

# New obligations for Welsh public bodies on social partnership and socially responsible procurement

29 June 2023

## Background to procurement reform in Wales

The Welsh Government has been working with the UK Government to ensure that the UK Public Procurement Bill reflects Welsh needs. The UK Bill will deal with the processes that contracting authorities are required to follow and will replace the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016 and the Utilities Contracts Regulations 2016.

In addition to the UK Public Procurement Bill, the Welsh Government has been working on specific Welsh legislation focusing on social partnership and socially responsible procurement as set out in the Social Partnership and Public Procurement Act 2023 (the Act). The Act has received Royal Assent but is not yet in force – it will enter into force at a time determined by the Welsh Ministers by Order. (Except for section 48, which entered into force one day after Royal Assent enabling the Welsh Ministers to make the necessary orders).

## Who does the Act apply to?

The Act applies to specified contracting authorities as listed in Schedule 1 of the Act, which includes the Senedd Commission, Welsh Language Commissioner, Future Generations Commissioner for Wales, Children's Commissioner for Wales, Social Care Wales, the Welsh Ambulance Services NHS Trust, Digital Health and Care Wales, Transport for Wales and Qualification Wales, among others.

It also applies to a person listed as a "public body" in section 6(1) of the Well-being of Future Generations (Wales) Act 2015 (WFGA 2015), which includes the Welsh Ministers, local authorities, local Health Boards, certain NHS Trusts (Public Health Wales and Velindre), Welsh fire and rescue authorities and Natural Resources Body for Wales, among others.

## What are the key obligations under the Act?

The Act is split into four parts covering the following:

- Part 1: The Social Partnership Council;
- Part 2: Social Partnership and Sustainable Procurement;
- Part 3: Socially Responsible Public Procurement; and
- Part 4: Final Provisions.

### Part 1: The Social Partnership Council

The Social Partnership Council is to be established with the mandate to provide information and advice to Welsh Ministers in relation to social partnership duties under the Act, the pursuit of the "a prosperous Wales" well-being goal by public bodies when carrying out sustainable development under the WFGA 2015 and/or the functions conferred on contracting authorities and the Welsh Ministers on socially responsible public procurement (Part 3). Information or advice can be provided on Social Partnership Council's own accord or when requested. There are specific provisions in the Act as to who its members are, appointments, operational matters and sub-groups. There is also provision for a specific sub-group to be established on public procurement within six months of the Act coming into force so

that it can provide advice and information to the Social Partnership Council about the functions on contracting authorities regarding socially responsible procurement.

## Part 2: Social Partnership and Sustainable Development

For the purposes of improving economic, environmental, social and cultural well-being (including improving public services), this Part of the Act:

- imposes new social partnership duties as part of the well-being duty in the WFGA 2015;
- amends the “a prosperous Wales” well-being goal to be pursued by public bodies when carrying out sustainable development under the WFGA 2015 so that securing fair work is part of the description of the goal.

## Part 3: Socially Responsible Public Procurement

This Part of the Act sets out the socially responsible public procurement duty in respect of major construction contracts, outsourcing services contracts, social public works clauses in contracts and sub-contracts, reporting obligations, public services outsourcing and workforce code, social public workforce clauses in outsourcing services contracts and sub-contracts, putting in place a procurement strategy and reporting and accountability obligations.

In addition, the Welsh Ministers may investigate a contracting authority that carries out public procurement and may make recommendations, publish a report and lay a copy of any report published before the Senedd.

## What does the Act require public bodies to do?

The Act imposes a range of duties on public bodies including:

### Social partnership duty

In carrying out sustainable development, a public body must, in so far as is reasonable seek consensus or compromise with recognised trade unions or other representatives of its staff on:

- the well-being objectives to be set under section 3(2)(a) of the WFGA 2015;
- decisions of a strategic nature to be made about the reasonable steps the body has taken (in exercising its functions) to meet those objectives.

The Act sets out how a public body is to demonstrate that it has sought consensus or compromise and for the purpose of what is reasonable, it must take into account guidance published by Welsh Ministers.

### Social partnership report

A public body is required to prepare for each financial year, a report to demonstrate what has done to comply with the social partnership duty.

### Socially responsible procurement duty

This duty requires a contracting authority to seek to improve the economic, social, environmental and cultural well-being of its area by carrying out public procurement in a socially responsible way. A contracting authority does this by taking action in accordance with the sustainable development principle aimed at contributing to the achievement of the well-being goals listed in section 4 of the WFGA 2015. In this regard, a contracting authority is required to set and publish objectives referred to as “socially responsible procurement objectives”, which are to be revised and reviewed.

In order to contribute to the achievement of the socially responsible procurement objectives, a contracting authority must:

- take all reasonable steps to meet its objectives when carrying out public procurement in respect of prescribed contracts;
- take prescribed actions when procuring major construction contracts or outsourcing services contracts.

However, importantly a contracting authority is not required to include provisions in a prescribed contract that:

- are not proportionate (taking into account the estimated value of the contract)
- would conflict with any other enactment or rule of law relating to public procurement.

### Major construction contracts

In respect of major construction contract, it is important to note that the threshold is low as it relates to any contract with a value of £2million or more that is a public works contract, works contract or a works concession contract. However, even so the obligation is for the contracting authority to:

- have regard to model social public works clauses published by Welsh Ministers
- as part of the procurement process to consider whether the contract is to include social public works clauses
- in negotiating and awarding contracts, to take all reasonable steps to include social public works clauses and ensure the clauses included can be implemented
- in managing the contract to take all reasonable steps to ensure such clauses are implemented.

The Welsh Ministers are to publish model clauses for major construction contracts within specified categories which are: payments, employment, compliance, training, sub-contracting and environment.

## **Outsourcing services contracts**

A similar approach applies to outsourcing services contract in relation to which contracting authorities are required to:

- have regard to the public services outsourcing and workforce code published by Welsh Ministers
- as part of a procurement process to consider whether the contract should include social public workforce clauses
- in negotiating and awarding the contract, take all reasonable steps to include relevant social public workforce clauses and ensure the clauses can be implemented
- in managing the contract take all reasonable steps such clauses are implemented.

The Welsh Ministers are to publish the public services outsourcing and workforce code, which is to include model contract clauses, although the Act does provide some guidance as to what they should cover with the focus being on protecting terms and conditions of staff that are transferred or employed.

## **Sub-contracts – major construction contracts and outsourcing services contracts**

Public authorities are also required to take all reasonable steps to ensure that obligations in the social public works clauses/social public workforce clauses are implemented where the contractor enters into a sub-contract with any other economic operator. The Act provides examples as to how public authorities can demonstrate that they have taken reasonable steps.

## **Reporting obligations (social public works clauses/social public workforce clauses)**

Contracting authorities are under an obligation to notify Welsh Ministers where:

1. the authority does not intend to include the applicable clauses;
2. the applicable clauses are not included in the relevant contract;
3. there is no process to ensure that obligations in the applicable clauses are implemented;
4. there is no process in place for ensuring that obligations in the applicable clauses are implemented when sub-contracted. Welsh Ministers then have certain obligations when dealing with such notifications including the ability to give a direction to a contracting authority.

## **Procurement strategy**

Contracting authorities are required to prepare a procurement strategy setting out how the authority intends to carry out public procurement. The strategy must state:

1. how the authority intends to ensure that it will carry out public procurement in a socially responsible way;
2. meet its socially responsible procurement objectives;
3. state how the authority intends to make payments promptly.

The procurement strategy is to be reviewed in each financial year and revised as appropriate.

## **Reporting**

Contracting authorities that award prescribed contracts during a financial year are to publish an annual report after the end of that year with specific information to be included as set out in the Act.

## Contracts register

Contracting authorities must create, maintain and publish a contract register. This is to include registerable contracts (to be determined by the Welsh Ministers through regulations). The register is to contain prescribed information regarding registerable contracts unless there are legitimate reasons for not including them in the register as set out in the Act relating to: prejudice of commercial interests, competition, impeding law enforcement or contrary to public interest.

## Next steps

As a first step public authorities should establish whether the Act applies to them. If it does then public authorities should:

1. familiarise themselves with the obligations set out in the Act;
2. consider responding to any consultations that [Welsh government](#) carries out;
3. stay up to date with any guidance that Welsh government publishes;
4. attend any training events;
5. consider its procurement documents and processes to ensure it takes into account these obligations and implements them in practice.

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