

Statutory Guidance on the Selection of Tenderers and Award of Contracts

**Addressing Fair Work Practices, including
the Living Wage, in Procurement**

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Introduction

1. Public procurement is a key driver of policy development and service delivery which supports sustainable economic growth. As such the Scottish Government is committed to sustainable procurement practices that deliver positive outcomes. The delivery of high quality services can impact on users of public services and can help create a fairer, more equal society. Service quality levels are often critically dependent on the quality and engagement of the workforce through fair work practices for those engaged in delivering public contracts.

2. The Scottish Government believes that employers whose staff are treated fairly, who are well-rewarded, well-motivated, well-led, have access to appropriate opportunities for training and skills development, and who are a diverse workforce are likely to deliver a higher quality of service. Further, we hold that good relationships between employers and their workforce contribute to productivity and ultimately sustainable economic growth.

3. The Scottish Government considers the payment of the Living Wage to be a significant indicator of an employer's commitment to fair work practices and that payment of the Living Wage is one of the clearest ways that an employer can demonstrate that it takes a positive approach to its workforce. As a Government we are, and encourage others to be, a Living Wage Accredited Employer.

4. We expect contractors who deliver public contracts to adopt policies which demonstrate how they comply with relevant employment, equality and health and safety law, human rights standards and adhere to relevant collective agreements. We further expect contractors to have policies which describe how they adopt fair work practices for all workers engaged on delivering the public contract. Examples of the type of issues that could constitute fair work practices for the purposes of this guidance can be found at Annex A; these may vary depending on the nature of the contract.

Purpose of this statutory guidance

5. This statutory guidance describes what is required of contracting authorities, when undertaking regulated procurements, to address fair work practices, including the Living Wage. The guidance provides information on how and when fair work practices, designed to promote improved productivity and economic growth, should

be addressed in the course of a public procurement exercise as a key driver of service quality and contract delivery.

Guiding Principles

- An employer's fair work practices can have a direct impact on the quality of service it delivers and, sometimes, of the goods it supplies and works performed.
- Wherever fair work practices may be relevant to the quality of service or goods or delivery/performance of the contract, it is important that a bidder's approach to fair work practices is evaluated as part of the procurement exercise, both as it applies to the workforce that will perform the contract and any sub-contracting chain. Further guidance on evaluating fair work practices in public contracts is provided in paragraph 20 onwards.
- Fair and equal pay, including Living Wage, is a positive factor and one of the clearest ways in which a bidder can demonstrate that it adopts fair work practices.
- A contracting authority can contribute towards improving the social wellbeing element of its sustainable procurement duty under section 9 of the Procurement Reform (Scotland) Act 2014 ("the Act") by adopting policies to promote fair work practices in relevant public contracts.
- Consideration of a bidder's approach to fair work practices must be a proportionate one, based on the nature, scope, size and place of the performance of the contract.
- Contracting authorities must consider a bidder's overall approach to fair work practices and all bids must be treated equally. This should include consideration of all relevant evidence, including (but not limited to) recruitment, remuneration, terms of engagement, skills utilisation and job support and worker representation. A bidder's approach to fair work practices may vary depending on the bidder's size and the scope of the contract.

Basis of the statutory guidance

6. Scottish Ministers have published this guidance under Section 29 of the Act. Contracting authorities must have regard to this guidance in relation to the selection of tenderers and the award of contracts for regulated procurements where the estimated value of the contract is equal to or greater than £50,000 for goods and services and £2,000,000 for works contracts and which is not otherwise exempt from

regulation. We would also encourage contracting authorities to apply this guidance wherever it is appropriate to do so, for example for lower value or exempt contracts where a formal tender evaluation is to be undertaken and where fair work practices are relevant and proportionate to the quality of the contract.

7. For the purposes of this guidance:

- ‘the Living Wage’ is an hourly rate set independently and updated annually by the Living Wage Foundation;
- ‘human rights standards’, include not only the standards guaranteed by the European Convention on Human Rights through the Human Rights Act, but also those guaranteed under other international treaties that the UK has signed;

(see Annex B for fuller details)

- ‘contracting authority’ has the same meaning as section 1 in the Act;
- ‘regulated procurement’ has the same meaning as section 2 in the Act and
- ‘regulated contract’ has the same meaning as section 3 in the Act.

8. When having regard to this statutory guidance contracting authorities must also take into account other relevant statutory guidance and consider other guidance or best practice where appropriate on the treatment of fair work practices as part of a public procurement process.

9. This document does not constitute legal advice. A contracting authority should seek its own legal advice if it is uncertain about having regard to this guidance in its own procurement exercises. This guidance applies to regulated procurements which commence on or after 1 November 2015.

Scope and application

10. International labour standards, set both by the European Union and the International Labour Organisation, should be respected by those who deliver public contracts, including sub-contractors. They should be able to demonstrate that they are good employers who have adopted policies which comply with relevant employment, equality and health and safety law, human rights standards and adhere to relevant collective agreements, and describe how they adopt fair work practices for all workers engaged on delivering the contract. This includes, for example, fair and equal pay (for example, supported by equal pay audits), respecting employee rights, avoiding exploitative employment practices, supporting progressive workforce

engagement by, for example, involving their employees in decision making and encouraging staff to join an appropriate Trade Union and play an active part in it. In the absence of a recognised Trade Union or where conditions of employment are not covered by a collective agreement, the existence of alternative arrangements to give staff an effective voice are important aspects of fair work which should be provided for.

11. Stability of employment and of hours of work is an important element of fair work, and fair work practices are not consistent with inappropriate, exploitative and avoidable zero-hours contracts. Where feasible, more stable forms of employment and hours of work, for example direct employment or fixed term employment contracts, should be offered to workers. Denying workers regular or sufficient working hours does not offer such stability.

12. Under certain circumstances, we recognise that the use of zero-hours contracts may be appropriate where their use aligns the needs of an organisation or sector with the needs of particular workers. For example: in respect of seasonal work in sectors such as agriculture or tourism; where there is a need to cover unanticipated peaks in service delivery; during holiday periods or where workers may find some benefit in retaining access to an employment contract until stable work becomes available again. However, where there is no specific justification for the use of zero-hour contracts or where they are used to avoid protections afforded by employment law we would consider their use to be inappropriate and potentially exploitative.

13. The Scottish Government and public bodies across Scotland are working to promote equality, reduce social inequality and ensure that individuals are not denied opportunities or disadvantaged through discrimination, prejudice or exclusion due to factors such as race, gender, gender identity, disability, sexual orientation, religion or belief, or age.

14. Equality legislation places duties on certain public bodies to promote equality through their actions and they must have due regard to whether the award and conditions of contract should include considerations to enable the better performance of the public sector equality duty. In addition human rights standards recognise the right of everyone to just and favourable working conditions; in particular fair and equal pay, safe and healthy working conditions and reasonable working hours.

15. Fair work practices for those who work on public contracts should therefore be broadly comparable with those adopted by public sector organisations and those working on public contracts should receive fair, equitable and non-discriminatory pay, terms and conditions and reward packages. Contracting authorities should also consider the Statutory Guidance to Local Authorities on Contracting (section 52 guidance) and the PPP Protocol in relation to removal of the scope for a two-tier workforce on the delivery of the contract.

16. Being considered as a good employer not only relates to workers directly employed but also workers who are engaged through, for example, employment agencies, “umbrella” companies and/or other employment intermediaries. In this context, an “umbrella” company is one which acts as an employer to agency workers who work under fixed term contract assignment. Inappropriate use of an “umbrella” company is inconsistent with the standard of a good employer adopting fair work practices. Such use could include, but is not limited to, engaging staff employed by the company to exploit workers who may otherwise be directly employed, through excessive administrative charges, issuing incomplete or confusing pay slips, moving staff on to the “umbrella” company without their prior knowledge and consent and using them as a device to reduce workers’ pay or conditions.

Living Wage

17. Section 15 of the Act introduces a requirement for a contracting authority which estimates that the value of its regulated contracts in a year will be equal or greater to £5,000,000 to prepare a procurement strategy. That strategy must include a statement of the authority’s general policy on the payment of a living wage to persons involved in producing, providing or constructing the subject matter of its regulated procurements.

18. In respect of how to apply the Living Wage in procurement processes the Scottish Government has obtained clarification from the European Commission. This confirms that contracting authorities are unable to make payment of the Living Wage a mandatory requirement as part of a competitive procurement process where the Living Wage is greater than any minimum wage set by or in accordance with law. In the UK, this is the National Minimum Wage. It is also important to take account of developing case law decisions on this matter. There have been a number of rulings of the Court of Justice of the European Union, including the most recent ruling at the time of the preparation of his guidance; *Bundesdruckerei v Stadt Dortmund*

(C549/13), which reinforces this position. It is, therefore, not possible to reserve any element of the overall tender score specifically to the payment of the Living Wage.

19. It is possible, however, where relevant to the delivery of a contract, to take account of a bidder's approach to fair work practices. Fair work practices can and would normally be expected to include fair and equal pay, including the Living Wage as part of a package of positive fair work practices to be delivered for the duration of the contract. Payment of the Living Wage is not the only indicator however, and it should be emphasised that whilst failure to pay the Living Wage would be a strong negative indicator it does not mean that the employer's approach automatically fails to meet fair work standards.

Evaluating fair work practices in public contracts

20. Section 9 of the Act places a sustainable procurement duty on a contracting authority before carrying out a regulated procurement, to consider how in conducting the procurement process it can improve the economic, social, and environmental wellbeing of the authority's area. Wellbeing of the authority's area includes, in particular, reducing inequality in the area. A contracting authority can contribute towards improving the social wellbeing element of its sustainable procurement duty by adopting a policy to promote fair work practices in relevant public contracts.

21. A contracting authority must consider, before undertaking a procurement exercise, whether it is relevant and proportionate to include a question on fair work practices, which would be evaluated along with other relevant criteria, while ensuring the appropriate balance between quality and cost of the contract.

22. Any decision to include a question on fair work practices should be made on a case by case basis taking into account commitments set out in the contracting authority's procurement strategy. The question should be framed in a way that is consistent with the principles deriving from the Treaty on the Functioning of the European Union: transparent, ensures equal treatment and non-discrimination, proportionate and mutual recognition and selection and award criteria must be relevant to the subject matter of the contract.

23. The question should ask bidders to describe the package of measures which demonstrate their positive approach to fair work practices in delivering the public contract. We regard a commitment to the Living Wage as one of the clearest ways in which a bidder can demonstrate this positive approach. Payment of the Living Wage

is not the only indicator however, and it should be emphasised that whilst failure to pay the Living Wage would be a strong negative indicator it does not mean that the employer's approach automatically fails to meet fair work standards.

24. A sample question in Annex A is how we recommend purchasers address fair work practices at the relevant stage of the procurement procedures, but this may need to be adapted to take account of the particular circumstances surrounding the goods, works or services being procured and to reflect those aspects of fair work practices which are relevant to the subject matter of the contract.

25. When considering the use of a question on fair work practices, it is important to consider the extent to which a bidder's fair work practices is related to the subject matter of the contract. The following factors should also be considered when devising the approach to the procurement process:

In respect of public contracts for services and works:

- Fair work practices will be particularly relevant to consider where the quality of the service being delivered or works performed is directly affected by the quality of the workforce engaged in the contract. For example, the continuity and quality of care and support services are likely to be closely related to the contractor's approach to its workforce in respect of matters relating to recruitment, remuneration and other terms of engagement;
- When weighting the fair work practices question, it is important to be proportionate by taking into account the likely impact on the quality of the service delivery or the works performed and by ensuring the appropriate balance between the quality and cost of the contract;
- When evaluating bidders' responses it is important to take into account those aspects of fair work practices which are likely to have a positive impact on the service delivery in that sector and the comprehensiveness and quality of the complete package of measures in general;
- It is also important to ensure that the evaluation is conducted in a proportionate, objective, transparent and non-discriminatory manner in recognition that responses may describe different approaches to fair work practices depending on the size and status of the bidders.

In respect of public contracts for the supply of goods:

- Fair work practices are less likely to be a significant consideration in respect of the procurement of goods, where the weighting of quality criteria will primarily focus on the quality and performance of the goods being supplied;
- Fair work practices should, however, be considered wherever the way the workforce are engaged in the supply of the goods will have an impact on their quality. For example, where the goods to be supplied are created by processes involving manual labour where the terms of engagement will impact on the quality of the goods.

26. In deciding whether or not fair work practices are relevant to the quality delivered under a contract, it is important to consider all relevant factors and be able to justify their inclusion in any decision making process. These factors may include whether:

- there is any previous experience of poor work practices, including pay and conditions, impacting on the quality of the contract to be delivered;
- there is any history of low pay or unequal pay in that sector;
- there is a risk that staff working on the contract might be subject to exploitative practices, e.g. through the inappropriate use of zero-hours contracts, through unnecessary distancing of the employer-worker relationship e.g. by use of an “umbrella company” and through pay and hours arrangements that deny workers stability of employment or hours of work, e.g. by failing to pay wages for travel time within the working day, such as in the care at home sector;
- there is evidence that working conditions are making recruitment and retention problematic;
- contractors are seeking to cut their costs through driving down staff terms and conditions, including pay;
- workers will be required to interact directly with the contracting authority’s employees and/or members of the public and whether they will spend any time on the contracting authority’s premises.

27. If the answer to any of the above questions is “yes”, then fair work practices are likely to be a relevant consideration for the contract in question. This is not, though, an exhaustive list and other factors may be relevant depending on the specifics of an individual contract.

Contract management and monitoring

28. Effective contract management and monitoring should be undertaken to ensure that fair work practices continue to be applied throughout the duration of the contract, e.g. by requesting information on the pay, terms and conditions of workers involved in the delivery of the contract.

Fair work practices – sample Invitation to Tender Question

(Note: This question should be adapted to take account of the particular circumstances surrounding the goods, works or services being procured and to reflect those aspects of fair work practices which are relevant to the subject matter of the contract.)

The Public Sector in Scotland is committed to the delivery of high quality public services, and recognises that this is critically dependent on a workforce that is well-rewarded, well-motivated, well-led, has access to appropriate opportunities for training and skills development, are diverse and is engaged in decision making. These factors are also important for workforce recruitment and retention, and thus continuity of service. Public Bodies in Scotland are adopting fair work practices, which include:

- a fair and equal pay policy that includes a commitment to supporting the Living Wage, including, for example being a Living Wage Accredited Employer;
- clear managerial responsibility to nurture talent and help individuals fulfil their potential, including for example, a strong commitment to Modern Apprenticeships and the development of Scotland's young workforce;
- promoting equality of opportunity and developing a workforce which reflects the population of Scotland in terms of characteristics such as age, gender, religion or belief, race, sexual orientation and disability;
- support for learning and development;
- stability of employment and hours of work, and avoiding exploitative employment practices, including for example no inappropriate use of zero-hours contracts;
- flexible working (including for example practices such as flexi-time and career breaks) and support for family friendly working and wider work life balance;
- support progressive workforce engagement, for example Trade Union recognition and representation where possible, otherwise alternative arrangements to give staff an effective voice.

In order to ensure the highest standards of service quality in this contract we expect contractors to take a similarly positive approach to fair work practices as part of a fair and equitable employment and reward package.

Fair work practices (xx%)

Q - Please describe how you will commit to fair work practices for workers (including any agency or sub-contractor workers) engaged in the delivery of this contract.

Answers need not be constrained to, or be reflective of any of examples given alongside this question.

Good answers will reassure evaluators that your company takes a positive approach to rewarding staff at a level that helps tackle inequality (e.g. through a commitment to paying at least the Living Wage); improves the wider diversity of your staff; provide skills and training, and opportunities to use skills which help staff fulfil their potential;

avoids exploitative employment practices (e.g. in relation to matters such as the inappropriate use of zero-hours contracts); takes the engagement and empowerment of staff engaged on this contract seriously, including having arrangements in place to ensure trade union representation where possible; otherwise alternative arrangements to give staff an effective voice and that your company will demonstrate organisational integrity with regards to the delivery of those policies.

This reassurance can include a variety of practices which demonstrate your approach to fair work and should be tangible and measurable examples that can be monitored and reported during contract management procedures.

Insert response here

Definitions

The “**Living Wage**” is-

a rate of pay which is sufficient to ensure that the recipient may enjoy an acceptable standard of living. The rate will be different for different places reflecting different costs of living. In the UK the rate is an hourly rate set independently and updated annually by the Living Wage Foundation and calculated by the Centre for Research in Social Policy at Loughborough University’, more information is available here - <http://www.livingwage.org.uk/what-living-wage> - and is consistent with the definition provided in Section 15(7) of the Procurement Reform (Scotland) Act 2014.

“**Human rights standards**” -

include not only the standards guaranteed by the European Convention on Human Rights through the Human Rights Act, but also those guaranteed under other international treaties that the UK has signed. For example, the International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to just and favourable working conditions; in particular fair and equal pay, safe and healthy working conditions and reasonable working hours. International labour standards, set both by the European Union and the International Labour Organisation, should also be respected by those who deliver public contracts.

Examples of how to apply this statutory guidance

<http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/ProcReformAct/statutoryguidance/examples>

Further guidance

Legislation

- Procurement Reform (Scotland) Act 2014
http://www.legislation.gov.uk/asp/2014/12/pdfs/asp_20140012_en.pdf
- Equality Act 2010
<http://www.legislation.gov.uk/ukpga/2010/15/contents>
- The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012
<http://www.legislation.gov.uk/ssi/2012/162/contents/made>
- Human Rights Act (1998)
<http://www.legislation.gov.uk/ukpga/1998/42/contents>

Other related statutory / guidance

- Statutory Guidance to Local Authorities on Contracting (Section 52 guidance)
<http://www.gov.scot/Publications/2006/05/11160409/1>
- Public Private Partnerships in Scotland - Protocol and Guidance Concerning Employment Issues
<http://www.gov.scot/resource/doc/1069/0005205.pdf>

Resources

- The Living Wage
<http://www.livingwage.org.uk/what-living-wage>
- Living Wage Accredited Employer
<http://scottishlivingwage.org/>
- Considerations around using Procurement to achieve payment of the “Living Wage” in Scotland
<http://readyforbusiness.org/wp-content/uploads/2015/01/lib-Living-wage.pdf>
- National Minimum Wage
<https://www.gov.uk/national-minimum-wage>
- Fair Work Convention
<http://news.scotland.gov.uk/News/Fair-Work-Convention-created-115d.aspx>
- Equality and Human Rights and procurement
<http://www.equalityhumanrights.com/about-us/devolved-authorities/commission-scotland/public-sector-equality-duty-scotland/procurement-guidance-scottish-public-authorities>
- International Covenant on Economic, Social and Cultural Rights
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>
- International Labour Organisation
<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>
- UN Guiding Principles on Business and Human Rights
http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf



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