

# **SOCIAL PARTNERSHIP AND PUBLIC PROCUREMENT (WALES) ACT 2023**

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## **EXPLANATORY NOTES**

### **GENERAL OVERVIEW OF THE ACT**

#### **Part 3 – Socially Responsible Public Procurement**

##### *Chapter 1*

58. *Chapter 1* sets out definitions of a “public contract”, a “contracting authority” and “public procurement”. It also makes provision for the Welsh Ministers to make regulations to amend the meaning of a contracting authority.
59. Contracting authorities are listed in Schedule 1.
60. The Welsh Ministers are a contracting authority for the purposes of this Part in all but two circumstances where it would be impractical for them to be considered a contracting authority. Under sections 29 and 35 a contracting authority must notify the Welsh Ministers in relation to the inclusion of social public works clauses in major construction contracts and social public workforce clauses in outsourcing of contracts. In turn, under sections 30 and 36 the Welsh Ministers are required to review any notifications provided by contracting authorities and subsequently publish the outcome of the review into the notification. In addition, under section 41 the Welsh Ministers have a power to investigate how a contracting authority carries out public procurement.

##### *Chapter 2*

#### **Section 24 - Socially responsible procurement duty**

61. This section sets out an overarching duty on contracting authorities, requiring them to seek to improve the economic, social, environmental and cultural well-being of their areas by carrying out public procurement in a socially responsible way.
62. Subsection (2) provides that this means that they must take action, in accordance with the sustainable development principle, aimed at achieving the well-being goals in the 2015 Act.
63. Subsection (3) requires contracting authorities to set and publish objectives (“socially responsible procurement objectives”) in relation to their public procurement designed to maximise the authorities’ contributions towards the well-being goals.
64. This section also introduces a category of public procurement in respect of “prescribed contracts”. These fall into three categories, as follows. The first category is major construction contracts. These are defined in section 25. The second category is outsourcing services contracts. These are defined in section 26. The third category is any other public contract described in regulations by the Welsh Ministers. When carrying out public procurement in respect of prescribed contracts subsection (5) provides that

contracting authorities must take all reasonable steps to meet their socially responsible procurement objectives.

65. Two constraints are placed by subsection (6) upon this duty to “take all reasonable steps” to meet objectives. The first is that any provisions included in a contract in relation to these objectives must be proportionate with respect to the contract value. The second is that the provisions must not conflict with any other relevant procurement-related legislation.

### ***Section 25 - Socially responsible procurement duty: major construction contracts***

66. This section introduces particular actions that are required in respect of a “major construction contract”.
67. Major construction contracts are defined as public works contracts or works contracts or works concession contracts with an estimated total value over £2m (inclusive of VAT). This includes both framework agreements and contracts entered into as a result of a framework agreement where the estimated value exceeds £2m. Public works contracts, works contracts and works concession contracts are all defined in section 45(1).
68. The main action is a duty on contracting authorities to consider whether “social public works clauses” (as published by the Welsh Ministers under section 27) should be included in any major construction contract they propose to award, and to take reasonable steps to ensure they can be implemented. The clauses are designed to bring about improvements to economic, social, environmental and cultural well-being listed under categories as set out in section 27.
69. If a decision is taken to include the clauses, in the subsequent management of the contract the contracting authority must take all reasonable steps to ensure that the obligations in the clauses are implemented.

### ***Section 26 - Socially responsible procurement duty: outsourcing services contracts***

70. Outsourcing services contracts are defined in subsection (2) as either a contract under which a public service that has been, or is currently, provided by a contracting authority is transferred to another organisation, or under which another organisation agrees to undertake any other function undertaken by, or previously undertaken by, a contracting authority.
71. This section sets out the particular actions that must be taken in relation to an outsourcing services contract (these are similar to the actions required in respect of major construction contracts).
72. The contracting authority must consider including “social public workforce clauses” in any relevant outsourcing services contract it proposes to award. Section 33 makes provision in connection with social public workforce clauses.
73. If they are included, in the subsequent management of the contract the contracting authority must take all reasonable steps to ensure that the obligations in the clauses are implemented.

### ***Section 27 - Social public works clauses in major construction contracts***

74. This section requires the Welsh Ministers to publish model clauses for major construction contracts (“social public works clauses”) designed to bring about improvements to economic, social, environmental and cultural well-being listed under the categories set out in the Table in section 27. In summary, these improvements cover: prompt payment for suppliers; providing employment opportunities to younger and disadvantaged people; ensuring compliance with legislation in relation to employment rights; providing appropriate training for workers; providing opportunities to SMEs

when subcontracting; and certain environmental matters. The table can be amended in future through regulations.

75. “Including” social public works clauses in major construction contracts means including *all* of the model clauses, incorporating wording that will have the same or substantially the same effect as the published model contract clauses.

### ***Section 28 - Social public works clauses in subcontracts***

76. As well as taking all reasonable steps to ensure that the social public works clauses are implemented in contracts (see section 25) this section requires contracting authorities to take all reasonable steps to ensure that the obligations are implemented where a contractor enters into a subcontract.
77. This section also gives some examples of what is meant by “reasonable steps”. In summary these are: ensuring that clauses with the same or substantially the same effect are included in subcontracts, and throughout subsequent contracts in the supply chain; ensuring that obligations within the clauses can be enforced; requiring contractors to obtain the consent of the contracting authority before appointing sub-contractors so that the authority can ensure that the clauses are included; requiring the contractor to inform the authority if it is not including the clauses in subcontracts; and requiring contractors to monitor the implementation of the clauses.

### ***Section 29 - Social public works clauses: notifying the Welsh Ministers***

78. There may be valid reasons why a contracting authority does not intend to include social public works clauses in major construction contracts. This section requires a contracting authority to notify the Welsh Ministers if, in relation to a major construction contract—
- a. it does not intend to include the social public works clauses, or
  - b. despite taking reasonable steps to include them, they are not contained in a contract.
79. A contracting authority must also inform the Welsh Ministers if it has failed to pass the required obligation through supply chains via subcontracts, or has not put a process in place to manage their implementation.
80. A notification must be made as soon as possible giving the authority’s reasons.

### ***Sections 30 and 31 - Social public works clauses: Welsh Ministers’ response and contracts***

81. Where the Welsh Ministers receive a notification from a contracting authority under section 29 this section sets out the steps required of the Ministers.
82. Where the Welsh Ministers receive a notification, they are required under subsection (1) to publish a summary of it and they must consider whether they are satisfied with the reasons given in the notification. In doing so, they may under subsection (3) consult the authority and may, by notice, require documents or other information from a contracting authority (both of which they must do as soon as reasonably practicable (see subsection (7)), in the event of which that documentation or information must also be provided as soon as reasonably practicable. The Welsh Ministers may also consult with the public procurement subgroup.
83. In the event of being satisfied with the authority’s reasons set out in the notification, the Welsh Ministers must publish a summary of their reasons for being satisfied. In the event of not being satisfied they may direct the contracting authority to take all reasonable steps to include social public works clauses in the major construction contract or in sub-contracts, and to put processes in place to ensure they are implemented. must publish any directions.

84. Subsection (6) provides that where they are not satisfied but do not issue directions, the Welsh Ministers must inform that SPC and must publish their reasons for not being satisfied and not issuing a direction.
85. Subsection (9) provides that the Welsh Ministers are not required to publish any information which would be exempt from disclosure under the Freedom of Information Act 2000.
86. **Section 31** makes provision for contracts let by the Welsh Ministers. They must publish a statement as soon as reasonably practicable if they do not intend to include social public works clauses in a major construction contract, including their taking reasonable steps to include them, they are not contained in a contract, or there is no process in place to manage their implementation, giving reasons.

### ***Section 32 - Public services outsourcing and workforce code***

87. This section requires the Welsh Ministers to publish a code of practice (the “public services outsourcing and workforce code”) about employment and pensions matters related to outsourcing services contracts. This is for the purpose of improving the quality of public services or other functions outsourced by contracting authorities. The “social public workforce clauses” (see section 33) are included as part of this Code.
88. Any subsequent revision to this Code must also be published by the Welsh Ministers and laid before the Senedd. The Welsh Ministers must consult with relevant stakeholders in developing or subsequently revising the public service outsourcing and workforce code.

### ***Sections 33 and 34 - Social public workforce clauses in outsourcing services contracts and in subcontracts***

89. The public services outsourcing and workforce code published under section 32 must include model contract clauses (“social public workforce clauses”), designed to ensure that members of staff employed to deliver a service can, if they wish, be transferred to the new employer that will be contracted to deliver the service. These clauses will also ensure that their terms and conditions of employment and pensions arrangements are protected.
90. The clauses are also designed to ensure that in the event of the new employer recruiting further members of staff to deliver the same service, the new members of staff are employed with terms and conditions that are no less favourable, and with pensions arrangements that are reasonable.
91. **Section 34** applies where a contracting authority intends to include social public workforce clauses into a outsourcing services subcontract. Section 34(2) requires contracting authorities to take all reasonable steps to ensure that the obligations in the social public workforce clauses are implemented into any subcontract which the contractor enters into with any other economic operator. Subsection (3) sets out examples of reasonable steps which may be taken. They include ensuring that clauses with the same or substantially the same effect are included in subcontracts, and throughout subsequent contracts in the supply chain; ensuring that they can be enforced; requiring contractors to obtain the consent of the contracting authority before appointing sub-contractors so that the authority can ensure that the clauses are included; requiring the contractor to inform the authority if it is not including the clauses in subcontracts; and requiring contractors to monitor the implementation of the clauses.

### ***Section 35 - Social public workforce clauses: notifying the Welsh Ministers***

92. **Section 35(1)** requires the contracting authority to notify the Welsh Ministers if it has not included, or does not intend to include, social public workforce clauses in the contract, including where the authority has taken reasonable steps to include them, or

there is no process in place for ensuring that obligations in social public workforce clauses are implemented whether in a contract or subcontract.

93. Under subsection (2), the contracting authority's notification and reasons for not including social public workforce clauses in the contract must be provided as soon as possible.

***Sections 36 and 37 - Social public workforce clauses: Welsh Ministers' response and contracts***

94. Where the Welsh Ministers receive a notification, they are required under subsection (1) to publish a summary of it and they must consider whether they are satisfied with the reasons given in the notification. In doing so, they may under subsection (2) consult the authority and may, by notice, require documents or other information from a contracting authority (both of which they must do as soon as reasonably practicable (see subsection (7)), in the event of which that documentation or information must also be provided as soon as reasonably practicable. The Welsh Ministers may also consult with the public procurement subgroup.
95. In the event of being satisfied with the authority's reasons set out in the notification, the Welsh Ministers must publish a summary of their reasons for being satisfied. In the event of not being satisfied they may direct the contracting authority to take all reasonable steps to include social public workforce clauses in the outsourcing services contract or in sub-contracts, and to put processes in place to ensure they are implemented. They must publish any directions.
96. Subsection (6) provides that where they are not satisfied but do not issue directions, the Welsh Ministers must inform that SPC and must publish their reasons for not being satisfied and not issuing a direction.
97. Subsection (9) provides that the Welsh Ministers are not required to publish any information which would be exempt from disclosure under the Freedom of Information Act 2000.
98. [Section 37](#) makes provision for contracts let by the Welsh Ministers. They must publish a statement as soon as reasonably practicable if they do not intend to include social public workforce clauses in an outsourcing contract, including their taking reasonable steps to include them, they are not contained in a contract, or there is no process in place to manage their implementation, giving reasons.
99. For contracts let by the Welsh Ministers, a statement must be published as soon as reasonably practicable by the Welsh Ministers if they do not intend to include social public workforce clauses in an outsourcing services contract, despite their taking reasonable steps to include them, they are not contained in a contract, or there is no process in place to manage their implementation, giving reasons.

***Section 38 - Procurement strategy***

100. This section requires contracting authorities to prepare and publish a "procurement strategy" setting out how the authority intends to carry out public procurement in a socially responsible way, how it intends to take reasonable steps to meet the objectives that it has set (see section 24) and how it intends to make payments promptly. Other matters to be included in procurement strategies may be set out in regulations made from time to time by the Welsh Ministers.
101. Under subsection (4), these strategies must be reviewed each year and any subsequent revisions must be published. Joint strategies may be published by two or more authorities.

### ***Chapter 3 – Reporting and Accountability***

#### ***Section 39 – Annual socially responsible procurement reports***

102. **Section 39(1)** sets out a requirement on contracting authorities to publish an annual socially responsible procurement report as soon as possible at the end of each financial year.
103. Subsection (2) provides that these reports must include a summary of the prescribed procurements that led to the award of any contract within that financial year, a review of the steps that the authority has taken to meet its objectives, what (if any) further steps could be taken in future procurements to meet those objectives and a summary of procurement that is planned for the following two years, along with any other information as may be specified in regulations made by the Welsh Ministers.
104. Subsection (2)(e) requires the Welsh Ministers to set out in regulations information that contracting authorities should include in their annual reports, subsection (3) specifies that must include information on the extent to which their public procurement activities are meeting their socially responsible procurement objectives by, for example contributing to the local economy, taking environmental and other social considerations – such as promoting and facilitating use of the Welsh language – into account.

#### ***Section 40 – Contracts register***

105. **Section 40(1)** requires each contracting authority to maintain and publish a contracts register. Subsection (2) provides that a register contains information on ‘registrable contracts’ which are of a description prescribed by the Welsh Ministers in regulations. Subsection (3) sets out the information required to be captured in respect of each registrable contract: its name, date of award, estimated value, the address of the contractor’s principal place of business, subject matter, start date, end date and any period for which it may be extended, as well as any other information which may be set out within regulations made by the Welsh Ministers.
106. Subsection (4) provides that contracting authorities are not required to register any information which they consider would impede law enforcement or not be in the public interest, would prejudice the commercial interests of a person or competition between economic operators. Under subsection (5), the information about any contract may only be deleted from the contract after the contract has either been terminated or expired.

#### ***Section 41 - Procurement investigations***

107. This section provides the Welsh Ministers with powers of investigation into how a contracting authority carries out public procurement. This could be in relation to a particular procurement or procurement activities more generally.
108. Under subsection (4) contracting authorities may be required by the Welsh Ministers to provide documents or other information for the purposes of an investigation. Subsection (5) provides that at the end of any investigation, the Welsh Ministers may make recommendations to the contracting authority, publish a report and/or lay a copy of any report before the Senedd.

#### ***Section 42 - Welsh Ministers’ annual report on public procurement***

109. **Section 42** requires the Welsh Ministers to publish, as soon as reasonably practicable after the end of a financial year, a report about public procurement in Wales. Subsection (2) provides that the report must summarise any investigations carried out under section 41 and information drawn from contracting authorities’ annual reports. Subsection (3) requires the Welsh Ministers to publish these reports and lay them before the Senedd.

110. **Part 4** contains provisions on subordinate legislation procedures; provides powers for the Welsh Ministers to make transitional, consequential etc. provisions; and makes provision in respect of commencement, interpretation, coming into force etc.

#### ***Section 43 – Guidance***

111. This section sets out details of the guidance that the Welsh Ministers may issue about Part 3 of the Act and to which contracting authorities must have regard when undertaking socially responsible procurement. Subsection (4) requires the Welsh Ministers to consult with the SPC and other stakeholders that they consider appropriate before issuing any guidance under this section.

#### ***Section 44 - Regulations***

112. This section makes provision about how regulations under Part 3 of the Act are to be made. This includes provision about the procedures of the Senedd that apply in relation to the regulations, and the ancillary provision (that is, supplemental, incidental, consequential, transitional, transitory or saving provision) that may be made in these regulations.

#### ***Section 45 - Interpretation of Part 3***

113. This section defines specific terms used in Part 3 of the Act and is self-explanatory.

#### ***Section 46 - General interpretation***

114. This section defines specific terms used in this Act and is self-explanatory.

#### ***Section 47 - Minor amendment of the WFGA 2015***

115. This section makes a minor amendment to section 9 of the WFGA 2015.

#### ***Section 48 - Coming into force***

116. Subsection (1) brings section 48 of the Act into force the day after the day of Royal Assent.
117. All other provisions of the Act come into force by order made by the Welsh Ministers (subsection (1)). Subsection (2) allows orders that bring provisions into force to appoint different days for different purposes and subsection (3) enables orders to make transitory, transitional and saving provision in connection with bringing provisions into force.

#### ***Section 49 - Short title***

118. This section provides that the short title of the Act is the Social Partnership and Public Procurement (Wales) Act 2023.