

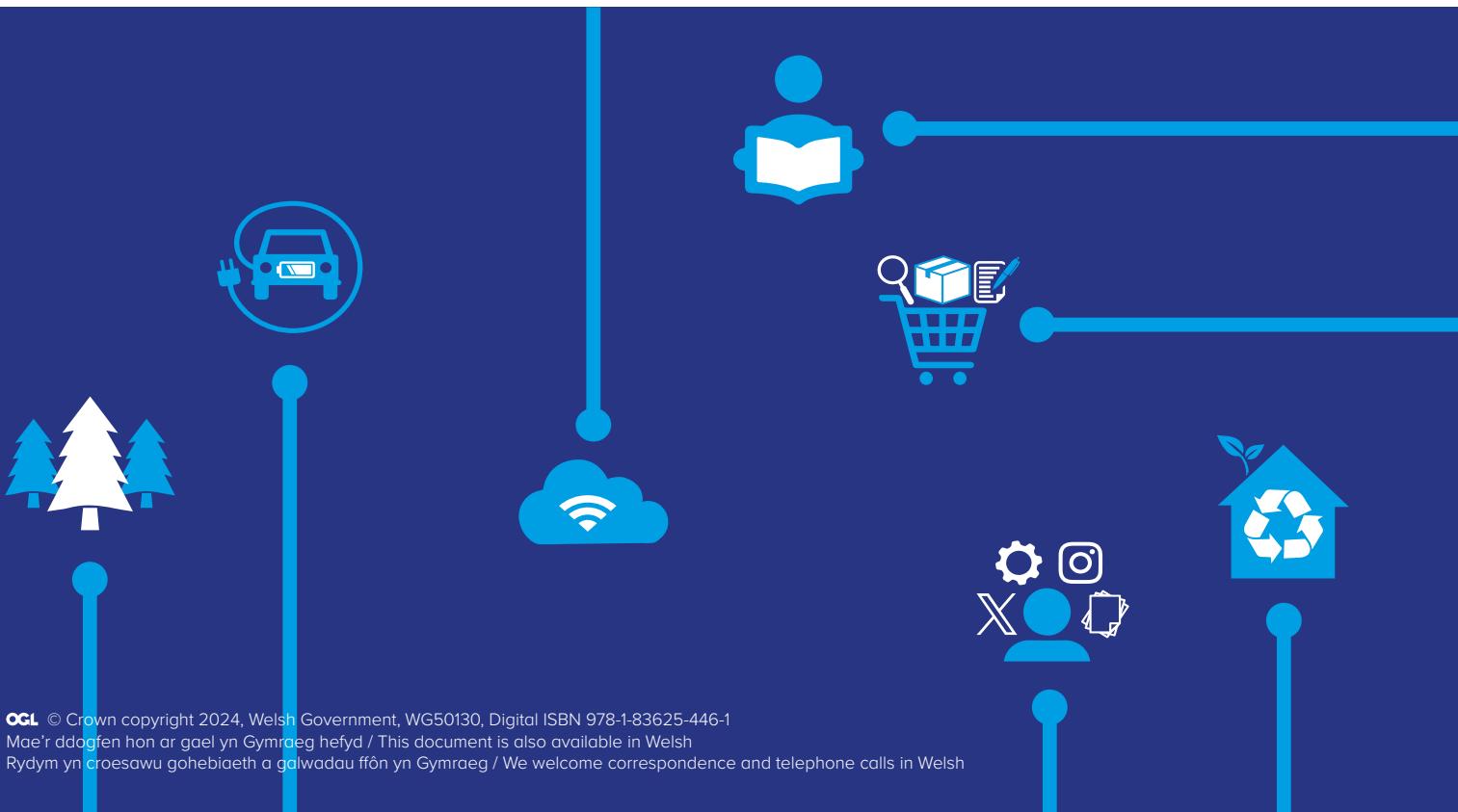


Llywodraeth Cymru
Welsh Government

Guidance

Contracting Authorities

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Guidance: Contracting Authorities

What are contracting authorities?

1. 'Contracting authority' is the term used to refer to an entity (referred to as a 'person' in the Procurement Act 2023 (the Act) to ensure it applies to a variety of circumstances) that is subject to the Act. A legal definition of contracting authorities is essential in order for entities to determine whether they are in scope of the rules, or not.

What is the legal framework that governs contracting authorities?

2. Section 2 of the Act defines a contracting authority. It sets out the criteria to determine whether entities are covered and specifically sets out which entities are excluded ('excluded authorities').
3. Section 2 brings the definition of a 'utility' into the definition of a contracting authority, consolidating the separate definitions in the previous legislation. Note that this guidance deals only with contracting authorities that are not utilities. Utilities¹ are dealt with in separate guidance.
4. Section 2(5) specifically defines entities that are excluded authorities i.e. those that are not covered by the Act.
5. Section 2(10) provides that where a controlled entity operates on a commercial basis and is awarded an exempted contract pursuant to the vertical arrangement in Schedule 2, paragraph 2, that controlled entity is deemed to be a public authority in relation to any relevant sub-contracts it awards.
6. Section 111 sets out the criteria when a contracting authority is to be treated as a 'devolved Welsh authority'. This definition includes reference to a 'private utility' but note that this guidance only deals with contracting authorities that are not utilities.

¹ Utilities are public authorities or public undertakings that carry out a utility activity and private utilities (section 35(4)).



What has changed?

7. The features of a contracting authority are intended to be the same as those in the previous legislation, with adjustments made purely for the purposes of UK law.
8. The definition covers what was referred to in the previous legislation as the state, regional or local authorities and bodies governed by public law (and associations of such authorities or bodies), and includes central government authorities, (defined in regulation 44 and Schedule 2 of the Procurement (Wales) Regulations 2024). There is no intended or implied change in the scope of entities covered. Indeed, since the definition forms the basis of the UK's international obligations on public procurement, it is important that the scope of entities covered is not changed.
9. Entities that were contracting authorities under the previous legislation are intended to still be contracting authorities (unless their status has changed, for example because their funding has changed from mainly public to mainly private sector or they are now operating commercially, whereas previously they were not). Similarly, entities that were not caught by the definition in the previous legislation are not intended to be caught by the new definition, unless their circumstances have changed. There is no intention to try and catch new entities, or to exclude entities that were covered previously – the aim is for a consistent effect, ensuring a smooth transition from the previous legislation to the new.
10. The features of funding, control and non-commercial nature are intended to capture the same contracting authorities as were previously covered.

Key points and policy intent

Contracting authorities

11. Contracting authorities are comprised of public authorities and, in the case of a utilities contract, public authorities, public undertakings and private utilities. They do not include excluded authorities, which are listed at section 2(5) of the Act. Since this guidance does not cover utilities, it only considers the definition of a public authority.
12. The definition of a contracting authority does not list individual entities or categories of entities explicitly. This would be impracticable as there are simply too many entities to list, and any list would only be a snapshot in time, as entities can change their structure or disappear and new entities emerge. Rather, the definition uses a number of tests to determine whether an entity is covered or not.



13. As stated above, section 111(3) and (4) of the Act sets out the criteria when a contracting authority is to be treated as a 'devolved Welsh authority'. It states that a devolved Welsh authority is a public undertaking or private utility if it operates wholly or mainly in relation to Wales, and its activities are wholly or mainly activities that do not relate to reserved matters. Otherwise, a contracting authority is to be treated as a devolved Welsh authority if its functions are exercisable wholly or mainly in relation to Wales, and its functions are wholly or mainly functions that do not relate to reserved matters. For information on what constitutes "reserved matters" under this section of the Act, please refer to the [Government of Wales Act 2006 Schedule 7A](#).

Public authorities

14. In considering whether an entity is a public authority, there are three elements to consider. The first two elements of the test are:
 - a. Public funding (section 2(2)(a)) - whether the entity's funding is derived entirely or mainly from public funds; or
 - b. Public authority oversight (section 2(2)(b)) – whether the entity is under the management or control of one or more public authorities, or of a board with more than half of its membership appointed by one or more public authorities (section 2(3)).
15. The third element of the test is that, in each case, the entity does not operate on a commercial basis (section 2(2)). To assist, section 2(4) sets out examples of factors that may be relevant when determining whether an entity operates on a commercial basis - this is not an exhaustive list and there may be other factors to be taken into account in different cases. For example, it may also be relevant to consider the intended purpose of the entity. Contracting authorities may need to consider questions such as if the entity was established with, or has a substantial purpose of providing a service in the public interest e.g. to provide social housing, even though it may have a commercial side too. If so, this could mean that the entity is not operating on a commercial basis in the true sense of the term. Conversely, entities established or operating for a commercial purpose, such as local authority trading companies established under section 95 of the Local Government Act 2003, are likely to be competing on the open market in all areas of their business and therefore are likely to fall within the meaning of operating commercially under the Act.
16. Public funding may be from a variety of sources, for example, funding may be provided:



- a. in the case of local authorities, from council tax and non-domestic rates;
 - b. in the case of Welsh Government sponsored bodies, from the sponsoring department; or
 - c. in the case of local authority companies, from the local authority itself.
17. Section 2(3) sets out what it means to be subject to public authority oversight, which is that the entity is subject to the management or control of:
- a. one or more public authorities; or
 - b. a board with more than half of members appointed by one or more public authorities.
18. Entities will need to consider their own structure, oversight, funding and commercial circumstances to determine whether they meet the test for a public authority, but the examples and explanations in the Act and this guidance should assist.

Centralised procurement authorities

19. Centralised procurement authorities are contracting authorities that are in the business of carrying out procurement for the benefit of other contracting authorities. These are considered further in the guidance on frameworks.

Exempted contracts

20. The authorities that are specifically excluded from the scope of the Act are named in section 2(5).
21. Schedule 2, paragraph 2 exempts contracts (referred to here as ‘relevant contracts’) awarded by public authorities to commercial entities that they control, such as local authority trading companies. Section 2(10) serves as an anti-avoidance mechanism to ensure that where a public authority awards a relevant contract to a controlled entity that operates on a commercial basis, the obligation to comply with the Act is flowed down from the public authority to the controlled entity when it is delivering the contract.

What other guidance is of particular relevance to this topic?

- Guidance on exempt contracts (for information relating to vertical arrangements)
- Guidance on utilities



Related questions

Q. Does the definition of contracting authority include housing associations?

The Act's definition of a contracting authority ensures consistency with the UK's international obligations regarding commitments in relation to registered providers of social housing. In determining whether a person operates on a commercial basis, section 2(4) of the Act provides examples of factors to be taken into account. Section 2(4) is not exhaustive and so in the context of housing providers, it may be relevant to consider other factors, such as the purpose of the entity. The Act is not intended to change the position of the previous legislation.

Q. Will being regulated by a regulator be enough to meet the contracting authority oversight requirement?

Not necessarily. Section 2(3) defines public authority oversight as meaning subject to the management or control of a public authority (or authorities) or of a board where more than half of the members are elected by a public authority (or authorities). It is not intended that regulators will always be classed as having the necessary oversight and therefore meet Section 2(3). There may however be circumstances where this is the case.

