

Public Services Outsourcing and Workforce Code

1. Introduction

- 1.1 The purpose of the Workforce Code is to maintain or improve the quality of public services or other functions outsourced by contracting authorities in Wales. The Workforce Code covers employment and pension matters related to the outsourcing of services contracts in Wales. The Workforce Code comes into force on **[date]**. From that date the Workforce Code replaces the Code of Practice on Workforce matters 2014 and any other previously published workforce codes (the '**Previous Code**') except:
- a) Where the public service or function was originally outsourced under a Previous Code; or
 - b) Where instructions to tender for a public service or function on a first generation outsourcing have already been issued.
- 1.2 Contracting Authorities will continue to need to interpret relevant legislation and seek legal advice as required. Contracting Authorities will need to determine, in light of their own legal advice, whether the principles of the Workforce Code should be followed and whether the Social Public Workforce Clauses should be included in any Outsourcing Services Contract.

2. Scope

- 2.1 The principles outlined in this Workforce Code apply to the following circumstances, unless there are genuinely exceptional reasons they should not apply:
- a) Where a Contracting Authority outsources public services or functions to a private sector entity or to a voluntary sector organisation (i.e. **contracting out**);
 - b) In relation to Second Generation Outsourcing, and any subsequent outsourcing, which results in a Subsequent Contractor undertaking the public service or function (where when the public service or function was first outsourced, staff transferred from Contracting Authority) (i.e. **a retender**);
 - c) Where a public service or function that has been outsourced under an Outsourcing Services Contract on or after the date this Workforce Code takes effect, is brought back into a Contracting Authority (where when the contract when it was first awarded involved the transfer of staff from a Contracting Authority) (i.e. **insourcing**).
- 2.2 Genuinely exceptional reasons where the principles of the Workforce Code should not apply and where staff will not transfer could include but are not limited to circumstances:
- a) where a contract is for the provision of goods only or goods and services, but the provision of services is ancillary in purpose to the provision of the goods; or
 - b) where the contracting authority is buying in one-off services of short duration.

- 2.4 Contracting Authorities should at the earliest possible stage in the outsourcing exercise determine whether the principles of the Workforce Code apply, and whether the Social Public Workforce Clauses should be included in the Outsourcing Services Contract. In so doing, relevant Contracting Authorities are referred to their Social Partnership duty¹ and in general, for any Contracting Authority not covered by that specific duty, consultation with recognised Trade Unions when proposals are at a formative stage is considered best practice.

3. Principles

- 3.1 This Workforce Code sets out the principles that Contracting Authorities must have regard to when they are considering outsourcing² public services or functions in Wales.

The Transfer of Staff

4. ***The principles of the Transfer of Undertakings (Protection of Employment) Regulations 2008 will apply when public services or functions are outsourced.***

- 4.1 It is a principle of the Workforce Code that staff should not be disadvantaged as a result of the transfer of their employment in association with the outsourcing of public services or functions.
- 4.2 TUPE protects the employment terms and conditions of staff when their employment is transferred from one employer to another and on an ongoing basis. TUPE also imposes obligations to inform and (in certain circumstances) consult with Transferring Staff and any recognised Trade Union³ regarding the transfer of employment, its implications and any actions, changes, or steps that the new employer envisages or plans to take in relation to the Transferring Staff. Contracting Authorities (and Contractors in a retendering process) will also be under an obligation to provide specific information about the Transferring Staff.
- 4.3 TUPE will ordinarily apply in relation to the transfer of staff in any of circumstances outlined in section 2.
- 4.4 Where TUPE does not apply in strict legal terms to one of the circumstances outlined in section 2 (for example where there is no change of employer or where Transferring Staff are not considered to be an “organised grouping” to which TUPE would apply) the principles of TUPE will nevertheless apply to ensure staff are not disadvantaged unless there are genuinely exceptional reasons they should not.
- 4.5 Contracting Authorities should at the earliest possible stage in the outsourcing exercise state that staff are to transfer and that TUPE, or the principles of TUPE under the Workforce Code, should apply.

Retendering

¹ Section 16 Social Partnership and Public Procurement (Wales) Act 2023

² The term outsource is used, however the scope of the circumstances where the Workforce Code applies can include second generation outsourcing and insourcing.

³ Where no Trade Union is recognised consultation should be with employee representatives.

- 4.6 If a Contracting Authority retenders an Outsourcing Services Contract, unless there are genuinely exceptional reasons not to do so, staff working on the Outsourcing Services Contract being retendered should transfer and TUPE, or the principles of TUPE, should apply.

Insourcing

- 4.7 If a Contracting Authority determines that a public service or function that has been outsourced should be brought back into the Contracting Authority, unless there are genuinely exceptional reasons not to do so, staff working on the Outsourcing Services Contract should transfer and TUPE, or the principles of TUPE, should apply.

Pensions

5. *Staff whose employment transfers as a result of a Contracting Authority outsourcing public services or functions will have their pension provision protected.*

- 5.1 It is a principle of the Workforce Code that staff will have their pension provision protected (as outlined in 5.2 below) in the event that their employment transfers in one of the circumstances outlined in Section 2.1 above.

- 5.2 TUPE does not protect staff access to their current pension arrangements. Certain other provisions however will obligate Contracting Authorities to ensure staff have their pension provision protected. These are:

- (a) [Fair Deal 2013](#) which requires that all staff who are members of a public-sector pension scheme who are compulsorily transferred out of the public sector, and who remain continuously employed on the delivery of the outsourced service or function, **remain eligible to be members of their public-sector pension scheme**. Transferred staff should also continue to be eligible to be members of the public-sector pension scheme following any Second-Generation Outsourcing. Fair Deal 2013 does not apply to local authority transfers.

- (b) [The Welsh Authorities Staff Transfers \(Pensions\) Direction 2022](#) which applies to local authorities, community councils, fire and rescue authorities and National Park authorities in Wales and provides for Transferring Staff to be given pension protection which provides for pension benefits that are **the same as or broadly comparable to or better** than those the transferring staff had with the relevant Contracting Authority. The relevant Contracting Authority must also ensure the contract on any Second-Generation Outsourcing provide pension protection as outlined in respect of any employees of who were formerly employees of the relevant Contracting Authority.

- 5.3 Contracting Authorities should ensure that the Transferring Staff have their pension provision protected as required by Fair Deal and the Pension Direction in relation to any of the circumstances outlined in section 2.1 above.

- 5.4 Where TUPE does not apply in strict legal terms the principles of Fair Deal and the Pensions Direction will nevertheless apply to ensure staff are not disadvantaged.

Other Staff

6. ***The terms and conditions of Other Staff will be no less favourable overall than those of transferring staff and the pension arrangements offered to Other Staff will be reasonable.***

Terms and conditions

- 6.1 It is a principle of the Workforce Code that where existing staff or new joiners work alongside Transferred Staff involved in providing the services or undertaking the functions that have been outsourced, they will be employed on terms and conditions which are no less favourable than those of Transferred Staff.
- 6.2 In order for the terms and conditions of Other Staff to be considered no less favourable overall, the terms and conditions offered to Other Staff must be fair and reasonable and the package of terms and conditions when considered as a whole should be no less favourable.
- 6.3 This may mean that the terms and conditions of Transferring Staff and Other Staff do differ in some ways. This principle does not require the terms and conditions of Transferring Staff and Other Staff to be identical, but it is unlikely that they will be able to be substantially different. The aim is to provide some flexibility to Contractors and Subsequent Contractors in the design of the delivery of the services or functions.

For example, the hours of work or shift arrangements for Transferring Staff and Other Staff may differ, but if this arrangement is less favourable to Other Staff they may be given additional flexibility or be offered time in lieu to ensure the package of terms as a whole is not less favourable.

- 6.4 The aim of this principle is to ensure that a scenario does not arise where Transferring Staff and Other Staff working on an Outsourcing Services Contract are employed on significantly different terms and conditions, and the terms and conditions of Other Staff are on the whole less favourable.
- 6.5 The package of terms and conditions to be offered to Other Staff should be evaluated as a whole and any recognised Trade Union should be consulted on the proposed package.

Pension

- 6.6 It is also a principle of the Workforce Code that Other Staff will be offered pension arrangements that are reasonable. For pension arrangements to be reasonable one of the following options should be offered to Other Staff:
- (a) Where the Contractor or Subsequent Contractor has admitted body status membership of the Local Government Pension Scheme;
 - (b) Where the Contractor or Subsequent Contractor has a participation agreement with a relevant public services pension scheme as mentioned in Fair Deal;

- (c) Membership of a pension scheme which meets the requirements of the Pension Act 2008 (regardless of whether the Pension Act 2008 requires the Other Staff member to be offered membership).

Subcontracts

7. *The Contracting Authority should take reasonable steps to ensure that the Social Public Workforce Clauses are included in any subcontract entered into between a Contractor and a Subcontractor for the provision of the services (or part of the services) or the undertaking of the functions (or part of the functions) transferred under the Outsourcing Services Contract.*

7.1 It is a principle of this Workforce Code that the Social Public Workforce Clauses should also apply in relation to any subcontract entered into for the provision of the services or the functions (or a part of them). The aim of this principle is to prevent any Contractor or Subsequent Contractor from circumventing the principles of this Workforce Code through a subcontracting arrangement.

7.2 The reasonable steps the Contracting Authorities must undertake include:

- (a) Ensuring that the Social Public Workforce Clauses⁴ are included in any subcontract entered into with a Subcontractor;
- (b) Ensuring that it can enforce the obligations under the Social Public Workforce Clauses included in any subcontract;
- (c) Requiring Contractors and Subcontractors to obtain the Contracting Authority's consent before entering into a subcontract.
- (d) Any consent given by the Contracting Authority to the Contractor, Subsequent Contractor or Subcontractor to subcontract is conditional upon the Social Public Workforce Clauses (or clauses having the same or substantially the same effect) being included in any subcontract.
- (e) Requiring the Contractor (or Subsequent Contractor) to monitor the implementation of the obligations under the Social Public Workforce Clauses (or clauses having the same or substantially the same effect) in relation to any subcontract.
- (f) Requiring any Contractor, Subsequent Contractor or Subcontractor to inform the Contracting Authority if it intends to enter into a subcontract that does not include the Social Public Workforce Clauses (or clauses having the same or substantially the same effect).

Monitoring implementation

8. *The Contracting Authority should ensure that there is a process in place to ensure that the obligations in the Social Public Workforce Clauses are implemented by the Contractor or any Subsequent Contractor or Subcontractor.*

8.1 It is a principle of the Workforce Code that the Contracting Authority takes steps to ensure that the obligations of this Workforce Code and the Social Public

⁴ or clauses having the same or substantially the same effect as provided for under section 34 of the Act.

Workforce Clauses are being complied with by any Contractor or Subcontractor.

8.2 The Contracting Authority should require any Contractor or Subcontractor to provide, in an anonymised form, on an annual basis information in relation to:

- (a) The terms and conditions of Transferring Staff;
- (b) The terms and conditions of Other Staff;
- (c) Details of the pension arrangements of Transferring Staff; and
- (d) Details of the pension arrangements for Other Staff.

9. Social Public Workforce Clauses

9.1 A Contracting Authority should include in any Outsourcing Services Contract the Social Public Workforce Clauses set out in Appendix 1 to this Workforce Code.

9.2 Inclusion of the Social Public Workforce Clauses in any Outsourcing Services Contract does not preclude the Contracting Authority and the Contractor or Subcontractor from agreeing additional provisions in relation to TUPE, Pensions or any other relevant matter as applicable to be included in any Outsourcing Services Contract.

10. Trade Union consultation & recognition

10.1 Where staff will transfer as a result of an Outsourcing Services Contract, Contracting Authorities should follow the requirements of TUPE and inform (and where necessary consult) with recognised Trade Unions in advance of a transfer of staff under an Outsourcing Services Contract.

10.2 An independent trade union that was recognised by the Contracting Authority in respect of the Transferring Staff should be recognised by the Contractor and any Subsequent Contractor to the same extent under the principles of TUPE⁵.

10.3 Any package of terms and conditions that are to be offered to Other Staff should be subject to consultation with any recognised Trade Union.

11. Insourcing

11.1 In relation to any re-tendering exercise, Contracting Authorities should explore the potential to insource the public service or function. [A toolkit for insourcing in Wales | GOV.WALES](#)

11.2 Contracting Authorities should be aware that the terms and conditions of any staff who have been insourced may be less favourable than those of the Contracting Authority's existing workforce. Advice should therefore be taken in respect of any potential risk under the equal pay or discrimination provisions of the Equality Act 2010 resulting from any such differential.

⁵ Regulation 6(2) Transfer of Undertakings (Protection of Employment) Regulations 2006

12. Revision of the Workforce Code

- 12.1 The Welsh Ministers may revise the Workforce Code and will publish any revision.

DRAFT

Appendix 1

Social Public Workforce Clauses

The following are the Social Public Workforce Clauses to be included in Outsourcing Services Contracts:

Schedule []

Social Public Workforce Clauses

1. Definitions

1.1 In this Schedule the following definitions apply:

Admission Agreement	Means the meaning given to it under Schedule 1 of the Local Government Pension Scheme Regulations 2013.
Contracting authority	Means an authority listed in Schedule 1 of the Social Partnership and Public Procurement (Wales) Act 2003.
Contractor	Means the person to whom the requirement to provide a public service provided by, or previously provided by a contracting authority is transferred under the outsourcing services contract.
Fair Deal	Means the A Fair Deal for Staff Pensions: staff transfer from central government (October 2013).
Legacy Scheme	Means the pension scheme of which Transferring Staff are members or are eligible for membership of prior to the Transfer.
LGPS	Means the Local Government Pension Scheme.
Other Staff	Means other members of staff of the Contractor or Subsequent Contractor who are involved in providing the services or undertaking the functions that have been outsourced. This can include existing staff allocated to the outsourced services or function and new joiners who are employed.
Outsourcing services contract	Means a contract under which:

	<p>(a) a requirement to provide a public service provided by, or previously provided by, a contracting authority is transferred to another person, or</p> <p>(b) another person agrees to undertake any other function undertaken by, or previously undertaken by, a contracting authority;</p> <p>and “outsourced” is to be construed accordingly.</p>
Participation Agreement	Means an agreement which is required under the provisions governing any Legacy Scheme to supervise the administration of all or part of such a scheme.
Pension Direction	Means the Welsh Authorities Staff Transfers (Pensions) Direction 2022
Pension Provisions	Means Fair Deal and the Pension Direction.
Second Generation Outsourcing	Means where the public service or function ceases to be carried out by a Contractor on the contracting authority’s behalf and is carried out instead by a Subsequent Contractor.
Subsequent contractor	Means the person to whom the requirement to provide a public service provided by, or previously provided by a contracting authority is transferred when the function ceases to be carried out by the Contractor.
Transfer	Means the outsourcing of public services or functions or any Second Generation Outsourcing under this contract.
Transferred/Transferring Staff	Means staff whose employment transfers as a result of a contracting authority outsourcing public services or functions or any Second Generation Outsourcing.
Social workforce clauses	Means the clauses included in Appendix 1 of this Workforce Code.
Subcontractor	An economic operator with whom either a Contractor, a Subsequent

	contractor or a Subcontractor enters into a subcontract for the provision of the services (or part of the services) or undertaking of the functions (or part of the functions) transferred under the outsourcing services contract.
TUPE	Means the Transfer of Undertakings (Protection of Employment) Regulations 2006

2. Compliance with the Workforce Code

- 2.1 The parties shall have regard to the Workforce Code and apply the principles of the Workforce Code.

3. Transferring Staff

- 3.1 The parties agree that TUPE should apply, or where TUPE does not apply the principles of TUPE should apply in accordance with the Workforce Code.
- 3.2 The parties agree that the contracts of employment of any Transferring Staff, which would otherwise be terminated by the transfer of services or functions under this contract, shall have effect after the transfer as if originally made between the Transferring Staff and the Contractor (or any Subcontractor) whether under TUPE or the principles of the Workforce Code.
- 3.3 The Contractor shall (and shall procure that any Subcontractor shall) ensure that:
- (a) the appropriate legal mechanism to give effect to the transfer of employment of any Transferring Staff, where this does not happen automatically, is implemented;
 - (b) continuity of service of any Transferring Staff is recognised;
 - (c) the terms and conditions of Transferring Staff enjoyed immediately prior to the Transfer are maintained post-Transfer.
 - (d) Transferring Staff have their pension provision protected and subject to the relevant Pension Provisions either:
 - (i) Retain their membership of the LGPS where the Contractor has entered, or will enter into, an Admission Agreement;
 - (ii) Retain their membership of a relevant Legacy Scheme where the Contractor has entered, or will enter into, a Participation Agreement; or
 - (iii) Are offered membership, or eligibility for membership, of a pension scheme on terms which are the same as or broadly

comparable to or better than the pension arrangements they enjoyed before the Transfer.

- 3.4 Nothing in this clause 3 will prevent Transferring Staff from objecting to the transfer of their employment.

4. Other Staff

- 4.1 The Contractor will (and procure that any Subcontractor will) ensure that Other Staff shall be employed on terms and conditions of employment that are no less favourable than those of Transferring Staff.

- 4.2 The Contractor will (and procure that any Subcontractor will) ensure that the pension arrangements of Other Staff provide for either:

- (a) Membership of the LGPS where the Contractor has entered into an Admission Agreement; or
- (b) Membership under the relevant Legacy Scheme other than LGPS where the Contractor has entered into a Participation Agreement; or
- (c) Membership of a pension scheme which meets the auto-enrolment standards under the Pensions Act 2008 (whether or not the Contractor is required to offer membership).

- 4.3 The Contractor shall (and procure that any Subcontractor will) consult with any recognised Trade Union in relation to the terms and conditions to be offered to Other Staff.

5. Subcontracting

- 5.1 The consent of the Contracting Authority is required before any subcontract for the provision of the services (or part of the services) or undertaking of the functions (or part of the functions) transferred under this contract can be entered into. Any consent to subcontract given by the Contracting Authority should be conditional upon the Social Public Workforce Clauses (or clauses having the same or substantially the same effect) being included in any subcontract.

- 5.2 The Contractor must inform the Contracting Authority if it intends to enter into a subcontract that does not include the Social Public Workforce Clauses (or clauses having the same or substantially the same effect).

- 5.3 The Contractor will ensure that the obligations under the Social Public Workforce Clauses included in any subcontract are capable of being enforced against any Subcontractor directly by the Contracting Authority.

- 5.4 The Contractor will ensure that the obligations under the Social Public Workforce Clauses are being met by any Subcontractor and will ensure there are adequate mechanisms in place to monitor the compliance of any Subcontractor.

6. Monitoring

6.1 The Contractor will (and procure that any Subcontractor will) in accordance with its obligations under the Workforce Code provide **[on an annual basis on the anniversary of the Contract/within 10 days of a request by the Contracting Authority]** accurate and complete information as requested by the Contracting Authority in an anonymised form in relation to:

- (a) The terms and conditions of Transferring Staff;
- (b) The terms and conditions of Other Staff;
- (c) Details of the pension arrangements of Transferring Staff; and
- (d) Details of the pension arrangements for Other Staff.