

An introduction to procurement

A concise version of UNISON's full procurement guide

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1 / Introduction

Public sector employers in England are under increasing pressure to contract out services as a part of the government's public services modernisation strategy in England. Although the devolved administrations in Scotland, Wales and Northern Ireland have pursued a more collaborative approach, preferring co-operation to competition, a growing number of public sector organisations in the devolved nations are also putting some of their services out to tender. The process used to secure these services, either in-house or from an external contractor, is called procurement. In recent years 'procurement' has become an increasingly common feature of public services reform, often leading to outsourcing. To varying degrees this is happening across all parts of the public sector.

It is important that UNISON branches both understand and seek to influence how employers use the procurement process. Branches need to convince employers that outsourcing often leads to a deterioration in service quality. We also need to show that the best way to improve public services is through more investment and the development of in-house services, supported by the workforce and their union. Crucial to this process is the development of an in-house service improvement plan.

Where services are at risk of being privatised the branch should resist and suggest a positive in-house alternative. However where the employer decides to go through a formal procurement process, the branch should engage with the process to ensure the interests of members continue to be represented.

This guide is a shorter version of UNISON's detailed guidance on procurement and commissioning. Procurement can involve complex rules and procedures and our full guidance comprehensively covers all of these issues. The full guidance is on UNISON's procurement web page: www.unison.org.uk/activists/procurement

Does this guide apply to all parts of the UK?

Yes. There are important differences in the legislative and political context of procurement between England, Scotland, Wales and Northern Ireland. However the advice

given in this document is largely generic and applies across the UK. Dedicated factsheets explaining the distinctive elements of procurement in the devolved administrations are available from the procurement webpage: www.unison.org.uk/activists/procurement/docs_list.asp

Why is commissioning and procurement a key issue for UNISON?

UNISON is a public services union. Our members are employed in the NHS, local government, police and fire services, probation and education and children's and other services. The commissioning and procurement agenda could lead to the fragmentation of public services and result in the transfer of thousands of public sector jobs to private companies and the voluntary and community sectors.

This could lead to the break-up of national bargaining and undermine the pay, conditions and pensions of many UNISON members. Despite government promises that staff transferred will have their employment rights and pensions fully protected, often undermined. The creation of a "two-tier" workforce with staff employed to do the same jobs on different terms and conditions is a constant danger.

What forms can procurement take?

The procurement of services can take a variety of different forms. These include:

- Contracting out or outsourcing is the most common form of procurement in which private or voluntary sector organisations take over management and delivery of a specific service for a defined period. Staff are usually transferred to a new employer under the TUPE Regulations or in some cases are seconded by their current employer.
- Public Private Partnerships or Private Finance Initiatives (PFI). Often used for infrastructure projects. Contracts usually involve a consortium of private companies financing, building and running key services for a period of 25 to 30 years.
- Strategic Service-Delivery Partnerships (SSDP) are long-term (10–15 years) multi-service contracts

usually between a local authority and a private contractor. Staff are usually transferred or can be seconded to a private contractor or to a joint venture company (JVC).

- Building Schools for the Future (BSF) programmes are a version of PFI's used for projects to build new schools and refurbish existing schools in England. They can cover services like grounds maintenance, information technology, and building cleaning.
- Shared services involves public sector organisation pooling resources either between departments or functions, or between different public authorities. This often, though not always, involves a private sector organisation running services on behalf of several public authorities. In some cases public authorities combine to provide shared services in public-public partnerships.
- Procurement under an "Express LIFT framework" is a modified form of PFI to build new clinics and health centres. Under the framework primary care trusts and local authorities can bypass the European procurement procedures by choosing a LIFT partner from a vetted list of companies.

2 / Understanding the procurement process

UNISON's 'twin-track' policy

Influencing procurement decisions through negotiations isn't an alternative to campaigning. They are both vital parts of the twin-track strategy successfully followed by many UNISON branches. UNISON branches can negotiate and campaign to keep services in-house. But in many cases we may not be able to stop outsourcing. It is vital the union stays involved in order to influence the procurement process and, if a contract is outsourced, to represent members under a new employer.

Building UNISON organisation

Your branch will be in a far stronger position to represent members in a procurement process if you are well organised and effective at recruiting members. Negotiations with employers on these issues can be used as a focus for recruiting and organising. It is also important in raising the profile of the union and showing members that the union is listening; of encouraging non-members to join; and of getting existing members more involved.

If a contract is outsourced the branch will need to focus its attention on the crucially important task of building union organisation and membership in the new employer. Good communications and the active involvement of members throughout the process will boost confidence in the union, lay the foundations for strong organisation, and make membership recruitment and retention easier even where a contract is outsourced. Further information and advice on this can be found in the Organising Guide to Transfers of Employment 2008 (UNISON), www.unison.org.uk/acrobat/PCU_Organising_guide.pdf

The different stages of procurement

UNISON branches need to intervene at an early stage in order to influence and shape the procurement process. The key stages are:

Stage 1: pre-procurement

All public authorities will have a procurement strategy or plan. This will set out its approach to procurement and how this relates to the authority's wider objectives. Branches should try to reach an agreement with the

authority that ensures that the union is fully consulted at all stages of the procurement process, including the service review stage. The agreement should also commit the authority to protecting existing staff, fully applying the relevant workforce code, and ensuring that compulsory redundancies are avoided through a good workforce training and development agreement. At this early stage the branch should:

- A: negotiate a service transformation and procurement agreement (For guidance go to page 14 of the Procurement Guide)
- B: develop a branch strategy (For guidance go to page 17 of the Procurement Guide)
- C: get on top of the employment issues (For guidance go to page 20 of the Procurement Guide)
- D: ensure compliance with the public sector equality duties and ensure that an equality impact assessment(s) is carried out. (For guidance go to page 23 of the Procurement Guide)

Stage 2: moves towards procurement

The public authority will normally carry out a service review to ensure it is providing good-quality, value for money services that meet the needs of service users. The branch should seek to influence both the service review and any improvement plan that develops out of this. The branch should also ensure that it is involved in any "options appraisal" that may involve the use of external consultants. At this stage the branch should:

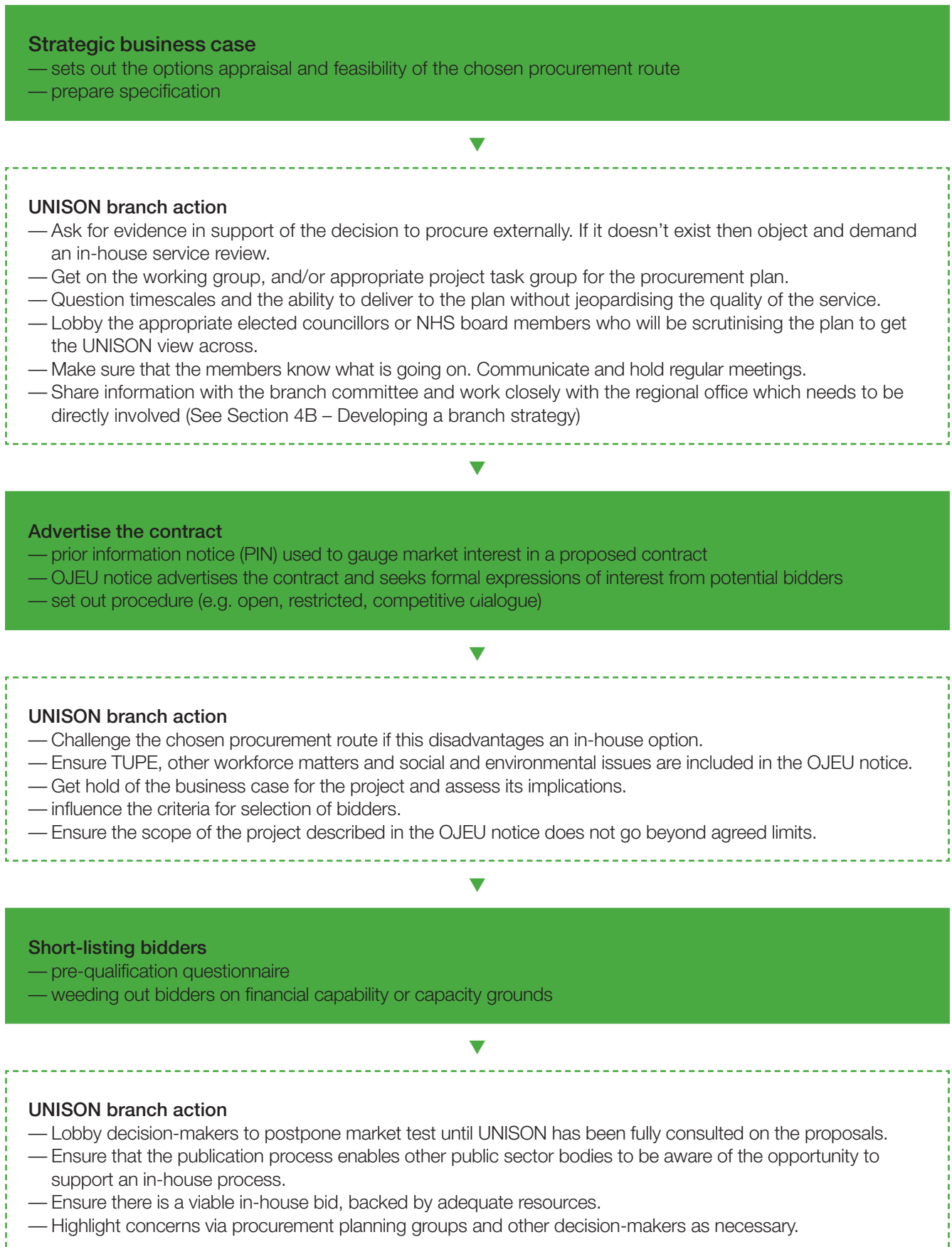
- A: contribute to any service review(s) and service improvement plan(s). (For guidance go to page 26 of the Procurement Guide)
- B: seek to influence the options appraisal. (For guidance go to page 37 of the Procurement Guide)

Stage 3: active procurement

Active procurement is the stage where a decision to 'go to the market', outsource or partner has been taken and the legal and technical process of procurement takes place. This usually has defined legal stages and timescales that begin with advertising the service for tender, through to awarding contracts and implementation.

The diagram below shows the different stages of the process and suggests the main areas for UNISON branch intervention. Links to the appropriate part of the Procurement Guide can be found by clicking on each box.

Figure One: UNISON interventions during the procurement process



Tender process

- invitation to tender (ITT) under restricted procedure
- invitation to dialogue (ITD) under competitive dialogue procedure
- discussions with short-listed bidders



UNISON branch action

- If there are fewer than three bidders, lobby for the abandonment of the process in favour of the in-house option on the grounds that there is no real competition.
- Get access to the information on potential bidders and to the tender documentation. Research their background using the Bargaining Information System and UNISON's Private Companies Unit.
- weeding out bidders on financial capability or capacity grounds



Evaluation of bids

- return of sealed tenders
- tender evaluation
- Most economically advantageous tender (MEAT) award criteria
- Post-tender evaluation/best and final offer (BAFO)



UNISON branch action

- Get access to bids and assess the potential impact.
- Draw together the steward from the affected services and get frontline views on the contractors proposals.



Contract start-up

- employment transfer (e.g. TUPE, TUPE Plus, secondment)
- contract monitoring



UNISON branch action

- Ensure the employment terms and conditions secured under the tender (secondment, TUPE Plus) are fully implemented before the start of the contract.
- Ensure compliance with the workforce code for new starters (i.e. overall no less favourable than TUPE).
- Ensure the branch is in a position to retain and organise membership with the new employer.

Stage 4: post –procurement

After a decision to award a contract externally has been made, staff can be transferred to another service provider. The branch still has a crucial role to play at this point, such as agreeing the detailed bargaining and negotiating arrangements with the new employer and effectively monitoring whether the relevant “two-tier” workforce code is being applied properly. For more guidance on recommended activity during the post-procurement stage go to page 58 of the Procurement Guide.

What support is available to UNISON branches?

Training

A procurement training programme for organising staff and activists is available. The courses are not intended to create procurement experts, but to provide practical advice to UNISON representatives who come into contact with the procurement process. If you or your branch colleagues think you would benefit from this two-day training course please get in touch with Jim Lewis in Learning and Organising Services by emailing J.Lewis@unison.co.uk. Additionally shorter courses can be arranged to help meet a specific and immediate threat.

Advice from your region

Your regional organiser (RO) should be contacted whenever there is a proposal to carry out a major service review or carry out a major procurement exercise. This will enable the branch and the region to discuss the support needed and help with the development and implementation of an effective strategy. If your branch wants help in dealing with other local procurement issues, your regional office should be your first port of call. Regional staff will be able to offer advice and support on all aspects of the procurement process. Any major procurement project will probably also affect other UNISON branches, making close contact with the region vital. The region can also discuss financial support, such as bids to the General Political Fund and the regional pool.

3 / Resources and guidance

Guidance on all aspects of the procurement process is available from the UNISON procurement web page at www.unison.org.uk/activists/procurement

From Commissioning to Contract Evaluation: UNISON's guide to campaigning and negotiating around procurement

Guide to help UNISON reps and branches respond effectively to moves to outsource or buy in services, and support members transferred to private contractors.
www.unison.org.uk/acrobat/17808.pdf

Q&A: UNISON's guide to campaigning and negotiating around procurement

Find out more about what procurement means, and how you can get involved in the process to campaign and negotiate for jobs and services in this handy Q&A to the UNISON guide: From Commissioning to Contract Evaluation: UNISON's guide to campaigning and negotiating around procurement
www.unison.org.uk/acrobat/B4388.pdf

Equal pay, privatisation and procurement

This publication from the Institute of Employment Rights explores the links between privatisation, the gender pay gap and the legal hurdles women face trying to manoeuvre between the complexities of equal pay and transfer laws.
www.unison.org.uk/acrobat/IER8917.pdf

Shared Services Branch Guidance

Guidance for branches on how to deal with a shared services reorganisation.
www.unison.org.uk/file/Shared%20Services%20Branch%20Guidance%202008%20-%20Final.pdf

Organising guide to transfers of employment

All the information and advice you will need when dealing with transfers, from start to finish
www.unison.org.uk/acrobat/PCU_Organising_guide.pdf

Negotiating and campaigning with the Freedom of Information Act

Full Guidance on the Freedom of Information (FOI) Act giving UNISON representatives practical guidance on how to get the best out of FOI.

Negotiating and campaigning with the Freedom of Information Act

www.unison.org.uk/acrobat/B1959.pdf

The Bargaining Information System (BIS) and the Private Companies Unit

BIS and the Private Companies Unit hold large amounts of useful information on private sector companies who may be bidding to run services in your locality. The more information you have about the activities of these companies, the better placed you will be to engage with the procurement process and represent members interests. E-mail: bsg@unison.co.uk or call 0207 551 1402 for more information

4 / Glossary

Commissioning

“Commissioning is the cycle of assessing the needs of people in an area, designing and then securing appropriate services” – Cabinet Office, 2006

Competitive dialogue procedure

A procedure used in the award of complex contracts where there is a need for the contracting authority to discuss all aspects of the proposed contract with candidates. This dialogue would not be possible under open or restricted procedures.

Contractor

The external organisation that takes over responsibility for delivering a service following a procurement process.

Devolved administrations

Scotland, Wales and Northern Ireland have their own institutions of government with responsibility for a range of domestic issues, including the rules that govern procurement and the extent to which procurement is used in public services.

Equality impact assessment

A process of investigation that checks how changes to a service or policy affects groups of people covered by equality legislation.

In-house

Maintained within the management of a public authority.

Invitation to dialogue (ITD) or Invitation to tender (ITT)

These are documents used by the contracting authority to specify what should be contained in bids or proposals to run a service. It should contain, among other things, the aims and objectives of the service or project and the scope of the service or project.

Most economically advantageous tender (MEAT) award criteria

A contract should be awarded to the “most economically advantageous tender”, but the decision must also have regard to having a range of contract related criteria including technical, qualitative, financial, social and environmental considerations as applicable.

OJEU notice

An advert inviting bids to run services that has been placed in the Official Journal of the European Union.

Options appraisal

When the various options for improving services are compared. This is sometimes carried out by external consultants.

Outsourcing

Moving services provided “in-house” to an external organisation, often to the private sector. This is a very similar concept to procurement and contracting-out.

Post-tender evaluation

This is often used in private finance projects. It introduces a second stage within short-listing, which allows for clarification and negotiation of bids.

Pre-qualification questionnaire (PQQ)

A method used for selecting potential suppliers to be invited to tender. Use of a PQQ is intended to add objectivity and consistency to the process. The PQQ is issued to organisations/contractors who have responded to the OJEU notice.

Restricted procedure

When a public authority chooses to procure services under a restricted procedure interested parties may “express an interest” in tendering for the contract. However, only those meeting the contracting authority’s selection criteria will be invited to do so.

Secondment

A secondment occurs when an employee is transferred to another organisation or a different part of the same organisation, but maintains the right to return to their original post once the period of the secondment has expired. Secondments are sometimes used as an alternative to formally transferring employees to another organisation.

Service improvement plan (SIP)

This is a plan of action produced by a public authority to drive up standards of service in a particular department or service area.

Service review

Service reviews are carried out by public authorities or by external consultants. They usually take place when a service area is deemed to be failing or sub-standard. The review will identify precisely which parts of the service are not performing adequately and why this is occurring.

Strategic Business Case

The strategic business case provides the rationale for taking a particular course of action. In the case of a procurement process this can mean a document that explains why contracting out a service will produce service improvements and efficiency savings. Equally, a public authority could produce a strategic business case for improving services in-house.

TUPE Plus

This is an agreement over staff transfers that builds on and enhances the basic legal rights provided by TUPE.

TUPE Regulations

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is the main piece of legislation governing the transfer of an undertaking, or part of one, to another. The regulations are designed to protect the rights of employees in a transfer situation enabling them to enjoy the same terms and conditions, with continuity of employment.

Two-tier workforce

A two-tier workforce is created when workers transfer from the public sector to the private sector and are joined by new recruits with different pay and conditions. The pay and conditions for new recruits are often worse than those of their transferred colleagues.

5 / Appendix 1: Procurement and the law

Below is a short summary of the legislation that impacts upon procurement in the UK.

European Union (EU) Procurement

Directive 2004/18/EC

The purpose of this directive is to set out the law on public procurement. The intention is to open up the public procurement market and ensure the free movement of goods and services within the European Union. Where the regulations apply, contracts must be advertised in the Official Journal of the EU, and specific procurement rules are set out that must be followed. Failure to do so can result in legal action being taken up to and including the use of the European Court of Justice (ECJ).

Public Contracts Regulations 2006

These regulations implement the (EU) Procurement Directive 2004/18/EC in the UK.

Competition Act 1998

This Act seeks to ensure competition and prevent the abuse of a dominant position in the market

Local Government (Best Value) Act 1999

Local authorities are under an obligation to secure "Best Value" for council taxpayers. This means they have to ensure that the services they provide are of a good quality and that they provide value for money. The Best Value duty applies to all authorities in England and Wales.

Local Government in Scotland Act 2003

An Act of the Scottish Parliament covering the way in which local authorities discharge their functions and the local provision of certain public services. It gives local authorities power to do things which they consider will advance well-being and covers the duty to secure best value defined as "continuous improvement in the performance of the authority's functions".

Local Government Act 2000 Part

1 Promotion of well-being

Part 1 of the Local Government Act 2000 introduced a power for local authorities to promote economic, social and environmental well-being of their areas. This is an important provision which links to the role of local authorities in commissioning and procurement.

Local Government Act 2003 Sections 101 and 102

These sections confer new powers on the secretary of state, the National Assembly for Wales and Scottish ministers to require best value authorities in England, Wales or Scotland, when engaged in contracting-out exercises, to deal with staff matters in accordance with directions. Section 101 also requires authorities to have regard to guidance on staff matters issued by the secretary of state, the National Assembly for Wales or Scottish ministers. It is intended to use the direction-making powers to ensure that contracting exercises are conducted either on the basis that TUPE will apply or, in circumstances where TUPE does not apply, that staff involved should be treated no less favourably than had the regulations applied, unless there are exceptional circumstances, and that transferees will be offered either retention of the Local Government Pension Scheme (LGPS) or a broadly comparable scheme.

The Local Government and Public Involvement in Health Act 2007 (LGPIH)

This act covers large areas of the work of public sector and health organisations. It includes: co-operation of English authorities with local partners, the duty to involve, local area agreements and community strategies, best value duties and the power of Welsh ministers to modify enactments obstructing best value, fair and open competition.

World class commissioning

The NHS world class commissioning programme only applies in England and not in Wales, Scotland or Northern Ireland. It is not enshrined in legislation, but is rather a centrally directed policy initiative by the Department of Health. World class commissioning has four main elements: a vision for world class commissioning; a set of commissioning competencies; an assurance system to deliver outcomes; and a support and development framework. While world class commissioning does not require compulsory competition, where procurement is used the EU consolidated procurement directive, the public contract regulations and the Competition Act will apply.

Delivering a shared responsibility (Wales)

Under the LGPIH Act 2007 (See above) the National Assembly for Wales can modify provisions in legislation relating to best value. "Delivering a shared

responsibility” in Wales sets out a new approach to performance improvement and community planning that redefines the duty of best value in Wales to encompass wider improvements to social, economic and environmental well-being and the sustainability and equity of public services.

Freedom of Information Act 2000 and Freedom of Information (Scotland) Act 2002

These acts set out rights of access to information for organisations and individuals. In terms of procurement there is a general right of access to information about all public contracts and procurement activity held by public authorities, regardless of the identity of the requester.

