



Llywodraeth Cymru
Welsh Government

Employment Practices on publicly funded projects

Procurement Advice Note (PAN) for the Public Sector in Wales

Employment Practices on Publicly Funded Projects

1. Introduction

(i) POINTS TO NOTE – *please ensure you read this section first*

- *The information set out in this document is not legal advice and is not intended to be exhaustive – contracting parties should seek their own independent advice as appropriate. Please also note that the law is subject to constant change and advice should be sought in individual cases. This document reflects the position as at February 2015*
- *This Procurement Advice Note (PAN) builds on, and is consistent with, the information available in the Procurement Route Planners (PRPs) on <http://prp.wales.gov.uk>. The note therefore assumes a certain level of knowledge of public procurement.*

(ii) Issues addressed

This policy advice note has been produced by the Welsh Government to inform and provide guidance to the public sector in Wales about how to address fair treatment in terms of pay and employment rights through procurement within publicly funded construction/infrastructure projects.

The Welsh Government is committed to ensuring workers on publicly funded projects are treated fairly and with respect. It has been highlighted that situations of “false self employment” are affecting workers, particularly in the Construction industry, and leading to unfair discrepancies between the pay and rights of workers that are not directly employed by contractors, in particular those supplied by Employment Businesses using umbrella payment companies.

This note is aimed at staff involved in procurement of construction/infrastructure projects and contract management of the projects.

Overview

The Welsh Government is committed to using procurement as a lever for driving economic, social and environmental benefits and supporting jobs and growth. Effective procurement policy can encourage ethical and responsible business behaviour helping to protect suppliers and employees, promoting Wales as a good place for doing business. This is in line with the overall aims and ethos of the “Wales

Procurement Policy Statement” (WPPS) issued by the Minister for Finance in December 2012 that clearly sets out the procurement practices and the specific actions that is expected of every public sector organisation in Wales. The WPPS is embedded within the Construction Procurement Strategy, which specifically references in its Charter the need to ensure better employment practices.

Welsh Government recognises the benefits of self-employment and strongly supports enterprise and those who choose to work for themselves. There has, however, been increasing evidence that some companies and Employment Businesses are using employment intermediaries to disguise the employment of their workers as self-employment primarily to avoid employer National Insurance and reduce the costs associated with workers’ employment rights.

The practice of “false self-employment” may mean workers are unaware that they are being treated as self-employed and losing out on employment rights, or they are aware but have little choice but to accept employment and payment through an umbrella payment scheme or lose the job.

This issue is primarily an employment law issue where workers will have recourse to remedies to address any instances of “false self employment” through the employment tribunal service. The spread of false self-employment was also addressed by the UK Government through the Finance Act 2014 which came into force in July 2014, effective retrospectively from 6 April 2014. However, it can already be seen that while this measure led to a reduction of false self-employment, it also led to an increase of workers having to accept employment through umbrella company arrangements some of which are operating unfair systems.

Background:

False Self Employment

False self-employment concerns employment where the contract of employment with the worker does not properly reflect the reality of the relationship. The problems that false self-employment causes can be summarised as follows:

- Unfair competitive advantage for those businesses who disregard their Pay as You Earn (PAYE) and National Insurance (NICs) obligations and other costs related to direct employment when they engage workers and a corresponding disadvantage for those businesses which properly engage their workers as employees;
- Loss of entitlement for the worker to Jobseekers Allowance and Secondary State Pension and loss of redundancy pay, maternity/paternity leave and pay, sick pay, holiday pay, overtime premium payments, travel allowances.

- a lack of long term job security and career opportunities; and
- Loss of revenue to the Exchequer, as the correct amount of income tax and NICs is not being paid.
- Health and Safety provisions deteriorate when workers work on falsely employed terms

Construction companies will use the services of Employment Businesses to source some of their workforce, often due to the sporadic nature of the industry.

An agency worker may be an employee of an employment business for tax purposes which means they are taxed on their earnings under the PAYE scheme and are liable for NI contributions. This means an additional cost arises for the employment business with the Employer NI contributions compared to engaging a self-employed person. This may be one of the reasons why some employment businesses seek to engage agency workers on a false self-employment basis.

The UK Government announced that they would tackle the use of employment intermediaries facilitating false self-employment to avoid employment taxes, hence the introduction of new legislation in July 2014.

The new legislation provides that agency workers of the employment business will be taxed as employees if they are subject to a right of direction, supervision and control by the client.

Under the new legislation the responsibility falls upon Employment Businesses to prove if a worker is employed or self-employed and will be liable for up to 6 years of unpaid tax and national insurance if a seemingly self-employed worker is subsequently found to not be truly self-employed. This is one of the reasons why there has been increased use of umbrella payment schemes.

Employment Businesses and Intermediaries / Umbrella Payment Schemes

Employment businesses engage work-seekers under a contract and then place them on a temporary basis with other client businesses who supervise their work. This is normally called 'temporary agency work' or 'temping'. Such businesses allow clients to take on temporary labour to meet uneven work loads. A distinction should be made with Employment Agencies who are engaged by clients to find individuals for employment by the client.

An Umbrella Company is a business that directly employs contractors and freelancers. Generally, an umbrella company's services are accountancy-based - such as managing timesheets, calculating PAYE tax and NI contributions, invoicing their client businesses and then paying their contractor / freelance employees. Contractors use Employment Businesses who in turn use Umbrella Companies to outsource their recruitment and payroll overheads for temporary staff consequently avoiding employment rights obligations.

The Freelancer and Contractor Services Association (FCSA), the trade body that represents businesses providing umbrella employment and accountancy services to the freelance sector, operates a code of conduct which some umbrella companies adhere to. Nevertheless, issues and unfair practices have still arisen.

Employment businesses have been using umbrella organisations and payment schemes to operate PAYE and NI contributions. Some schemes seem unfair in their calculations of deductions and fees and in many cases the worker is in fact paying the employer NI contribution which comes out of the worker's pay. They often also receive no holiday pay, albeit this may come about indirectly when the pay is rolled up in the regular pay.

The working time directive states that paid leave should be paid when the worker takes the leave. Rolled up holiday pay does not facilitate this as in reality the worker is not entitled under his/her contract to any paid days leave, thereby creating a situation of workers working 52 weeks of the year save for time off on bank holidays (for which they receive no pay)

Employment Law: **Rights of Agency Workers:**

Agency workers earn the right to the same basic working and employment conditions as direct recruits once they have been engaged by a particular hirer for a period of 12 weeks. The agency worker has to undertake the same role with the same hirer for 12 continuous calendar weeks. Basic working and employment conditions include pay, duration of working time, rest breaks and annual leave but not notice pay, expenses, redundancy pay, occupational sick pay or occupational maternity/paternity or adoption pay.

Deliberate attempts to avoid the above rights are covered by anti avoidance provisions as long as it can be demonstrated that there is a deliberate and regular pattern designed to avoid the regulations.

Individuals, as agency workers, who feel they are being treated unfairly if there is a refusal of the hirer or employment business to recognise their assertions over employment status, or if they feel their calculation or deductions to pay is being

determined unfairly, should seek redress through the appropriate industrial disputes procedure and/or the employment tribunal service.

UK Government legislation

The Finance Act 2014 - On Shore Employment Intermediaries: false self-employment Legislation

The UK Government has sought to reduce tax avoidance and support enterprise and those who choose to work for themselves. The UK Government believes that the tax system should continue to recognise the additional risk taken on by someone who is genuinely self-employed.

However, HMRC has evidence of substantial and growing numbers of people who are falsely self-employed. Much of the growth in false self-employment can be attributed to employment intermediaries who are facilitating it.

The UK Government announced that they would tackle the use of employment intermediaries facilitating false self-employment to avoid employment taxes. The UK Government consulted on strengthening existing legislation with effect from 6 April 2014 to ensure the correct amount of tax and NICs are paid where the worker is, in effect, employed. The Finance Act 2014, which came into force on 17 July 2014 included this specific legislation “On Shore Employment Intermediaries: False self employment” which is effective from 6 April 2014, and so can be applied retrospectively.

This has strengthened existing legislation relating to employment agencies by focussing on whether the worker is subject to supervision, direction or control as to the manner in which the duties are carried out.

Addressing the issue through Procurement

Welsh Government is committed to ensuring good employment practices operate in the delivery of public services and on publicly funded contracts and seeks to encourage contracting authorities and suppliers to promote this through the management of their contracts.

Good contract management will ensure these issues are highlighted and monitored and is an important step towards ensuring workers on publicly funded projects are being treated fairly and with respect.

What is Employment Best Practice?

As a minimum clients should require contractors to adopt fair employment and labour practices, recruiting and retaining staff in a fair and ethical manner, and provide a safe and competent workforce employed in accordance with industry best practice.

Specifically in relation to the issues raised in this policy note clients should ensure that conditions of false self-employment are not created which unduly disadvantage individuals in terms of pay and rights of employment such as holiday pay, sick pay, national minimum wage protections and pension contributions.

Some examples of good practice can be seen in the Memorandum of Understanding of Direct Employment for the Olympics, the Hinkley Point C agreements and industry wide agreements including for example the CIJC Agreement, NAECI Agreement and JIB Agreement.¹

The setting of nationally agreed terms and conditions of service in the UK is intended to set a standard by which all employers within the sector should comply and remove the potential for unfair practices. Details of current collective agreements in the construction sector can be found from the following link:

www.unitetheunion.org/how-we-help/list-of-sectors/construction/constructioncollectiveagreements
www.ucatt.org.uk/cijc-construction-industry-joint-council-working-rule-agreement

Clients should seek to address these matters through the procurement process and contract management by working collaboratively with contractors and suppliers.

Pre Contract steps

As part of the tender process, contracting authorities should set out that it will be a requirement of contract for contractors to provide transparency of employment practices being deployed across the workforce delivering the project.

In the Invitation to Tender inclusion of the following statement will alert contractors to the requirement to monitor and report on employment practices as part of the contract management reporting process:

¹ www.unitetheunion.org/how-we-help/list-of-sectors/construction/constructioncollectiveagreements
www.ucatt.org.uk/cijc-construction-industry-joint-council-working-rule-agreement

“[Contracting Authority] is committed to ensure fair and transparent employment practices are in place throughout the supply chain for this project, consequently we will be seeking to work with you to monitor to ensure fair employment practices including, where possible and appropriate, direct employment operate on this project

Post Contract - ensuring best practice through Contract Management

Good contract management is vital to ensure the requirements of the contract are being delivered and value for money continues to be achieved.

Contracting authorities are expected to monitor and audit employment practices of contractors and supply chains through rigorous contract management. Adopting a “partnering culture” with the contractor and agreeing shared principles to ensure fair employment practices are adopted throughout the supply chain will foster better relationships and improve the working conditions of all workers.

Collective agreements have been established in the UK and can be referred to, to help encourage contractors to adopt fair employment practices.²

Acknowledgements

Value Wales is pleased to acknowledge that it has drawn upon the following publications and organisations to supplement its own research to produce this note (links are provided where appropriate):

- Unite the Union and UCATT Union of Construction, Allied Trades and Technicians
- HM Revenue & Customs “Onshore Employment Intermediaries: False Self-Employment” Consultation Document – 4 February 2014
- HM Revenue & Customs “Onshore Employment Intermediaries: False Self-Employment” – Summary of Responses
www.gov.uk/government/uploads/system/uploads/attachment_data/file/290046/Onshore_Intermediaries_False_Self_Employment_Summary_of_Responses.pdf
- HMRC Guidelines on Direction, Supervision and Control
www.gov.uk/government/uploads/system/uploads/attachment_data/file/290051/Definition_of_Supervision_Direction_or_Control_with_supporting_examples.pdf

² www.unitetheunion.org/how-we-help/list-of-sectors/construction/constructioncollectiveagreements
www.ucatt.org.uk/cijc-construction-industry-joint-council-working-rule-agreement

- European Commission “Buying Social – A guide to taking account of Social Considerations in Public Procurement
- The Employment Agencies Act 1973 and the Conduct Regulations (The Conduct of Employment Agencies and Employment Business Regulations 2003)
- Agency Worker Regulations 2010

Guidance and Tools

Below are some of the policy guidance documents and supporting tools that are available to you for use in your procurement activity, full list of documents is available on Value Wales Procurement Route Planner (PRP)

www.prp.wales.gov.uk/toolkit

- Wales Procurement Policy Statement
- Community Benefits Guidance, Maximising Value from the Welsh Pound, Value Wales 2014
- Community Benefits Measurement Tool for Wales, Value Wales
- Supplier Qualification Information Database (SQuID), Value Wales
- Sustainable Risk Assessment (SRA), Value Wales
- Project Bank Account Guidance and Advice note
- Blacklisting in the Construction Industry - Policy Advice Note
- Construction Procurement Strategy
- Framework Agreement Procurement Advice Note Updated Calling Off Section December 2013
- Joint Bidding Guide

Should you require further information please contact:

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