



Supported Factories & Business

Frequently Asked Questions



Llywodraeth Cynulliad Cymru
Welsh Assembly Government



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FOREWORD

The Business Procurement Task Force, which I chair, has over the last three years worked to ensure a consistent approach to procurement across the public sector in Wales and addressing issues of concern to smaller organisations wishing to supply.

One of the initiatives overseen by the Task Force has been to help the public sector in Wales to engage more with supported factories and businesses e.g. Remploy. European legislation¹ now clearly allows Member States to reserve contracts for supported factories and businesses, as explained in OGC guidance². Moreover, this can be done for contracts with values both above and below the EU procurement threshold.

I, and the Welsh Assembly Government are committed to supporting the employment of disabled persons, but have noted with disappointment, the results of a recent survey, which indicated that the Welsh public sector makes little use of the powers available to discriminate positively in favour of supported factories and businesses when awarding contracts. Responding to feedback that suggests that the public sector is nervous about using

this legislation, the Supported Businesses subgroup of the Task Force, with its representation from the public sectors, legal profession and other interested organisations, have produced this 'Frequently Asked Questions' guidance to dispel some of the myths and apprehension about applying the legislation.

I strongly urge the public sector (subject to complying with any internal or external financial rules) to commit a percentage of their expenditure to supported factories and businesses by reserving contracts directly for them, encouraging their inclusion as sub-contractors or partners as part of larger contracts, and by making use of the Framework contract being led by Value Wales. I also take this opportunity to remind public sector procurers of one of their commitments, included within the 'Opening Doors - the Charter for SME Friendly Procurement' that they will "use sustainable development criteria in determining value for money, including assessing the impact of economic, environmental and social factors".

The positive social and economic impacts of the Public Sector working with supported factories and businesses is self evident.

Andrew Davies AM
Minister for Finance and
Public Service Delivery

¹ Article 19 of Directive 2004/18/EC on Public Procurement

² "OGC guidance on reserved contracts for supported factories and businesses" soon to be published"].



ENDORSEMENT

The Wales TUC and my own Trade Union, the GMB, welcome the publication of this Supported Factories and Businesses 'Frequently Asked Questions' document. Over many years we have been actively involved at European level in changing legislation, and at UK level in the production of regulations and their implementation, which allows the public sector to positively promote employment opportunities for people with disabilities in supported factories and businesses by reserving contracts.

The challenges faced by people coping with a disability are immense, and supported factories and businesses play a major and valuable role in providing highly skilled employment and ongoing training, social interaction and mentoring and support to help people with disabilities become more independent, and play an active part in the world of work and their communities. The factories and businesses produce state of the art products and services such as high specification protective clothing for military and police, quality furniture and fittings, and security support. It is vital that we provide a steady stream of work into supported factories and businesses to maintain and develop this access route for as many people as possible facing such challenges in integrating into the labour market.

Opportunities offered by Article 19 of the EU Directive for reserving contracts for supported factories and businesses, provide us with the legal means of ensuring a steady stream of high quality work, and are unique within the world of procurement regulations, because the impact of providing employment for disabled people is universally recognised as being of significant financial and social benefit. As a matter of policy, every contracting authority in Wales should aim to have at least one or more contracts with supported factories or businesses.

I am pleased to be actively involved with representatives of the public sector and supported factories and businesses in developing initiatives that promote supported factories and businesses. Accordingly, I commend this valuable 'Frequently Asked Questions' guidance document, which is designed to guide and give confidence to the public sector about the use of Article 19 and I now ask that the public sector in Wales re-examines and significantly increases its support for supported factories and businesses.

Allan Garley - GMB

Wales TUC representative on the Supported Businesses Sub-group

SUPPORTED FACTORIES AND BUSINESS - FREQUENTLY ASKED QUESTIONS

1. What opportunities does Article 19 offer the public sector in Wales?

Article 19 grants Member States the ability to reserve the right to participate in tender procedures to supported factories and businesses - i.e. no other provider may tender. This is enacted in the UK by Regulation 7 of the Public Contracts Regulations 2006 (SI 2006/5), which uses similar language. In both cases, it is stated that the right to participate in tender procedures may be reserved to supported factories and businesses. This is express language and as such, can be relied on.

Article 19 may be used both for contracts above the relevant OJEU value threshold and those below. Where a contract is below the OJEU threshold, the purchasing authority has two options. It may either:

- (a) voluntarily use the OJEU procedure for a below-threshold contract; or
- (b) state openly in whatever other advertisement or procurement procedure it is using, that the contract is reserved for supported factories and businesses.

In the case of contracts which may be too large or complex for supported factories and businesses to handle alone, public bodies also have the option of encouraging larger contracting entities to include supported factories and businesses within their supply chain as sub-contractors or consortium partners.

2. Why reserve contracts for Supported Factories and Businesses?

It is Welsh Assembly Government policy to, as far as possible, give people with disabilities the opportunity to enter the labour market. Therefore public expenditure should be used in a way that supports this objective wherever practical. One route is by reserving contracts for supported factories and businesses. This also contributes towards meeting a contracting authority's Corporate Social Responsibility objectives.

As stated in the Minister's foreword above, contracting authorities in Wales should aim to place a percentage of their contracts with supported factories and businesses. Therefore all contracting authorities should try to place at least one or more contracts with supported factories and businesses.

There is no restriction on the size and type of contracts that can be reserved under this provision, and the principle can be applied to major contracts as well as contracts for niche products or services. The use of supported factories and businesses can increase supplier diversity in the public sector and help in the delivery of quality public goods and services.

Main contractors should also be actively encouraged, on either a voluntary basis or by the use of appropriate non-discriminatory contract terms, to use supported factories





and businesses in their supply chains on larger or more complex public contracts. For example, this could be done through relationship management with the supplier and by highlighting the importance of the supported employment agenda to Government. The use of supported factories and businesses as sub-contractors can also help private sector organisations to meet their Corporate Social Responsibility targets.

3. Ensuring Value for Money

The Welsh Assembly Government's procurement policy is that all public purchases must be based on value for money. However, value for money is not about identifying the bid offering the lowest price, it is about optimum combination of whole-life cost and quality to meet the user requirement. "User requirement" can in this sense include the fulfilling of social goals which are delivered by working with supported factories and businesses, such as increased employment and training opportunities, and greater independence for disabled persons.

Also, it must be remembered that supported factories and businesses, like any other business, function in a competitive market, selling their goods and services both to the public sector and to other businesses. Therefore they have to deliver good value to survive and it is a fallacy to assume that they will necessarily be more expensive or provide poorer value for money.

Value for money can therefore go hand in hand with working with supported factories and businesses. A more detailed commentary on what you can do to ensure value money is set out in Section 14 below.

4. What is a "supported factory or business"?

The term "sheltered workshops" comes from the European legislation. In the UK, the term used is supported factories and businesses. These terms are defined in the Regulations³ as follows:

A supported factory is: *'An establishment where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market.'*

A supported business is: *'A service where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market.'*

A supported employment programme is: *'A scheme under which work is provided for disabled persons and where more than 50% of the workers so supported are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market.'*

Under the EU Directive, these are known as sheltered employment programmes.

The 50%-plus threshold is the only test which the organisation needs to fulfil. "Supported" is something of a misleading title as it is not necessary that the organisation be in receipt of funding from government or elsewhere. Nor is it necessary that it be a charitable, community or social enterprise (although many such organisations are likely to be).

5. What is a “disability”?

The Directive and the Regulations define “disabled persons” as persons who by the reason of the nature or severity of their disability are unable to take up work in the open labour market.

The definition of “disability” is set out in Section 1 of the Disability Discrimination Act 1995. This defines a disabled person as someone with “a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day to-day activities.” Schedule 1 of the Disability Discrimination Act contains provisions, which supplement the definition of disability in Section 1 e.g. it provides definitions for impairment and disfigurement etc.

6. Do 50% plus of the organisation’s staff have to be disabled employees, or do any ‘workers’, e.g. voluntary workers, count towards the total?

The terminology used in Regulation 7 is “worker”. This is broader than the term “employee”. The definition of a “worker” under the Employment Rights Act 1995 includes both people who are under a formal contract of employment and those who carry out work or services on a less formal basis (other than in the course of a business or as a self-employed person). Therefore, any persons who are genuinely engaged in working in the business (but who are not external contractors or self-employed) may be counted towards the threshold of 50%-plus. This could include, for instance, secondees or voluntary workers.

7. How do I check if a business is a supported factory or business?

The crucial test is that the business has over 50% disabled workers.

The first step should be to ask firms which are tendering to provide data on the total number of workers and the total of that number who are considered to be disabled.

Actually obtaining concrete proof is problematical. It could conceivably be possible to ask for evidence such as benefits claims records, etc, but this would create severe problems in terms of overcoming the Data Protection Act 1998 restrictions on sensitive personal information. Also, not all persons who are disabled claim benefits, and not all who claim benefits are disabled.

Indicative supporting evidence may be found from checking whether the business is registered with the British Association of Supported Businesses (BASE) or the Online Supported Business Directory (www.supportedbusiness.org.uk).

However, this should not be taken as a sole determining factor, since only British firms are registered on these sites and therefore excluding other businesses could amount to discrimination against businesses from other EU nations.

In the end, there will inevitably have to be a certain amount of reliance placed by the purchasing authority on the bona fides of the organisation tendering, supported by whatever checks the authority feels appropriate (eg visits, interviews, etc).





8. Does Article 19 apply to social firms/social enterprises as well?

Unfortunately not, unless they also meet the threshold of having over 50% disabled workers.

9. What sort of contracts are appropriate for supported factories and businesses? How do I find out what supported factories and businesses can deliver?

The Department of Work and Pensions, with Remploy and other organisations, has set up a website (www.supportedbusiness.org.uk) which provides a searchable database of supported factories and businesses, their locations, and the products and services they offer. Also see www.base-uk.org/business which also details goods and services available from supported factories and businesses in Wales and other parts of the UK. These sites are a useful starting point.

Your organisation could also carry out a “meet the buyer” event and invite representatives from supported factories and businesses to discuss your organisation’s likely procurement needs and their ability to meet them.

Many of the methods used for encouraging participation by SMEs (see Opening Doors <http://www.buy4wales.co.uk/PRP/10672.file.dld>) including encouraging collaborations or consortia between organisations to bid for larger contracts, will also be effective when used in connection with supported factories and businesses.

10. How do I get a sufficient response to ensure a sufficient competition?

The best way is to carry out research and/or pre-tender dialogue as suggested above to identify how many providers are willing and able to meet your needs.

In addition, it is permissible also to advertise simultaneously (but not before the publication of the OJEU notice, where one is used) in places which are more likely to come to the attention of supported factories and businesses. As in any tender, you may even contact potentially interested parties directly to inform them of the existence of the tender process, provided you do not give them any advantage in the tender process, and do not contact them until the OJEU notice has been published.

11. Can I reserve contracts to supported factories and businesses below the OJEU threshold?

Yes. Whilst it is mandatory to use the OJEU notice procedure for contracts above the tender threshold, organisations may use it voluntarily (and many do) for contracts which are below the threshold value. Using an OJEU notice in this context is a useful way of advertising that the contract is a reserved contract.

Alternatively, there is no reason why you could not state that you are reserving a sub-threshold contract, in the advertisement or call for competition which you issue via a portal other than OJEU.

12. Are there alternatives to full reservation?

Some contracts may be too large or complex to offer to supported factories and businesses, but supported factories and businesses may still play a part as sub-contractors to or partners with the main provider.

Article 19 states that you may also (as an alternative to full reservation) require that the contract be performed “in the context of” a supported factory or business; i.e the provider need not itself be a supported factory or business but must place the specified element of supplies or services with an organisation which is.

There are various options which you could use, of varying degrees of formality, for instance:


- encouraging bidders on a major contract to consider using supported factories or businesses in their supply chain, without making this a formal requirement. Bidders will tend to adapt to what the contracting authority wants in order to increase their chances of winning;
- introduce contract terms or key performance indicators regarding delivery of social and community goals including engagement with supported factories and businesses. The degree to which bidders' proposals comply with such requirements can be made part of the tender process (although it should remain an “added value” issue and not the sole or determinative criterion);
- splitting the procurement into lots, and reserving one or more lots for supported factories and businesses.

Careful attention needs to be paid to contract terms, KPIs etc to ensure that they are non-discriminatory and that the main provider retains responsibility for all sub-contractors, - ***If I ask a prime contractor (who is a non-supported factory or business) to use a supported factory or business as a sub-contractor, do I run the risk of taking responsibility for the sub-contractor if something goes wrong?***

This will depend upon the wording of the contract which you use. If wording is applied, which states that prime contractors must take responsibility for all of their sub-contractors (as is standard in most public sector contracts), then the fact that you have asked generally for supported factories or businesses to be involved in an element of the contract should not make any difference. You should avoid specifying a particular supported factories and businesses and simply direct main contractors to the appropriate information sources. Prime contractors in such circumstances may ask for specific amendments to the contract and you need to be careful about accepting these, and should take legal advice.

Generally, if recommending that prime contractors use supported factories and businesses as sub-contractors, this is better done by encouraging prime contractors during the tender process to use supported factories and businesses, and not by imposing a strict requirement that they should use a particular supported factory or business. The “encouragement” route carries much less of a risk that a sub-contractor will amount to a “nominated” sub-contractor, than insisting on a particular supported factory or business.





Where a contract is sufficiently large or of a long duration, contractual terms or KPIs could be introduced as part of the tender process to favour the inclusion of supported factories and businesses (as in Section 12 above).

13. How do I go about reserving a contract, or using one of the alternative methods?

13.1 Reserving a contract

If advertising in OJEU, then you simply have to state in the OJEU notice that the contract is reserved to supported factories and businesses. This is done by putting a cross in the box at paragraph III.2.4 of the standard OJEU Contract Notice and it is also worthwhile putting a note to that effect in the “Additional Information” section in case potential bidders do not notice the cross in the box.

Once you have done that, the procedure is the same as a normal tendering exercise (save that only supported factories and businesses are eligible to tender).

13.2 Alternative methods

If the contract is not being reserved in full, the relevant box at paragraph III.2.4 of the standard OJEU Contract Notice should not be crossed. The essence of this approach is that all qualified economic operators are eligible, so it is undesirable to exclude them inadvertently from participating. The precise approach which the purchasing authority wishes to use to encourage partnering with supported factories and businesses should be described in the Additional Information section and set out in more detail in the tender documents.

If you are using lots, then the lot which is to be performed by supported factories and

businesses must be clearly indicated in the “Lots” section of the OJEU Contract Notice and again, appropriate explanation added in the “Additional Information” section.

If there are going to be specific contractual terms (eg requiring the bidders to give a statement of how they will involve supported factories and businesses in delivering the contract, which then becomes a binding obligation of their contract if they win), then these need to be drafted in full and sent out with the tender documents.

If you are simply encouraging bidders to engage with supported factories and businesses, but are not making it a formal tender requirement, you should either state this in the “Additional Information” section of the OJEU notice or in the tender documents when they are issued.

14. How does reserving contracts / encouraging inclusion of supported factories and businesses fit in with value for money, my organisation’s procurement rules, standing orders and standing financial instructions?

The “**most economically advantageous tender**” criterion, used in the great majority of cases, includes factors which may not be economically measurable (although they do have to be capable of objective evaluation). This can include (but is not limited to) benefiting the organisation’s wider aims and functions. For instance, it is well-known that if disabled people can work and become

more self-sufficient and have greater control over their life choices, health outcomes improve and so there is less of a burden on resources and benefits payments.

When considering whether to reserve a contract, public bodies should first of all assess whether supported factories and businesses can meet their needs. This can be done by comparing procurement needs, such as the goods or service to be procured, with those offered by supported factories and businesses, for example, looking at what product or service lines they are able to provide that meet your requirement. In addition, public bodies should compare or benchmark quality, prices and capacity potential with the rest of the market and against previous contracts for similar goods/ services. This assessment should be made before the formal procurement process starts, that is, when the contracting authority defines their needs and sets out their business case.

When formulating the business case, where appropriate, contracting authorities should bear in mind wider benefits to society where these are relevant to the procurement process. This means that as well as taking into account the direct costs of the contract, consideration should also be given to the wider social benefits. Although it is not always possible to place a market value on some of these benefits, they should not be overlooked, but rather that they should be considered in terms of the actual social benefits that they bring against any costs. These benefits could include the following:

- Contributing to the WAG and UK Government commitments to enable greater access to employment opportunities for disabled people;
- Increasing the diversity of the public sector supplier base to help deliver better public

goods and services that meet the needs of those who use them;


- Drawing on the wider pool of talent and skills available in the workforce that are currently under utilised;
- Increased social inclusion and interaction of disabled people in the labour market and their communities.

Many supported factories and businesses operate within niche markets, offering specialised products, which can often be reflected in the quality of the goods they produce. Due to their specialised nature, many are flexible in what they can offer their customers, and using supported factories and businesses is often a cost effective way of contracting.

Organisations that bid for public contracts under the reserved contracts provision still compete amongst the group of suppliers that bid for reserved contracts. This competition is likely to be reflected in the bids that they submit as they compete against each other, as contracting authorities will still award contracts on the basis of value for money.

As with all contracts, once awarded and in place for a period of time, contracting authorities can assess the performance of the contract. During this process, contracting authorities can examine the actual outcomes, the delivery of the procurement against what was expected and extent to which value for money is achieved. Where supported factories and businesses have been used and have delivered value for money, these positive experiences and benefits could be used to promote future procurement decisions to reserve a contract.





Standing Orders and Standing Financial Instructions may need minor variations in order to permit reservation or other measures designed to improve participation of supported factories and businesses.

15. What measures can I take to facilitate tendering by supported and businesses?

In general, try to avoid unnecessary complexity or over-reliance on standard documentation with long lists of questions, not all of which may be relevant. Supported factories and businesses, like SMEs, have limited resources and may not be able to produce all the collateral information required, or may find it prohibitively expensive to do so. The measures set out in *Opening Doors: The Charter for SME Friendly Procurement* to encourage SME participation will be equally applicable to supported factories and businesses.

Insert in tender documents a statement that if tenderers require the documents in a particular format, eg large print, or on disc or other electronic means, this will be provided in line with your organisation's accessibility or diversity policy.

NB: It should be noted that these FAQs are provided by Value Wales and their advisers as general guidance only, and are not to be used as a substitute for taking detailed legal advice on specific factual circumstances which may arise.