

**Best Practice Guidance
on Addressing Fair
Work Practices, including the
Real Living Wage, in Procurement**

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INTRODUCTION

1. PURPOSE

- 1.1. This Guidance supports the practical application of, and must be considered alongside, the [Statutory Guidance on Addressing Fair Work Practices, including the Living Wage, in Procurement](#) (Statutory Guidance) and other relevant guidance, including the [Procurement Journey](#). It is part of the suite of guidance materials which support the Scottish Process for Sustainable Procurement underpinned by the [Sustainable Procurement Duty tools](#).
- 1.2. It offers practical guidance to help public bodies and suppliers think about how to develop and adapt their approach to Fair Work practices at the relevant stages of the procurement process.
- 1.3. It has been developed with support from a working group of representative public sector procurement professionals and in consultation with stakeholders, including the Fair Work Convention and trade unions.

A [Toolkit](#), which includes Information Sheets, Practical Tools and Examples, which can be used at key stages of the procurement process is also available.

2. INTRODUCTION

- 2.1. [Scotland's Economic Strategy](#) sets out an overarching framework for how the Scottish Government aims to achieve a more productive, cohesive and fairer country. It prioritises boosting investment and innovation, maintaining a focus on internationalisation, and supporting inclusive growth.
- 2.2. Inclusive growth is where the benefits of economic growth are shared more equally across society. There is a growing body of international evidence that more equal societies are more productive and as a result achieve stronger and more sustainable economic growth in the long run.
- 2.3. A fair and inclusive jobs market in which every individual can participate to achieve their full potential is central to achieving inclusive growth. The [Scottish Government's Labour Market Strategy](#) sets out the action we are taking to deliver our vision for “a strong labour market that delivers inclusive, sustainable economic growth, characterised by growing, competitive businesses, high employment, a skilled population capable of meeting the needs of employers, and where Fair Work is central to improving the lives of individuals and families”.
- 2.4. The [National Performance Framework](#) provides a clear vision for Scotland with broad measures of national wellbeing covering a range of economic, health, social and environmental outcomes, indicators and targets. The Framework comprises eleven National Outcomes, including a Fair Work Outcome: “We have thriving and innovative businesses, with quality jobs and Fair Work for everyone”.
- 2.5. The National Indicators aid scrutiny of the Outcomes and illustrate how progress will be measured in relation to each of them. The National Indicators which support the Fair Work Outcome, include:
 - Employees on the living wage;

- Pay gap;
- Contractually secure work;
- Employee voice;
- Skills under-utilisation;
- Work related ill health; and,
- Gender balance in organisations.

3. FAIR WORK PRACTICES IN PUBLIC SECTOR SUPPLY CHAINS

- 3.1. Contractors delivering public contracts must comply with workplace standards and labour laws. The Scottish Government expects suppliers to implement relevant policies to give effect to the standards and legal requirements and effectively communicate those policies to employees. Having clarity on workplace rights and responsibilities including on equality, human rights and discrimination, health and safety obligations, recruitment and working hours, pay, and trade unions or other forms of employee representation can make a real difference to employees, to the organisation and to the way the contract is delivered.
- 3.2. The Scottish Government believes that contractors who go beyond minimum legal requirements by adopting Fair Work practices will increase innovation, improve workplace outcomes and business performance, and can positively impact on the delivery of a public contract.
- 3.3. In respect of public procurement, the range of Fair Work policies and practices which can be addressed must relate to the nature of the contract being delivered and should reflect the five dimensions from the [Fair Work Framework](#).
- 3.4. We believe that the way a public contract is delivered can benefit from contractors adopting Fair Work practices. We also accept that the way particular dimensions of Fair Work will impact on the delivery of the contract will differ. This will be dependent on the nature and size of the contract and the size and status of suppliers making up the market, and should be targeted on a case-by-case basis.
- 3.5. **The Scottish Government expects:**
 - **public bodies** to promote Fair Work practices in all relevant procurement processes while ensuring the appropriate balance between quality and cost of the contract, including the impact of cost on working conditions, and
 - **suppliers delivering public contracts** to adopt and demonstrate appropriate Fair Work practices, ensuring that these are delivered for all workers engaged on the delivery of the public contract.

4. PROCUREMENT POLICY

- 4.1. There are a range of legislative provisions available which provide the framework for a public body to address Fair Work practices through public procurement processes.
- 4.2. A public body's approach to addressing Fair Work practices in relevant procurement processes must be consistent with the fundamental principles of the [Treaty on the Functioning of the European Union](#) (TFEU): transparency, equal treatment and non-discrimination, proportionality and mutual recognition. This includes taking account of a bidder's size and status.
- 4.3. [The Procurement Reform \(Scotland\) Act 2014](#) (the Act) contains provisions which support sustainable outcomes for regulated and EU-regulated procurements, including the Sustainable Procurement Duty which places socially responsible decisions at the heart of public procurement processes. The Sustainable Procurement Duty requires a public body to consider how its procurement activity can improve the economic, social and environmental wellbeing of its area. A public body can contribute towards its Sustainable Procurement Duty by adopting a policy to promote Fair Work practices in relevant public contracts.
- 4.4. [The Public Contracts \(Scotland\) Regulations 2015](#) (PC(S)R 2015) include provisions for EU-regulated contracts, which enable sustainable outcomes to be incorporated into specifications, contract conditions and award criteria as they relate to the goods, works or services provided under the contract. A public body has this same discretion in regulated procurements.
- 4.5. [Section 15\(5\)\(b\)\(iii\) of the Act](#) requires a public body to include in its Organisational Procurement Strategy, a statement of its policy on payment of the Living Wage and to report on compliance. The Act requires this statement to focus on payment of the Living Wage to those working on the contract and [Statutory Guidance under the Procurement Reform \(Scotland\) Act 2014](#) states that this should form part of an approach to promote Fair Work practices.
- 4.6. Contractors must continue to comply with all relevant legislation in the delivery of public contracts and the [PC\(S\)R 2015](#) require all EU-regulated contracts to include conditions to ensure that the contractor complies with environmental, social and employment law (see [Scottish Procurement Policy Note 09/2016](#)). This includes for example breaches of the [Employment Relations Act 1999 \(Blacklists\) Regulations 2010](#), tax and social security obligations, relevant health and safety, employment and equalities legislation established in national, European and international law obligations, including the International Labour Organisation's Conventions.

- 4.7. A public body must have regard to the [Statutory Guidance](#), published in October 2015, in all regulated and EU-regulated procurements which commence on or after 1 November 2015. This guidance requires a public body to consider how to address Fair Work practices, including the real Living Wage, as part of a procurement process. This will include, for example, those directly employed and those employed via an agency and / or umbrella company.
- 4.8. The public sector equality duty ([Equality Act 2010](#)) requires a public body to have due regard to equality when exercising its functions. The duty is to:
- eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct;
 - advance equality of opportunity between people who share a relevant protected characteristic and those who do not; and,
 - foster good relations between people who share a protected characteristic.
- 4.9. [The Equality Act 2010 \(Specific Duties\) \(Scotland\) Regulations 2012](#) also requires a public body to consider for EU-regulated procurements whether the award criteria and contract performance conditions should include considerations to enable it to better perform the equality duty. By completing an equality impact assessment a public body can identify the impact of its decisions on people who share one of the protected characteristics and therefore inform how the procurement process can identify opportunities to comply with equality duties.

5. FAIR WORK POLICY

- 5.1. The Scottish Government fully endorses the [Fair Work Framework](#) produced by the Fair Work Convention in 2016. The Framework sets out the Convention's vision and definition of Fair Work.
- **Vision:** By 2025, people in Scotland will have a world leading working life where Fair Work drives success, wellbeing and prosperity for individuals, businesses, organisations and society.
 - **Definition:** Fair Work is work that offers effective voice, opportunity, security, fulfilment and respect; that balances the rights and responsibilities of employers and workers and that can generate benefits for individuals, organisations and society.
- 5.2. The dimensions that are detailed in the Fair Work Framework are summarised below. Many of these areas may also form part of internal policies and will therefore be covered by the existing rules in the workplace.

- 5.3. The Scottish Government strongly believes that all public bodies should be exemplars of Fair Work and that they should be able to demonstrate practices which cover each of the five dimensions of the Fair Work Framework. Some Fair Work practices will cover more than one dimension. Perhaps most significantly, by giving workers a right to be heard, through an effective voice, which underpins the other dimensions of Fair Work. Real dialogue between organisational stakeholders can help deliver on opportunity, security fulfilment and respect.
- 5.4. While employment law is reserved to the UK Government, the Scottish Government is taking action using the levers available to deliver Fair Work. This includes:
- Establishing and continuing to support the [Fair Work Convention](#).
 - Promoting the real Living Wage and achieving a target of 1000 Scots-based accredited employers by autumn 2017.
 - Supporting trade unions and providing support to the Scottish Trades Union Council.
 - Encouraging collective bargaining.
 - Encouraging businesses to make the [Scottish Business Pledge](#) thereby demonstrating commitment to Fair Work, employee engagement and innovation.
 - Launching the [Workplace Equality Fund](#) to deliver employer led innovative solutions to overcome workforce inequality.
 - Encouraging flexible working practices by funding [Family Friendly Working Scotland](#), which is working with employers to change workplace cultures.
 - Establishing the Pregnancy and Maternity Discrimination Working Group who have among other things strengthened the availability of guidance to pregnant women, new mothers and employers about rights and responsibilities within the workplace.

Information Sheets including a more detailed overview on Fair Work practices is available are the [Toolkit](#).

SUMMARY OF FAIR WORK FRAMEWORK

SECURITY:

Security of employment, work and income are important foundations of a successful life. This can be achieved through, for example:

- Fair pay (for example, the real Living Wage)
- No inappropriate use of zero hours contracts or exploitative working patterns
- Collective arrangement for pay and conditions
- Building stability into contractual arrangements
- Flexible working to align with family life and caring commitments
- Employment security arrangements
- Fair opportunity for pay progression
- Sick pay and pension

RESPECT:

Fair Work is work in which people are respected and treated respectfully, whatever their role and status. This can be achieved through, for example:

- Considering the concerns of others
- Respect of behaviours and attitudes
- Policies and practices which are understood and applied that respect health, safety and well-being
- Respect of workers' personal and family lives
- Opportunities for flexible working

OPPORTUNITY:

Fair opportunity allows people to access and progress in work and employment and is a crucial dimension of Fair Work. This can be achieved through, for example:

- Robust recruitment and selection procedures
- Paid internships
- Training and development opportunities
- Promotion and progression practices
- Buddying and mentoring
- Engaging with diverse and local communities

FULFILMENT:

It is widely accepted that fulfilment is a key factor in both individual and organisational wellbeing. This includes the opportunity to use one's skills, to be able to influence work, to have some control and to have access to training and development. This can be achieved through, for example:

- Effective skills use
- Autonomy, opportunities to problem solve and make a difference
- Investing in training, learning and skills development and career advancement

EFFECTIVE VOICE:

The ability to speak, individually or collectively, for example, through a recognised trade union, and to be listened to, is closely linked to the development of respectful and reciprocal workplace relationships. Effective voice underpins the other dimensions of Fair Work, and real dialogue between organisational stakeholders can help deliver on opportunity, security, fulfilment and respect. This can be achieved through, for example:

- Enabling staff to have a voice at all levels
- Openness, transparency, dialogue and tolerance of different views
- Formal and informal structures
- Union recognition and collective bargaining



The real Living Wage

- 5.5. The Scottish Government considers the payment of the real Living Wage to be a significant indicator of an employer's commitment to Fair Work practices and that payment of the real Living Wage is one of the clearest ways that an employer can demonstrate that it takes a positive approach to its workforce.
- 5.6. [Research](#) shows that paying the real Living Wage helps businesses recruit and retain better staff, reduce absenteeism, encourage higher productivity and 93% of businesses say Living Wage Accreditation has improved their reputation.
- 5.7. The real Living Wage should not be confused with the National Minimum Wage (including the "national living wage"), which is the legal minimum an employer must pay an employee and is set by the UK Government. The real Living Wage is a voluntary wage rate of pay which is calculated by the Resolution Foundation and overseen by the Independent Living Wage Commission. [The Scottish Living Wage Accreditation Initiative](#) provides more information.

Accreditations

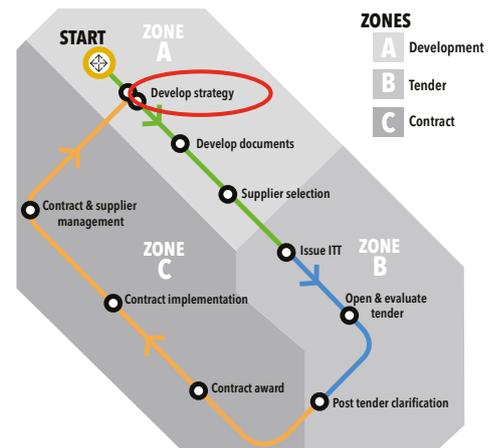
- 5.8. There is no singular accreditation which would reflect Fair Work in its entirety and public bodies and suppliers can support effective Fair Work practices without being accredited to any of these schemes.
- 5.9. Accreditations which reflect aspects of Fair Work include, but are not limited to:
 - [Scottish Living Wage Accreditation](#);
 - [Scottish Business Pledge](#);
 - [Investors in People](#);
 - [Investors in Young People](#); and,
 - [Healthy Working Lives Award Programme](#).

DEVELOP STRATEGY

INTRODUCTION

The decisions taken at the develop strategy stage of a procurement process are crucial in helping a public body meet its obligation to have regard to the [Statutory Guidance on Addressing Fair Work Practices, including the Living Wage, in Procurement](#).

This section of the Guidance along with the Practical Tools and Examples which are available in the [Toolkit](#), will help a public body consider Fair Work practices when developing its commodity / service strategy.



6. ORGANISATIONAL PROCUREMENT STRATEGY AND APPROACH

- 6.1. A public body's Organisational Procurement Strategy statement on the payment of the Living Wage as required by the [section 15\(5\)\(b\)\(iii\) of the Act](#) establishes an agreed organisational approach to tackle Fair Work in the scope of its procurement activity. This statement can include information on the public body's priorities and goals to address Fair Work practices and information on a targeted approach in individual commodity / service strategies, and local decision making processes and monitoring arrangements.
- 6.2. A public body may also establish an organisational approach to weighting criterion on Fair Work practices by commodity / service type. It is important to note that if such an approach is taken, weightings must continue to be considered on a case-by-case basis, balancing the quality and cost of the contract.

7. SUPPLY MARKET ANALYSIS / MARKET SOUNDING

- 7.1. [Regulation 41 of the PC\(S\)R 2015](#) permits a public body, before commencing a procurement, to conduct market consultation with a view to preparing the procurement and informing the market of its procurement plans and requirements. Market sounding typically includes researching and analysing the market and engaging with suppliers and / or stakeholders to understand the opportunities and risks for sustainable outcomes before starting a procurement process.
- 7.2. Early engagement with the market can help a public body gather background information about the nature of Fair Work practices that are typical in the sector. This will also provide information on what opportunities there are to address Fair Work practices in a procurement process in a way that is relevant, proportionate and treats bidders equally.

- 7.3. It can help a public body to understand more about suppliers and their supply chains, for example, whether the contract will typically be delivered by a supply chain of sub-contractors, self-employed workers, sole traders, small, medium or micro businesses, or whether suppliers from other countries are likely to bid.
- 7.4. It is also an opportunity to establish whether the supply chain is susceptible to exploitative practices. For example, in construction contracts where the workforce can typically be made up of sole traders or self-employed workers, consideration should be given to whether this is appropriate or a form of bogus self-employment.
- 7.5. Furthermore, a public body can seek input from other areas of its own organisation, stakeholders, industry bodies or trade unions to establish which dimensions of Fair Work could be addressed in a particular commodity area and to shape commodity strategies.

8. COMMODITY / SERVICE STRATEGY

- 8.1. Fair Work practices can contribute to the way any public contract is delivered, and a comprehensive approach to practices across all the dimensions of Fair Work can have an impact on how the contract is performed. When developing its commodity / service strategy, a public body will determine how relevant Fair Work practices are to the contract and identify the dimensions of Fair Work which could be targeted through the procurement process.
- 8.2. The decision about how relevant Fair Work practices are to the contract will be based on the nature of the contract and the impact Fair Work practices will have on the way the contract is performed.
- 8.3. This will also be informed by a range of factors, including: a public body's policy on promoting the real Living Wage as set out in its Organisational Procurement Strategy; the outputs of the [Sustainable Procurement Duty tools](#); the results of supply market analysis; or, the outcomes of a completed equality impact assessment. A public body should also consider whether any [Transfer of Undertakings \(Protection of Employment\) Regulations 2006](#) obligations or any other organisational priorities, local agreements or accreditations may affect how it addresses Fair Work practices in a procurement exercise.

Practical Tools and Examples on how to develop your commodity / service strategy are available in the [Toolkit](#).

9. FRAMEWORK AGREEMENTS

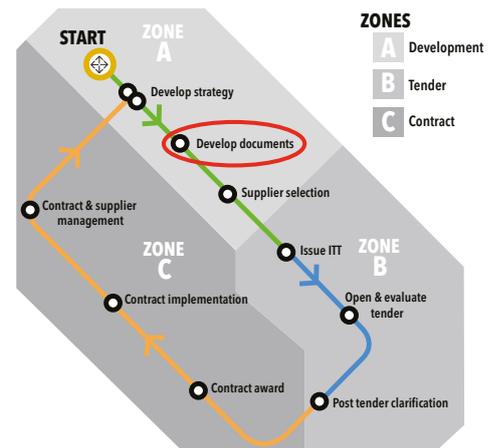
- 9.1. Where a framework agreement is being established, consideration must be given to how best to secure Fair Work outcomes through the subsequent call-off arrangements.
- 9.2. A public body should include a relevant Fair Work criterion as part of the procurement process and the subsequent contractual terms and conditions for establishing call-off contracts. This ensures that a contractor delivering a call-off contract will adopt or be required to demonstrate the Fair Work practices agreed when the framework was established.
- 9.3. Where Fair Work practices have not been included in the framework agreement, but are relevant to the nature of the call-off contract, a public body should consider how best to address Fair Work practices in the call-off contract in line with its policy contained in its Organisational Procurement Strategy. Mini-competitions must generally be based on the same terms as those which were applied for the award of the framework. [Regulation 34\(10\) of the PC\(S\)R 2015](#), however, allows that, that where necessary those criteria may be more precisely formulated, or that other terms referred to in the procurement documents for the framework, may be applied where appropriate.
- 9.4. A public body should consider whether the terms laid down in the framework enable a Fair Work criterion to be included or refined in order to target Fair Work practices relevant to the delivery of the call-off contract. For example, if the framework agreement includes an award criterion to tackle “sustainability”, it is possible to include more precisely formulated criteria under this broader heading to address Fair Work practices.

DEVELOP DOCUMENTS

INTRODUCTION

The approach a public body takes when developing documents is essential to achieve the outcomes sought in the commodity / service strategy for the procurement process.

This section of the Guidance along with the Practical Tools and Examples which are available in the [Toolkit](#), will help a public body to target Fair Work practices on a case-by-case basis in its procurement documents.



10. PRE-CONTRACT NOTIFICATION

- 10.1. It is helpful for a public body to highlight to the market at an early stage any contract requirements, including its approach to addressing Fair Work practices in the procurement process. This should be included in the procurement documents, which invite suppliers to participate in the procurement process.

Examples of statements for procurement documents are available in the [Toolkit](#).

11. EXCLUSION AND SELECTION OF TENDERERS

- 11.1. Fair Work practices are actions an employer adopts for the benefit of its workers that are above and beyond the minimum requirements set out in law and reflect the five dimension of the [Fair Work Framework](#). In addition to considering how Fair Work practices can be addressed in a procurement process, it is important to also consider whether there are grounds for the exclusion of suppliers in respect of their legal obligations as a diligent employer.
- 11.2. Procurement legislation requires a public body, in all regulated and EU-regulated procurements, to establish whether exclusion grounds apply to suppliers, including sub-contractors. [Regulation 58 of the PC\(S\)R 2015](#) and [regulations 8 and 9 of The Procurement \(Scotland\) Regulations 2016](#) (P(S)R 2016) set out the exclusion grounds, which are tested in Part 3 of the European Single Procurement Document. This includes consideration of exclusion grounds which cover a range of employment matters established in national, European and international law, including the International Labour Organisation's Conventions. This includes, for example, breaches of the [Employment Relations Act 1999 \(Blacklists\) Regulations 2010](#), tax and social security obligations, relevant health and safety, social, employment and equalities law.

- 11.3. Breaches of environmental, social and employment law are discretionary exclusion grounds, except blacklisting which is a mandatory exclusion ground. These legal breaches are wide ranging and a public body can focus on a specific area of law that suppliers must take into account when making their self-declaration in respect of exclusion grounds, for example, breaches of health and safety legislation.
- 11.4. Where exclusion grounds apply, a public body must consider the evidence provided by the supplier of self-cleansing measures taken to demonstrate its reliability. A public body must take into account the circumstances of the breach and consider whether this affects the reliability of the supplier to deliver the contract.
- 11.5. Selection criteria can be used to set requirements to determine whether suppliers have existing capability and capacity to perform the contract. Selection criteria must be relevant and proportionate to the nature of the contract and must not have the effect of discriminating against any particular supplier or group of suppliers.
- 11.6. Careful consideration must be given to whether it is relevant and proportionate to address Fair Work practices as selection criteria. Any requirements of tendering must be relevant and proportionate to the contract and a public body must carefully consider the market and sectoral norms to minimise the unintentional deselection of capable suppliers. It may be more appropriate to include Fair Work practices in award criteria, which encourage bidders to explain how any existing and any new Fair Work practices they propose to adopt will positively impact on the way the contract is performed.
- 11.7. When calling off from a framework agreement, is important to note that there is no scope to apply selection criteria. Selection criteria will have been applied when establishing the framework agreement and must not be repeated at the call-off stage.

Examples of statements for procurement documents are available in the [Toolkit](#).

12. SPECIFICATION AND AWARD CRITERIA

- 12.1. Award criteria are used to determine which bidder is best placed to deliver the contract. Award criteria must be proportionate and linked to the subject matter of the contract, and will form the basis for contract delivery.
- 12.2. The [Statutory Guidance](#) provides a sample invitation to tender Fair Work award criterion question, which should be adapted on a case-by-case basis to be relevant to and reflect the nature of the contract.

- 12.3. A Fair Work award criterion question will invite suppliers to describe the Fair Work practices, including the real Living Wage, they propose to adopt to engage their workers in order to have a positive impact on the quality of the service delivery, works performed or goods supplied. A question on Fair Work should clearly describe how a public body expects that a comprehensive approach to Fair Work practices, which takes account of all five dimensions of the Fair Work Framework will impact on the way a contract is performed.
- 12.4. It is important not to be prescriptive by providing a list or checklist of Fair Work practices required of bidders when responding. To do so would not be consistent with the fundamental principles of the TFEU and, for example, would suggest that the real Living Wage is a requirement of bidding. It is also important not to limit responses from bidders, which will vary dependant on different Fair Work practices they adopt and because of the size or status of bidders.

Practical Tools and Examples on how to develop a Fair Work criterion are available in the [Toolkit](#).

13. WEIGHTING CRITERIA

- 13.1. Fair Work practices can have a positive impact on the way the contract is performed and the weighting given to a Fair Work criterion will affect a supplier's overall bid. The weighting and score given to a Fair Work practices criterion must be considered on a case-by-case basis taking into account the other relevant criteria and the relative impact Fair Work practices can have on the quality of the service delivery, works performed or goods supplied. Weighting must ensure the appropriate balance between the quality and cost / price of the contract and be proportionate to the contract, taking care not to negatively affect the quality of the contract to be performed.
- 13.2. The weighting may be higher in a contract where the way workers are engaged will have a direct impact on how the contract is performed or where there is a strong service or works element to the contract. Higher weightings may also be relevant, for example: where low pay and poor conditions of employment exist or can have an impact on the quality of the contract, such as the use of umbrella companies to exploit workers' security of employment; where the availability or continuity of staff will impact on a services; where there is limited, or no access to trade unions; or, where a limited employee voice is having an impact on how health and safety matters are handled or how working time regulations are applied.
- 13.3. The weighting of a Fair Work criterion in a goods contract is likely to be lower, as the quality of the goods is more likely to be affected by a range of factors other than how the workforce are engaged. This is not to say that a Fair Work criterion is never relevant in a goods contract. It will be relevant where the goods to be supplied are created by manual labour or where an element of the workforce delivers the goods and / or ancillary services, such as customer service or installation / delivery services.

14. SCORING METHODOLOGY

- 14.1. When evaluating a bidder's response against a Fair Work criterion, it is best practice to use a scoring methodology rather than a pass / fail approach. A pass / fail approach would not be consistent with the fundamental principles of the TFEU which require a public body to objectively evaluate different bidder responses proportionately and without discrimination. It is also important to note that it is not possible to require the payment of the real Living Wage as part of a tender process by scoring this element separately, including the use of a pass / fail approach.
- 14.2. The methodology must be relevant, proportionate and suit the requirements of the contract and the criterion. The methodology should allow a public body to take a balanced approach to scoring varying responses by taking into account the whole package of Fair Work practices proposed and not requiring any individual Fair Work practice or by scoring individual elements separately.
- 14.3. The technical scoring criteria used by a public body can be general or amended to be specific to certain criteria. Whichever approach is adopted, the scoring methodology must have been communicated in the procurement documents as part of the tender process and should enable the evaluation panel, following individual bid evaluation, to score responses based on the relative advantages and disadvantages of the package of Fair Work practices proposed.

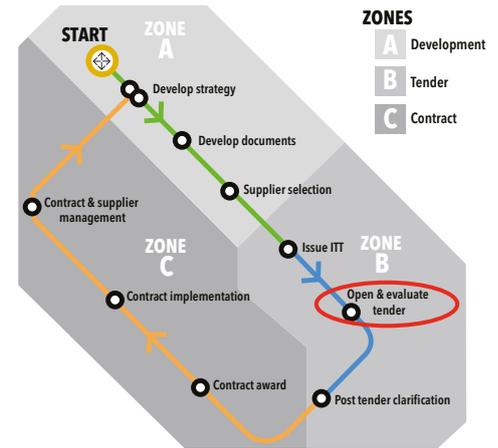
Examples of scoring methodologies are available on the [Procurement Journey](#) and the [Toolkit](#).

OPEN AND EVALUATE TENDER

INTRODUCTION

Evaluators must take care to consider each bidder's proposed package of Fair Work practices by considering its impact on the delivery of the contract.

This section of the Guidance along with the Practical Tools and Examples which are available in the [Toolkit](#), will help a public body to evaluate tenders.



15. EVALUATING TENDER RESPONSES

- 15.1. Evaluation must always ensure equal treatment and be undertaken by more than one person in a proportionate, objective, transparent and non-discriminatory manner. It is important that evaluators are familiar with the public body's priorities and goals to address Fair Work practices as set out in its Organisational Procurement Strategy. Evaluators must also be familiar with the obligations in the [Statutory Guidance](#) and of how the five dimensions of the [Fair Work Framework](#) can impact on the quality of the goods, services or works to be performed.
- 15.2. Prior to the receipt of tenders, it is important to ensure that the evaluation panel agree the approach to scoring responses and of how to handle responses from different sizes or types of bidders to ensure a consistent, non-discriminatory approach is taken, in line with the fundamental principles of the TFEU.
- 15.3. A public body may also consider including a panel member with relevant knowledge or experience to help evaluate bidders' responses to a Fair Work practices criterion, for example, this could include a human resources or trade union representative.
- 15.4. Evaluators must take into account the complete package of Fair Work practices a bidder offers and the impact those practices can have on the way the contract is performed. Individual elements of a package of Fair Work practices must not be evaluated separately. This includes considering how a bidder has put in place policies, which effectively implement its legal obligations, the practices which demonstrate it invests in and values its workforce and any new Fair Work practices it proposes to adopt on the delivery of the contract.

The real Living Wage

- 15.5. A bidder's package of Fair Work practices would normally be expected to include fair pay and equal pay, including the real Living Wage. The Scottish Government considers the payment of the real Living Wage to be a significant indicator of an employer's commitment to Fair Work practices. Payment of the real Living Wage is not the only indicator however, and whilst failure to pay the real Living Wage would be a strong negative indicator it does not mean that the employer's approach automatically scores poorly against a Fair Work criterion.
- 15.6. The Scottish Government has obtained clarification from the European Commission, which confirms that a public body is unable to make payment of the real Living Wage a mandatory requirement as part of a competitive procurement process where the real Living Wage is greater than any minimum wage set by or in accordance with law. It is, therefore, not possible to reserve any element of the overall tender score specifically to the payment of the real Living Wage.

Compliance with relevant laws

- 15.7. It is expected that bidders will comply with all relevant legal obligations, including workplace standards and labour laws.
- 15.8. This extends to the nature of the bid and evaluators must consider whether there is a risk that the nature of the bid could result in non-compliance. There are two circumstances provided for in the Procurement Regulations to enable a public body to mitigate this risk.
- Where it has established that the tender itself would not comply with relevant environmental, social and employment law, for example, equality or health and safety legislation, a public body can decide not to award a contract to that bidder ([regulation 57\(2\) of the PC\(S\)R 2015](#)).
 - Where a bid appears to be abnormally low, a public body must require the bidder to explain its pricing. This can include an explanation of how the bid will maintain compliance with relevant environmental, social and employment laws. The bid may be rejected if the explanation given does not satisfactorily account for the low bid ([regulation 69\(4\) of the PC\(S\)R 2015](#)). The bid must be rejected if it is established that the bid is low because the bid does not comply with relevant environmental, social and employment law ([regulation 69\(5\) of the PC\(S\)R 2015](#)).

- 15.9. When reviewing a bid for compliance with relevant laws (see above), it is important to recognise that the legal requirements applicable to bidders from other countries will depend on where the contract is performed. For example, if a supplier from another country is providing workers to perform a service contract in Scotland, UK legislation in respect of workers' rights will apply to those workers. If workers providing supplies in a goods contract will be located in another country, the legal requirements of that country will apply to the workers, for example, UK minimum wage rates will not apply. In the latter circumstances, the bidder should be capable of, evidencing an approach to Fair Work practices, for example, in respect of fair pay and equal pay, by referring to standards of living and average or minimum wages to offer a reasonable standard of living for workers delivering the contract in line with the five dimensions of the Fair Work Framework.

Subcontractors

- 15.10. Where a bidder proposes to use subcontractors as part of contract delivery, particularly where subcontractors are likely to deliver a significant portion of the contract, the Fair Work practices of those subcontractors should be considered as part of the evaluation. Consideration should also be given to any measures a bidder will take to ensure any subcontractors, which are not yet known to it, will adopt appropriate Fair Work practices when they engage on contract delivery.

Size and status of bidders

- 15.11. It is important to treat all bids equally and not to discriminate based on a bidder's size or status. This includes taking into account the relative differences in a bidder's approach when evaluating responses.
- 15.12. It may not be proportionate for small (<50 employees) and micro businesses (<10 employees), or small third sector or voluntary organisations to have teams of staff in place who are responsible for processes, procedures and controls to enforce their stated policies on promoting Fair Work practices. Such organisations may, however, be able to offer different approaches to give staff an effective voice given the nature of relationships that will exist due to their size.
- 15.13. Third sector or voluntary organisations may take a different approach to the Fair Work practices they offer taking account of the resource constraints under which they operate and may not be able to commit resources to longer term investments in workforce practices.

Bidders from other countries

- 15.14. It is important to consider whether a supplier's location could impact on its approach to Fair Work practices. Suppliers from different countries will operate within different legal frameworks and cultures which could impact on their approach to employment and workers' conditions.

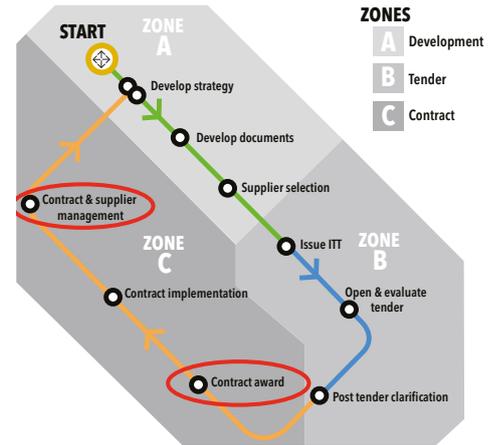
CONTRACT AWARD & CONTRACT AND SUPPLIER MANAGEMENT

INTRODUCTION

A public body should consider how to appropriately debrief bidders, including on how they have responded to a Fair Work criterion.

It is also important that contract terms and conditions, and an agreed approach to contract and supplier management ensures that any Fair Work commitments offered by the winning bidder(s) are adopted and complied with for the duration of the contract.

This section of the Guidance along with the Practical Tools and Examples which are available in the [Toolkit](#), will help a public body to provide feedback to bidders and adopt an appropriate approach to contract and supplier management.



16. STANDSTILL / DEBRIEFING TENDERERS

- 16.1. Providing further information to successful and unsuccessful tenderers about their bid is an opportunity to explain why, along with other criteria, Fair Work practices, including the payment of the real Living Wage, are important and can contribute to the quality of the contract. It is helpful if this information can draw out the positive aspects of the tenderer's response and suggest areas for improvement.
- 16.2. In EU-regulated procurement exercises, a public body must send a standstill notice to all tenderers and candidates concerned, unless the circumstances described in [regulation 85\(4\) of the PC\(S\)R 2015](#) apply. This notice must set out:
- The criteria for the award of the contract;
 - Where practicable, the score of the bidder concerned;
 - The name and, where practicable, the score of the winning bidder;
 - In the case of an unsuccessful tenderer, a summary of the reasons why it was unsuccessful and the characteristics and relative advantages of the winning bidder;
 - In the case of an unsuccessful candidate, a summary of the reasons why it was unsuccessful; and,
 - A precise statement on the effect of the standstill period.

- 16.3. In response to a written request from an unsuccessful bidder, a public body must inform the bidder of the reasons why it was unsuccessful. If the request comes from a successful bidder, a public body must describe any improvements that could have been made to the bid.
- 16.4. For regulated procurements below the OJEU threshold, public bodies must notify all unsuccessful bidders of the name of the winning bidder, the criteria used to award the contract, and the scores of both that unsuccessful bidder and the winning bidder. In response to a written request from an unsuccessful bidder, a public body must give the bidder a summary of the reasons why it was unsuccessful and the characteristics and relative advantages of the winning bid. If the request comes from a successful bidder, a public body must describe any improvements that could have been made to the bid.
- 16.5. A public body should take care to ensure that the feedback does not suggest that any one element of a package of Fair Work practices is regarded as a requirement of tendering. It is helpful to identify how some elements of their package were stronger than others, for example, while the real Living Wage cannot be a requirement of tendering, it is a clear indication of a positive approach to Fair Work.

17. CONTRACT TERMS AND CONDITIONS

- 17.1. It is expected that those performing public contracts comply with all relevant law and international obligations, including employment law.
- 17.2. [Regulation 19\(4\) of the PC\(S\)R 2015](#), places a legal obligation on a public body to include in each public contract or framework agreement, conditions relating to the performance of the contract or framework as are considered reasonably necessary to ensure that the supplier complies with environmental, social and employment law. [Scottish Procurement Policy Note 09/2016](#) has been issued to public bodies, which includes guidance and contract conditions a public body can adapt for use in its contracts.
- 17.3. The commitments offered by the winning bidder(s) will form the basis on which the contract will be performed. It is therefore important to ensure that the Fair Work practices to be adopted are reflected in the contract documentation and the contract terms and conditions. For example, this could be done by including the commitments as an added value annex to the Schedule of Requirements and the Price Schedule.
- 17.4. It is also important, in the case of a framework agreement to ensure that the Fair Work practices to be adopted are outlined in the buyer's guide to ensure these are known to contract users and applied in the terms of any call-off contracts.

18. APPROACHES TO CONTRACT MONITORING

- 18.1. Fair Work practices must be considered as an integral element of the contract and supplier management process and should be included as a standard agenda item at supplier review meetings to be considered alongside all other contract management matters. It is important to ensure monitoring includes the use of any agency or sub-contractor workers throughout the duration of the contract, including any new members joining the workforce engaged on the delivery of the contract.
- 18.2. Fair Work practices could be embedded with a balanced scorecard approach as part of the performance monitoring and continuous improvement, enabling the delivery of the contractor's commitments to Fair Work practices to be measured. Further guidance is available on the [Procurement Journey Contract and Supplier Management – Managing & Improving Performance](#), including balanced scorecard suggestions.
- 18.3. Evidence should be sought from contractors to demonstrate compliance with agreed contract conditions, for example, reviewing information on pay policy and terms and conditions of workers involved in the delivery of the contract, including what the main contractor is doing to ensure commitments are being maintained for agency workers and down the sub-contractor supply chain. This can, for example, take the form of a statement from a Director that workers pay has been adjusted annually to maintain parity with any national increase in the real Living Wage.
- 18.4. In certain circumstances a public body could consider how workers can support the monitoring process by reporting any non-compliance with agreed terms and conditions, for example through a trade union representative or adopting a basic dispute resolution process, agreed by trade unions and communicated to all workers.
- 18.5. Where there are material concerns regarding a contractor's compliance with any Fair Work commitments or the contractual obligations it has made, a public body could consider whether to undertake an audit of the contractor's Fair Work practices. This could be undertaken as part of a more general sustainability audit of the contract.
- 18.6. A public body can also promote the benefits of adopting wider Fair Work practices to its contractors as part of contract management and monitoring arrangements. This could include signposting a range of useful sources of information such as:
 - The Information Sheets available in the [Toolkit](#)
 - The Close the Gap – [Think Business, Think Equality Tool](#)
 - A public body can also encourage them to consider accreditations, for example, [Scottish Living Wage Accreditation](#), [Investors in People](#), [Investors in Young People](#), [Healthy Working Lives](#) and to sign up to the [Scottish Business Pledge](#), or equivalent in their own country.

ANNEXES

ANNEX A – WORKING GROUP AND STAKEHOLDER LIST

WORKING GROUP	
Aberdeenshire Council	North Lanarkshire Council
Advanced Procurement for Universities and Colleges	Perth and Kinross Council
Dundee City Council	Renfrewshire Council
Greater Glasgow Health Board Procurement	Scotland Excel
Historic Environment Scotland	Scottish Enterprise
Inverclyde Council	Scottish Government Fair Work Directorate
New College Lanarkshire	Skills Development Scotland
NHS Lothian	Strathclyde University
NHSS National Procurement	Transport Scotland
North Ayrshire Council	University of Edinburgh

STAKEHOLDERS	
Advanced Procurement for Universities and Colleges	Scotland Excel
Advisory, Conciliation and Arbitration Service	Remarkable
Build UK	Scottish Building Federation
Business Community in Scotland	Scottish Council for Development and Industry
Civil Engineering Contractors Association	Scottish Council of Voluntary Organisations
Close the Gap	Scottish Enterprise
Coalition of Care and support Providers in Scotland	Scottish Federation of Housing Associations
Comhairle nan Eilean Siar	Scottish Futures Trust
Construction Industry Training Board	Scottish Government
Construction Scotland Industry Leadership Group	Scottish Local Authorities Economic Development Group
Convention of Scottish Local Authorities	Scottish Prison Service
Fair Work Convention	Senscot
Federation of Master Builders	Social Firms Scotland
Federation of Small Businesses	Specialist Engineering Contractors Group
Fife Council	Scottish Trades Union Congress
Glasgow Council for the Voluntary Sector	Supplier Development Programme
Glasgow School of Art	Sustainable Procurement Ltd
Healthy Working Lives	Thomas & Adamson
Highlands and Islands Enterprise	University of Edinburgh
Momentum Skills	University of Strathclyde
NHS National Services Scotland	Visit Scotland
Port of Leith Housing Association	West Dunbartonshire Council
Poverty Alliance	



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