be a standard development agreement attached as a schedule to the Partnership Agreement, which would be completed and amended as necessary for each scheme, and then entered into between the parties as a separate contract. Each development agreement will need to satisfy the requirements of the Regulation 12 Exemption before it could be entered into.

7. Note on the selection of LHA partners

Whilst reliance on the Regulation 12 Exemption means that the procurement is exempt from Part 2 of the PCR 2015, the award of a contract may be challenged by economic operators. Legal advice should always be sought before seeking to rely on the Regulation 12(7) Exemption and a full audit trail kept of the reasons for given for use of the Regulation 12 Exemption.

Any decision made by a LHA is capable of being judicially reviewed. Where it is likely that more than one RSL would be interested in collaborating with the LHA, it is imperative that the LHA develops a process for the selection of a partner which is both transparent and fair. Decisions made by the contracting parties need to be lawful, rational, and in accordance with the Wednesbury principle, namely reasonable in order to be defended against any challenge by judicial review.

In circumstances where the LHA determines that the Regulation 12 Exemption

applies and more than one RSL may want to collaborate with the LHA (for example where a LHA wants to share the risk on a larger development or a longer term partnering arrangement), the LHA should run a documented selection process which complies with the principles of transparency and equal treatment. Such a process is likely to involve the following:

- written communication to all RSLs operating in the LHAs locality, providing information about the LHAs intention to collaborate and inviting them to submit an expression of interest in a prescribed form, which sets out their experience and financial standing;
- selecting those that apply and meet the basic standards to submit formal written responses to a set of requirements set out in a tender document. It is important that the criteria for awarding the partnership are clearly set out in the tender document;
- appointing a partner RSL in accordance with the criteria set out in the tender document; and,
- providing feedback to the RSLs who were unsuccessful bidders.

8. Note on co-operation arrangements with RSLs involving the disposal of LHA land

LHAs must be mindful of the duty outlined in S.123 (2) of the Local Government Act 1972 to achieve best value in the disposal of land and also be mindful that there may be a need to obtain the consent of the Welsh Ministers (unless an exception applies). Whether or not consent is required to dispose of land will depend on the facts of each case. State aid issues can arise even if consent is obtained and legal advice should be sought in relation to this.

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9. Legislation

The legislation relevant to this WPPN 01/2020 are:

- Public Contracts Directive 2014/24/EU (the "Directive")
- Public Contracts Regulations 2015 ("PCR 2015")
- S.123 (2) of the Local Government Act 1972

10. Timing

This WPPN is effective from the date of publication until it is superseded or cancelled.

11. Contact details

If you have any questions about this WPPN, please contact:

- Simon Inkson: Simon.Inkson@gov.wales, or
- Value Wales Mailbox: VWPolicy@gov.wales.

12. Acknowledgements

The following publications and organisations (links are provided where appropriate) were utilised in the preparation of this WPPN:

- [Public Contracts Directive 2014/24/EU](#) (the "Directive")
- [Regulation 12\(7\) of the PCR 2015](#)

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- [Crown Commercial Service Guidance note](#)

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