

Summary:

Considerations around using Procurement to achieve payment of the “Living Wage” in Scotland

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In recent months, there has been much coverage in the press of matters relating to the payment of a Living Wage. Recently, a number of public bodies have concluded procurement processes with suppliers who have made commitments in respect of paying a living wage. This brief note:

(i) summarises current limitations in using procurement to secure payment of a living wage; and

(ii) sets out examples of what some organisations have sought to do to secure payment of a living wage given those limitations.

Some background information on the Living Wage

The ‘living wage’ is an hourly rate set independently and updated annually, according to a calculation undertaken to assess the basic cost of living. It is applicable to the whole of the UK (except London which is set at a higher rate), according to the basic cost of living.

The living wage is an informal benchmark; it is not a legally enforceable minimum level of pay unlike the national minimum wage.

The national minimum wage is set by the business secretary each year on advice provided by the Low Pay Commission and is enforced by HMRC, pursuant to the National Minimum Wage Act 1998.

The current National Living Wage (as at November 2014) is £7.85 an hour. By comparison, the national minimum wage has (since October 2014) been £6.50 an hour for adults aged 21 and over, and £5.13 for those aged 18 to 20. The minimum wage has come under criticism that it fails to cross the poverty line, meaning numerous working people are left living in poverty.

Employers, at present choose whether or not to pay the Living Wage on a voluntary basis.

A number of organisations have signed up for accreditation with the Living Wage Foundation, an initiative of Citizens UK, which offers accreditation to employers that pay the living wage, or those committed to an agreed timetable of implementation. To be an accredited employer through The Living Wage Foundation, all staff that are directly employed must be paid the living wage, and there must be a plan in place to implement this for all contracted staff.

To recognise contractors who support the aims of the Living Wage Foundation, the Living Wage Foundation has introduced the ‘Service Provider Recognition’ programme.

As part of this, contractors commit to always supply a living wage bid alongside every market rate submittal to all of their prospective and current clients. This means the client always has the choice to implement the living wage at the point of tender.

What is the position on a public sector body using its procurement processes to further use of the Living Wage in Scotland

Is it possible to include a mandatory requirement that a bidder pays the living wage?

Taking the direct approach to securing a nationally-set living wage on a procurement runs the risk of breaching European Law and European Procurement rules. If a contracting authority includes a mandatory requirement to pay the living wage that could be challenged by a bidder who can show they are disadvantaged by that requirement.

To gain a greater understanding of the reasons for the above, readers may wish to read further the European cases of [Ruffert](#), [Laval](#) or indeed the recent [Dortmund](#) case (and by clicking on the text links).

Briefly, European law recognises that contracting authorities within member states may, within procurements, require payment of legislative and/or universally applicable minimum rates of pay (i.e. such as the UK minimum wage). The new European Directive on public procurement (Directive 2014/24/EC) essentially reflects this position in recital 98 in relation to arrangements involving posted-workers.

However, where an obligation is included in a procurement requiring payment at a “higher level” than that set out in legislation / than is universally applicable, this could be open to challenge as an “unjustified restriction”breaching Article 56 of the Treaty of the Functioning of the European Union (free movement of services). (Note: there are relatively complex arguments that might potentially be put forward as a defense to a challenge but for the purposes of this note, the high level point is that there is legal risk of challenge).

The above position was confirmed by [letter](#) from the European Commission to the Scottish Government dated 7 May 2012 and subsequently in [Scottish Government Procurement Policy Note \[SPPN 4/2012\]](#).

SPPN 4/2012 specifically notes that measures taking the form of “encouragement” to pay a living wage, may be explored (paragraph 9).

Readers may also be interested in a number of separate and recent legal updates from law firms covering this area, see for example: [Anthony Collins LLP](#), [MacRoberts LLP](#), [Wragge & Co.](#)

It is worth noting that the above position is relevant to procurements that are above the thresholds at which the European Procurement Rules apply and/or which involve a contract of potential cross-border interest.

So, what options does that leave for a contracting authority wishing in some way to incorporate living wage considerations?

First, a number of contracting authorities have sought to include living wage considerations into their procurements without making payment of the living wage a mandatory requirement. The following are examples known to Ready For Business and are included to provide examples of how some contracting authorities have sought to approach this area. (Ready For Business would recommend that contracting authorities discuss with their legal departments incorporating living wage considerations in procurement).

Example 1: Evaluation of “Proposals to enhance workforce retention/cohesion/performance”:

a contracting authority, within its quality scoring, included an award criterion in this vein for a service contract where staff were key to successful delivery. Bidders were required to provide a method statement setting out how they would meet certain specified requirements and what additional

measures they would put in place. Reference was made in the question to the authority having an interest in the promotion of equality and measures towards ensuring good working conditions for those performing the contract, etc.

- *Outcome:* the successful bidder included a commitment to paying the living wage within their response to this question and living wage was achieved via a mechanism holding bidders contractually to their method statements (even though living wage had not been a requirement).
- *Brief comments:* if considering this potential route, contracting authorities need to ensure they are clear and transparent on how they will approach scoring and that they ensure all aspects of the award criterion are objective, proportionate and linked to the subject matter of the contract. It would also be important to check that the approach would not lead to indirect discrimination. This is something that may change from one contract to another.

Example 2: Submission of separate “living wage based” offer: a

contracting authority sought bids under a procurement process that permitted voluntary submission of a second sealed “living wage” bid (which was identical with all aspects of the first bid other than the cost component relevant to paying the living wage). The contracting authority was very clear in its documentation that it would make its evaluations on the basis of the primary bid and if (and only if) the primary bid was successful, it reserved the right then to open the second bid and accept any submitted “living wage” bid.

- *Outcome:* having concluded its evaluation and then considered a second bid that had been voluntarily submitted by the successful bidder, the contracting authority proceeded with the living wage bid.

Example 3: Below threshold/not of cross border interest: where

the full European regime does not apply, some authorities have sought contractual requirements on living wage, though thought and care needs to be given to the impact on economic operators in this area (where there may be more SME’s gaining contracts).

Example 4: Partnering/voluntary commitments to work towards

living wage: some authorities have sought to put in place “loose” arrangements under which, over the duration of a contract, a supplier gives a non-binding commitment to work towards an authority’s goals (including payment of living wage). The principal negative with this approach is that it relies on the “goodwill” of the economic operator.

This note will be updated when further detail on Scottish Government’s proposals for implementation of the new European directives and the Procurement Reform (Scotland) Act 2014 are made public.