Living wage through procurement

Purpose

1. The purpose of this Scottish Procurement Policy Note (SPPN) is to inform stakeholders about clarification from the European Commission on use of the public procurement process or public contracts to require contractors to pay their staff a 'living wage'. This Note also informs stakeholders that views on using procurement activity as a mechanism for promoting the living wage are being sought as part of the Scottish Government's public consultation exercise on the Procurement Reform Bill. In addition, John Park MSP is separately consulting on a draft proposal for legislation which would require private sector employees working on public sector contracts to be paid the living wage.

Key points

2. The key points are as follows:

- The European Commission has clarified that public bodies cannot require contractors to pay their employees a living wage as a condition of participating in a tendering exercise or through a contract performance clause. Public bodies can, if they wish, still encourage contractors to pay their employees a living wage.

- Scottish Government is seeking views from stakeholders on the implications of encouraging payment of a living wage through public procurement processes.

- Separately, John Park MSP is seeking views from stakeholders on a draft proposal for legislation which would require private sector employees working on public sector contracts to be paid the living wage.
Background

3. The aim of the Scottish Living Wage Campaign is for all employers in the public, private and voluntary sectors to pay their workers no less than the Scottish Living Wage. The living wage, a rate of pay higher than the UK’s National Minimum Wage\(^1\), is regarded by the Living Wage Campaign as the minimum income that households need in order to afford an acceptable standard of living. The hourly rate is calculated by the Living Wage Foundation and the Centre for Research in Social Policy at Loughborough University and is currently set at £7.20 per hour.

4. The Scottish Government supports the principles of the Scottish Living Wage campaign and in 2011 introduced a requirement for all employers subject to its public sector pay policy to pay, as a minimum, the Scottish living wage. The Public Sector Pay Policy covers the Scottish Government and its associated departments, Agencies, Non Departmental Public Bodies, Public Corporations and NHS Scotland Senior Managers.

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5. The Scottish Parliament’s Local Government and Regeneration Committee undertook an inquiry into the living wage in Scotland in December 2011, part of which looked at using public procurement as a means of delivering a living wage. A copy of the Committee’s report, the subsequent parliamentary debate and the Government’s response to the report is available on the Parliament’s website:

http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/43751.aspx

6. In evidence to the Committee, the Scottish Government stated that it had sought clarity from the European Commission on the possibility of requiring contractors, as part of the public procurement process, to pay their staff a living wage.

7. The European Commission has now responded and has confirmed that any requirement, as part of a procurement process or public contract, on contractors to pay their employees a living wage set higher than the UK’s National Minimum Wage is unlikely to be compatible with the Treaty on the Functioning of the European Union. In practice, this means that public bodies cannot address payment of a living wage as

\(^1\) £6.08 per hour for all workers aged 21 and over
part of the award criteria for a public contract nor make it a condition of contract performance.

8. The European Commission’s statement on the living wage is at Annex A.

**Further consideration of living wage**

9. If public bodies wish to **encourage** contractors to pay their employees a living wage through procurement processes, this is still possible, although they cannot treat contractors who say that they will pay employees engaged in the delivery of a contract a living wage any more favourably than those contractors that say that they will not.

10. We are aware that a number of public bodies are taking steps to encourage contractors to pay their employees a living wage. We are keen to understand the implications of using procurement activity as a mechanism for promoting the living wage across the private and voluntary sectors. We are therefore, as part of the wider consultation on the Procurement Reform Bill, seeking stakeholders’ views on a number of questions regarding using procurement activity as a means of encouraging contractors to pay their employees a living wage.

**Member’s Bill by John Park MSP**

11. John Park has lodged a draft proposal for legislation in the Scottish Parliament as the first stage in the process of introducing a Member’s Bill. Mr Park has published a consultation document seeking stakeholders’ views on his draft proposal. Following the consultation, a final proposal may be lodged in Scottish Parliament and will progress to parliamentary scrutiny if it secures the necessary support from MSPs.

**Action required**

12. Stakeholders are invited to note the advice provided by the European Commission and to submit their views in response to the Scottish Government’s consultation. Stakeholders are also alerted to Mr Park’s consultation.

- The Scottish Government’s consultation document can be accessed via the Scottish Government’s website: [http://www.scotland.gov.uk/Publications/2012/08/3295](http://www.scotland.gov.uk/Publications/2012/08/3295). Questions relating to the living wage through procurement can be found at Annex A of that document.
Please note that the deadline for responses to the consultation is Friday 2 November 2012.


**Dissemination**

13. 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**

14. Enquiries about this SPPN should be addressed to Susan Duncan, Scottish Procurement, e-mail susan.duncan@scotland.gsi.gov.uk.

Scottish Procurement
The Scottish Government
2nd Floor, Europa Building
450 Argyle Street
Glasgow
G2 8LG
Clarification received from the European Commission on the possibility of requiring contractors, as part of the public procurement process, to pay their staff a living wage

“The current EU public procurement rules allow contracting authorities to take into account social considerations in the award criteria and contract performance clauses of a public contract, provided certain conditions are met. In general, social considerations must comply with the Treaty’s principles of (transparency, equal treatment etc) and with any other EU law that may be relevant.

If social considerations are taken into account in the award criteria, they must be linked to the subject matter of the contract, i.e. to the supply, services, works which are the object of the contract. If they are included in the contract performance clauses, they must be linked to the performance of the contract, i.e. to the tasks necessary for the delivery / provision / execution of the supplies / services / works of the contract.

A requirement regarding the payment of a ‘living wage’ would in practice most probably be linked to the tasks necessary for the performance of the contract, and therefore be used as a contract performance clause. Such clause would have to be non-discriminatory and known in advance by all candidates for transparency reasons.

In terms of other relevant EU legislation, it would have to comply inter alia with the Posting of Workers Directive. The ‘living wage’ to staff involved in the performance of the contract would have to be set in accordance with one of the procedures laid down by Article 3 of the Directive. It was the non-compliance with this requirement which led the Court of Justice to its decision in the Rüffert case. In addition, the Court held in the Laval case that requirements regarding the level of wage payable to posted workers may not go beyond the mandatory rules for minimum protection provided for by the Directive. A ‘living wage’ set at a higher level than the UK’s minimum wage is unlikely to meet this requirement.”

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2 For additional details on these conditions, see the sections “award criteria” and “contract performance clauses” of the Guide: "Buying social: A Guide to taking account of social considerations in public procurement": http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm#social


4 Case C346/06

5 The Court held in the Laval case that the “level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited in principle, to that provided for in Article 3(1), first subparagraph (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision” (point 80 of the Laval judgement)