



Caffael Masnachol / Commercial Procurement

## Welsh Procurement Policy Note (WPPN) number / 2021: Sourcing building materials for construction projects in Wales.

Version 1.0

[09/2021]

**Commented [A1]:** From [REDACTED]:

### My Comment on the PPN Generally

The PPN seeks to equitably redress economic and programme problems, to construction projects, that may arise indirectly from Brexit and Covid. These effects are referred to generally and the causes are essentially indirect, and complex, in nature. The burden of proof for evidence, in these instances, are that the commercial and programme effects that are demonstrated to be 'over and above what could have been expected within an acceptable risk profile' (my paraphrasing not a direct quote)

In respect your request for comments to improve the wording. Well I think that the intent of the policy is clear and reasonably well made to achieve the stated desired results.

It is clear that this policy will be applied to existing projects where cost-escalation clauses are not included in their agreements, and so it is also clear that the intent is to equitably allow cost and programme changes to be recoverable where no specific contract ...

**Commented [A2]:** From [REDACTED]:

No major issues with the PPN other than a comment on risk transfer. We've previously discussed, at the Construction Forum, mandating risk registers being produced by clients to issue to contractors during the tendering process so that risk identification and transfer is transparent and not hidden in weasely (not a technical term 😊) T&Cs. I know we haven't agreed this but could we not make it more explicit in this PPN that a formal risk register should accompany any tender docs and include an explicit reference to how clients are intending to deal with this particular risk?

**Commented [A3]:** From [REDACTED]:

As a 'spoiler' I believe the PPN does have a potential to put the MIM project status, at risk. I acknowledge that you mention that words could be added to specifically exclude the A465 project from the policy, but I am by no means certain that this would be successful and that at the very least our ProjectCo would seek to challenge them.

I can see that the PPN is perhaps, objectively speaking, a fair and reasonable approach to the issues of the commercial pressures on contractors under the current financial climate and the effects of Brexit/Covid in ...

**Commented [A4]:** From [REDACTED]:

I feel at present that the way it is written presents a bit of a fait accompli to the market that (a) the public purse is going to take on the risk of inflation from hereon in (as well as potentially retrospectively to the start of Covid?) and (b) authorities are open to renegotiating completions dates/ programmes in all cases. I'm just not convinced that this is what WG are after (unless of course I'm missing something)? Such a shift could see major increases finding their way to public sector budgets - in some instances I'm sure this will be appropriate, but likewise there's bound to be instances where it is not.

**Commented [A5]:** From [REDACTED]:

The Builders Merchants Federation welcomes this initiative, though we believe it should have come earlier; just a few minor comments - is it worth mentioning the issue of shortage of HGV drivers which is also hindering supply;

## 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 **September** 2021.
- This Welsh Procurement Policy Note (WPPN) builds on, and is consistent with, the Wales Procurement Policy Statement and the Public Contracts Regulations 2015<sup>1</sup> (“PCR 2015”) that remain unaffected by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020<sup>2</sup>, 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](http://Gov.Wales) and any queries should be directed to [CommercialPolicy@gov.wales](mailto:CommercialPolicy@gov.wales) or via the [Welsh Governments’ customer services](#).

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<sup>1</sup> SI 2015/102

<sup>2</sup> SI 2020/1319

### 1. Purpose

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.

This is being published in response to unprecedented pricing pressures across building materials. It does not however suggest a new paradigm in terms of the management of materials inflation.

It should be stressed that each project/ programme is to be considered on a case by case basis.

This WPPN does not represent a definitive position on such/ each project/ programme.

The WPPN provides a number of practical considerations that could be considered and implemented in addressing this issue

There are a number of forms of contract in use across the Welsh Public Sector. References to the NEC within this WPPN are provided as an example

### 2. Dissemination and scope

This WPPN is relevant for all public sector contracting bodies 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.

Outside of the scope of this WPPN are those projects conducted under a contract form that is specifically designed to avoid such macro-economic risks. Ie the Mutual Investment Model (MIM) projects

There are a number of forms of contract in use across the Welsh Public Sector. References to the NEC within this WPPN are provided simply as an illustration

### 3. Background and Guidance

With the emergence of the Covid-19 pandemic in 2019/20, businesses globally were encouraged to adhere to their national government restrictions to reduce

**Commented [A6]:** From [redacted]:  
**My thoughts specifically for A465 Sections 5&6**

The PPN is a charter for contractors to pursue claims for additional time and money, outwith their specific contractual entitlement. This is all in a laudable attempt to avoid contractor and subcontractor insolvency, unemployment and a failed project. It would almost certainly also open the gates to claims on the A465 MIM project, which is conducted under a contract form that is specifically designed to avoid such macro-economic risks.

The majority of WG projects will not have cost escalation clauses in their agreements, and this policy note opens the door to claims for them. What would differentiate the A465 MIM project from a 'normal' NEC-based project that also places economic risk at the

**Commented [A7]:** From [redacted]:

Is this PPN to be time limited? In essence it strongly suggests that inflation risk is to shift squarely on the market to the public purse – that is a major shift, certainly on major infrastructure. Perhaps it would be of benefit to make it clear that each project/ programme is to be considered on a case by case basis and that this PPN is not a definitive position on such/ each project/ programme.

As currently drafted I do get the feeling that the market will see this as a done deal that they're to be given

**Commented [A8]:** From [redacted]:

Given that so many public sector clients are using private sector consultants should we not include them in any rollout of this PPN? I don't think this PPN should just land on the desk of procurement officers but should rather be launched via a webinar with public and private sector contributors (WCFA could arrange?) so that the message is strengthened and targets a wide range of stakeholders? Experience from the Covid PPNs is that "some" did not apply the spirit of them and this has led to considerable post-contract dispute - especially where clients have relied considerably on "consultant support"

**Commented [A9]:** From [redacted]:

ACE Wales' Committee has not had the time to consider this draft in detail. However, we see the advice as a positive attempt to guide the industry through a period of extreme uncertainty.

One observation I have is that the paper's purpose and scope is passive. What are you expecting to get out issuing it? Modified forms of contract? Negotiated agreements within live contracts? An evidence base for any mediation/dispute resolution? ACE Wales' Committee has not had the time to consider this draft in detail. However, we see the advice as a positive

**Commented [A10]:** From [redacted]:

- I'd probably also think about including:
1. Impact of large scale construction products e.g.HS2
  2. Fact that this is a global issue (some of the feedback I get is that wood in particular as it makes its way to UK gets diverted to the US for better prices).
  3. Some contracts will have built in price mitigation costs for increases in materials etc, but indicatively these would not cater for the 10%-40% price increases in products being experienced by the sector.
  4. Also runs the risk of contractors not completing the work – leaving more cost again for the client to assume

transmission and spread of the disease. Many countries adopted national lockdown strategies which led businesses to close unless they could continue to work safely.

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.

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.

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.

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.

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.

While in 2022 a number of the markets should stabilise, (eg timber and steel) the global shortage is expected to continue into 2022 for a number of products resulting in sustained difficulty in sourcing materials and high material costs.

Where contracting 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, contracting bodies should always seek appropriate commercial and legal advice.

### 4.1. MANAGING DELAYS DUE TO MATERIAL SUPPLY ISSUES

#### 4.1.1. Existing 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 contracting bodies and the contractor should work together in a spirit of mutual trust and cooperation to identify

**Commented [A11]:** Is there wider evidence to support this? We are experiencing issues across the education construction side

steel price increases have had a major impact on the wider construction sector, affecting structural steel, M&E trunking etc. leading to more specialist work like lift installation costs increasing and thus affecting the wider sector.

**Commented [A12R11]:** I agree with [REDACTED]. This is affecting the whole infrastructure sector and don't see the need to emphasise housing at the expense of, or precluding, other forms of infrastructure projects. You could remove "those used in housebuilding and domestic repair maintenance and improvement (RMI), including"

**Commented [A14]:** From [REDACTED]: I suggest the ranking of materials/products on page 3 should instead start with cement ! To now read: 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.

**Commented [A15]:** If you want hard evidence, BEIS produce monthly stats on building materials prices – see link here - [Monthly Statistics of Building Materials and Components - data.gov.uk](#)

**Commented [A16]:** From [REDACTED]: And increased total/ project/ programme prices (?)

**Commented [A17]:** From [REDACTED]: I think it is a bit more nuanced than this – I think [REDACTED] sent an e-mail making the point around timber specifically. Steel capacity is also nuanced as I understand matters

**Commented [A18]:** From [REDACTED] 1. These are very abnormal circumstances in a global pandemic, all parties to a contract should work together in a spirit of openness and cooperation (as the ethos of the NEC Contracts).

**Commented [A19]:** From [REDACTED]: As for the consulting and engineering sectors, there are two overriding issues: risk and pragmatism. Risk must be analysed rigorously, kept up to date, budgeted for and allocated equitably pre-contract and negotiations will need pragmatism to develop win/win resolutions during contracts.

What the industry doesn't need at this time is stalled programmes or for risk levels to threaten companies' financial viability.

**Commented [A20]:** From [REDACTED]: if they are working open book – could reference adopting a "Pain / Gain" type approach

**Commented [A21]:** From [REDACTED]: This will mean different things to different people. I would not use the phrase without defining it clearly

suitable alternative materials or agree an acceptable change to the completion date or KPI.

- 4.1.1.2. Contracting bodies 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 Contracts

- 4.1.2.1. Contracting bodies 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. 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. Project delivery structures, both internal and external should be reviewed, corresponding to what's set out in the Construction Play book. Before allocating responsibility for such risks, the contracting authority 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

- 4.2.1.2. 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 bodies could consider appropriate variations subject to the considerations highlighted under section 4.4 Transparency.
- 4.2.1.3. Regulation 72 of the Public Contracts Regulations 2015 sets out the conditions under which contracts can be modified during their term.
- 4.2.1.4. 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 contracting authority could not have foreseen;

**Commented [A22]:** From [REDACTED]:  
Do we have to be so prescriptive as ultimately this suggests it's a done deal, i.e. it says from the off that the client is willing to agree a new completion date with you. That to my mind is a tad dangerous in that they could use this as a safety blanket; though times are tough they must still mitigate programme impacts not think that they'll get a free pass on the back of the PPN and some evidence.

**Commented [A23]:** Text proposal by [REDACTED]  
1. Where a contractor and/or its supply chain can provide compelling evidence on an open book basis that a significant delay has been or will be experienced in the supply of construction materials that impacts on the completion date (or sectional completion) or a Key Performance Indicator (KPI), the contracting bodies the contractor and its supply chain firms must 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 sectional completion date) or KPI.

**Commented [A24]:** Tracked changes from [REDACTED]

**Commented [A25]:** From [REDACTED]:  
Change the type of contract utilised from Fixed price to Cost plus (ie evaluate on the service provided costs and take materials out of the evaluation – pay on receipt of invoice for actuals)

**Commented [A26]:** From [REDACTED]:  
This needs to be expanded to say design teams and contractors since major infrastructure projects will typically see design teams sat within wider JV's or as sub-contractors to a contractor. In reality it isn't the designer 'buying' the material.

**Commented [A27]:** Tracked changes from [REDACTED]

**Commented [A28]:** Tracked changes from [REDACTED]

**Commented [A29]:** From [REDACTED]:  
Can I suggest that we also mention that project delivery structures – internal and external – should be reviewed, akin really to what's now set out in the construction play book

**Commented [A30]:** Tracked changes from [REDACTED]

**Commented [A31]:** From [REDACTED]: Who will define 'moderate'? Some of the price rises are extraordinarily excessive.

**Commented [A32]:** From [REDACTED]:  
I think this is a bold statement – you have no visibility of a contractor's pricing/ deals within their supply chain/ at group level. In reality they could point to this statement forever and a day as a reason why a project should shift its position on pricing. What if a contractor is making high margins on a particular job, and losing on another? Is he allow to claim on the loss making scheme? A si say I find this quite a bold statement, which will inevitably be punned upon

**Commented [A33]:** Text proposal by [REDACTED]  
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 bodies should consider appropriate variations to cater for collaborative risk sharing on the volatility of fluctuating materials prices.

(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.

4.2.1.5. 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.

4.2.1.6. 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.

4.2.1.7. 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 Department could consider applying a Net Price Adjustment for inflation to impacted element(s) of the Price. Where this is applied the Department must ensure it is applied in supply chain contracts under which most of the project value is delivered. This is a temporary measure and its use will be reviewed in November 2021.

4.2.1.8. 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.

4.2.1.9. 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.

4.2.1.10. 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.

4.2.1.11. 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.

**Commented [A34]:** From [REDACTED]:  
This is one form of contract – others are also widely used. Am not sure mentioning such detail adds anything – indeed it could cause difficulties, vis a vis contractors under these forms deeming entitlement to relief

**Commented [A35]:** From [REDACTED]:  
As above

**Commented [A36]:** Tracked changes from [REDACTED]

**Commented [A37]:** From [REDACTED]:  
I would suggest examples are set out as to how 4.2.1.7/8 and 9 are to work (there also appears to be some duplication).

If you have an inflation mech in your contract it should/ will capture the increases at some point in time - why therefore the entitlement?

Am struggling with the argument around reasonable anticipation if they are entitled to inflation. If an inflation mech is in play then it's a client risk – typically all elements would shift with inflation. Happy to be challenged on this but if you have a price broken down into elements, with each of those elements shifting in line with inflation, why is reasonable anticipation in play?

**Commented [A38]:** Tracked changes from [REDACTED]

### 4.3. Future Construction Works and Maintenance

- 4.3.1. Contracting bodies 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. Contracting 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 bodies 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. Contracting authorities 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.

**Commented [A39]:** From [REDACTED]: Think about using different types of contract as opposed to fixed price (as per comment for 4.1.2)

**Commented [A40]:** From [REDACTED]: This is difficult if not impossible.

**Commented [A41]:** From [REDACTED]: Are we therefore saying that moving forward inflation is to be a client risk? That is a major shift in stance, which will have a real impact on budgets, e.g. on a major infrastructure ECI project there is a point in time when the contractor takes the risk – it aids budget management and to a degree, delivery. There could be significant sums needing to be found on projects to cater for inflation.

**Commented [A42]:** Tracked changes from [REDACTED]

**Commented [A43]:** From [REDACTED]: ICE offers an Arbitration service.

### 4.4. TRANSPARENCY

- 4.4.1. Contracting bodies 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 Department 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 bodies 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 bodies will take action to recover payments made.

**Commented [A44]:** From [REDACTED]: Suggest discounts and rebates should also be considered, as well as group level purchasing arrangements – how is this to be truly policed – at a portfolio level you won't have knowledge of the prices etc. a contractor can really secure without delving into their group arrangements, rebates, discounts etc. I'm not advocating this is an issue on all contracts but it will certainly be on national level projects. As mentioned elsewhere, what if a contractor is winning (making decent margin) on a particular job, and not on others – are they still entitled to relief? That could become embarrassing quite quickly

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

## 4.5. BENCHMARKING

4.5.1. Contracting Bodies 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 xx/xx/2021 until it is superseded or cancelled.

## 7. Welsh Government Procurement Policy Statement (WPPS) relevance

This WPPN is duly aligned to the Wales Procurement Policy statement.

**Commented [A45]:** Need to add to which WPPS principle this WPPN aligns to (it can be more than 1 principle).

Please follow this example:

This WPPN aligns with the following WPPS Principles:  
• Principle 9: We will improve the integration and user experience of our digital solutions and applications, maximising the use of our procurement data to support decision making.

## 8. Contact Details

If you have any questions about this WPPN please contact:

- [CommercialProcurement.Buildings@gov.wales](mailto:CommercialProcurement.Buildings@gov.wales)

## 9. Acknowledgements

[If we need to acknowledge input from others.]

Include orgs contributed to note, SECA, NWCF etc

## 10. References

- [Assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/atta) [online] available at:  
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/atta>



[chment\\_data/file/1007521/21-cs8 - Construction Building Materials - Commentary July 2021.pdf](#)

- [Construction Product Availability Statement » Construction Leadership Council \[online\] available at:   
<https://www.constructionleadershipcouncil.co.uk/news/construction-product-availability-statement-5/>](#)
- [The Construction Playbook - GOV.UK \(www.gov.uk\)](#)

**Commented [A46]:** we normally use hyperlinks, it looks better.