

Cynulliad Cenedlaethol Cymru  
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Sgiliau  
Caffael cyhoeddus yn yr economi  
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Ymateb gan TUC Cymru

National Assembly for Wales  
Economy, Infrastructure and Skills  
Committee  
Procurement in the foundational  
economy  
  
Evidence from Wales TUC

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## Public Procurement in the Foundational Economy

Our response to the consultation by the Economy, Infrastructure and Skills Committee

### About the Wales TUC

The Wales Trades Union Congress is the voice of Wales at work, our aim is to make Wales a fair work nation. As the largest democratic membership based civic body in Wales, we speak for approximately 400,000 union members of our 49 affiliated unions.

Proudly part of the TUC and the wider international union movement, the Wales TUC is the devolved authority for unions in Wales.

Our biennial Welsh Congress of unions decides on Welsh policy and elects the Wales TUC General Council to oversee delivery through the Wales TUC General Secretary and his staff.

### Background and context

Existing guidance does not adequately recognise the importance of workers' collective voice. There is very limited recognition in current procurement processes of the importance of formal union recognition and collective bargaining arrangements.<sup>1</sup>

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<sup>1</sup> The Welsh Government's Procurement Advice Notice for the public sector states: "Contracting authorities may decide not to award a framework to the bidder submitting the most economically advantageous tender where they have established that the tender does not comply with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Public Contracts Directive (Regulation 56(2) PCR 2015)." (*Welsh Government (2017), Framework Agreements Procurement Advice Note (PAN) for the Welsh Public*)

EU and UK law provide opportunities for clauses requiring collective bargaining to be included in procurement contracts. Compliance with social and labour obligations – including collective agreements – is enshrined in the principles of this law and tenderers can be excluded in case of non-compliance.

If procurement policy is to deliver fair work, it is essential that the process values the role of organised workers' voice and collective arrangements. In addition to compliance with relevant legislation and the Code of Practice: Ethical Employment in Supply Chains, public procurement should support:

- Trade union access to the workforce (and, where relevant, supply chains)
- Formal union recognition and collective bargaining arrangements
- Adherence to relevant collective bargaining agreements
- The right for unions to present the collective voice of workers to employers and to have (meaningful) access to the workforce

Devised in social partnership, this approach will prevent unfair competition by undercutting of industry level agreements, and maintain the level playing field for pay and conditions based on collectively agreed standards regardless of ownership model.

This should be linked to a wider overhaul of the public sector's approach to procurement, including strengthening the following:

### ***Community benefits***

Welsh procurement policy refers to the Welsh Government's role in providing the Community Benefits policy. It calls on public sector organisations to apply a Community Benefits approach to all public sector procurement and apply the Measurement Tool to all such contracts over £1m, as a minimum (or provide justification for all contracts valued above £1m where the approach has not been used). It is vital that this approach is given statutory underpinning, with specific reference made to the need for targeted recruitment and training.

### ***Joint and several liability – sub-contracts and supply chains***

The fragmentation of the employment relationship within the private sector should be tackled through a new model of joint and several liability, whereby workers are able to bring a claim for unpaid wages, holiday pay and sick pay against any contractor above them in the supply chain. It should be established what legislative and other levers Welsh Government has to enforce such a policy.

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*Sector*). There is no information on whether the failure to recognise collective agreements has been a reason for not awarding the most economically advantageous tender.

**Below are our responses to the relevant consultation questions. Please get in touch if there's anything you'd like us to expand on or if you'd like us to arrange further consultation with some or all of our affiliated unions.**

**To what extent could increasing 'local procurement' by the public sector create stronger local supply chains and build wealth in communities across Wales?**

- Trades unions in Wales want to see procurement spend used to invest in Wales-based employers, so long as quality of work considerations are also considered. This is the only way that procurement will create a fairer distribution of wealth in our communities. This could be especially important in foundational sectors which have high levels of public sector investment (typically through procurement spend) and low levels of fair work, such as lower than average pay or lower than average collective bargaining coverage, such as social care.
- While procurement offers an opportunity to develop local supply chains and grow enterprises into sustainable medium-sized enterprises, this should only be nurtured in situations where the workforce will get their fair share of the gains from this growth and are able to access their right to a democratic collective voice. This can only be fully realised where there is an active trade union and collective bargaining arrangements in place. Democracy in the workplace is a fundamental right, which delivers higher wages and better working conditions, more innovative, flexible and stable workplaces create a stronger economy and fairer society.<sup>2</sup>
- Wales TUC believes that every opportunity to deliver fairer work through procurement policy must be taken, and that Welsh Government should place a legal duty on all public bodies to ensure fair work outcomes are delivered through their procurement spend.
- We agree with the Fair Work Commission's recommendation that:  
"It is important that every lever at the public sector's disposal is utilised to support the principles of fair work. Fair work is integral to the review of public funds and should sit within a future local wealth building programme which

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<sup>2</sup> See chapter 2 of TUC (2019), [A stronger voice for workers: How collective bargaining can deliver a better deal at work](#)

can help join up the impact of the public sector's financial power; economic development; fair employment; and socially productive use of land and property. We note from experience elsewhere, such as Preston and Manchester councils, that progressive procurement is optimised only through effective coordination with other levers. Therefore, the Office for Fair Work which has a co-ordinating function, should lead on employment related procurement policy as part of the future local wealth building programme.”<sup>3</sup>

- We would not support policy that treats local providers preferentially while giving no recognition to the quality of work they provide or whether or not they allow a trade union to access the workforce. Our experience is that this is likely to result in contracts being awarded to firms which provide poorer employment conditions than other bidders.
- The Wales Audit Office identified that public bodies already face challenges in balancing potentially competing procurement priorities and in responding to new legislation and policy,<sup>4</sup> and arguably this may have worsened as a result of emerging priorities such as the foundational economy agenda. The focus on local suppliers in some areas of Welsh Government policy work and communications risks further confusing those working in procurement.
- Without coherent and clear policy, we fear that public bodies may prioritise local suppliers over those who provide fair work, therefore potentially making no progress on the goal of raising the quality of work through procurement spend. Unless this potential tension is addressed directly through a legally-binding duty, public bodies may not be clear what the expectation is on them in terms of the added value of their procurement spend.
- There are two points at which fair work priorities could be leveraged through the procurement process:
  - When bidding for a contract, a supplier should evidence that they comply with any existing sectoral collective agreements (e.g. collective agreements in construction) and that they permit a trade union to access staff. These two criteria should be essential for anyone bidding for a public contract, and a commitment should be made that they cascade this through their supply chains. While we acknowledge that sectoral agreements do not exist in many sectors, where they do exist they must be complied with.

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<sup>3</sup> Fair Work Commission (2019), Report of the Fair Work Commission

<sup>4</sup> Wales Audit Office (2017), Public Procurement in Wales

- The second opportunity to leverage fair work outcomes is at the stage of awarding points for compliance with fair work criteria. This could include trade union recognition, the presence of workplace trade union representatives and collective bargaining arrangements. Decisions around the weighting of this in the overall assessment of each bid should be made in consultation with social partners.
- For example, for construction projects (the largest area of procurement spend and a foundational sector), the bidder would have to agree to permitting union access and to agree to request this of any sub-contractor etc. it chooses to work with as part of the delivery to be eligible. It would then have to demonstrate how it complies with fair work criteria, including whether there are any existing trade union representatives in the workplace, compliance with any firm-level agreements (e.g. an agreement on facility time for reps) and demonstrate how it would comply with any relevant sectoral collective agreements (such as the Building and Allied Trades Joint Industrial Council) or other relevant agreements (such as the Two Tier Code and agreement over the use of non-guaranteed hours contracts).
- This approach should be applied to all those involved in delivering the contract, including sub-contractors and umbrella companies. Looking ahead, the fragmentation of the employment relationship within the private sector should be tackled through a new model of joint and several liability, whereby workers are able to bring a claim for unpaid wages, holiday pay and sick pay against any contractor above them in the supply chain. It should be established what legislative and other levers Welsh Government has to enforce such a policy.
- Statutory guidance should be issued in the form of a step-by-step process for procurement professionals to follow. We have concerns that the approach taken with the Code of Practice – Ethical Employment in Supply Chains document has not been introduced in such a way, which has weakened its effectiveness.

### **Monitoring and enforcement**

- To some extent, the potential for the creation of stronger local supply chains depends on how effectively the policy is communicated, monitored and enforced.
- Monitoring and compliance should be done with the assistance of relevant trade unions as well. Public authorities and contractors should face consequences for ignoring existing Welsh Government policies. There is

evidence that public authorities in Wales are not implementing agreements made at the Workforce Partnership Council relating to the Code of Practice for Ethical Employment in Supply Chains with the most obvious example being the Parc Adfer construction project jointly tendered by five north Wales counties.

- As we have seen with the Code of Ethical Practice in Supply Chains, well-intentioned policy fails to fulfil its potential if it is not supported by sufficient resource, monitoring and enforcement. We are aware that there has been increased investment in the communications and monitoring, but we continue to have concerns about whether there are consequences for non-compliance with the code or a willingness to not offer contracts to organisations unwilling to sign.
- We are also aware of how costly and bureaucratic effective monitoring and enforcement can become. We would like government to consider all actors at play, including social partners and other enforcement agencies, to audit and monitor procurement supply chains.

### **A strategy for Insourcing**

- We must also consider the case for insourcing. Unions have long-opposed any move to take the delivery of public services out of the public sector. All public services must remain within the public sector and be delivered by public servants, so that they are truly accountable.
- Where services have already been outsourced, Welsh Government should establish a robust process for evaluating where contracts could provide greater public value if they were in-sourced. This should include fair work implications. While the scale of outsourcing in Wales has been nothing like what has happened in England, our unions are still aware of cases where outsourced service provision has failed both service users and staff. The recommendations from our 'Lessons from Carillion' report on making a public interest case and on transparency and accountability should be considered.<sup>5</sup>
- Furthermore, firms which have failed to meet an agreed standard of fair work while delivering a contract should not be eligible to bid again. If policy initiatives are to be successful given the limited levers we have, there must be implications for failing to achieve a basic standard of fair work while in receipt of public money. This would include excluding unions from accessing workers, failure to respect collective agreements and failure to comply with employment law.

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<sup>5</sup> TUC (2018), [What lessons can we learn from Carillion – and what changes do we need to make?](#)

**What is your view of the Welsh Government's intended approach to increasing the amount of 'local procurement' undertaken by the public sector in Wales (including how 'local procurement' will be defined and monitored; how the principles of sustainable and ethical procurement are being applied; and how the statutory goals set by the Well-Being of Future Generations (Wales) Act are being met)?**

- As stated above, we are keen to see greater procurement spend going to Welsh firms so long as every opportunity is taken to ensure and drive-up the quality of employment offered by these employers – both in terms of those directly employed and through their supply chains. This is a key lever with which Welsh Government can deliver fairer work in Wales.
- We do not have a specific definition of 'local', nor do we believe that it would be worthwhile to spend too much time attempting to define it, given the additional challenges we are aware of such as capacity within firms. It is likely that a pragmatic approach to defining 'local' is probably best to begin with, which can later be analysed to identify if a fairer geographic distribution is necessary.
- There is a sort of exception here. There continues to be potential to use reserved contracts more widely to deliver improved employment prospects for those defined as disadvantaged workers, which can help to tackle regional inequalities. Building on the lessons learned from the Better Jobs Closer to Home initiatives, more use should be made of reserved contracts, particularly to establish new employment hubs in disadvantaged areas with a mission to support workers into sustainable employment and create jobs with decent wages and good conditions. This would assist young people, lone parents, adults without formal qualifications and the long term unemployed among others. The same fair work criteria as set out above must be applied to reserved contracts.

**To what extent could increasing 'local procurement' by the public sector create stronger local supply chains and build wealth in communities across Wales?**

- The best way to build wealth inclusively and in such a way that addresses inequality is by addressing unfair work in our communities. As set out above, we could not support an approach which solely focussed on the location of bidders and not on the quality of work they offer, as there are no mechanisms to ensure that this would build wealth in a fair and inclusive way.
- We are concerned that the assumption that local businesses are somehow better employers or better for our communities is being treated as fact, when in our experience this is not necessarily the case. This is why the measures we have set out above are so important. Strengthening local supply chains and building wealth will also involve other issues being addressed, such as improving how the viability of bids is calculated and monitored and exploring whether in-sourcing offers the best opportunity to maximise public value.