

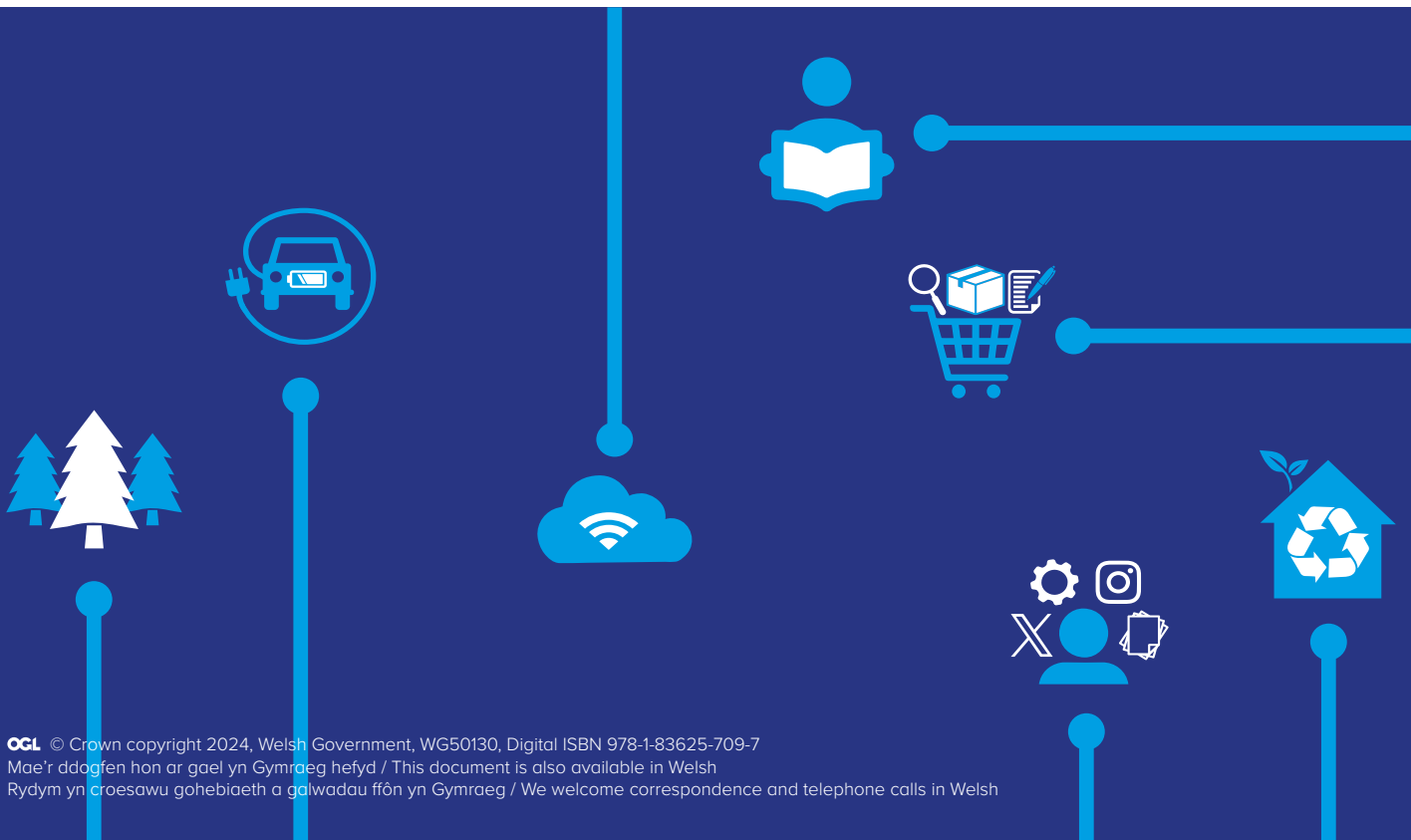


Llywodraeth Cymru
Welsh Government

Guidance

Electronic Communications

September 2024





Guidance: Electronic Communications

What are electronic communications?

1. The Procurement Act 2023 (the Act) requires contracting authorities, so far as practicable, when carrying out covered procurement, to communicate electronically with suppliers and to take steps to ensure that suppliers participating in procurements also communicate electronically. This will help to ensure that communication is undertaken in an efficient, open and transparent way.
2. Electronic communications can help reduce the cost of carrying out a procurement, reduce timescales during the procurement procedure, encourage access to opportunities for suppliers and facilitate compliance with the Act.

What is the legal framework that governs electronic communications?

3. Section 96 of the Act contains the main provisions on electronic communications.
4. The Act also contains requirements to publish or give certain notices, documents or information and the [Procurement \(Wales\) Regulations 2024](#) (“the regulations”) generally require those notices, documents or information to be published electronically, on the central digital platform. Contracting authorities will need to comply with the requirements set out in the regulations in this regard when communicating with suppliers. For devolved Welsh authorities, the requirement to publish on the central digital platform will be met via the use of the Welsh digital platform (Sell2Wales) as per [regulation 5 of the Regulations](#).

What has changed?

5. The Act does not change the general rule on communicating electronically set out in the Public Contracts Regulations 2015 and the Utilities Contracts Regulations 2016, although it does simplify the rules in this area.
6. The Act does, however, include stricter requirements for electronic communication than in the Concession Contracts Regulations 2016. For example, these regulations in most cases allowed for other means of communication, which included post, facsimile, and oral communication. These are only permitted under the Act where it is not practicable to communicate electronically.



Key points and policy intent

7. Section 96(1) of the Act requires contracting authorities to, so far as is practicable, communicate with suppliers electronically and take steps to ensure that suppliers participating in a procurement communicate electronically. In practice, this means, for example, that contracting authorities should make use of emails, e-procurement systems, virtual conferencing and share or publish key information electronically. This applies to covered procurements from the start of a procurement and throughout the period of the contract until it ends.
8. Contracting authorities should note that, under section 96(1) of the Act, non-electronic communications are permissible where electronic communications are not practicable. For example, if an aspect of a procurement requires a scale model to be submitted or a demonstration of a product is required, then this is unlikely to be possible electronically. Oral communication could take place during negotiations, meetings or for general conversations about the procurement. However, it would be best practice for this communication to be documented and where appropriate, for any relevant information to be shared electronically with suppliers.
9. A contracting authority may use or require the use of an 'electronic communication system', which includes any electronic system used for the purpose of communication with suppliers, to carry out a covered procurement.
10. Section 96(2) of the Act provides that electronic communication systems used or required to be used, however, must be:
 - a. free of charge and readily accessible to suppliers;
 - b. generally available or interoperable with other generally available systems;
 - and
 - c. accessible to people with disabilities.
11. The purpose of section 96(2)(a) of the Act is to allow suppliers to freely see and access information in relation to tender opportunities and not be deterred by 'paywalls' which can limit the field of competition. Electronic communication systems are intended to help facilitate suppliers' participation in procurements and should not act as an indirect barrier, which could particularly disadvantage small and medium-sized enterprises.
12. Section 96(3) of the Act sets out an exception to the requirement for electronic communications systems to be free of charge and readily accessible to suppliers, which applies when these systems are used after the award of a public contract



or in relation to a utilities dynamic market. The effect of this is that contracting authorities may, for example, charge suppliers a fee in connection with obtaining and maintaining membership of a utilities dynamic market and, after a contract has been entered into, require the use of electronic invoicing systems. The ability to charge a fee to suppliers for the use of an electronic invoicing system is, however, prohibited unless the contracting authority is a defence authority (see section 67(6) of the Act). It also allows contracting authorities to charge for supplier management systems, but this should be avoided where possible and practicable to do so. In addition, where there is a charge, the contracting authority should be transparent about the requirement and the charges to suppliers at the start of the procurement.

13. If a contracting authority considers that the use of electronic communication, or the use of an electronic communication system that is free of charge and readily accessible, generally available or interoperable with generally available systems and accessible to people with disabilities (i.e. meeting the requirements of section 96(2)), poses a security risk in a specific procurement, section 96(4) of the Act provides that section 96 does not apply. Where this exemption applies it is good practice for a contracting authority to use a system which aligns with as many of the requirements in section 96 of the Act as possible, with any necessary modifications to account for security risks.

What other guidance is of particular relevance to this topic area?

- Guidance on covered procurement objectives
- Guidance on the Welsh digital platform
- Guidance on the central digital platform

