



Statutory Guidance: Works and Workforce Clauses - Notifications



Introduction

1. The purpose of the duties about works and workforce clauses in the Social Partnership and Public Procurement Act (the Act), which apply to major construction¹ and outsourcing services contracts² respectively, is to strengthen the link between well-being requirements included in contracts and due diligence in contract and supply chain management.
2. Sections 24(5)(b) and (c), 25(1) and 26(1) require contracting authorities to have regard to social public works clauses and social public workforce clauses, and to consider including these clauses within relevant contracts. Welsh Ministers are placed under a duty to publish model clauses (section 27(1) and 32).
3. Sections 25, 26, 27, 28 and 34 define a “major construction contract” and an “outsourcing serviced contract”, the particular actions required by Contracting Authorities in relation to these contracts, the categories of clauses to be used in major construction contracts, and the requirement for works and workforce clauses to be applied through subcontracts and supply chains.

Including social public works clauses in major construction contracts

4. The focus of the duty for major construction contracts³ is on the construction sector, where risks of poor compliance with well-being obligations can be hard to address throughout long and complex supply chains. The implementation of the social public works clauses will give greater assurance of agreed standards, including for workers and the environment. It will also give bidders more confidence that they, and their competitors, will be held to contractual obligations
5. The [social public works clauses](#) can be found here. Contracting Authorities must:
 - i. have regard to the clauses and consider whether to include them (Sections 25(1) and 26(1) parts (a) and (b));
 - ii. take all reasonable steps to include the clauses and ensure that they can be implemented (Sections 25(1) and 26(1) part (c)); and
 - iii. in managing the contract take all reasonable steps to ensure that the clauses are implemented (Sections 25(1) and 26(1) part (d)).

¹ Section 25(2) for definition

² Section 26(2) for definition

³ Section 25(2)(b) as amended (see annex A)



6. [Further information on the works clauses](#), with links to other sources of information, to help with implementation can be found here.

The Public Services Outsourcing and Workforce Code and the social public workforce clauses

7. The purpose of the Public Services Outsourcing and Workforce Code (the Code) (Section 32) and the social public workforce clauses is to maintain or improve the quality of public services or other functions outsourced by Contracting Authorities in Wales. The Code covers employment and pensions matters related to the outsourcing of services contracts in Wales. Section 33 of the Act requires that the Code includes model contract clauses which are:
 - a) designed to ensure that staff have the option of transferring to a new employer when a contracting authority outsources a service or function;
 - (b) designed to protect the terms and conditions and pensions arrangements of transferring staff;
 - (c) designed to ensure that other members of staff employed to deliver the transferred service or function, are engaged on terms no less favourable with reasonable pensions arrangements.
8. The [social public workforce clauses](#) can be found here along with the [Public Services Outsourcing and Workforce Code](#) which Welsh Ministers must publish under section 32. Contracting Authorities must:
 - i. have regard to the Code (Section 26(1)(a)) and consider whether to include the workforce clauses (Section 26(1)(b));
 - ii. take all reasonable steps to include the clauses and ensure that they can be implemented (Section 26(1)(c)); and
 - iii. in managing the contract, take all reasonable steps to ensure that the clauses are implemented (Section 26(1)(d)).

The notifications process

9. The clauses have been designed so that they can be applied to all relevant procurements. These are major construction contracts and outsourcing services contracts respectively. The expectation is therefore that all clauses will be included and applied throughout the contract period and through supply chains.



10. However, there may be occasions when contracting authorities, after considering the clauses, decide that they are not able to include and apply some or all of the clauses in a relevant procurement.

11. In this situation, Sections 29 and 35 place a duty on Contracting Authorities to notify the Welsh Ministers. They must do so if the Contracting Authority:

- does not intend to include any or all the clauses in the contract;
- has not included any or all the clauses;
- has no process in place for ensuring the obligations in the clauses are implemented (including, when applicable, if the contract is subcontracted)

The notification should include reasons for a decision not to include.

12. As soon as the Contracting Authority has decided not to include any or all of the clauses in a relevant contract, it must notify Welsh Ministers. Ideally this should be in advance of contract advertisement, leaving sufficient time for the reasons to be assessed and a response to be received. It is suggested that at least one calendar month should allow enough time for the reasons to be considered by Welsh Ministers.

13. If this (non-inclusion) position is reached later in the procurement process, the notification should be sent to Welsh Ministers as soon as possible after the decision has been made, giving the reasons.

14. The detail required should include:

- Planned timelines for the procurement process.
- Rationale for not including any or all the clauses in the relevant contract.
- Details of the process followed to date, including route to market, market engagement, contract-specific procurement strategy and assessments of providers to meet the Act (including legal advice where provided).
- Details of any alternative routes to market that have been considered that would allow for inclusion of the relevant clauses and why these alternatives are not being taken forward.
- Any potential impact, for example financial or on service delivery, should the contract not be procured in line with its strategy and timelines.
- Any potential mitigation measures considered as to how supply chain due diligence on the subject matter of the clauses can be achieved in other ways.
- Any measures the Contracting Authority will undertake to ensure future iterations of the contract will include the clauses.



15. To submit a notification, Contracting Authorities should contact the [XXX mailbox]. This notification should include the information in the bullet points above, as this will allow a response to be provided as quickly as possible.

Framework agreements, dynamic markets and call-off contracts

16. A “public contract” is defined in section 21(1) as a “contract between one or more economic operators and one or more contracting authorities; and having as its object the execution of works, the supply of products or the provision of services”. Section 21(2) requires a framework agreement to be treated as a public contract. Section 25(2) defines a “major construction contract as a public contract that is a works contract with a value equal to or greater than £2m.”
17. This means that both a framework agreement let by a Welsh Contracting Authority, and a call-off from it, should be treated as a public contract. Therefore, the duties in relation to works and workforce clauses will apply to both. The nature of outsourcing services contracts is that they would not normally be sourced via a framework agreement / Dynamic Market, however construction contracts are frequently created as call-offs from framework agreements. Call-off contracts from dynamic markets should also be treated as public contracts.
18. It should be noted that the obligation to consider including relevant clauses will apply to all contracting authorities listed in Schedule 1 of the Act as soon as the Act is in force. This means that contracting authorities must consider including all of the relevant clauses in a call-off contract, even if the framework agreement or dynamic market was made by a body not included in Schedule 1 (for example a body located outside of Wales) or was made before the law comes into force. If the authority creating the call-off contract decides it does not intend to include the clauses, a notification will need to be sent to Welsh Ministers, as described above.
19. Although there is no obligation for those contracting authorities who manage framework agreements or dynamic markets to amend existing agreements to include the clauses, the more they are able to do this the easier it will be for organisations calling off these arrangements to meet the requirement to consider including the clauses (and to include the clauses where possible, thereby avoiding the requirement to notify Welsh Ministers).
20. Over time, as framework agreements and dynamic markets are refreshed after this legislation is in force, call-offs from frameworks are likely to include the relevant clauses as a matter of course.



Communication with suppliers

21. It will be important to make potential suppliers aware as early as possible in any relevant procurement exercise that these clauses will need to be applied without change, with these expectations maintained throughout the supply chain, and that this will need to be monitored. This means that potential bidders will be able to discuss the clauses with planned subcontractors so that when the tender goes live, all bidders will be able to factor the impact of these requirements into their bid.
22. This means that once their inclusion has been agreed they should be treated as non-negotiable and a mandatory element of a compliant bid. This raises the potential for several scenarios to unfold at various stages. Here are some examples:
 - If, during the pre-tender engagement process a significant number of suppliers inform the Contracting Authority that implementation of the clauses is not feasible for a specific project, the Contracting Authority should undertake an assessment of the reasons provided and establish whether these are legitimate barriers that cannot be overcome in this context, whether action(s) could be taken that would allow for inclusion of the clauses (if action is recommended on the basis of one supplier's concerns or operational context, care should be taken that any advice or recommended actions should be shared with all potential bidders), or whether to proceed with inclusion of the clauses into the tender. This will help provide an evidence base should the Contracting Authority need to submit a notification for this tender at any point.
 - If suppliers inform the Contracting Authority that they cannot comply with the clauses during the tender period, the Contracting Authority should seek confirmation from all other bidders that they are able to implement the clauses. If this is the case, then all bidders unable to use and monitor the clauses are deemed to have excluded themselves from the tender process. This process should be explained in both the pre-tender engagement and the tender documentation. If it is determined that due to the nature of the contract (for example if there is a very limited market or the nature of the work is specialist and precludes use of any or all of the clauses), then this should form part of the evidence base for a notification, which should be submitted to Welsh Ministers before proceeding with the tender process.
 - If suppliers or subcontractors inform the contracting authority, the main contractor or next tier sub-contractors (as appropriate within the supply chain)



that they cannot implement or monitor the clauses post contract award and during contract management (after project commencement), the Contracting Authority must be notified as soon as possible. It should work with supply chain partners to address the problem, but if this is not possible it should inform Welsh Ministers via a notification immediately. This process should include an assessment of the options available. For example, if inclusion of a particular set of materials would preclude inclusion of the clauses, an assessment of any alternatives should be undertaken and reported to the Contracting Authority. The Contracting Authority should then take a view as to whether contracting for/with the alternative product/supplier would have materially affected the tender outcome and the risks associated with that course of action.

The response to the notification

23. Notifications will be considered by Welsh Ministers in the first instance (section 36), who may seek, as soon as reasonably practicable, further information from the Contracting Authority. Or they may seek the advice of the procurement subgroup of the Social Partnership Council.
24. In a straightforward case that does not require the provision of complex further information and engagement with the Procurement Subgroup of the SPC, Welsh Ministers will endeavour to respond within one calendar month of receiving the notification.
25. Section 30(7) of the Act requires that any further information must be requested, and provided, as soon as reasonably practicable.
26. If Welsh Ministers are satisfied with the reasons given this will be communicated with the contracting authority as quickly as possible. A summary of their reasons for being satisfied must be published.
27. If not satisfied, (Sections 30(4) and 36(4)) Welsh Ministers may direct the Contracting Authority to take all reasonable steps to:
 - (a) include social public workforce clauses in the outsourcing services contract,
 - (b) put processes in place for ensuring that obligations in social public workforce clauses are implemented, or



(c) put processes in place for ensuring that obligations in social public workforce clauses are implemented where the contract is subcontracted.

28. If Welsh Ministers decide to direct the Contracting Authority, they must inform the procurement subgroup of the SPC of their decision, and publish the directions given.
29. Alternatively, Welsh Ministers may decide that they are not satisfied but do not wish to direct the Contracting Authority. In this case, they must inform the procurement subgroup of the SPC and publish their reasons as to why no direction has been given.
30. Welsh Ministers will report on all notifications, whatever the outcome. These reports will summarise the factors in the case that led to the non-inclusion of clauses, and the decision taken by Welsh Ministers as a result. These reports will be published online.

Managing Contracts

31. Contracting Authorities will need to put processes in place to ensure that the model clauses are being applied throughout supply chains. This means regular monitoring and recording as part of their contract management regime. Each authority will have its own approach to contract management, but it is suggested that the following actions may be useful for ensuring that all parties are adhering to the Act:
- Spot checks of contract documentation
 - Meetings with contractor representatives
 - Meetings with subcontractor representatives
 - Third party verification for higher risk contracts – the definition of which should be left to individual authorities
 - Requirement for contractors to provide quarterly data on numbers of new joiners and adherence to the Act
 - Annual reports to include data on inclusion of model clauses and actions taken during the past year to ensure adherence (see guidance on annual reports)
 - Documentation of all above actions to ensure a strong audit trail.