



Comisiynydd y
Gymraeg
Welsh Language
Commissioner

welshlanguagecommissioner.wales

Contracting out Public Service Contracts: Welsh Language Considerations

Background

The principal aim of the Welsh Language Commissioner, an independent organisation established under the Welsh Language Measure (Wales) 2011, is to promote and facilitate the use of Welsh. This entails raising awareness of the official status of the Welsh language in Wales and imposing standards on organisations. This, in turn, will lead to the establishment of rights for Welsh speakers.

Two principles will underpin the work:

- In Wales, the Welsh language should be treated no less favourably than the English language.
- Persons in Wales should be able to live their lives through the medium of the Welsh language if they choose to do so.

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Introduction

The legislative context

The Welsh Language (Wales) Measure 2011 (“the Welsh Language Measure”) sets a new legal context for the Welsh language. After it received Royal Assent in February 2011, official status was established for the Welsh language in Wales, as well as the general principle that the Welsh language should be treated no less favourably than the English language in Wales. The Welsh Language Measure creates a new legislative framework for enforcing duties on persons operating in Wales with regard to the Welsh language, and will in that respect, in due course, replace many of the provisions of the Welsh Language Act 1993 (“WLA 1993”).

Section 2 of the Welsh Language Measure establishes the Welsh Language Commissioner (“the Commissioner”) to implement this new legislative framework. The Commissioner is independent and has responsibility for enforcing legal duties on persons via ‘standards’ detailed in Part 4 of the Welsh Language Measure. These standards are enforceable by the provisions of Part 5 of the Welsh Language Measure. To aid organisations’ future implementation of the standards, codes of practice will be produced in relation to standards. The standards will come into effect for most public bodies within the next few years.

Many of the public organisations which will be subject to standards currently operate statutory Welsh language schemes under the WLA 1993. When the Welsh Language Board was abolished at the end of March 2012, its duties in relation to Welsh language schemes were transferred to the Welsh Language Commissioner. Each organisation will still be obliged to comply with its Welsh language scheme, as approved under the WLA 1993, until such a time as that organisation

becomes subject to standards under the Welsh Language Measure.

The Welsh Language Commissioner’s advice documents

In addition to obligations set out within the standards and statutory codes of practice, the Commissioner may also publish advice documents, to assist any organisation or individual to offer bilingual provision.

For organisations implementing standards or schemes under the legislative framework of the Welsh Language Measure or WLA 1993 as appropriate, these advice documents will assist compliance and build upon other statutory guidance.

For other organisations, the advice documents will assist in the provision of bilingual services and operations in a context where the Welsh language has official status in Wales.

Purpose of this advice document

Public organisations are increasingly turning to other public, private and voluntary organisations to deliver services on their behalf by contract. The procurement of public services is a means of ensuring high quality services and best value for the public pound.

The principle established by the Welsh Language Measure that the Welsh language should be treated no less favourably than the English language is as relevant to services provided directly by public organisations as those provided by contract. Delivery of the public services via contractors does not dilute or circumvent the legal requirement for those services to be delivered in accordance with duties imposed upon the public sector. Under the WLA 1993 a



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duty is placed on providers of public services in Wales, under Welsh language schemes, to ensure that any 3rd parties acting on their behalf give due regard to the needs of Welsh speakers.

The purpose of this advice document is to offer advice and assistance on how to consider the needs of Welsh speakers in all aspects of contracting public services and goods. The publication of this advice document is intended to lead to the expansion of service provision for Welsh speakers. The advice document will also allow public organisations to ensure value for money when procuring Welsh language services.

The advice document was prepared by solicitor Lucy Griffiths, Eversheds with assistance from the barrister Gwion Lewis, Landmark Chambers. We thank them both for their work.



Part 1 – Context

- 1.1. Objectives and scope
- 1.2. Background/Facts and figures
- 1.3. Specific matters to address
- 1.4. Relevant legislation

1.1. Objectives and scope

This advice is aimed at assisting organisations with a legislative business case to ensure that contractors delivering a public service on their behalf are able to deliver such a service in compliance with the requirements of Welsh language legislation. This advice seeks to balance such requirements against the numerous other factors which must be considered when awarding a contract, whilst providing reassurance on the legality of the recommendations contained in this document.

This advice document focuses predominantly on public sector requirements when putting a contract for services, goods or works out to tender. The public sector is required to protect or achieve numerous legal obligations in conducting a tender process and awarding the resulting contract; some international, some European and some domestic. These can at times create competing priorities all of which must be balanced within the process to ensure that the differing levels of legal precedence are respected. The advice document also gives consideration to factors or differences which may specifically affect regulated utility providers.

Non-regulated utility providers and other private organisations are subject to few, if any, regulatory constraints when letting a contract and have more flexibility to deliver language requirements as part of their corporate social responsibility plans. As and when such organisations adopt Welsh language schemes or choose to adhere to the principles of Welsh language standards therefore, they

are likely to be able to require and enforce Welsh language expectations and obligations to a far greater degree than is the focus of this advice.

This document is aimed at heads of procurement departments, policy development officers, Welsh language officers and managers who are responsible for preparing procurement documentation. The example documents and clauses contained within this document may also be of use to all levels of procurement staff, once relevant or tailored wording has been approved internally as referred to in section 4.4 of this advice.

This document is relevant to organisations in Wales as well as beyond, who provide services to people in Wales. Organisations should consider this advice and mainstream the consideration given to the Welsh language within the context of the wider procurement policy that is relevant to them.

While this document contains guidance on the law, it is not intended to give legal advice which may be relied on in individual cases. It should not be used as a substitute for taking professional legal advice.

1.2. Background/Facts and figures

The purchase of goods and services by the public sector in Wales equates to around £5.5 billion¹. The award and delivery of contracts for goods and services is therefore key to how the public sector functions and how it is perceived.

¹Figures provided by Value Wales



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Clearly, some of those contracts will relate to delivering goods and services directly to the public sector organisation itself and may not involve any direct public service (which is the focus of this advice document). However, core public service delivery areas do form a huge part of this annual spend.

As explained in detail in Part 2 of this document, in the conduct of public business the English and Welsh languages should be treated on a basis of equality. 23% of the population of Wales speak some Welsh – and 11% of the population are fluent.²

47% of Welsh speakers in Wales are fluent and of those 84% speak Welsh daily³, yet access to public services for Welsh speakers in their language of choice is not equal or consistent.

In a survey of criminal justice services in North Wales, the findings noted that:

“the provision of a choice of services in Welsh or English... is varied and inconsistent.”⁴

In particular, the survey found that:

“The evidence provided by agencies shows that their internal systems, working arrangements and procedures for

offering, recording, responding to and forwarding a record of language choice are generally inadequate, inconsistent and in some cases non-existent.”

This evidence appears to be consistent in other sector areas, including for the purchase of IT software to enable the provision of literature to the public. A survey of IT systems of several Welsh local authorities used to generate election voting forms indicated that not one system recorded the voters' language of choice. Further, only half the IT systems included the facility for forms to be generated bilingually⁵.

However, the benefit of providing bilingual services is clear both from a 'customer satisfaction' perspective, and more importantly, from the point of view of effective delivery of services in Wales. At a national healthcare conference, the chairman of a local health board emphasised the benefits to patients following the introduction of Welsh Language Awareness Training for NHS staff:

“This training is important because patients and service users should increasingly find that language choice is regarded as a natural part of their care, and that they can see that efforts will be made to provide services in the patient's language... this can only have a positive effect. It enables the service to care for patients through their language of choice, and helps to make the vulnerable feel

²See Welsh language use in Wales, 2013-15 <http://www.comisiynyddygydraeg.cymru/English/Publications%20List/Welsh%20language%20use%20in%20Wales%202013-15.pdf>

³Welsh language use in Wales, 2013-15 <http://www.comisiynyddygydraeg.cymru/English/Publications%20List/Welsh%20language%20use%20in%20Wales%202013-15.pdf>

⁴The Provision of Welsh Language Choice in the North Wales Criminal Justice Sector – April 2008 http://www.iaith.eu/uploads/bwrdd_cyfiawnderadroddiad_saesneg_terfynol.pdf

⁵<http://surveys.cardiff.gov.uk/electsys/list.asp>



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more at ease in different surroundings.”⁶

Similarly the criminal justice services survey referred to above found that:

“Across the sector, agencies’ strategies for helping the vulnerable and preventing reoffending are highly dependent on the effective deployment of language skills by professionals. In such circumstances, the use of Welsh with Welsh speakers should be considered as a central and integral aspect of the quality and standard of the service provided rather than as an adjunct to it.”⁷

In terms of public perception, the same survey established that:

“Where language choice is offered and Welsh speakers have the opportunity to use Welsh as their preferred language, being able to deal with the criminal justice system in Welsh is a far better experience which adds significantly to the quality of the service they receive... Welsh speakers tend to perceive the opportunity to use Welsh as an indicator of customer care and equal treatment.”

As this advice document explains in detail, in order to deliver effective, quality and equal public services within Wales, there is a requirement and need to include language obligations from the outset of a tender process. This advice considers the method in which those obligations should be effectively included, implemented and monitored throughout

a tender process and the life of the resulting contract.

1.3. **Specific matters to address**

A comprehensive legal section has been included in Part 2 of this advice to explain how Welsh language legislation sits alongside relevant principles of European Union (“EU”) law. This section is supported by the legal opinion of a barrister specialising in language law. Part 2, and the legal opinion included within Schedule 1 of this advice document, may assist organisations in discussions with their legal and policy departments to enable them to develop legally reliable policies for the inclusion of Welsh language requirements in procurement documentation.

In addition, and in line with the purpose of the advice as set out in section 1.1 above, this advice focuses solely on the contracts relating to the “provision of services to the public”.

In this context, the “provision of services to the public” may involve services or goods e.g. helplines, websites, booklets or other goods. Monitoring and inspection reports also indicate that where only goods are required to be purchased for the provision of services to the public (e.g. signage, publications, branded uniforms etc.), that organisations governed by Welsh language schemes demonstrate a high level of compliance. Organisations have indicated that achieving bilingual signs and branded uniforms etc. via a procurement process is working well, as such wording can be provided either by the organisation directly or achieved by any contractor via the use of translators.

⁶Welsh Language in Healthcare conference report <http://www.wales.nhs.uk/documents/welshlanguage-healthcare.pdf>

⁷The Provision of Welsh Language Choice in the North Wales Criminal Justice Sector (Jones and Eaves, 2008)



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The more uncertain and perhaps complicated areas tend to be where service users may require either Welsh or English services or goods directly from a contractor. This is likely to require a proactive approach from contractors, including access to Welsh speakers delivering the service for certain contracts. This advice therefore concentrates predominantly on such contracts, with frequent reference to examples to assist with the application of principle.

Throughout this document, contracts covered by this advice (as described above) are referred to as “public service contracts”.

1.4. **Relevant legislation**

As indicated above, this advice includes a comprehensive analysis of the main relevant legislation in relation to awarding a public service contract in Wales. Part 2 of this advice considers the specific legislation and the overriding principles which must be respected.

Part 2 includes separate sections to deal with procurements covered by European directives on the award of regulated contracts (section 2.2.2) as well as a section addressing contracts which are outside of those directives (section 2.2.3). Other relevant statutory considerations are set out in section 2.2.4 and 2.2.5.

However, this advice highlights how Welsh language requirements can form a mandatory part of a specification. Such requirements impact less on the actual conduct of the

procurement process itself and more on the requirements to be dealt with within the documents to tenderers and their responses. They relate to the contractors' ability to deliver the public service contract effectively, which may or may not require them to tender through the medium of Welsh. This advice is not an indication that all procurement processes must be conducted bilingually, with procurement documents issued and received in Welsh.

That said, an organisation may consider that for particular procurements it is important that some or all of the procurement process should be presented in Welsh in order to demonstrate a contractor's technical ability. However, such a decision will need to be subjective, based upon the service user requirements under each particular contract and how the specification and contract documents are constructed. Section 3.1.2 of this advice contains further detail on this point.

Concern has been raised that it is not possible to conduct procurements bilingually where they are regulated by European Directives. Notices relating to such procurements are required to be published via the Official Journal of the European Union (OJEU) in one of the EU's official languages and are therefore conducted in English in the UK.⁸ The EU Council approved Welsh as a co-official language of the EU on 15 July 2008. This means Welsh may be used in certain meetings of and correspondence with the EU Council but not for official documents such as OJEU notices.

⁸Article 51(3) Public Contracts Directive 2014



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However, whilst OJEU requires English documents, this does not prevent organisations from including a link in their contract notice (such as to a bilingual buyer's profile) directing contractors to Welsh versions of the documentation. Such Welsh versions must not contain any additional information to that posted on the OJEU. Where organisations are required by standards to publish 'invitations to tender for a contract' in Welsh, this should as a minimum include publishing the contract notice in Welsh on the buyer's profile (i.e. Sell2Wales).

In deciding whether a contracting authority wishes to conduct some of its tender process in Welsh, the contracting authority will need to consider what is appropriate in relation to that particular contract and their internal capacity to deal with such contracts in Welsh. It may not be proportionate to require a full tender process to be bilingual where both parties will have to use translators in order to deal with the documentation. However, organisations subject to standards must also be aware of the obligation to permit tenders to be submitted in Welsh and not to treat bids received in Welsh less favourably than those received in English.

Conducting a process entirely or largely in Welsh may, however, be appropriate if a contract relates to services where all service users would require Welsh language services. For more limited requirements, organisations may wish to require certain elements or examples of the process

to be provided bilingually. For further information on such matters see Part 3 of this advice.

In recognition of procurement language, this document also refers to the organisations which are the focus of this advice as "contracting authorities" within the following parts. This phraseology is adopted from the Public Contracts Directive⁹. Under the directive regulating contracts awarded by regulated utility providers, the relevant phrase is "contracting entity".

⁹Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC("Public Contracts Directive").



Part 2 – Legal requirements

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2.2.4. Best Value Obligations

2.2.5. Compliance with the Agreement on Government Procurement (GPA)

This Part of the advice seeks to clarify the legal position regarding Welsh language obligations when a contracting authority wishes to let a public service contract.

The sections which follow set out the relevant procurement and language legislation with an analysis of how both these requirements can be met to appropriately contract out the delivery of a public service within Wales.

2.1. Legal language duties

2.1.1. The Welsh Language (Wales) Measure 2011 and the Welsh Language Act 1993

The Welsh Language Measure tasks the Commissioner with the duty of promoting and facilitating the use of the Welsh language, including increasing the use of the Welsh language in the provision of services¹⁰. The Welsh Language Measure also requires certain organisations to comply with service delivery standards. An organisation will be notified of which standards must be complied with and when. Service delivery standards relate to a 'service delivery activity'. Section 28(2) explains that this means:

- "a person –
- (a) delivering services to another person, or
 - (b) dealing with any other person in connection with delivering services –
 - i. to that person, or
 - ii. to a third person"

Where a contracting authority deals with a contract in relation to providing services on its behalf, under a contract, this comes within the definition set out in s28(2)(b)(ii) shown above. The Welsh Language Measure therefore intends for standards to be relevant in dealings with contractors to deliver services on a contracting authority's behalf.

Until all such standards are in force, the WLA 1993 continues to impose a duty on certain organisations to prepare and comply with Welsh language schemes, in order to give effect to the principle:

"that in the conduct of public business and the administration of justice in Wales the English and Welsh languages should be treated on a basis of equality."¹¹

Under the WLA 1993 the actions taken and guidance developed in order to give effect to these principles and obligations must be "appropriate in the circumstances and reasonably practicable". Similarly, the Welsh Language Measure ensures that the requirement to comply with a standard is both reasonable and proportionate.¹²

This has always ensured that in the performance of these obligations, organisations governed by Welsh language obligations are able to respond proportionately to the requirements of the beneficiaries of this legislation, namely the public in Wales.

¹⁰Section 3(1) and (2) Welsh Language (Wales) Measure 2011

¹¹Section 5 Welsh Language Act 1993

¹²Section 54(2) Welsh Language Measure



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However, when contracting out the delivery of such services to the public, the above principle needs to be considered in relation to other cross-border requirements. In the public procurement sector there is concern in particular over balancing legal language requirements with wider procurement rules. However, an understanding of the international and European application of this Welsh language principle demonstrates that these two requirements can both be compliantly achieved when letting a contract.

2.1.2. The UNESCO Convention

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions¹³ was approved by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in Paris on 20 October 2005 with the support of the European Community and most of its Member States. The UNESCO Convention came into force on 18 March 2007.

The Convention acknowledges:

"the importance of cultural diversity for the full realisation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognised instruments."¹⁴

Article 2(2) of the UNESCO Convention gives the principle of sovereignty as one of its guiding principles, stating:

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign

right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory."

Article 6 of the UNESCO Convention contains the following:

"1. Within the framework of its cultural policies and measures... each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.

2. Such measures may include the following:

- (i) regulatory measures aimed at protecting and promoting diversity of cultural expressions;
- (ii) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such services.

The UNESCO Convention is an international treaty which emphasises the right of Member States to adopt measures for the protection and promotion of the diversity of cultural expressions. This expressly allows, at an international level, for Contracting States to adopt measures regarding the language used for such services.

The EU and the UK have undertaken to take the UNESCO Convention into account when interpreting and applying

¹³Annex 1(a) to Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (OJ 2006 L 201, p. 15)

¹⁴Fifth recital in the preamble to the UNESCO Convention



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other treaties, including when interpreting and applying the European Community Treaty¹⁵.

2.1.3. The EC Treaty¹⁶

There is clear recognition at EC level of the right to linguistic diversity. The Council of the European Union has recently affirmed that the linguistic diversity of Europe should be respected and respect for and promotion of the diversity of its cultures constitutes one of the EC's main preoccupations in all areas (Article 151(4) EC Treaty).

The Lisbon Treaty¹⁷, which entered into force on 1 December 2009, amended the EC Treaty. The Treaty also made the EU's human rights charter, the Charter of Fundamental Rights, legally binding on the EC and its Member States¹⁸. The Charter of Fundamental Rights expressly states that “the Union shall respect cultural, religious and linguistic diversity”¹⁹.

2.1.4. Welsh Language legislation and EC Treaty together

Even more relevant to this advice, case law has in fact confirmed the approach of the European Court of Justice to national legislation to protect and promote the official languages of a Member State (which were not official EU languages) when considered against the fundamental freedoms contained within the EC Treaty.

In March 2009, the European Court of Justice made its ruling in the case of UTECA²⁰. The case concerned a challenge against Spanish national legislation which required television operators in Spain to earmark a large percentage of their funding for the production of films in any of the official languages of Spain, most of which were not official languages of the EU. Whilst not strictly a “procurement case”, the judgement in the case sets out some very key requirements to ensure that no measures breach the fundamental freedoms of the EC Treaty. These fundamental freedoms include the freedom to provide crossborder services (Article 49) which the case dealt with specifically.

The judgement summary of the case sets out the following:

“It is true that, such a measure, ... constitutes a restriction on several fundamental freedoms, that is to say on the freedom to provide services, freedom of establishment, the free movement of capital and freedom of movement for workers.”

“However, that measure may be justified by the objective of defending and promoting one or several of the official languages of a Member State concerned. In that regard, such a measure, ... appears appropriate to ensure that such an objective is achieved.”

¹⁵The EC Treaty was renamed as the Treaty on the Functioning of the European Union (TFEU) by the Lisbon Treaty which entered into force on 01 December 2009. The TFEU is referred to as the EC Treaty throughout this advice as it is still commonly known as such at the time of writing.

¹⁷http://europa.eu/lisbon_treaty

¹⁸The Lisbon Treaty contains an opt-out for the UK in relation to the Charter of Fundamental Rights. The impact of this is that where a provision of the Charter refers to national laws or practices, it shall only apply to the UK to the extent that the rights or principles that it contains are recognised in the law or practices of the United Kingdom (Lisbon Treaty - Protocol (No 7)

¹⁹Article 22

²⁰Case C-222/07 UTECA v. Administración General del Estado (European Court of Justice 5 March 2009)



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"In addition, it does not appear that such a measure goes beyond what is necessary to achieve that objective."

Most languages having official status in Spain (e.g. Catalan and Basque) are official languages within certain territories of the Kingdom of Spain only. Similarly, Welsh is an official language within Wales, not in the wider UK. The case therefore confirms that in order for Welsh language requirements to be incorporated within a tender process without breaching the fundamental freedoms of the EC Treaty the measure must:

- defend or promote the official language of the country ("the objective")
- be appropriate to ensure that the objective is achieved
- not go beyond what is necessary to achieve the objective.

In order to set out the obligations imposed on them by language standards or under their Welsh language schemes, organisations must therefore assess for each type of procurement process what requirements are appropriate and necessary.

This will involve an analysis by the contracting authority of Welsh language requirements that would or may be necessary for the delivery of a particular service over the life of the contract. It is important that at the outset, any potential increase in Welsh language requirement is factored into the procurement process to ensure

contractors can deliver this obligation throughout the contract.

In the judgement in the UTECA case the judge went on to state:

"The fact that the criterion on which that measure is based may constitute an advantage for ... undertakings which work in the language covered by that criterion and which, accordingly, may in practice mostly comprise undertakings established in the Member State of which the language constitutes an official language appears inherent to the objective pursued. Such a situation cannot, of itself, constitute proof of the disproportionate nature of that measure without rendering nugatory the recognition, as an overriding reason in the public interest, of the objective pursued by a Member State of defending and promoting one or several of its official languages."

In short, contracting authorities must not refrain from incorporating Welsh language requirements into tender processes, because in practice it is more likely that organisations with Welsh speakers may be successful. Such realities are accepted by the European Court of Justice as a justified restriction on the fundamental freedoms of the EC Treaty, provided the manner in which this is achieved is appropriate and necessary.

The best practice contained within this advice is considered both appropriate and necessary to ensure that Welsh



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language obligations are delivered when contracting out.

2.2. Legal requirements when purchasing goods and services

2.2.1. EC Rules

Public sector organisations and many quasi-public organisations (defined as "contracting authorities") are required to comply with the Public Contracts Directive which sets out strict rules and procedures which must be adhered to for contracts for certain works, services or goods.

Regulated utilities providers are also required to comply with the Utilities Directive²¹ which contains similar requirements. The Directives are implemented in UK law by way of Regulations²².

The directives are aimed at opening up procurement to EC wide competition and are supplemental to the general principles of EC law which apply to the award of all public contracts²³. The relevant principles are:

Equality of treatment and prohibition on discrimination based on nationality;

Measures chosen are proportionate in light of the objectives sought;

Transparency;

Mutual recognition of the standards and checks of other Member States.

The first three principles are reflected directly within the Public Contracts Directive.

These principles seek to ensure that discriminatory behaviour is prevented across the EC, and it is this restriction on discrimination between Member States which can cause concern to public organisations in particular when trying to incorporate language considerations and matters imposed solely by domestic legislation within tender processes.

European Court of Justice procurement case law has consistently held that measures which impede or render less attractive the provision of services in a Member State (or part of it) are capable of restricting free trade as protected by the EC Treaty. In particular, the European Court of Justice procurement case of Rüffert²⁴ held that domestic legislation which caused undertakings from outside the relevant Member State to lose their competitive advantage was in breach of the EC Treaty. However, the case concerned legislation which was discriminatory in effect as it could not be justified by the objective it was seeking to protect.

In relation to Welsh language obligations, the UTECA case confirms that such measures would not be considered a

²¹Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (28.03.2014) ("Utilities Directive")

²²Public Contracts Regulations 2015 (SI 2015 No 102) and Utilities Contracts Regulations 2016 (SI 2016)

²³Whilst it is not clear how far the Treaty principles apply to utilities, the Utilities Directive itself contains a prohibition on discrimination and expressly requires transparent award procedures (Article 10)

²⁴Case C-346/06 Dirk Rüffert v Land Niedersachsen 3 April 2008



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2.1.3. The EC Treaty

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2.2.1. EC Rules

2.2.2. Contracts covered by the Directives (“OJEU” procurements)

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breach of the EC Treaty as they are necessary provided they are implemented in a way which is appropriate. Previous case law has also consistently held that such measures are warranted if they pursue a legitimate objective compatible with the Treaty and are justified by overriding reasons of public interest²⁵.

The recent case of Stadt Landau²⁶ further confirms that where a procurement process includes a condition laid down by national legislation which is warranted as pursuing a legitimate objective compatible with the Treaty, it is also permissible for an operator to be excluded from participating in a procedure for failure to confirm compliance with this condition in its tender.

2.2.2. Contracts covered by the Directives (“OJEU” procurements)

The strict requirements of the Public Contracts Directive only apply to certain types and value of public sector contracts²⁷. Where contracts are required to be procured in compliance with the Directive, the rules require entities to advertise their contracts in the Official Journal of the European Union and to award contracts through a prescribed procedure. The rules deal very specifically with what can be considered at different stages of the tender process. The legal effect of each of these is considered below in relation to incorporating Welsh language requirements. Practical examples of how to apply these

legal obligations are contained in Part 3.

2.2.2.a. Selection stage

Before undertaking its full evaluation²⁸, a contracting authority may exclude a tenderer from the procurement if the grounds set out in Article 57 apply, or they fail to meet minimum standards of financial standing or technical or professional ability. Such minimum standards must be set out in the contract notice and be related and proportionate to the subject matter of the contract²⁹.

i. Exclusion grounds

The grounds set out in Article 57 relate predominantly to matters such as tenderers having been convicted of a criminal offence. One additional ground which will be relevant is where a tenderer “has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, [or] a prior contract with a contracting entity... which led to early termination of that prior contract, damages or other comparable sanction.”

Where the performance in question relates to complying with legal requirements to deliver a contract through the medium of Welsh to the public, a breach of this would constitute a failure to meet a legal obligation. It is therefore important that contracts include clear obligations and consequences for failure to comply with Welsh language

²⁵Bosman (cited in footnote 56), paragraph 104; Commission v Portugal (cited in footnote 56), paragraph 49; Joined Cases C-92/04 and C-202/04 Cipolla and Others [2006] ECR I-11421, paragraph 61; Case C-438/05 International Transport Workers’ Federation and Finnish Seamen’s Union [2007] ECR I-10779 (“VikingLine”), paragraph 75; and Case C-341/05 Laval un Partneri [2007] ECR I-11767, paragraph 101

²⁶RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz C115/14 of 17 November 2015

²⁷For further information on thresholds and regulated contracts see <http://prp.wales.gov.uk/planners/general/phase2/procurementbelowjoethreshold/>

²⁸The Directive allows the inspection of tenders before the selection requirements are fulfilled in specific situations - Article 56(2)

²⁹Public Contract Directive Article 58



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obligations, in order that deficiencies in performance and the sanctions taken can be evidenced in considering qualifications for future procurement opportunities.

It should be noted that this ground for exclusion may only be used where the significant or persistent deficiency has occurred within the last three years³⁰. In addition, the Public Contracts Directive, provides for a 'self-cleaning' regime where a contractor is in the situation or persistent deficiency referred to above. This allows the contract to provide evidence to the effect that measures taken by the contractor are sufficient to demonstrate its reliability despite the existence of the ground for exclusion.³¹

The contractor must prove that they have undertaken relevant compensation, collaborated with the investigating authorities, and taken concrete technical, organisational and personnel measures that are appropriate to prevent further misconduct.

The contracting authority must consider whether the measures taken are sufficient, and where they decide not, they must provide the contractor with a statement of the reasons for that decision.

Making contractors aware that a failure to ensure that Welsh language obligations were met could constitute a ground for exclusion from future procurements would provide a strong incentive for contractors to demonstrate their compliance. Contractors should however be made

aware that any such breach would be considered on a case by case basis.

ii. Minimum standards

In setting minimum standards with which a contractor must comply in order to have their tender evaluated, a contracting authority may have regard to certain limited requirements and means of proof set out in the Directive. All requirements must be relevant and proportionate.

In relation to the need to meet Welsh language obligations, the most relevant "means" is the ability to ensure:

That the economic operator possesses the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

This requirement may include demonstration of the contractor's ability and experience in delivering the required services in Welsh. In order to be proportionate the minimum standard must take into account the purpose and scale of this requirement.

For example, a generic question as to how many Welsh speakers the contractor employs, with a higher score being awarded for a high number of employees, would not be appropriate for all contracts. Some contracts may anticipate a high level of requirement for delivery of services in Welsh whereas others may not.

³⁰Public Contracts Regulations 2015 Section 57(12)

³¹Public Contracts Directive Article 57(6)



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An appropriate question may therefore investigate the contractor's ability to deliver through the medium of Welsh based on high or low levels of anticipated service requirement as appropriate. However, even where low levels of demand have been encountered previously, it is important that a contractor is able to respond to any number of users who wish to receive such Welsh language services throughout the contract.

It would therefore be appropriate to also investigate what processes they have used to react to changing levels of demand in previous contracts.

Such minimum requirements must be set out in the contract notice (or pre-qualification documentation) and contracting authorities should support this with a clear specification explaining requirements (see further in section 3.1.2 below). Contracting authorities should also note that it is not permitted to request any information which is not to be scored. They should therefore carefully consider why the information requested is needed. Care also needs to be taken when setting the minimum score to be achieved for such questions, and the practicalities of this are discussed further in Part 3.

For further information on general guidance at the selection stage please refer to <http://prp.wales.gov.uk/planners/general/planning/selectioncriteria/>

2.2.2.b. **Evaluation stage**

Following the initial selection stage, a contracting authority may evaluate tenders in order to make its decision as to the

awarding of the contract.

A contracting authority may award a contract on the basis of the offer which is the most economically advantageous from the point of view of the contracting authority. A contracting authority must use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous. Those criteria may include quality, price, technical merit, aesthetic and functional characteristics, design for all users, social and environmental characteristics, running costs, organisation, qualification and experience of staff, after sales service, technical assistance, delivery date and delivery period and period of completion.

As criteria used must be linked to the subject matter of the contract, contracting authorities must decide exactly what is required of tenderers to deliver Welsh language requirements throughout the whole life of the contract.

Given that Welsh language obligations are a mandatory requirement of delivery of services to the public in Wales, they are by definition linked to the subject matter of the contract. However, the importance that is attributed to those criteria may depend on the nature of the contract to be delivered and how relevant a feature the delivery of the services in Welsh will or could be to the contract.

A contracting authority must ensure that the criteria that it sets and the questions that are posed to tenderers in order to demonstrate those criteria, still comply with the basic EC Treaty principles.



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Award criteria must be stipulated in the contract notice or contract documents and should include the relative weighting of the criteria³². Also, award criteria must not revisit criteria used or information provided at the selection stage.

It is therefore vital that contracting authorities take a view on the extent of the importance of Welsh language obligations to each particular contract at the outset in order to consistently and appropriately draft notices, specifications, and contract documents. In order to achieve this, the tender process should factor in input from wider authority personnel other than the purchasing department (both to general internal policies and on a contract by contract basis as necessary).

Detailed guidance prepared by the central purchasing department for procurement officers governing conducting tender processes should include clear input from strategic officers of the authority such as Welsh language officers.

When conducting a particular process using that central guidance, a procurement officer is likely to need to contact those officers, as well as the department for whom the contract is being let, in order to correctly reflect the nature and level of bilingual service delivery that will be required. The central guidance should include a checklist to remind the procurement officer of this step. An example of a checklist is included in Schedule 2.

2.2.2.c. **Contract conditions**

It is obviously important that a contractor adheres to the contract conditions which reflect the tender process conducted to select them. However contract conditions are entirely separate from the technical specifications and selection and award requirements. Whilst contractors must accept the contract conditions in order to be awarded the contract (and therefore should be provided with a full set of relevant conditions), evidence of compliance with these should not generally be requested during the selection or award stage. It is not possible to "evaluate" compliance with the specific contract conditions as part of the tender process.

However, a contract can, and indeed should, include commitments which bind contractors to deliver the Welsh language obligations which they have committed to in the process. Techniques to effectively achieve this are included in section 3.1.5 below.

2.2.3. **"Non-OJEU" procurement processes**

As already indicated, many public sector contracts may not be regulated by the Directives discussed above. For the public sector, these are broadly summarised as three different categories, being (i) excluded contracts (ii) below threshold contracts and (iii) "Light Touch Regime contracts"³³.

³²Criteria may be placed in the descending order of importance only where, for objective reasons, it is not possible to provide weightings. However the Commission has indicated that this will be acceptable in exceptional circumstances only.

³³The Light Touch Regime (LTR) replaces the old Part B regime although it is considerably more limited. For further information on the LTR please refer to the Crown Commercial Service document "Guidance on the new Light Touch Regime for Health, Social, Education and certain other service contracts" at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/409543/GUIDANCE_ON_THE_NEW_LIGHT_TOUCH_REGIME_FOR_HEALTH_SOCIAL_EDUCATION_AND_CERTAIN_OTHER_SERVICE_CONTRACTS.pdf



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Even when a tender process is not subject to the Public Contracts Directives (for example because the estimated value of a contract falls below the relevant threshold), EU Treaty-based principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality apply. Where the authority considers that a contract is likely to attract cross-border interest it is obliged to publish a sufficiently accessible advertisement to ensure that suppliers in other Member States can have access to appropriate information before awarding the contract. This is in line with the UK objective of achieving value for money in all public procurement - not just those covered by the Public Contracts Directives. Some degree of advertising, (appropriate to the scale of the contract), is likely to be necessary to achieve transparency where the contract is likely to attract cross-border interest.

The legal interpretation and principles clarified in this advice deal almost exclusively with the fundamental freedoms and principles of the EC Treaty. It is therefore important that a consistent approach is taken by public sector organisations or regulated utilities in relation to all contracts for delivery of a public service which is put out to tender.

Where a contract is covered by the Directives, practical matters such as the need to publish contract notices or contract documents in an official language of the EU are easily dealt with (see section 1.4 above). However, the principles behind these recommendations apply equally to

"non-OJEU" procurement processes, as the steps that the contracting authorities take in imposing Welsh language obligations within a tender process must at all times be necessary and appropriate.

Whilst contracting authorities must ensure that they comply with the strict rules of the Directive, where the contract is covered by those rules such strict requirements are considered supplemental to and consistent with the general principles set out in this advice rather than in any way restricting such principles.

2.2.4. **Best Value Obligations**

The UK Government's procurement policy is that all public procurement should be based on 'value for money', having due regard to propriety and regularity. This policy is set out in Managing Welsh Public Money (section 2.2 and annex 4.5) published by the Welsh Government in January 2016. The Welsh Government launched the Wales Procurement Policy Statement for the public sector in Wales in December 2012 .

However, award criteria must account for all mandatory requirements of the specification and legal obligations in providing the goods or services. As discussed in this advice document, Welsh language obligations must form a part of such criteria in order to assess the ability of a contractor to deliver a compliant best value service.



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2.2.5. Compliance with the Agreement on Government Procurement (GPA)

The Agreement on Government Procurement (GPA) was signed in Marrakesh on 15 April 1994. The GPA establishes an agreed framework of rights and obligations among its Parties with respect to their national laws, regulations, procedures and practices in the area of government procurement.

Not all public procurements are covered by the GPA³⁴, but where they are covered, Parties to the Agreement are required to treat the products, services and suppliers of any other Party to the Agreement "no less favourably" than their domestic products, services and suppliers and not to discriminate against goods, services and suppliers of other Parties.

As an international agreement, the GPA is interpreted in light of other international laws and agreements. These include the international conventions referred to above. The GPA is not considered to impose any additional or require any lesser obligations or requirements than those discussed above arising from the EC Treaty.

³⁴The GPA does not regulate utilities, only public organisations



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3.1. Including Welsh language requirements within the tender process

Whether or not a contract award is governed by the full requirements of the Directives, it is advisable that the procurement process for most contracts is divided into the following four stages in order to ensure it is conducted in a scoped, transparent and fair manner³⁵. The four stages are as follows: establishing the contract requirements, setting the specification, conducting an initial selection and, finally, evaluating proposals to award the contract.

3.1.1. Identify requirements

Before a procurement process is formally launched it is always helpful to establish the existing known requirements for the contract to be awarded. This is particularly the case if a contract involves the award of a contract to deliver a public service on behalf of the contracting authority.

Whilst a contractor must be able to deliver the service to any service user who requires the service through the medium of Welsh, the requirements established in section 2.2 confirm that a contracting authority must be clear from the outset as to the extent of relevant language circumstances applicable for that particular contract.

This will enable the contracting authority to set appropriate requirements for the contractor to tender against and ultimately deliver.

To establish this the contracting authority will need to

consider the types of circumstances relevant to this particular contract where language choice will need to be met.

For example, which of the following circumstances are relevant to the contract:

- Face to face – provide a bilingual contact to serve the customer.
- Correspondence – write in accordance with the language of choice of the addressee.
- Telephone – answer the phone with a bilingual greeting and respond to a caller in their language of choice. Messages on answering machines must be bilingual.
- Public meetings – enable the public attending public meetings to speak in Welsh or English.
- Literature – public literature including forms, leaflets, booklets, explanatory material, advertisements and publicity must be available in a bilingual format.
- Advertisements – advertisements giving general information or promotional information, recruitment etc. must be fully bilingual.
- Service delivery – provide services to a client in their language of choice, for example home care services, residential care, and play groups.

It is also recommended that procurement staff liaise with internal customers i.e. those working in the particular service area (e.g. social care colleagues) in order to

³⁵For further details on planning and conducting a procurement process please refer to the Value Wales Procurement Route Planner at <http://prp.wales.gov.uk/>



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establish previous levels of Welsh language service that were available and to what extent this was taken up. They may also be able to establish any year on year increase (or decrease) that has been experienced in the service provision and the take-up rate. However, officers should be aware that this information may not reflect the potential past or future requirement for the service through the medium of Welsh, and may be subject to factors such as awareness of service users, past monitoring and promotion (or lack of the same) by contractors etc.

Procurement officers should also consult with internal Welsh language officers in order to factor in any current policies or trends being experienced in relation to the usage of Welsh language services. As well as figures, if possible, it would be helpful to identify barriers to access to services delivered in accordance with this particular contract in the Welsh language.

Procurement officers should also seek to establish how the figures were obtained. If the levels of service provision through the medium of Welsh and take-up rates have not been or cannot be established or monitored from previous contracts then they should treat such figures as estimates. This would emphasise that it is necessary and appropriate to include within the specification a requirement upon the contractor to monitor and report on the Welsh language service.

For example, if the contract is for provision of care for the

elderly, the contracting authority should establish the current extent of Welsh language users in the area to be covered by the contract and any identifiable or estimated change in that demand. Users in this sense would be the elderly persons themselves but may also include their families.

If, for example, current providers or care inspectorate indicate that only 3% of users use their services through the medium of Welsh, it may be appropriate for the contracting authority to further investigate whether all service users have received a questionnaire on this point. If comprehensive figures are not available before launching the procurement process, this should be a requirement that is built into the specification for the contractor to achieve during the contract. The tender process would then assess their ability and approach to be able to conduct and respond to such an exercise.

If a contract for a specific type of service has not previously been awarded, procurement officers may find it helpful to consult with other organisations who have awarded such contracts, and/or the Commissioner, in order to establish current indicative levels of bilingual service provision and take-up rates.

It is also recommended that contracting authorities undertake a general review of the current contracts and agreements in place with contractors (or due to be put out to tender) in order to assess the extent of services to the public and current compliance with Welsh language



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requirements. A pro forma questionnaire is attached in Schedule 6 which may assist organisations in undertaking a review. The questionnaire can then be utilised to conduct periodic assessments in the future.

3.1.2. **Setting a specification**

A specification sets out the requirements of the contract so that contractors are able to appropriately tender and then perform against those requirements.

The form of a specification is not set and may vary greatly. For a contract covered by the Directives, the specification must be issued at certain stages in the procedure and remain available for certain time periods. However for all procurement processes the specifications drawn up must not be discriminatory, should be cost-effective, appropriate and proportionate.

Specifications for the purchase of services are likely to be far more complex than specifications for the purchase of goods. However even with the latter it may be necessary to factor in possible language requirements to ensure the contractor can include this within their proposal and price.

For example, in a contract for the production of staff uniforms, it may be necessary or desirable to include a requirement that the contractor embroider onto the uniform a method of identifying whether staff are Welsh speakers. Whilst the Welsh Language Commissioner provides free badges for anyone to indicate their ability to communicate in

Welsh, such badges may not be suitable for certain areas of staff work.

Including such a requirement to include a Welsh language indicator as an integral part of the contract can ensure this is appropriately quoted as part of the tender, and that the contractor can ensure they have any necessary access to design reproduction rights where needed.

Having established the potential Welsh language requirements for a particular contract, the contracting authority must now interpret these requirements into the specification. The specification may set out certain core requirements as to the Welsh language and then go into further detail on certain performance or functional requirements. A core requirement is an essential part of the contract, such as the requirement to provide the services through the medium of Welsh or English as required by the service users. The core requirement should explain whether or not this must involve oral or written services (for example helplines, direct contact or only written services), whether informational or promotional literature is needed or any other signage to be on display to the public as part of the service.

Specifications can be set by reference to performance or functional requirements. If the contracting authority is able to describe the outcome required for Welsh language aspects of the contract, then the contractors will be encouraged to provide their own innovative solutions to



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ensure that this service requirement is met.

The contracting authority needs to be able to assess whether contractors are able to deliver such legal language obligations. Having a Welsh language policy or confirmation that they will comply with the Welsh language legislation is unlikely to be sufficient. The specification should ideally describe a more specific language outcome based on that particular contract in order to allow contractors to demonstrate their ability accordingly.

For example, in a procurement process for the award of a contract to deliver training in the community:

“The training must be provided in Welsh or English as required by the service users on an equal basis. Contractors will need to demonstrate that the service will be operated in a manner which facilitates and promotes this ability from inception to end i.e. marketing the training, handling bookings, co-ordinating service delivery and providing supporting literature.”

Past experience of a particular service may however indicate to a contracting authority that there has been little or no Welsh language take-up in that area. Contracting authorities may need to assess internally whether this outcome may have other reasons behind it (such as lack of awareness of the availability of the service in Welsh).

The pro forma questionnaire set out in Schedule 6 below may assist in this regard. Further details on use of this pro forma are included at section 3.1.1 above.

However, it is also important that the specification is proportionate to the requirement. The specification should not insist that all individuals providing a service must be bilingual, for example, where a low usage has been previously experienced. The contracting authority must however ensure that the ongoing legal obligation to enable the public to access any such services in Welsh is met.

For example, a contracting authority requires a contractor to provide support services to particular communities in relation to the prevention of homelessness in young people. The contracting authority may understand that the communities in question have little or no Welsh language requirements.

The specification should make this clear so that contractors can plan accordingly. However, the specification should reiterate the legal requirements if any of those communities require Welsh language services. It should explain that contractors must be able to respond to this requirement as it arises on an equal basis and must demonstrate this in their tender. The specification should also include the requirement to monitor and promote Welsh language options by the contractor.



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Note – in these particular circumstances, it is unlikely to be a minimum standard that a contractor can immediately demonstrate their ability to deliver the services through the medium of Welsh (see sections 3.1.3 and 3.1.4 below regarding selection and evaluation).

In response to this specification, a contractor may indicate that they have Welsh-speaking staff who would be assigned to those service users and a bilingual method of identifying and promoting potential Welsh language take-up. Alternatively they may indicate that they would be able to recruit or sub-contract such a requirement should it arise and as a temporary measure access translators. A permanent solution of using translators is unlikely to be acceptable where direct contact with the public is required as part of the service as this would not be seen as treating the Welsh and English languages equally. The contracting authority may wish to offer temporary access to internal translators (should they have them) in such circumstances, but if so, this would need to be offered to all contractors within the specification to ensure this is not discriminatory. Contractors may however wish to use translators on a permanent basis to assist with the production of bilingual documentation or signage.

It is important to note that the specification must only deal with requirements which relate to the subject matter of a contract and must not dictate wider social requirements.

For example, a specification for 2-year drug rehabilitation

services may indicate that around 10% of service users are estimated to require the service through the medium of Welsh during the life of the contract. It would go on to stipulate that counselling services are required to be provided in Welsh to those service users both in person and over the phone. Informational literature provided in support of this service should also be bilingual, as well as any posters or marketing information promoting the service.

The specification could go on to require contractors to monitor the demand and actively promote the Welsh-medium service in order to ensure that all those service users who wish to deal in the Welsh language are aware of their ability to do so.

However, the specification should not state that the contractor must employ a certain percentage of Welsh-speaking staff or that they must ensure that their staff learn Welsh. Such a requirement would go beyond the requirements of the contract and instead dictate how the contractor must manage their business beyond any legal duty that is imposed directly upon them.

Periodically public organisations conduct pilot studies in different service areas which will assist them to establish approaches to setting Welsh language specifications.

For example, a consortium of 10 county councils ran a pilot scheme in relation to the provision of accommodation services for looked after children. The specification required



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contractors to sign up to an All Wales Framework Contract where their details were categorised by what services they could offer, including languages spoken.

All providers who were capable of delivering the care and language requirements of a new client, would receive an email requiring them to take part in a mini-competition for meeting those requirements. The relevant council would consider all the tenders received as part of the mini-competition and make the placement based on the most economically advantageous proposal taking into account all the relevant criteria.

Whilst pilot schemes may include certain results which are specific to the location or population of a particular contracting authority, the Commissioner would encourage the wider dissemination of the outcomes of such pilot schemes between contracting authorities so that general approaches can be shared.

3.1.3. Selection

Where a contract is governed by the full requirements of the Directives, the selection stage contains two clear sections relevant to Welsh language requirements. Firstly, a tenderer may be excluded if a ground in Article 57 of the Public Service Directive applies (subject to the self-cleaning regime discussed further below) and secondly, a tenderer may be excluded for failing criteria of ability or capacity.

Principles of public procurement have also made it clear

that contracting authorities must maintain the distinction between selection criteria and award criteria in conducting a procurement process. 'Selection' criteria, such as suppliers' capability and experience, must not be repeated at the 'award' stage. Full details of the scoring of selection criteria (including pass thresholds if used) must be made available to contractors in advance in the contract notice or contract documents.

Where a contract is not governed by the Directives, but is still subject to the general principles of the EC Treaty, a contracting authority will have more flexibility as to how it conducts an initial selection. However such requirements must be fair, transparent and proportionate. In addition, any initial requirements which exclude contractors must satisfy the test that they are necessary and appropriate as indicated from case law in section 2.1.1.

As far as Welsh language considerations are concerned therefore, it would be best practice for a contracting authority to apply a consistent approach to initial selection, whether or not the contract is covered by the EU rules. A contracting authority is likely to want to satisfy itself that a contractor is potentially able to fulfil the requirement by way of initial selection stage before they undertake the longer process of assessing full proposals in any event.

The relevant ground to exclude a tenderer under Article 57 (being for significant or persistent deficiencies) is discussed in section 2.2.2.a above. As the contracting authority has



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the discretion to exclude tenderers for such deficiencies (rather than the obligation to), the contracting authorities may wish to agree an internal policy on the factors to assess when considering whether to exclude tenderers from further participation for previous breach or failure to deliver Welsh language obligations. This policy should not purport to put forward an exhaustive list of factors because it will be essential, as part of the exercise of the discretion, that each case is considered on its own facts and that tenderers facing exclusion should be given the opportunity to provide evidence of 'self-cleaning' the deficiencies in accordance with the Public Contracts Regulations 2015 (see further information on this at section 2.2.2.a above). Whatever approach is taken, it must be applied fairly and consistently to all tenderers. Therefore, an agreed central policy in these terms may be appropriate provided it allows for subjective assessment.

Secondly, a contracting authority may select suitable tenderers for the next stage of the process, according to the contractor's capacity to deliver the particular requirements. Welsh language requirements are often not specifically addressed at this stage or, where they are, a question simply asks contractors to confirm if they will comply with the obligations of the WLA 1993 or the particular organisation's Welsh language scheme. This approach will not adequately ensure the technical ability of the contractor for a contract involving a public service.

Contracting authorities are able to consider the technical ability of the contractor as well as their organisation,

qualification and experience of staff and measures for ensuring quality. The ability of the contractor to deliver needs to be explored in a proportionate way at this stage of the tender.

For example, a contracting authority may require a contractor to deliver a complaints management service. This may be a service both by phone and on-line. The contracting authority should ensure at this selection stage that the contractor has the technical ability to deliver both aspects of the contract through the medium of Welsh. Whilst the on-line element will need to be consistently applied bilingually, the ability in relation to the phone helpline will need to be proportionate to perceived demand. Such as:

Q: Describe your previous experience and/or the technical facilities available to provide software solutions of the type sought in this contract in both Welsh and English versions, including the ability for interactive features to be provided in both languages.

Q: Provide details of your past experience or specific approach to ensuring a bilingual helpline service is available to customers. Your response must refer to the level of anticipated Welsh language requirement set out in the specification to demonstrate this is appropriately achievable. Where there is no current Welsh language demand your response must deal with what measures you take to ensure a quality seamless bilingual service is offered should a Welsh language service be required by a customer.



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Q: Describe your experience and/or approach to promoting and delivering public services of this kind in Wales to ensure the obligations of the Welsh Language (Wales) Measure 2011 and the Welsh Language Act 1993 are met and encouraged.

Delivery of the service through the medium of Welsh and English is a core requirement of this contract. A response which is not able to deliver services in the Welsh language at all, or no response to these questions, would mean the tenderer's proposal will not be considered further.

The above questions build in the ability for a tenderer to demonstrate any track record they may have, but also include wording regarding "approach", so as not to unfairly exclude new contractors who may be capable of fulfilling the contract.

It might be necessary to enquire whether a contractor would utilise any sub-contractors to deliver any of the Welsh language elements of the contract and if so, the capabilities of those sub-contractors and measures to ensure a quality service is maintained.

Under the Utilities Directive, a contractor has a slightly less restricted regime in relation to selection criteria. However, whatever criteria it utilises must be "based on objective rules and criteria" which are established up front and issued to tenderers.³⁶

3.1.4. Evaluation

Whether or not a contract is covered by the Directives, evaluation of a public services contract should involve the assessment of criteria other than just price in order to ensure that requirements can be delivered and value for money can be achieved.

When a contract is covered by the Directives, evaluation of tenders on the basis of most economically advantageous criteria is limited to acceptable criteria, known as award criteria. Importantly, such criteria must also be relevant to the subject matter of the contract.

However, as the need for a contractor to deliver a Welsh and English service to the public is a legal obligation which is compatible with the EC Treaty, it is by definition linked to the subject matter of the contract. Furthermore, including Welsh language requirements as award criteria are justified (and indeed essential) provided such criteria are tested in an appropriate and proportionate manner.

For example, an award criterion based on how many of the contractors' suppliers speak Welsh and a requirement that they only recruit Welsh speakers would not be appropriate or proportionate.

Conversely, an award criterion based on the contractor's ability to deliver the service in Welsh and English to the degree required by the specification would be appropriate and proportionate.

³⁶37 Article 78 (1)



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It should be noted that award criteria must not be discriminatory. Welsh language obligations must not require a contractor to be from Wales as this would be discriminatory. It is the contractor's ability to deliver a service in the Welsh and English languages which is relevant to the contract, not their origin.

Should a contractor propose delivering this via sub-contractors then it would not be appropriate to give a lower score provided they can demonstrate a consistent and efficient service delivery method and the tender remains cost effective.

In addition, award criteria must not revisit criteria used or information provided at the selection stage. The selection stage relates to the tenderer's financial standing and technical or professional ability, whereas the evaluation stage (using the award criteria) must focus on the quality, characteristics and price of the contractor's proposals to deliver this particular contract.

It would be useful to continue with the example used in the selection stage:

Q: Describe how you would deliver this service to ensure that service users are treated equally whether they wish the service in English or Welsh. Your response should briefly describe all key aspects of the service e.g. from initial phone call/on-line enquiry to complaint resolution

including supporting information. Your response should also specifically refer to the level of anticipated Welsh language requirement for this contract.

Q: Explain the plan or campaign you would employ for this service to monitor and promote the ability of service users to receive a service which treats the Welsh and English languages equally.

Tenderers must be notified in advance of the award criteria to be used. If the contract is covered by the Directives, the criteria (and any sub-criteria) must be included in the contract notice or contract documents and include relative weightings for each criteria³⁷. This would include the advance notification of the marking scheme to be used.

Whilst weightings are not strictly required for contracts which are not covered by the Directives, the EC Treaty principles still require the contracting authority to conduct a fair and transparent process. Case law has also stressed the importance of the ability to review the procedures used in an impartial way³⁸. It is therefore advisable that some indication of the importance of criteria is included, even where they are not covered by the Directive.

This is also important in order to demonstrate that steps taken in relation to Welsh language requirements were appropriate and proportionate.

³⁷See footnote 32 in relation to descending order of importance
³⁸Case C-324/98 Telaustria [2000] ECR I-10745



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Setting relevant weightings must be a subjective decision of the contracting authority based on the importance of all other factors affecting the contract.

Welsh language requirements may be a sub criterion³⁹ of other areas (e.g. service delivery and marketing⁴⁰) or may warrant a criterion of their own.

Having already established some Welsh language ability in the selection stage, the contracting authority will now assess the quality and performance of the Welsh language service for this contract. In setting the weightings, the contracting authority will need to consider factors such as how dependant this contract will be on the Welsh language aspects and the length and coverage of the contract.

For example, a contract for the production and distribution of leaflets regarding grants for agricultural areas of Wales, including follow up helpline support, would require excellent bilingual writing skills as well as a high level of oral bilingual skills. The weighting of criteria dealing with quality of the service through the medium of Welsh and English is likely to be high.

Conversely, a 3 month contract for IT training for community groups in which there are no known Welsh speakers is unlikely to require its own Welsh language criteria. Whilst the selection stage would still require an ability to be able to meet the obligations of the Welsh Language Measure and, where relevant, the WLA 1993, it may not be proportionate

to assess this as a separate criterion further.

3.1.5. **The contract – drafting and monitoring Welsh language obligations**

The terms of the contract which is to be awarded must capture all the requirements and performance commitments that the contractor is to deliver. Whoever wins the tender should be able to meet the contract conditions from the time that the contract starts.

However, a contract may also include a schedule to incorporate specific commitments a tenderer has made in their tender into the contract, in order to convert these to binding contractual commitments. This schedule can be useful to incorporate specific Welsh language (and other) proposals which the successful tenderer put forward in their tender. Tenderers will need to be notified within the specification that proposals may be incorporated into the contract in this way.

The Public Contracts Directive states that: “Contracting authorities may lay down special conditions relating to the performance of the contract, provided that they are linked to the subject matter of the contract... and indicated in the... procurement documents”⁴¹.

In order to be compatible, such conditions must not be discriminatory and must be proportionate. As explained in section 2.1 above, case law has confirmed that national language obligations such as those contained within

³⁹Where sub-criteria are used, case law indicates that the relative weightings of those sub-criteria must also be published in advance.

⁴⁰Note however that where requirements are split over several criteria, different aspects of the criteria must be scored under different headings. It is not permissible to score the same information twice under different headings.

⁴¹Article 70



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the Welsh Language Measure and the WLA 1993 are compatible with the EC Treaty, provided they are applied reasonably.

For example, it would not be reasonable for a contract condition to require a contractor to adhere to the contracting authority's Welsh language scheme in full as if it were the contracting authority. Such schemes may include matters relating to internal recruitment policies, Welsh language lessons for staff etc. It would not be proportionate to bind contractors to comply with such commitments.

However, it may be proportionate to require a contractor to adhere to those elements of the scheme which relate directly to the provision of services to the public.

The requirements of the Welsh Language Measure and, where relevant, the WLA 1993 may not currently apply to many contractors directly and therefore should be included within the contract in order to become binding upon them.

In order to ensure the process is transparent, the contract conditions should also be made available to contractors along with the specification. Examples of contract conditions to deal with Welsh Language requirements are contained in Schedule 5. A contracting authority may wish to select one or more of these to use, dependent upon the nature of the contract being awarded.

Where the need to offer the service to the public in Welsh and English will be a core requirement of the contract, it is also important that performance against the same is monitored. The contracting authority will require this information in order to satisfy itself that it is meeting its obligations under its Welsh language scheme, the Welsh Language Measure and the WLA 1993. Such obligations should therefore be built into the Key Performance Indicators (KPIs) for the contract.

However, the extent and form of monitoring will again depend on the nature, period and coverage of the contract. Please see section 3.1.1 above in relation to steps a contracting authority can take to establish circumstances relevant to language within particular contracts.

A very short term contract where little Welsh language requirement is anticipated could perhaps just be followed up with a contractor questionnaire to establish whether any requests for Welsh language services were received and if so, how the contractor responded. An adaptation of the questionnaire in Schedule 6 may assist in this regard.

A longer contract, or a contract where delivery or promotion of the service in the Welsh language was part of the specification, is likely to require more periodic monitoring during the contract term.

The contract should contain a requirement for contractors to submit a periodic update (monthly, quarterly or perhaps



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bi-annually dependant on the nature of the contract) as part of the KPIs, reporting to the contracting authority on the level of Welsh language take-up rate in relation to that service.

The contractor should also briefly describe the steps they have taken to meet these requirements and may also report on promotional activities, referring back to a marketing plan if applicable. The report may be supplemented by example literature if this is relevant to the contract.

To be effective, monitoring requirements need to be clear from the outset and allow the information to be collated relatively easily for contractors. It is not intended to create burdensome workloads for contractors or contracting authorities but to be a suitable check on the contractor's compliance with legal obligations. If such reporting indicates a failure by the contractor to meet or monitor such requirements this may be best addressed initially by a meeting between the contractor and the contracting authority's procurement officers and Welsh language officer.

Examples of possible contractual clauses to include in order to assist monitoring are included in Schedule 5. For further information on use of KPIs please refer to <http://prp.wales.gov.uk/planners/general/contractmanagement/keyperfindicators/>

3.2. **Giving compliance notices to contractors**

The Welsh Language Measure also gives the Commissioner the power to give a compliance notice directly to certain contractors who provide the public with services provided under an agreement with a public authority (s48). This would make certain standards directly applicable to the contractor.

In so doing, the Commissioner must secure that the requirement for the contractor to comply with the relevant standard is the same as, or not greater than, the requirement for the public authority to comply with the standard. This is consistent with the principle set out above that the contracting authority must only require contractors to comply with such as its standards/scheme obligations as are relevant to the delivery of the services within the contract.



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4.1. **Examples of key contracts**

The following section discusses some of the key contracts which take different approaches to dealing with the incorporation of Welsh language requirements. The examples briefly highlight the particularly relevant stages of the procurement process for different types of contracts. However, these are by way of example only and contracting authorities should treat all procurement processes subjectively based on their requirements.

4.1.1. **Information Technology (IT)**

Where software or hardware is required by the contracting authority either for direct interaction with the public or in order for the contracting authority to deliver its services to the public, these will need to be capable of delivering services equally in Welsh or English. For example, this may include software to deal with billing, voting or website building.

When identifying the requirements for an IT specification, the number of Welsh versus English users is largely irrelevant. Instead the specification will focus on technological features with the requirement that software must be capable of dealing with bilingual systems and data entries. Specifications for websites which are to be accessed or used by the public should include a requirement for those websites to be fully bilingual.

The selection stage would include a mandatory requirement

for systems/software to be capable of Welsh and English application of use. The evaluation stage may assess additional features such as each page of a website being able to switch to its bilingual equivalent, or the functionality of software that can convert notes or data entries into either language enabling staff of both languages to deal with calls.

The contract conditions would include this specification and build in testing of the same into the acceptance test stage. Ongoing performance monitoring should include confirmation of user response to the equality of the service. Monitoring the number of users in each language may also be helpful to contracting authorities in gathering statistics for future use.

4.1.2. **Care services**

In establishing requirements for care services it will be important to establish potential language requirements within the sector. Information gathered should ideally establish current numbers of Welsh speakers and estimated changes in number over a preceding period in order to try and establish anticipated variations but also identify the reliability of such data as discussed in section 3.1.1. Liaison with the contracting authority's Welsh language officer may be useful.

The specification should relate to such current and anticipated take-up and include a requirement for contractors to monitor and promote the Welsh language



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option in order to establish whether figures change following increased awareness.

However, the selection stage must ensure that as a minimum, contractors are able to meet the obligations of the Welsh Language Measure, and, where relevant, the WLA 1993 and more specifically are capable of providing an equal and seamless service to service users in both languages. This would require information regarding care providers' ability to communicate in Welsh both verbally and in writing and assess the contractor's ability to provide bilingual literature.

The evaluation stage would assess the contractor's performance proposals to ensure users are aware of the bilingual service and how the delivery of the service in either language will be delivered for this particular contract.

Contract conditions would include obligations to comply with the Welsh Language Measure and the WLA 1993, to report on take-up and response to Welsh language care services and include a schedule to bind in any specific tenderer proposals.

4.1.3. **Billing and revenue services**

A contract of this nature may cover production and distribution of billing information, receipt of payment and dealing with enquiries. In such circumstances there would be a software element and a helpline element to the contract.

The software element of the contract should deal with the relevant matters raised in section 4.1.1 above (regarding IT contracts).

In relation to the helpline, the contracting authority should try to establish anticipated or possible Welsh language demand for inclusion in the specification.

The selection stage would assess that the contractor has the experience/ability to undertake a contract with such a requirement.

The evaluation stage will be key to such a contract in order to understand the contractor's proposals for dealing with the process in either language on an equal basis from start to finish e.g. establishing users' language of choice, issuing reliable invoices in the language of choice, dealing with queries in the language of choice from the outset as well as consistency with follow-up communication.

Such a contract is likely to have a strong emphasis on requiring the contractor to promote the availability of a bilingual service and to monitor demand.

4.2. **Problems encountered**

Two potentially difficult areas that have been highlighted are in relation to framework agreements and co-ordinated procurement exercises.



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4.2.1. **Framework agreements**

Procurement practice has seen a significant increase in the number of multi contractor framework agreements being established from which several contracting authorities may 'call off' as their requirements arise. Some such agreements may be Wales wide, with others being procured on a UK wide basis in order to maximise the effect of aggregated buying power.

The pilot project referred to in section 3.1.2 above highlights one method in which framework agreements can factor in Welsh language requirements within a call off contract. Framework agreements are often categorised by different service/goods types from which a mini-competition can be conducted. By including a category for Welsh language, this may assist contracting authorities to conduct mini-competitions between contractors who are able to meet the legal obligation where a service user is identified who requires the service through the medium of Welsh.

Where such frameworks are procured on a national basis, early dialogue with the central purchasing organisation should assist to ensure that such requirements are built into the specification. A central purchasing organisation would be likely to enable contracting authorities who are to use such frameworks to meet their legal obligations to doing so. See section 4.3.2 below in relation to existing framework agreements.

It is also essential to understand the options available under a framework agreement to ensure a mini-competition exercises those options to enable Welsh language requirements.

As an example, Authority A was procuring new IT hardware via the National Procurement Service for Wales. Under the framework agreement procured by NPS, Authority A had the option to require that all new computers procured for staff came with Welsh-medium software pre-installed. In calling off under the framework agreement, Authority A did not exercise this option and so did not receive computers with this software.

4.2.2. **Collaborative procurement exercises**

A collaborative procurement exercise is a process in which demand for certain goods or services across a number of organisations is aggregated and a tender exercise is conducted by a lead authority (or central purchasing organisation) on behalf of those organisations.

For example, consider a collaborative procurement for IT software and support services for all educational facilities in a region which may cross several counties and affect schools and further education establishments. Such a process ultimately results in each contracting authority entering into a direct contract with the winning contractor, but have the benefits of aggregating demand.



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The process is normally led by a lead authority in order to centralise the procurement. When establishing the user requirement for Welsh language purposes, the lead authority may have far lesser requirements than other contracting authorities that are part of the process. However, as referred to in section 4.2.1 above, a process run by a central purchasing organisation must meet the needs of all contracting authorities that it is intended to benefit in order to be a valid procurement process.

Such contracts can be divided into 'areas' (as opposed to lots) with variations for each area highlighted. Contractors can then be asked to propose how they will address such area variations in order to meet all the requirements of the contracting authorities involved. Alternatively a more generic question can be posed explaining possible variances in Welsh language requirement as a whole, and seeking proposals on how the contractor will deal with the requirement to meet this.

4.3. **Difficult areas to overcome**

4.3.1. **Limited specialist services**

Particular difficulties may be encountered with contracts for particularly specialist services where there are either no or very limited contractors with Welsh language facilities available.

For example, a contract for medical services where past experience has indicated a shortage of appropriately qualified and experienced physicians in general. Physicians supplied under the contract are often not of UK origin and English is not their first language. The specification includes a requirement to obtain a certain level of competency in English.

In such circumstances, a contracting authority will need to assess what is appropriate to include in the specification in order to address Welsh language requirements. Whilst not an entirely equal approach, this may include a requirement for the contractor to be able to supply translators at their cost to assist with such requirements. Alternatively the contracting authority may consider it appropriate to supply such translators at their own cost. Such a subjective decision will depend on matters such as the level of anticipated Welsh language requirements, length of the contract and the likelihood of how the contracting entity is to be structured (e.g. contracts with individual physicians or with a central entity which then sub-contracts to physicians).

4.3.2. **Existing long term contracts**

Long term contracts which are currently in place with a substantial period to run may not, with hindsight, adequately deal with the Welsh language requirements of the contractor. Such contracts may include a reference to Welsh language obligations within the contract, but no further obligations, or may be silent altogether on such matters.



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As best practice, contracting authorities may wish to review all such current public service contracts for terms which may enable dialogue with the contractor on Welsh language service delivery.

If silent on Welsh language requirements, it is unlikely to be permissible to introduce new requirements of the contractor at this stage in relation to service delivery. However, most contractors are likely to be prepared to work with the contracting authority to monitor and improve bilingual services where possible. A refusal to engage in dialogue may leave the contracting authority in breach of its obligations under the Welsh Language Measure and the WLA 1993, and mean that it should assess whether early termination of the contract might be possible/required.

If the existing contract is a long term UK wide framework agreement with several years still to run and silent on Welsh language requirements, the contracting authority may wish to explore other framework agreements which may be in place which have been procured by other central purchasing organisations which include Welsh language requirements. These may be of use provided they were procured with sufficient scope (within the contract notice and tender process) to enable that contracting authority to come within its auspices.

4.4.

Best practice guidance

As referred to in this advice document, some example procurement documentation and model contract terms and conditions are included to deal with incorporating Welsh language requirements into the tender process. These are considered to be best practice examples for information and guidance for procurement officers.

The use of such clauses and documents is not mandatory, as contracting authorities may wish to develop their own alternatives tailored to their existing suite of procurement documents. However, it is important that such tailored alternatives meet the principles and recommendations of this advice document in order to ensure that contracting authorities are meeting the commitments discussed in this document. The examples provided may also be limited in their application and may need to be modified in order to reflect particular procurement processes to which they are applied. Contracting authorities should make a subjective assessment as to whether any amendments are needed for each contract being procured. Contracting authorities may wish to seek further guidance from Value Wales or legal advisors for particularly complex contracts.

For further best practice guidance on the procurement process in general please refer to the Value Wales Procurement Route Planner at <http://prp.wales.gov.uk>



Part 5 – Legal opinion and practical assistance

Schedule 1 - Legal opinion regarding compliance with procurement obligations: Opinion

I am asked to advise on supplementary issues that have arisen in connection with the advice document prepared for the Welsh Language Commissioner on the procurement obligations of public sector organisations when contracting for goods or services. The advice document has advised in particular on the interplay between these obligations and those that arise separately under the Welsh Language Measure and the WLA 1993 when a public sector organisation is required to prepare and act in accordance with Welsh language standards or a Welsh language scheme (as relevant).

I do not seek in this opinion to repeat the discussion of the legal framework given in the advice document. I adopt that discussion and commend the author for its clarity. Rather, my aim is to address three specific questions that arise from that advice and which merit further scrutiny.

Question 1: Can (or must) organisations with approved Welsh language schemes or where compliance notices are in force in relation to Welsh language standards, incorporate Welsh language requirements within all contracts which deliver “public services” in Wales? Indeed, are they not obliged to do so?

1. It would not be prudent for a contracting authority to act on the basis that Welsh language obligations should be incorporated into a contract simply by virtue of the fact that it is required to comply with Welsh language standards or that it has a Welsh language scheme.

That is not the correct starting point. As the advice document explains, an act that has the effect of interfering with one or more of the fundamental freedoms of the European Union (for example, the freedom to provide services) will be unlawful unless it can be justified as a proportionate interference that is necessary to serve an overriding reason in the public interest. For example, in *Rüffert*⁴¹, a procurement case heard by the European Court of Justice, domestic legislation that caused undertakings from outside the relevant Member State to lose their competitive advantage was held to be in breach of the EC Treaty. However, that was not a case in which the measures in question could be defended as being in pursuit of an “overriding reason in the public interest”.

On the other hand, in the *UTECA*⁴² case (see section 2.1.4 of the main document), the European Court of Justice referred (at para 27) to its previous decisions in which it had accepted that the objective of defending and promoting one or several of the official languages of a Member State constitutes such an “overriding reason”: *Case C-379/98 Groener* [1989] ECR 3967 at para 19; *United Pan-Europe Communications Belgium and Others* at para 43.

2. In my view, the status of the Welsh language is equivalent to those official languages referred to in the *UTECA* case. Spain has one national language, Spanish, but of the five languages that have official status within Spain, four have that status only within certain territories of the Member State. Similarly, since the Welsh Language Measure was enacted, Welsh has been an official language of Wales, a part of the larger UK Member State.

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⁴¹Case C-346/06 *Dirk Rüffert v Land Niedersachsen* 3 April 2008

⁴²Case C-222/07 *UTECA v. Administración General del Estado* (European Court of Justice, 5 March 2009)



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3. The need for acts of defence and promotion to be proportionate (i.e. no more than is necessary in pursuit of the objective) is closely aligned to the duty of notified public organisations to prepare a Welsh language scheme that treats Welsh and English equally “so far as is both appropriate in the circumstances and reasonably practicable” [s. 5(2) WLA 1993]. There is the same emphasis on proportionality if an application is made to the Commissioner for an assessment of whether the requirement to comply with a standard is “unreasonable or disproportionate” [s. 56(1) Welsh Language (Wales) Measure 2011]. The effect of the principle of proportionality is that a contracting authority would expose itself to a court challenge were it to include Welsh language requirements in award criteria indiscriminately, without a thorough analysis first of what would be proportionate in view of the overarching objective of defending and promoting Welsh. For example, if local authority Y were to tender for care home services, it would be strongly arguable that it would be disproportionate to require that the owners of the care service company were Welsh-speaking, as opposed to requiring that there would always be a Welsh-speaking carer on duty in the home. Whereas there is a strong argument that the latter requirement is necessary to ensure that the Welsh language and those who speak it are treated with dignity and respect over the life of the contract, it would seem excessive to insist that those with limited or no contact with the Welsh-speaking service users should speak the language.

4. It is clear from this discussion that a highly robust (if not the most robust) basis upon which to demonstrate the proportionality of Welsh language requirements is demand from service users. In my view, before each contracting authority that is subject to a Welsh

language standard or scheme goes out to tender for public services, it would be good practice to prepare a short decision document explaining why any Welsh language requirements that are proposed to be included are considered necessary. This could include reference to Census data or other demographic or research data that demonstrates that there is demand for services to be provided through the medium of Welsh.

5. Similarly, if the contracting authority takes the view that no Welsh language requirements are necessary, it would also be good practice to set out in writing the reasons and the evidential base for a decision in these terms. Nevertheless, it is difficult to conceive of a situation in which a contracting authority that is subject to a Welsh language standard or scheme could go out to tender for “public services” contracts without making any provision whatsoever for the Welsh language. Even in the most predominantly English-speaking areas of Wales, there will still be a minority of service users who would prefer the service to be delivered in Welsh. I am not aware that there is anywhere in Wales where this minority is so small as to be insignificant. Moreover, should the organisation take the view that the demand for Welsh language services within its area of jurisdiction is so low that it would be disproportionate to require anything at all of contractors in respect of the Welsh language, such a view would surely sit uneasily with a Welsh language standard or scheme that will have been approved by the Commissioner with a view to furthering the statutory duty of “promoting and facilitating the use of the Welsh language” (s3(1) Welsh Language (Wales) Measure 2011).



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6. Accordingly, should a contracting authority be thinking in terms of going out to tender for the delivery of services to the public without requiring anything of contractors by reference to the Welsh language, it should first consult the Commissioner for an opinion on whether this is consistent with the obligations of the authority under the Welsh language standard or scheme. Given that such approaches are most likely to be made where a contracting authority assesses there to be low demand for services through the medium of Welsh, it will be for the Commissioner at this stage to advise on what, if anything, is considered proportionate in the circumstances to promote and facilitate the use of the Welsh language. There is no one correct answer when making these judgments, but the Commissioner might wish to advise the contracting authority, where there is presently little or no demand for the service to be provided through the medium of Welsh, that a contractor should demonstrate a willingness and ability to monitor the demand for Welsh services over the life of the contract and to have a strategy for responding to an increase in demand should it occur. In my view, failing to provide for this as a minimum would not be consistent with the overarching duties of the contracting authority under the Welsh Language Measure and the WLA 1993 to ensure that Welsh and English are to be treated equally in public business.

Question 2: When assessing what is 'proportionate' to require of contractors in respect of the Welsh language, is this limited to the question of service user demand, or can the contracting authority go further and require contractors to propose strategies to increase demand over the life of the contract?

7. The judgment of the European Court of Justice in UTECA is instructive. There, the European Court of Justice confirmed the legitimacy of measures that have the objective of “defending and promoting” (my emphasis) one or several of the official languages of a Member State. This is consistent with the EC Treaty which provides at Article 151(4) that the Community “shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and promote the diversity of its cultures”. In the same vein, one of the guiding principles of the Welsh Language Measure is that the Welsh Language Commissioner is to carry out work, including monitoring of compliance with Welsh language standards and supervision of Welsh language schemes, with a view to “promoting and facilitating the use of the Welsh language”.

8. This demonstrates that Welsh language requirements need not be limited to what is necessary to preserve the status quo. It is legitimate to go further than this and require contractors to come forward with strategies to promote the take-up of services through the medium of Welsh. This will still be subject to the principle that the contracting authority must not go further than is necessary in order to achieve the objective of “promoting” the Welsh language. However, given that this inevitably involves difficult discretionary judgments as to the weight to be given to competing considerations (the freedom to provide service on the one hand, the promotion of the Welsh language on the other), the courts will generally be reluctant to interfere in the absence of a manifestly unreasonable judgment. Plainly, if a contracting authority were to set targets for Welsh language take-up over the life of the contract that, on any reasonable analysis, were unrealistically ambitious or excessively



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onerous, it is likely that the courts would consider the measure to be disproportionate. Short of that, however, it seems to me that there is considerable scope for the contracting authority to exercise its discretion as to what it considers necessary to promote the Welsh language.

9. Accordingly, whereas setting Welsh language requirements by reference to data on service user demand is in my view a robust way of ensuring the proportionality of those requirements, it is not the only way of ensuring that this principle is satisfied. The legal framework allows contracting authorities to be more ambitious than this whilst still remaining within the realm of what is permissible pursuant to the underpinning principle: proportionality.

Question 3: If Welsh were recognised as an official language of the EU, what impact would this have on the conduct of procurement processes in Wales (over and above being able to publish procurement documentation in Welsh in the Official Journal of the EU)?

10. Should Welsh be recognized as an official language of the EU, it would provide a further basis upon which to argue that the defence and promotion of Welsh is an important part of promoting the cultural diversity of the Union in accordance with Article 151(4) of the EC Treaty. However, such official language status at the EU level is not necessary to make it proportionate to include Welsh language requirements in the criteria for awarding public services contracts.

As UTECA makes clear, official status at the Member State level is sufficient.

11. From a public procurement perspective therefore, it follows that official language status at the EU level would serve only to reinforce the legitimacy of promotional measures that are already legitimate in my view, rather than making legitimate for the first time measures that previously were not. In this context, therefore, the change would mainly be one of form relating to OJEU, rather than one of substance within procurement, but clearly that is not to diminish the broader significance and symbolism of such a development from other perspectives.

Conclusion

12. I do hope that this opinion on supplementary matters is a useful addition to the detailed and comprehensive main advice document.

Necessarily, this advice has focussed on matters of principle.

Gwion Lewis
Landmark Chambers London
1 April 2015



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Schedule 2 – Practical Assistance

Procurement officer checklist – Welsh language requirements

<input type="checkbox"/>	Specification set using: <ul style="list-style-type: none">• Evidence of language requirements of contract (refer to pro forma questionnaire in the case of an existing contract exists)• Liaison with Welsh Language Officer to ensure current policy and trends incorporated into specification• [Reference to any other best practice in central guidance document]
<input type="checkbox"/>	Instructions to tenderers prepared (including paragraph regarding Welsh language obligations and cross-referring to relevant sections of specification, selection/award criteria and contract conditions).
<input type="checkbox"/>	Selection Criteria established - methodology section & additional formulae with a summary of how these will be applied etc. Assess and indicate which criteria Welsh language obligations are included within or whether standalone criteria needed (subject to contract type).
<input type="checkbox"/>	Award Criteria established - assess and indicate which criteria Welsh language obligations are included within or whether standalone criteria needed (subject to contract type). <i>Note: must not repeat selection stage.</i>
<input type="checkbox"/>	KPI requirements – include reporting on delivery and/or monitoring of Welsh language obligations.
<input type="checkbox"/>	Terms & Conditions drafted – include Welsh language contract terms.

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Schedule 3 – Practical Assistance

Selection – Pre-Qualification Questionnaire

General statement

The contract which is the subject of this procurement process relates to a 'public service contract' which is subject to the requirements of the Welsh Language (Wales) Measure 2011 and, where relevant, the Welsh Language Act 1993.

The contractor will therefore be required to demonstrate as part of this tender process its ability to comply with the requirements of those Acts and any relevant Welsh language standards or scheme that the Authority is required to comply with. This will involve the ability of the tenderer to deliver the service in Welsh or English to service users on an equal basis and/or to be able to market and promote the service bilingually. At this initial selection stage, tenderers are required to demonstrate their capability and/or past experience in relation to Welsh language obligations.

Breach of Welsh language requirements

Has your organisation had a contract terminated and/or been notified of a breach or potential breach of a contract for reasons related to Welsh language requirements within the last 3 years?

YES / NO

If 'Yes', please provide further details of the breach, any sanctions imposed and any remedial steps taken by you and/or the contracting body. Remedial steps should evidence measures taken sufficient

to demonstrate rectification and reliability. This may include paying compensation for damage caused, collaborating with authorities to clarify facts and taking concrete technical, organisational and personnel measures that are appropriate to prevent further deficiencies.

Tenderers should note that a significant or persistent deficiency in the performance of a substantive requirement relating to Welsh language obligations under a prior public contract could constitute a ground under which the tenderer may be excluded from similar processes in the future in accordance with Article 57(4)(g) of the Public Sector Contracts Directive. However the seriousness of any such breach and subsequent measures taken will be considered on a case by case basis.

[Note to procurement officers – in assessing a Yes response to this question, it is necessary to subjectively consider whether details of a breach are considered to be significant or persistent. If yes, the tenderer may be excluded from the process. However, the Directive provides for a self-cleaning regime whereby the contractor may provide evidence to the effect that measures taken are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. The evidence provided shall be evaluated taking into account the particular circumstances of the deficiency. Where the evidence is considered to be insufficient, the contractor must be given a statement of the reasons for that decision..

Staff Numbers [Note: this should only be utilised for contracts

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where it is known that a substantial number of service users require a Welsh language service.]

Please state the number of staff currently involved directly in the provision of the service which is subject to the contract:

Permanent Casual

Of the above, please indicate what number are capable of providing the service in Welsh:

Permanent Casual

[Note to procurement officers: This question may need to be adjusted if the contract in question involves a TUPE transfer. If the question is relevant, staff need to consider the Welsh language requirements defined in the specification carefully in setting an appropriate response.

If a minimum number of Welsh speakers is to be required or recommended (bearing in mind the service user requirement), tenderers must be made aware of this in this document e.g. 'Tenderers should note that it is considered that a minimum of [x] Welsh [speaking/writing] staff is considered [essential] [desirable] to this contract. A tenderer's proposal [will] [may] not be considered further if their response is lower than this figure.'

Previous Experience

Please describe what systems and procedures you typically employ to ensure that the requirements of the Welsh Language (Wales)

Measure 2011 and, where relevant, the Welsh Language Act 1993 are met in relation to services of this type.

Please describe what communication and reporting systems and procedures you typically employ to keep contract parties updated on a [monthly] [quarterly] [bi-annual] basis in relation to monitoring and promoting Welsh language demand and service delivery.

[Note to procurement officers: when setting an appropriate scoring system and weighting for these questions, it is necessary to do so in light of the anticipated Welsh language requirements for the particular contract in question. Such an assessment will indicate what level of appropriate scoring and weighting is necessary.

Tenderers must be informed that no response or a zero score will/ may eliminate them from the process.]

Schedule 4 – Practical Assistance

Evaluation - ITT

Tenderers are reminded that the services must be delivered in a manner which is compliant with the the Welsh Language (Wales) Measure 2011, Welsh Language Act 1993 (where relevant) and with the Welsh language standards or scheme that the authority is liable to comply with, as if the tenderer was itself the authority. Tenderers must ensure that they are familiar with the authority's current Welsh language scheme which is available at [insert here a link to the authority's Welsh language scheme]] OR [the standards with which the authority is liable to comply which are available at [insert here a link to the authority's Welsh language standards]]. [Delete as appropriate.]



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Tenderers are required to provide a method statement describing how they would deliver the service under this contract to ensure that service users are treated equally whether they require the service in Welsh or English. [The method statement should briefly address each key aspect of the service and should address the anticipated level of Welsh language requirement for this contract].

Tenderers are required to explain the marketing plan or campaign they would employ for this contract to monitor and promote the ability of service users to receive an equal Welsh or English service. The response should include [a staged plan over the life of the contract] [examples of bilingual information to be provided] [and an indication of how the tenderer would respond to any resulting change in demand for the service to be provided through the medium of Welsh/English].

[Note to procurement officers: when including questions, setting an appropriate scoring system and weighting for these questions, it is necessary to do so in light of the anticipated Welsh language requirements for the particular contract in question. Such an assessment will indicate what level of appropriate scoring and weighting is necessary.]

Schedule 5 – Practical assistance

Contract Conditions

1.1 The Contractor shall at all times comply with the Welsh Language Act 1993 (where relevant) and the Welsh language standards or scheme with which the Authority is liable to comply, as if it were the Authority to the extent that

the same relate to the provision of the Services.

- 1.2** The Contractor shall deliver the Services (in accordance with the Specification) through the medium of English or Welsh (on an equal basis).
- 1.3** The Contractor shall be responsible for promoting the delivery of the Services in Welsh or English to the Service user and shall use all reasonable steps to achieve this.
- 1.4** The Contractor shall be responsible for monitoring the level of take-up for the Service through the medium of Welsh and English and shall report to the Authority on a [monthly] [quarterly] [bi-annual] basis by providing the following information in writing:
 - 1.4.1** The number of users requiring the Service in Welsh and English.
 - 1.4.2** The percentage increase/decrease from the previous report.
 - 1.4.3** The allocation of staff to deliver the Services in Welsh and English.
 - 1.4.4** Any changes in Service delivery made or anticipated by the Contractor as a consequence of the above and, if relevant, the timescale for their implementation.
 - 1.4.5** Any complaints of difficulties indicated by Service users or staff of the contractor in delivering the Services in compliance with Welsh language obligations during the report period [and any advice or guidance that is required by the Contractor in delivering such Services].
- 1.5** Contractor specific proposals – Schedule to include any specific proposals included by the contractor within



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their successful tender to deal with Welsh language requirements.

Schedule 6 – Practical assistance

Pro forma questionnaire - scheme compliance questionnaire

Pro forma contract - Welsh Language Services Contracted Out, Agreements, Agencies etc

The requirements of the Welsh language standards/scheme include not only services to the public provided directly by the [contracting authority] directly, but also those provided to the public on behalf of the [contracting authority] by contractors, consultants, agents and other third parties.

It will therefore be necessary to ensure that these bodies are aware of the contents and measures of the documents, and that they conform to their requirements where they have to do with the services provided to the public.

It should be noted that many of the agreements with the [contracting authority] are not substantially for services to the public on behalf of the [contracting authority] but are mainly for services provided to the [contracting authority] itself or its departments e.g. construction works or providing materials and equipment. Others, e.g. catering, property care, are likely to involve a greater degree of direct service to the public and professional services will continue to provide significant direct services to the public after they are contracted out.

This proforma is for your use to list the contracts and agreements

which are arranged and controlled by your department and to assess the extent of services to the public, in accordance with Welsh language obligations. The proforma also gives the opportunity to note whether the contract complies with the relevant standards/scheme/policies. If necessary, please ask the advice and guidance of [contact name].

1. Description of service/work:
2. Contract undertaken by:
3. Duration:
.....
4. Starting date: ending:
5. Area served:
6. On ending, the contract will be:
 i. Put out to tender Yes No
 ii. Renewed Yes No
 iii. Discontinued Yes No

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	Tick if relevant	Tick if currently bilingual		Tick if relevant	Tick if currently bilingual
Forms					
Public reports, statistics etc	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
ix. Publicity:	<input type="checkbox"/>	<input type="checkbox"/>	x. Activities:	<input type="checkbox"/>	<input type="checkbox"/>
Press releases	<input type="checkbox"/>	<input type="checkbox"/>	Arranging activities	<input type="checkbox"/>	<input type="checkbox"/>
Arranging exhibitions	<input type="checkbox"/>	<input type="checkbox"/>	Arranging events	<input type="checkbox"/>	<input type="checkbox"/>
Surveys and interviews	<input type="checkbox"/>	<input type="checkbox"/>	Arranging courses	<input type="checkbox"/>	<input type="checkbox"/>
Phone helpline	<input type="checkbox"/>	<input type="checkbox"/>	Arranging other		
Publicity campaign	<input type="checkbox"/>	<input type="checkbox"/>			
Public notices	<input type="checkbox"/>	<input type="checkbox"/>			
Press advertisements					
Other publicity					



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Schedule 7 - Practical assistance

Summary flowchart

The following flowchart summarises each step of the procurement process through to contract award as relevant to Welsh language obligations. Requirements or obligations of bilingual service provision must be considered at all of the stages referred to below. The stages with key decisions for inclusion of Welsh language criteria, specifications or conditions are indicated with an asterisk (*).

