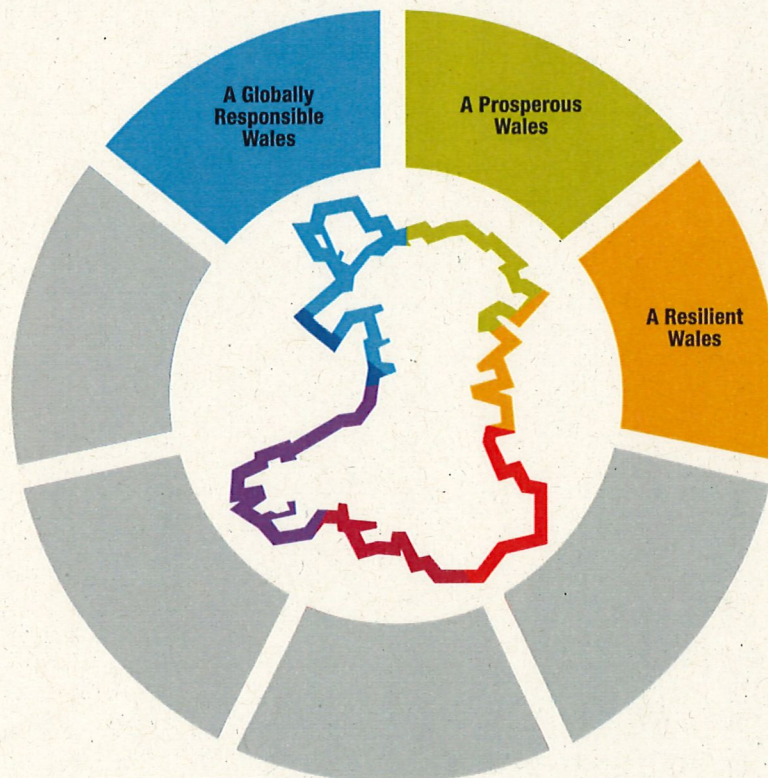


Appendix for Response 10.10

Caffael Masnachol / Commercial Procurement

Welsh Procurement Policy Note (WPPN) 09/21: Sourcing building materials for construction projects in Wales.

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



Version 1.0

[10/2021]

Points to note - please ensure you read this section first.

- The information set out in this document is neither legal advice nor statutory guidance and is not intended to be exhaustive. Nor is it intended to override existing legal obligations applicable to Welsh Public Sector (WPS) contracting authorities – contracting parties should seek their own independent legal advice as appropriate. Please also note that the law is subject to constant change and advice should be sought in individual cases. This document reflects the position as at October 2021.
- This Welsh Procurement Policy Note (WPPN) builds on, and is consistent with, the Wales Procurement Policy Statement and the Public Contracts Regulations 2015¹ (“PCR 2015”) that remain unaffected by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020², effective from 1 January 2021.
- This note assumes a certain level of knowledge of public procurement. It is available via the Welsh Government website Gov.Wales and any queries should be directed to CommercialPolicy@gov.wales or via the [Welsh Governments’ customer services](#).

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¹ SI 2015/102

² SI 2020/1319

1. Purpose

- 1.1. The purpose of this WPPN is to provide public sector bodies in Wales with advice on the actions that could be taken to manage and mitigate market pressures affecting the availability and affordability of building materials.
- 1.2. This is being published in response to unprecedented pricing pressures across building materials.
- 1.3. The WPPN provides a number of practical approaches that could be considered and implemented in addressing this issue.
- 1.4. It should be stressed that each project / programme is to be considered on a case by case basis.
- 1.5. For these reasons the WPPN does not suggest a new paradigm in terms of the management of materials inflation, nor does it seek to represent a definitive position on each or any project / programme
- 1.6. There are a number of forms of contract in use across the Welsh Public Sector. The New Engineering Contract (NEC) form of contract is used extensively across the Welsh public sector. Within this WPPN, references to the application of the NEC form of contract are provided as illustrations.

2. Dissemination and scope

- 2.1. This WPPN is relevant for all public sector contracting authorities in Wales and any external advisers working on their behalf. It should be circulated (for information) within your organisation, particularly drawing it to the attention of those with a procurement or contract management role.
- 2.2. Projects conducted under a contract form that is specifically designed to avoid such macro-economic risks e.g. the Mutual Investment Model (MIM) projects are outside of the scope of this WPPN.

3. Background and Guidance

- 3.1. With the emergence of the Covid-19 pandemic in 2019/20, businesses globally were encouraged to adhere to their national government restrictions to reduce transmission and spread of the disease. Many countries adopted national lockdown strategies which led businesses to close unless they could continue to work safely.
- 3.2. As the disease became better understood, restrictive measures were gradually eased in line with the rise and fall of infection rates and some

businesses were able to continue operations either in part or in full subject to safe social distancing requirements.

- 3.3. The impact of these measures, together with other pressures such as the shortage of HGV drivers, has led to a reduction in the supply of raw materials to the manufacturing sector for production of everyday consumables which are often taken for granted.
- 3.4. The products most affected are cement (bulk & bagged), plaster, timber & roofing materials, insulation (esp. PIR board), plastic pipes (interior use), plastic pipes (external underground), PVA sealants, kitchen carcassing, and landscaping products. There has also been pressure on steel pricing with a 53% price increase since the New Year.
- 3.5. Although typical increases are in the range 10-25%, some material prices have reportedly increased by 40% in recent months. The combination of product shortages, delivery delays and escalating costs for some products is impacting on project delivery.
- 3.6. Where contractors could not have anticipated the current delays or price pressures and allowed for them in their tender and programme there is a risk that this could lead to late completion and/or ultimately contractor failure.
- 3.7. While in 2022 a number of the markets should stabilise, (e.g. timber and steel) the global shortage for a number of other products is expected to continue into 2022 resulting in sustained difficulty in sourcing these materials and high material costs.
- 3.8. Where WPS bodies are aware that market volatility, delays in the supply of materials and/or price increases are impacting on the delivery of construction contracts that are necessary to support public services, they should consider the following actions.

4. Actions for contracting authorities

In considering the actions set out below, WPS bodies should always seek appropriate commercial and legal advice.

4.1. MANAGING DELAYS DUE TO MATERIAL SUPPLY ISSUES

4.1.1. Existing Construction Works and Maintenance Contracts

- 4.1.1.1. Where a contractor can provide compelling evidence, on an open book basis, that it has experienced a significant delay in the supply of a construction material that impacts on the completion date or a Key Performance Indicator (KPI), the WPS bodies and the contractor should

work together in a spirit of mutual trust and cooperation to identify suitable alternative materials or agree an acceptable change to the completion date or KPI.

- 4.1.1.2. Contracting authorities should consider early warnings of delay in the contract. They should consider meetings with the contractor and relevant subcontractors to resolve how any delay can be minimised (e.g. through a design change), and consider waiving or delay exercising the authority's rights and/or remedies (for example, to claim delay damages). In these circumstances, contract change control procedures should be used to keep records of any changes made and the rationale for each decision.

4.1.2. Future Construction Works and Maintenance Contracts

- 4.1.2.1. Contracting authorities should work with the design team to review material availability and estimated delivery times during the design stage to aid development of a realistic specification and works programme. Where significant lead-in times have an adverse impact on the projected critical path, alternative materials or an extension of the works programme should be considered.
- 4.1.2.2. Project delivery structures, both internal and external should be reviewed, corresponding to what's set out in the Construction Playbook.
- 4.1.2.3. Whilst responsibility for the works programme rests with the contractor and supply chain, lead-in times for specific materials for which there is no alternative, should be clearly identified as a risk to the contract. Before allocating responsibility for such risks, the WPS body should consider how they may impact future tender prices and the successful delivery of the contract. Care should be taken to avoid the wholesale transfer of risk along the supply chain which could mean that SMEs are saddled with the risk.

4.2. MANAGING THE IMPACT OF VOLATILE MATERIAL PRICES

4.2.1. Existing Construction Works and Maintenance Contracts

- 4.2.1.1. It is reasonable to expect contractors to absorb price fluctuations within moderate tolerances as prices for materials will change regularly depending on the level of supply and demand within markets. However, where these tolerances are exceeded then contracting authorities could consider appropriate variations subject to the considerations highlighted within section 4.4 Transparency.
- 4.2.1.2. Regulation 72 of the Public Contracts Regulations 2015 sets out the conditions under which contracts can be modified during their term.
- 4.2.1.3. Regulation 72 (1) (c) is pertinent to this note, setting out the legislative framework under which contracts and framework agreements may be modified without a new procurement procedure where all of the following conditions are fulfilled:—

- (i) the need for modification has been brought about by circumstances which a diligent WPS body could not have foreseen;
- (ii) the modification does not alter the overall nature of the contract;
- (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.

4.2.1.4. There are various NEC contract pricing options including priced contracts (Options A and B), target contracts (Options C and D) and cost reimbursable contracts (Option E). The effect of an increase in the cost of materials will depend on the pricing option - the impact on a priced contract will be quite different from a target contract with a pain/gain share in relation to any increased costs.

4.2.1.5. In addition, the impact of the change will depend upon the Secondary Optional clauses and any Z clauses. For example, the contract may already include an adjustment for inflation if Option X1 (Price Adjustment for Inflation) applies. In relation to both the pricing options and Option X1 care must be taken to ensure that these are applied to the relevant subcontracts.

4.2.1.6. Notwithstanding the presence or absence of an existing contractual clause to deal with price adjustment for inflation, where the contractor or supply chain provides compelling evidence, on an open book basis, that clearly demonstrates that the impact of inflation is higher on specific element(s) of the contract than that which a diligent contractor or supply chain contractor could reasonably have anticipated, then the WPS body could consider applying a Net Price Adjustment for inflation to impacted element(s) of the Price. Where this is applied the WPS body must ensure it is applied in supply chain contracts under which most of the project value is delivered.

4.2.1.7. Where a contract does not include a mechanism for price adjustment for inflation, then the Net Price Adjustment is the 'extra over' amount between actual inflation and that which a diligent contractor ought to have anticipated and included for within its tender for that specific element.

4.2.1.8. Where a contract already includes a mechanism for price adjustment for inflation, then the Net Price Adjustment is the extra over amount between actual inflation and that which a diligent contractor ought to have anticipated and included for in its tender for that specific element less that payable under the contractual mechanism for price adjustment for inflation.

4.2.1.9. The Net Price Adjustment may be calculated by comparing the index forecast for that element(s) at the closing date of tender submissions with the actual index outturn data, with the difference being applied to the sum allowed for by the supplier for that element(s) in its original tender as evidenced on an open book basis.

4.2.1.10. The selected index, shall be appropriate for the specific contract element(s). All sums payable as a result of a Net Price Adjustment shall be the defined cost i.e. not subject to any mark up for profit, overhead or other fee.

4.3. FUTURE CONSTRUCTION WORKS AND MAINTENANCE CONTRACTS

- 4.3.1. Contracting authorities should take cognisance of increasing prices when setting budgets for future projects.
- 4.3.2. Discussions on the availability of materials should be started at an early stage and if issues with material availability are anticipated, they should be planned for within the project programme and budget. WPS bodies should ensure that the evaluation and award stage of procurements are completed quickly to avoid unnecessary delays.
- 4.3.3. It will be difficult for contractors and their supply chains to hold tendered prices open for acceptance for long periods after the tender submission date. Contracting authorities could consider including a price adjustment for inflation mechanism in works and maintenance contracts (e.g. NEC Option X1) with a base date set to the tender return date and ensure that this mechanism is mirrored in corresponding supply chain contracts. WPS bodies should also seek to minimise the periods between contract awards and dates for commencement of the works.
- 4.3.4. An appropriate Price index should be selected for the particular type of contract and supply chain contracts.

4.4. TRANSPARENCY

- 4.4.1. Contracting authorities and suppliers must work collaboratively to ensure there is transparency surrounding any Net Price Adjustment payments.
- 4.4.2. Suppliers in receipt of public funds on this basis must agree to operate on an open book basis. This means they must make available to the WPS body their original tender build up and any data from ledgers, cash-flow forecasts, balance sheets, and profit and loss accounts, as required and requested to demonstrate the impact of inflation. For example, this might include evidence that relevant sums have been passed on to the supply chain as quickly as possible.
- 4.4.3. In respect of national level contracts, suppliers should also share discounts and rebates as well as group level purchasing agreements.
- 4.4.4. Contracting authorities should keep records of decisions and agreements made, and ensure suppliers maintain records to enable future audits to be undertaken.
- 4.4.5. Suppliers should not expect to make profits on payments received as a result of a Net Price Adjustment payment.
- 4.4.6. Suppliers are expected to operate with integrity and should be made aware that, in cases where they are found to be taking undue advantage or failing in their duty to act transparently and with integrity, contracting authorities will take action to recover payments made.

4.4.7. Further, any supplier found to have acted fraudulently may be excluded from future public contracts on grave professional misconduct grounds.

4.4.8. Contracting authorities should ensure records of any decisions and agreements made are kept for future audit purposes.

4.5. BENCHMARKING

4.5.1. Contracting authorities should take measures to ensure cost volatility of materials are benchmarked. While there are a number of well publicised indices available, the Welsh Government Commercial Procurement team receives monthly updates from a number of sources including Builders Merchants Federation.

5. Legislation

- Public Contracts Regulations 2015
- Wellbeing of Future Generations (Wales) Act 2015

6. Timing

This WPPN is effective from the date of publication 14/10/2021 until it is superseded or cancelled.

7. Welsh Government Procurement Policy Statement (WPPS) relevance

This WPPN aligns with the following WPPS principles:

- **Principle 7:** We will align our ways of working and increase stakeholder involvement to support innovative and sustainable solutions through procurement
- **Principle 10:** We will promote value-based procurement which delivers optimum long-term outcomes for Wales.

8. Contact Details

If you have any questions about this WPPN please contact:

- CommercialProcurement.Buildings@gov.wales

9. Acknowledgements

- Actuate UK
- National Federation of Builders
- Institute of Civil Engineers (ICE)

- Civil Engineering Contractors Association (CECA)
- Builders Merchants Federation (BMF)
- Welsh Public Sector - Construction Policy Officials

10. References

- [Assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk)
- [Construction Product Availability Statement » Construction Leadership Council](#)
- [The Construction Playbook - GOV.UK \(www.gov.uk\)](https://www.gov.uk)