

# **SL(6)340 – The Construction Contracts (Exclusion) (Wales) Order 2023**

## **Background and Purpose**

Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (**the Act**) makes provision as regards the terms of construction contracts. Section 106A(2) of the Act confers power on the Welsh Ministers to disapply any or all provisions of Part 2 in relation to any description of construction contracts concerning the carrying out of specified construction operations in Wales.

This Order disapplies Part 2 of the Act in relation to certain infrastructure project contracts in Wales where a party to the contract is a sewerage or water undertaker, subject to requirements including:

- the contract must relate to a project designated by the Water Services Regulation Authority as a 'direct procurement for customers' (**DPC**) project in accordance with the conditions of the relevant undertaker's appointment;
- the contract must involve the making of regular payments by reference to actual costs incurred and which become due after one or more parts of the construction operations are completed and can perform a sewerage or water service.

The Order also disapplies section 110(1A) of the Act in relation to the kind of contract referred to, above, where a party to that contract enters into a sub-contract. Section 110(1A) of the Act provides that the requirement that contracts provide an adequate mechanism for establishing what payments become due and when under the contract is not met if payment is conditional on obligations being performed under another contract.

Paragraph 4.4 of the Explanatory Memorandum states that there is currently only one project to which this Order could apply, being the Dŵr Cymru Welsh Water Cwm Taf water treatment works.

## **Procedure**

Draft Affirmative

The Welsh Ministers have laid a draft of the Order before the Senedd. The Welsh Ministers cannot make the Order unless the Senedd approves the draft Order.

## **Technical Scrutiny**

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

## **Merits Scrutiny**



Senedd Cymru  
**Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad**  
—  
Welsh Parliament  
**Legislation, Justice and Constitution Committee**

The following point is identified for reporting under Standing Order 21.3 in respect of this instrument.

### **1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd**

The Explanatory Memorandum says:

*“4.9. Ofwat have stipulated that water companies should not pay the [Competitively Appointed Provider] for these projects until they have been completed and become operational so water companies (funded by customer bills) will not have to pay before the work is completed and delivered.”*

*“4.11. Parties entering into DPC procurements will have full knowledge of the terms including that payment will only commence after construction has been completed.”*

However, article 3(1)(d) of the Order says that, in order for Part 2 of the Act to be disapplied, the contract must fulfil the condition that (emphasis added):

*“(d) the consideration due under the contract consists, **at least in part**, of regular payments that—*

*(i) are determined in part by reference to the actual cost of the construction operations to which the contract relates, and*

*(ii) become payable after **at least one part** of those construction operations is completed and is capable of performing a sewerage or water service.”*

We would be grateful if the Welsh Government could clarify the extent to which payments must be made only after projects have been completed.

## **Welsh Government response**

### **Merit Scrutiny point 1:**

The purpose of the draft Construction Contracts (Exclusion) (Wales) Order 2023 is to exclude from relevant construction contracts various protections (such as staged payments) which those contracts would otherwise have under Part 2 of the Housing Grants, Constructions and Regeneration Act 1996 (“the Act”).

Section 110(1A) of the Act prevents any term in a construction contract which makes payment conditional on the performance of an obligation under another contract.

Due to the financing arrangements of Direct Procurement for Customers (“DPC”) contracts, payment to the firm that has delivered the infrastructure by the commissioning water and sewerage firm only commences once at least one stage (or part) of the sewerage or water asset has been completed and is capable of operating.

The Competitively Appointed Provider (“CAP”) agreement and first tier sub-contracts fall under the definition of a construction contract and therefore may be subject to challenge for non-



compliance with the Act. If non-compliant, the relevant payment provisions of the Scheme for Construction Contracts would be implied in the contract and take precedence over contract provisions designed for DPC. This would adversely affect the structure and operation of these DPC agreements.

The Order excludes two types of construction contract from the Act:

- DPC CAP Contracts - excluded from all requirements of Part 2 of the Act; and
- DPC First Tier Sub-Contracts - excluded from section 110(1A) of the Act.

All remaining construction contracts through the supply chain remain subject to the provisions of the Act.

### **Legal Advisers**

**Legislation, Justice and Constitution Committee**

**16 March 2023**



Senedd Cymru

**Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad**

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Welsh Parliament

**Legislation, Justice and Constitution Committee**