



Llywodraeth Cymru
Welsh Government

Social Partnership and Public Procurement (Wales) Bill

Policy intent for regulations, directions and
guidance

June 2022

SOCIAL PARTNERSHIP AND PUBLIC PROCUREMENT (WALES) BILL

POLICY INTENT FOR SUBORDINATE LEGISLATION, DIRECTIONS AND GUIDANCE

This document provides an indication of the current policy intention for the subordinate legislation, directions and guidance that the Welsh Ministers are empowered or required to make under the provisions of the Social Partnership and Public Procurement (Wales) Bill ('the Bill'). It has been published in order to assist the responsible Committee during the scrutiny of the Bill and should be read in conjunction with the Explanatory Memorandum and Explanatory Notes.

The Bill provides for a framework to enhance the well-being of the people of Wales by improving public services through social partnership working, promoting fair work and social responsible public procurement.

In summary, the Bill makes provision for:

- the establishment of a Social Partnership Council ("SPC");
- a statutory duty on certain public bodies to seek consensus or compromise with their recognised trade unions (or where there is no recognised trade union other representatives of their staff, when setting their well-being objectives and delivering on those objectives under section 3(2) of the WFG Act 2015;
- a statutory duty on Welsh Ministers to consult social partners, employers and worker representatives through the Social Partnership Council when delivering on their well-being objectives under section 3(2)(b) of the WFG Act 2015 ;
- amendment of section 4 of the WFG Act 2015 by substituting 'fair work' for 'decent work' within the description of the existing "A prosperous Wales" goal (one of the Well-being goals that public bodies subject to the Act must seek to contribute to);
- a statutory duty on certain public bodies to consider socially responsible public procurement when carrying out procurement, to set objectives in relation to well-being goals, and to publish a procurement strategy
- certain public bodies to carry out contract management duties to ensure that socially-responsible outcomes are pursued through supply chains.
- reporting duties to be imposed on the public bodies and Welsh Ministers in relation to the Social Partnership Duty and Procurement duty.

Section	Description	Policy Intention
The Social Partnership Council		
7(4) 7(6)	The Welsh Ministers will publish a set of procedures for the SPC that sets out how the Council will function.	The SPC's procedures will specify the details of how the SPC will operate that are not set out in the Bill. A 6-month time limit beginning on the day after subsection 7(4) comes into force is placed on publishing these procedures so that it does not delay the SPC being operational.
9(2) 9(4)	Welsh Ministers will publish a set of procedures for the public procurement subgroup that sets out how the subgroup will function.	Similarly to that of the SPC, the public procurement subgroups procedures will establish the operational detail and how the subgroup will be established and governed. A 6-month time limit beginning when this subsection comes into force is placed on publishing these procedures so that it does not delay the public procurement subgroup being operational.
Social Partnership duty – Public Bodies		
16 (3)	The Welsh Ministers may issue guidance to public bodies listed in section 6 of the WFGA 2015	<p>In considering what is reasonable under section 16(1) of the Bill a public body must take into account guidance published by the Welsh Ministers.</p> <p>The Welsh Ministers will take account of information and advice received from the Social Partnership Council on the operation of the Social Partnership duty in determining whether guidance for public bodies is needed and the content of any such guidance. Guidance might deal with the representation of staff and workers where there is no recognised trade union; what constitutes “decisions of a strategic nature” in relation to the reasonable steps public bodies</p>

		<p>must take (in the exercise of their functions) to meet their well-being objectives under section 3(2)(b) of the WFGA 2015; the nature of the information which should be made available to facilitate the process of engagement with recognised trade unions or other staff representatives; or the time which should be allowed for consultation and engagement with recognised trade unions or other staff representatives.</p> <p>Guidance may also be required on how the duty to seek compromise and consensus in relation to these matters differs from a requirement simply to consult.</p>
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Social Responsible Public Procurement

22(4)	<p>The Welsh Ministers may modify, by regulations, the meaning of a “contracting authority”, a “contracting authority’s area”, and the list of contracting authorities included at Schedule 1.</p>	<p>The Socially Responsible Public Procurement Duties fall on bodies known as “contracting authorities” and these are defined as those listed in Schedule 1. These bodies were identified in light of matters including the extent and nature of their procurement activities. The list of bodies subject to the duty may need to change from time to time, including potentially where new bodies may be created, their name changed or the procurement activities of bodies changes.</p> <p>Over time other bodies may come in or out of scope based on these criteria, or Ministers may choose to change these criteria or the definition</p>
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		<p>of a “contracting authority’s area. This regulation-making power allows for change.</p>
<p>24(8)(c)</p>	<p>The Welsh Ministers may make regulations defining a “prescribed contract”.</p>	<p>Whilst the socially responsible public procurement duty applies to all of a contracting authority’s procurement activity, the publishing of objectives and particular actions in relation to contract management are required for a category of procurements described as “prescribed contracts”. These include major construction contracts (defined in section 25) outsourcing services contracts (defined in section 26) and any other public contract prescribed by Ministers.</p> <p>Particular contract management duties have been applied to major construction and outsourcing services contracts only at this time, but in future the Welsh Ministers may choose to include other categories in these contract management duties.</p> <p>The policy intention is that the definition of “any other public contract” is linked to the financial thresholds that are set by the World Trade Organisation (WTO) in its Agreement on Government Procurement (GPA) and updated every two years.</p> <p>This regulation-making power allows Ministers to define the categories of expenditure and financial thresholds that are required to define “prescribed contracts” in line with GPA thresholds initially, and when updated.</p>

		<p>Section 21(2) clarifies that public contracts awarded as a result of framework agreements (as defined in section 45(1)) are to be treated in the same way as other public contracts.</p>
25(3)	<p>Welsh Ministers may amend the definition of a “major construction contract” by regulations.</p>	<p>As described above, the category of “prescribed procurements” includes “major construction contracts”, which are described in 25(2) as public works, works or works concession contracts with estimated value above £2m inclusive of VAT. This regulation-making power allows Ministers to update the threshold or any other aspect of this definition.</p>
27(1) and (2)	<p>Welsh Ministers will publish model social public works clauses to be included in major construction contracts in order to bring about improvements listed in the table in 27(2). The table groups these improvements into categories.</p>	<p>This requires the publication of clauses to be included in all major construction contracts, and that a process is in place to ensure that they are implemented throughout supply chains.</p> <p>The intention is that these clauses will be published alongside statutory guidance issued under section 43 which will explain how they are to be applied.</p> <p>The categories to be covered by those clauses and the improvements to be achieved by those clauses as against each category are set out in the table in section 27(2).</p> <p>This section sets parameters for the subject matter that they will cover. The categories within which improvements are to be sought through</p>

		<p>the application of the drafted clauses are (in summary):</p> <ul style="list-style-type: none"> • Prompt payment • Making employment opportunities available • Ensuring compliance with employment law • Providing training for workers • Providing sub-contracting opportunities for SMEs and voluntary organisations • Environmental management and climate resilience.
30(4)	<p>This gives the Welsh Ministers a power of direction that may be used if a contracting authority does not provide adequate reasons for why it is not intending to include the social public works clauses in a major construction contract or put processes in place to ensure they are implemented.</p>	<p>This power allows the Welsh Ministers to direct a contracting authority to include the social public works clauses in a major construction contract and put processes in place to ensure they are implemented if the reasons provided for their non-inclusion are assessed as not being adequate.</p> <p>This allows, but does not require, Ministers to direct a contracting authority, because there may be situations where the reasons provided by the contracting authority for not including the clauses whilst not being considered adequate, may not dictate the issuing of directions for other practical reasons.</p>
32(1)	<p>This requires the Welsh ministers to publish a Public Services Outsourcing and Workforce Code, to which contracting authorities must have regard.</p>	<p>The policy intention is to replace the Workforce (two-tier) code of practice, and its associated guidance and procurement advice note,</p>

published in 2014. This Code is currently guidance to assist particular public bodies when they are transferring staff to a third party as part of an outsourcing contract.

The aims of both the existing Code, and the new Code are the same, and are set out in (section 33):

- ensuring that where public sector staff are transferred their terms and conditions of employment are protected;
- ensuring that where staff are subsequently recruited to work alongside the transferred workforce they are employed on terms and conditions that are no less favourable, and a reasonable pension provision is made; and
- requiring contracting authorities to monitor and report on the implementation of the Code.

However, under the Bill, contracting authorities will be required to have regard to the code in fulfilment of their socially responsible procurement duties under section 24(5)(c) and section 26(1)(a).

Following a review of the current Code, several matters require updating in the new Code to address recent developments and improve it in other ways.

The Code will include model contract clauses, the “social public workforce clauses” designed

		<p>to achieve the aims listed above, and described in sections 33 (a) to (c).</p> <p>The Code, and any subsequent revision of it, must be published and laid before the Senedd.</p>
36(4)	<p>This gives the Welsh Ministers a power of direction that may be used if a contracting authority does not provide adequate reasons for why it is not intending to include the social public workforce clauses in an outsourcing services contract, or put processes in place to ensure they are implemented.</p>	<p>This power allows the Welsh Ministers to direct a contracting authority to include the social public workforce clauses in an outsourcing services contract, and put processes in place to ensure they are implemented if the reasons provided for their non-inclusion are assessed as not being adequate.</p> <p>This allows, but does not require, Ministers to direct a contracting authority, because there may be situations where the reasons provided by the contracting authority for not including the clauses which not being considered adequate, may not dictate the issuing of directions for other practical reasons.</p>
38(3)	<p>The Welsh Ministers may make regulations that amend or add to the categories of content that must be included in a contracting authority's published procurement strategy.</p>	<p>Publishing a procurement strategy is one of the duties placed on contracting authorities designed to make commercial activities more transparent. The Bill does not specify in detail what must be included in a strategy, and only requires authorities to state how they comply with the socially responsible public procurement duty and take all reasonable steps to meet their socially responsible procurement objectives. They are also required to include their prompt payment procedure.</p>

		<p>Many contracting authorities already publish a procurement strategy and will be encouraged to continue including any other material that they see fit to include, which is likely to include matters other than socially responsible procurement.</p> <p>This regulation-making power allows Ministers to include other matters to be covered in procurement strategies, and to amend the 30 day payment requirement. The UK Procurement Reform Bill is expected to make provision for Welsh Ministers to reduce the 30 day requirement, which would require this regulation-making power to be exercised.</p>
39(2)(e)	The Welsh Ministers may make regulations that amend or add to the categories of content that must be included in a contracting authority’s published annual report.	<p>Publishing an annual report is one of the duties placed on contracting authorities that is designed to make their procurement activities more transparent. The Bill summarises the information that needs to be included in the report:</p> <ul style="list-style-type: none"> • a summary of “prescribed procurements” • the extent to which the socially responsible objectives were met • further steps that could be taken in future to better meet objectives • a summary of the procurement “pipeline” – procurements that are expected to be carried out in the next two years. <p>Since the information included in these reports is likely to be similar to procurement-related</p>

		<p>material in the annual reports that are already required of those bodies included in the WFG Act 2015 the policy intention is that this reporting is coordinated and streamlined to minimise the workload for the contracting authorities concerned.</p> <p>This regulation-making power allows Ministers to require additional information to be included in annual reports.</p>
40(2)	The Welsh Ministers will specify in regulations the meaning of a “registrable contract”.	<p>Contracting authorities will be required to publish and maintain a register of the contracts that they have entered into, including the date of award, name of contractor, subject matter, estimated value, start and expected end dates and any possible period of extension.</p> <p>This regulation will allow Ministers to specify, amongst other matters, the expected values and types of contracts that must be included in the register. This may, for example, also include contracts smaller than the “prescribed contracts” defined in the Bill and other regulations. The UK Procurement Reform Bill is likely to include many provisions aimed at increasing transparency, with associated financial thresholds. In order to minimise workload for contracting authorities the intention is that these requirements are streamlined.</p>
43(1) and (2)	This allows the Welsh Ministers to issue guidance on all matters relating to Part 3 of the Bill, on Socially	This will allow for guidance on every aspect of Part 3 of the Bill to be issued and not only those listed in the following subsection. It may,

	<p>Responsible Public Procurement and to help contracting authorities in:</p> <ul style="list-style-type: none"> • carrying out procurement in a socially responsible way; • setting objectives and taking all reasonable steps to meet them; • applying the social public works clauses, the social public workforce clauses and the public services outsourcing and workforce code; and • the preparation of procurement strategies and annual reports. 	<p>amongst other things, set out more detail on how a Procurement Investigation would work, for example on the evidence that might trigger an investigation and the process that would be followed.</p> <p>There will be detailed and clear guidance on what it means to carry out all procurement in a socially responsible way, seeking to improve the economic, environmental, social and cultural well-being of its area. Guidance will explain how this requirement should be scalable to procurements with different values and risk profiles. For the larger “prescribed contracts” advice will cover how to set appropriate objectives that are capable of being monitored or measured and reported.</p> <p>Guidance will include details of what needs to be considered in each category at the various stages of a procurement exercise. Stages include scoping of the requirement and procurement options, market testing, specification, preparing questions and tender documentation, preparing contract clauses, carrying out the contract, agreeing KPIs and contract and supply chain management.</p> <p>In each of the wellbeing categories various considerations will apply. For example:</p> <ul style="list-style-type: none"> • In the economic well-being category consideration will be needed as to whether the requirement should be packaged to encourage smaller and
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		<p>locally-based suppliers to bid for contracts or subcontracts, and methods for improving payment practices in supply chains</p> <ul style="list-style-type: none">• In the social well-being category opportunities for improving the well-being of workers and service users, addressing equalities and risks of poor employment practices will be considered.• In the environmental well-being category considerations relating to waste minimisation, decarbonisation, sustainable sourcing, climate resilience and enhancement of the natural environment and diversity will be included.• In the cultural well-being category it is intended that guidance relating to opportunities for promoting the Welsh language will be set out. <p>These lists are not exhaustive.</p> <p>It will necessary to link statutory guidance developed for this Bill to other guidance developed to support the UK Procurement Reform legislation, and much existing guidance that is already in use.</p> <p>Clear links will also be made between this statutory guidance and the Wales Procurement Policy Statement.</p>
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Guidance will be developed to support the contract management duties for major construction projects and the application of the social public works clauses. This will explain how the clauses are to be applied, giving examples of processes that can be put in place to ensure delivery. Examples would include how audits and due diligence processes might be used to ensure compliance with employment law for workers in supply chains, use of sustainable materials, compliant disposal of waste.

Guidance will set out practical details about sending a notification to Welsh Government if a contracting authority does not intend to include the clauses in a relevant procurement and put a process in place to ensure that they are implemented in supply chains. Further details of the notification process will be included and a mechanism developed for reporting the outcome.

Similarly, a public services outsourcing and workforce Code will be produced to update the existing Workforce (Two-tier) Code, setting out how the new model clauses should be applied and practical details about sending a notification needs to Welsh Government, as well as details of the notification process.

Guidance on the publication of procurement strategies will be developed, setting out what needs to be included and giving examples.

		<p>It is intended that guidance on the publication of annual reports will include details of data that must be collected and reported against each of the socially responsible procurement objectives set. Work has been underway on defining outcomes and metrics for procurement linked to well-being goals and this will feed into the statutory guidance.</p>
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