

# Scottish Procurement

## Scottish Procurement Policy Note

SPPN 1/2015

Date 4 February 2015



### **Evaluating employment practices and workforce matters, including living wage, in public contracts**

#### **Purpose**

1. This note provides information on how and when employment practices and 'workforce matters', including payment of the living wage, should be considered in the course of a public procurement exercise as a key driver of service quality and contract delivery. It is issued in advance of the full implementation of the provisions of the Procurement Reform (Scotland) Act 2014 and the Statutory Guidance to be published under the Act.

#### **Key Points**

- A bidder's employment practices and its approach to its workforce can have a direct impact on the quality of service it delivers and, sometimes, of the goods it supplies and works performed;
- Wherever it can be deemed relevant to quality of service or goods or delivery/performance of the contract, it is important to ensure that a bidder's employment practices and approach to the workforce it will engage to perform the contract is evaluated as part of the procurement exercise;
- Fair pay, including payment of the living wage, is one of the ways a bidder can demonstrate that it takes a positive approach to its workforce;
- Consideration of the bidder's approach to employment practices and workforce matters must be proportionate and based on the nature, scope, size and place of the performance of the contract.

- The purchaser must consider the bidder’s overall approach to employment practices and workforce matters – this should include all relevant evidence, including remuneration and employee representation, demonstrating the employer’s approach to being a good employer delivering good quality services.

## **Background**

2. The Scottish Government values the delivery of high quality services and recognises that service levels are often critically dependent on the quality and engagement of the workforce engaged in delivering public contracts. We expect those who deliver public contracts to adopt fair employment practices for all workers engaged on delivering the contract. This includes not only workers they directly employ but workers who they will engage with through, for example, employment agencies and/or “umbrella” companies. We believe that workers who are treated fairly, who are well-rewarded, well-motivated, well-led and who have appropriate opportunities for training and skills development are likely to deliver a higher quality of service and that good relationships between the contractor and the workforce contribute importantly to sustainable economic growth.

3. The Scottish Government considers the payment of the living wage to be a significant indicator of employer commitment in this regard. The Scottish Government has obtained clarification from the European Commission that public bodies are unable to make payment of the living wage a mandatory requirement as part of a competitive procurement process, ([see SPPN 4/ 2012](#)). It is therefore not possible to reserve any element of the overall tender score solely to the payment of a living wage. It is, however, possible to encourage suppliers to pay a living wage as part of a procurement exercise and the Scottish Government has recently successfully piloted this approach in a tender exercise; see paragraphs 7 and 8 below.

4. It is right to expect those who deliver public contracts to adopt fair employment practices. This includes, for example, no inappropriate use of zero hours contracts and ensuring that workers receive fair terms and conditions and a fair pay. This also applies where an employment agency is used to supply workers

to perform the contract who are employed by an umbrella company. 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 could include, but not be limited to, engaging staff employed by the company to exploit workers 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. The Freelancer & Contractor Services Association (FCSA) has established a code of conduct which includes provisions aimed at promoting good practice in this area. Where a contractor may use agency staff in the performance of the contract, we recommend that purchasers consider making it a condition of contract that the contractor complies with FCSA’s code of conduct.

5. The Scottish Government has a range of internal policies in place to support a well-rewarded, well-motivated, well-led workforce. Details at Annex A include a pay policy that includes a commitment to supporting the living wage for the duration of this parliament, fair employment practices, no inappropriate use of zero hours contracts and the encouragement of staff to join an appropriate Trade Union and to play an active part in it, making sure their views are represented. In order to ensure the highest standards of service quality in public service contracts, contractors are expected to demonstrate a similarly positive approach to workforce-related matters as part of a fair and equitable employment and reward package.

6. The Procurement Reform (Scotland) Act 2014 allows Ministers to publish statutory guidance on the selection of bidders and the award of contracts. Scottish Ministers will consult on the content of such statutory guidance including addressing issues associated with fair employment practices and how to promote the living wage in public tender exercises in the context of a package of workforce matters this month. This Scottish Procurement Policy Note (SPPN) is issued pending the commencement of the relevant provisions and publication of statutory guidance, which we expect to publish following consultation with stakeholders in late 2015.

## **Pilot approach - Workforce Matters Invitation to Tender Question**

7. The recent Scottish Government pilot focussed on the use of an Invitation to Tender (ITT) question on 'workforce matters' in the tender exercise for catering services on its premises. Following completion of the selection stage of the procurement process, the ITT described the Government's approach to 'workforce matters' and asked bidders to demonstrate their own approach. On this occasion, we reserved 10% of the overall quality scoring for the responses to the question. It is important, however, that the amount of marks allocated is proportionate and takes account of the likely impact on quality for that particular contract. In some cases, e.g. personal social care, the impact on quality will merit a high score. In other cases, where workforce matters may be relatively less important to quality, the amount of marks may need to be lower. Each procurement must be considered on its own merits.

8. In the catering services procurement, evaluations were undertaken on the basis of the comprehensiveness and quality of the overall package of measures (i.e. not focussing solely on one aspect of workforce matters). The award of this contract guarantees that all those working on it will benefit from a package of positive workforce measures, which will include payment of the living wage.

9. The text at Annex A is how we recommend purchasers address workforce matters at the contract award stage of relevant procurement procedures. It has been developed in light of our experience in relation to the catering contract pilot.

## **Considerations in applying this approach in public contracts**

10. Any decision to include a question on 'workforce matters' in a tender exercise should be made on a case by case basis and 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: transparency, equal treatment, non-discrimination, proportionality and mutual recognition. The following factors should also be considered:

- In a tender exercise the selection and award criterion must be relevant to the subject matter of the contract; therefore it is important to consider the extent to

which a contractor's approach to its workforce is related to the subject matter of the contract;

- Workforce matters are most likely to be relevant in relation to contracts involving services and construction;
- It is right to expect all suppliers who deliver public contracts to adopt fair employment practices;
- When weighting the 'workforce matters' question, it is important to be proportionate and take into account the relevance of workforce to the subject matter and quality of the service delivery, goods supplied or the delivery of the contract;
- When evaluating bidders' responses to this question it is important to take into account the comprehensiveness and quality of the complete package of measures in general and not to treat any individual element more favourably than any other.

11. In deciding whether or not workforce matters are relevant to the quality delivered under a contract, purchasers should consider, for that particular type of contract, whether:

- the purchaser has any previous experience of workforce matters or poor employment practices, including pay and conditions, impacting on the quality of service to be delivered;
- there is any history of low pay in that sector;
- there is a risk that those working on the contract might be exploited in any way, e.g. through the inappropriate use of zero hours contracts or as a result of being employed by an umbrella company;
- contractors might seek to cut their costs through driving down workers' terms and conditions, including pay;
- the contractor's workers will be required to interact directly with the public body's employees and/or members of the public and whether they will spend any time on the public body's premises.

If the answer to any of the above questions is "yes", then workforce matters 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.

## **Existing contracts**

12. Public bodies may have existing contracts where workforce matters are an issue, for example low pay or the inappropriate use of zero hours contracts. In such instances, it may be feasible to address these issues by varying the terms of the existing contract, but caution should be exercised and account should be taken of a range of factors.

13. Where a contract has been awarded which includes a provision to amend the contract, then provided the variation takes place within the parameters set by the contract there should be little or no risk of legal challenge.

14. Where there is no power to vary the contract, some adjustments may be still be possible without risk of challenge, but significant variations to contracts do bring a risk of challenge. Caselaw on this matter (*Presstext Nachrichtenagentur v Republik Österreich* [C-454/06](#)) confirms that an amendment of a contract which is significant will amount to the illegal direct award of new contract without competition. Economic advantage given to a contractor as a result of variation will, prima facie, be considered significant as will any amendment which could have distorted competition or have a discriminatory effect and lead to a different outcome in the procurement. A simple obligation on the part of the contractor to make payment of no less than the living wage whilst not making any consequent changes to employees' contractual terms is unlikely to be controversial in this respect.

15. The new EU Procurement Directive provides what may be described as a "safe harbour" in relation to variations of contract, with an upper limit in relation to variations of not more than 10% by value for services contracts and 15% for works contracts, provided that in each case the value of the variation remains less than the applicable EU threshold value for a contract of the relevant type. Where the contract is below the EU threshold or otherwise exempt, there is likely to be less risk of challenge to any variation.

16. It should again be emphasised that a contract condition or any other measure that would make payment of at least the living wage mandatory cannot be included as a requirement of a competitive procurement which is subject to EU law.

17. The Scottish Government has recently reviewed its current contracts where the contractor's workers routinely work on Government premises. In the case of three contracts where not all workers were currently receiving at least the living wage, a variation has been applied to ensure that all individuals performing these contracts on Government premises are to be paid an hourly rate at least equal to the living wage, whilst maintaining other workforce benefits and avoiding any reduction in contract performance standards.

### **Action Required**

18. Public bodies are asked to note the advice in this policy note and are asked to adopt it, wherever it is legally possible to do so, in their own procurement procedures. If you are in any doubt as to whether adopting the measures proposed are legally possible you should take appropriate legal advice.

### **Dissemination**

19. Please bring this SPPN to the attention of all relevant staff, including those in Agencies, Non-Departmental Public Bodies and other sponsored public bodies within your area of responsibility.

### **Contact**

20. If you have any enquiries about this SPPN or would like to discuss the issues it raises, please contact [Scottish Procurement mailbox](#)

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**Workforce Matters Invitation to Tender Question**

The Scottish Government (SG) is persuaded by evidence which shows that the delivery of high quality public services is critically dependent on a workforce that is well-motivated, well led and has appropriate opportunities for training and skills development. These factors are also important for workforce recruitment and retention, and thus continuity of service. SG itself has adopted workforce policies to meet these requirements. These policies include:

- a pay policy that includes a commitment to supporting the living wage for the duration of this parliament;
- fair employment practices;
- clear managerial responsibility to nurture talent and help individuals fulfil their potential;
- a strong commitment to Modern Apprenticeships and to the development of Scotland’s young workforce;
- support for learning and development;
- no inappropriate use of zero hours contracts;
- no inappropriate use of “umbrella” companies
- flexible working;
- flexi-time; and
- career breaks.

The Scottish Government also attaches importance to ensuring effective consultation and involvement of staff and Scottish Government management work in partnership with the trade union. While it is, of course, a personal decision whether or not to join a Trade Union, the Scottish Government encourages its staff to join an appropriate Union and to play an active part within it, making sure their views are represented.

In order to ensure the highest standards of service quality in this contract we expect contractors whose workers work alongside ours to take a similarly positive approach to workforce-related matters as part of a fair and equitable employment and reward package.

***Workforce Matters (X%\*)***

Q - Please describe how your organisation proposes to commit to being a best practice employer in this respect 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 the engagement and empowerment of workers seriously; takes a positive approach to rewarding workers at a level that can help tackle poverty (e.g. through a commitment to paying at least the living wage), adopts fair employment practices, provides skills and training which help workers fulfil their potential, that you do not exploit workers (e.g. in relation to matters such as the inappropriate use of zero hours contracts or “umbrella” companies); and that your company will demonstrate organisational integrity with regards to the delivery of those policies, including having arrangements in place to ensure effective employee representation. This reassurance should be achieved by providing tangible and measurable examples that can be monitored and reported during contract management procedures.

*Insert response here*

\* In our Catering contract, 10% of the total score available for the Quality aspects of the bids was allocated to workforce related matters. The amount of points allocated by purchasers should be considered on a case by case basis and should be proportionate to the contract in question taking account of the likely impact on the quality of service delivered.