

## **Worker conditions: sustainable procurement guidance**

Guidance for public bodies covering the purchase of products and services where there may be concerns about human rights, working conditions and exploitation.

### **Fairly and ethically traded – supply chain conditions and worker exploitation**

This guidance is concerned with the procurement of products, services and works, where there may be concerns regarding human rights, working conditions and worker exploitation in the supply chain.

Its focus is on behavior that is exploitative and concentrates on circumstances where human rights may be infringed.

It is part of a series of guides which support the sustainable procurement duty tools to help public sector organisations embed sustainability into their procurement processes.

### **Description of risk/opportunity**

- Are there potential concerns about human rights and worker conditions / exploitation anywhere within the supply chain? (supply chains can be local, regional or global)
- Are there potential opportunities to mitigate human rights risks and prevent worker exploitation within the supply chain by working with the market?

### **Examples**

Concerns regarding compliance with ILO Conventions or conditions where human rights may be infringed or conditions that could foster exploitation might include:

- slavery and human trafficking statements not published by suppliers (where required under section 54 of the Modern Slavery Act 2015)
- poor pay and conditions, e.g. under / delayed payment of wages or excessive or illegal wage deductions
- excessive working hours, compulsory or excessive overtime
- charging illegal or excessive fees for recruitment, accommodation, health checks, documents, equipment, etc.
- restrictions on movement (workers unable to change employer) or identity documents withheld
- forced or child labour and human trafficking
- low health & safety standards or hazardous working conditions
- restrictions on trade union membership or other representation / no route to lodge concerns or activity or workers ill-informed about terms

Risks may be more prevalent where there is reliance on:

- labour supply from recruitment agencies
- migrant or seasonal workers
- temporary or agency staff

Almost every industry is at risk especially where there is a complex supply chain or a lack of transparency in the supply chain, anywhere there are labour intensive production processes and low skill and low pay occupations including:

- Electronics and high technology
- Steel and automobiles
- Construction
- Manufacturing, e.g. incl. garments, textiles, footwear, surgical supplies
- Food processing
- Primary production e.g. Agriculture and seafood
- Extraction, e.g. Mining and minerals
- Shipping, transportation and storage
- Recycling / waste disposal
- Service work – catering, cleaning services, hospitality, care, domestic service

### **Role of procurement**

The relevant National Outcomes and Indicators within the [National Performance Framework](#) focus our activity around ‘creating a more successful country, with opportunities for all of Scotland to flourish, through sustainable and inclusive economic growth’.

This includes tackling supply chain condition and worker exploitation through relevant procurement processes.

[The Procurement Reform \(Scotland\) Act 2014](#) (the Act) places a Sustainable Procurement Duty on a contracting authority before they buy anything, to think about how they can – through their procurements - improve the social, environmental and economic wellbeing in Scotland, with a particular focus on reducing inequality.

The Act also requires organisations to develop an organisation procurement strategy and report against its delivery at the end of each year.

This includes a requirement to include a statement of the authority’s general policy on the procurement of fairly and ethically traded goods and services and report on progress.

Contracting authorities are likely to have different social and ethical policy objectives, for example tackling labour standards or workforce exploitation within supply chains.

If a buyer intends to incorporate ethical policy objectives into their procurement they must ensure these are clearly articulated.

A clear policy objective in the commodity strategy aligned with their organisational procurement strategy will help demonstrate how the requirement is relevant to the subject matter of the contract.

The public procurement regulations allow a contracting authority to exclude companies from tendering for public contracts for not meeting certain conditions i.e. breach of any obligations in the fields of environmental, social or labour law; and

select the most suitable bidders based on technical ability and previous experience in relation to the subject matter of the contract.

This is done through the [European Single Procurement Document](#) (ESPD (Scotland)). The public procurement regulations also permit contracting authorities to ask for tenderers to be registered under a certain social label scheme - as long as the circumstances outlined later in Specification Development and Award apply.

There is frequently a perception that procurement has a limited ability to apply control or influence throughout the supply chain beyond tier one suppliers.

The procurement process provides opportunities to map supply chains, incorporate relevant and proportionate criteria and specification requirements, and it is possible to work with suppliers to improve social and ethical performance.

Risks and opportunities for sustainable procurement can be identified by undertaking in depth market and supply chain analysis and for example, through the appropriate use of the [Sustainability Test and Prioritisation Methodology](#), and the application of relevant and proportionate contract requirements.

Further information on how to tackle risks / opportunities at various stages of the procurement process is provided in this guidance.

**! This guidance is provided to support the embedding of relevant and proportionate contract/framework requirements and the information and examples are provided in good faith. To the extent that this guidance contains any information concerning procurement law such information does not constitute advice to you. The content of this guidance is not to be construed as legal advice or a substitute for such advice, which you should obtain from your own legal advisers if required. Scottish Government is not and shall not be held responsible for anything done or not done by you as a result of this guidance.**

### **Policy and legal context**

Scotland is committed to economic, social and human rights, and as part of the UK is signed up to the [International Labour Organisation \(ILO\) core conventions](#). The eight fundamental principles of which are:

1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87),
2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98),
3. Forced Labour Convention, 1930 (No. 29),
4. Abolition of Forced Labour Convention, 1957 (No. 105),
5. Minimum Age Convention, 1973 (No. 138),
6. Worst Forms of Child Labour Convention, 1999 (No. 182),
7. Equal Remuneration Convention, 1951 (No. 100),
8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

Scotland, as part of the UK, has also signed up to the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR). The ICESCR requires state parties

to protect, respect and fulfil fundamental economic, social and cultural human rights, which include rights to work, health, and an adequate standard of living (including food and housing). The right to work encompasses fair work and decent working conditions.

[Scotland's National Action Plan for Human Rights](#) (SNAP) has a vision for Scotland where everyone lives with human dignity. It was developed to give effect to the [United Nations \(UN\) Guiding Principles on Business and Human Rights](#) (UNGPs).

The UNGPs are a set of guidelines for States and companies to prevent, address and remedy human rights abuses committed in business operations. Launched in December 2013, responsibility for developing the plan was shared by public bodies, voluntary organisations and individuals from all over Scotland.

Scotland was one of the first countries in the world to sign up to the [UN Sustainable Development Goals](#) (SDGs). Many of these goals align with [Scotland's National Performance Framework](#) and [SNAP](#).

Goal 8: Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all, involves the eradication of forced labour, modern slavery, human trafficking and child labour.

### **Human Trafficking**

In 2015 the Scottish Parliament passed the [Human Trafficking and Exploitation \(Scotland\) Act 2015](#), which sets out the legislative framework governing human trafficking in Scotland. Human trafficking is the buying and selling of people, adults and children, for the purposes of exploitation.

It is a crime that can take many forms but trafficking for the purposes of labour exploitation is the single biggest type.

Labour exploitation relates to behaviour that goes beyond bad employment practices such as a failure to pay the minimum wage. It encompasses slavery, servitude and forced or compulsory labour. These terms are further explained [here](#).

The equivalent UK legislation is the Modern Slavery Act 2015, parts of which apply in Scotland, including [section 54](#), provides that all commercial organisations with a turnover of £36 million or more must complete and publish a Slavery and Human Trafficking Statement.

This is to be done annually and is designed to achieve transparency in supply chains (TISC). The Scottish Government published a [Trafficking and Exploitation Strategy](#) in May 2017, which sets out the steps that the Scottish Government and partners will take to eliminate human trafficking and exploitation.

Part of that will be to ensure that people and businesses are aware that what they do and what they buy can contribute to this crime.

Slavery and Human Trafficking [Guidance for Businesses](#) has been produced to help businesses identify and prevent human trafficking and exploitation across their operations.

### **Assessment of risk/opportunity**

It is important that a buyer carries out an appropriate level of due diligence early in the process to establish if what they are buying raises any concern about human rights and worker conditions / exploitation. The table on the front page of this guidance identifies indicators of risk / opportunity.

A buyer should conduct their own research for up to date information on risks related to a particular commodity or service. This could include using the various sources of information available on-line, for example see the sources of advice / reference below:

- Check whether existing contractors are compliant with the [Modern Slavery Act 2015](#), i.e. have they published a slavery and human trafficking statement. Do these highlight any particular risks in their industry or sector. Buyers can check for statements on suppliers websites, or via an online registry: [TISC Report](#) or [Modern Slavery Registry](#).
- [CSR Risk Check](#) is an assessment tool that highlights risks for particular products and services, and its [World Map](#) shows known risks in each country.
- [Global Slavery Index](#) is a country by county estimate of the number of people living in modern slavery today, it provides a country or regional analysis of the size of the problem and the actions governments are taking.
- [Walk Free Foundation](#) focusses on global initiatives to drive change and build awareness around the complex and often hidden nature of modern slavery.
- [Freedom in the World annual report](#) ranks countries political rights and civil liberties.
- [Transparency International Corruption Perception Index](#) highlights the progress countries are making in ending corruption.
- An online tool [Modern Slavery Map](#) has been created that can be searched by location, sector, issues and organisation type for anti-human trafficking initiatives and projects.
- CIPS have a number of ethical and sustainable procurement resources including [e-learning and an online test](#) which addresses sustainable procurement.
- [Sedex](#) have a number of relevant publications available including several briefings on modern day slavery, business ethics, and transparency.

There are also various industry initiatives and campaigns to improve workers conditions and ensure that their fundamental rights are respected.

The information available from these sources can be used to help embed ethical standards into procurement. For example the [Clean Clothes Campaign](#), [Green Electronics Council](#), [International Labour Organisation \(ILO\)](#), [Fairtrade Foundation](#) and [Ethical Trading Initiative](#), together with the criteria behind some of the certification labels available: [Fairtrade](#), [Ecolabel](#), etc.

#### **4. Pre-contract notification**

It is good practice to notify bidders of any particular contract performance requirements or any essential award criteria early in the process.

This can be done by including details in the Contract Notice or a Priority Information Notice, so that they can take an early view on whether they can satisfy the requirements.

These can be included at section V1.3 Additional Information of the Contract Notice. Below are examples of wording that can be used for this purpose:

‘The Contracting Authority has included obligations within the contract conditions relating to ethical working conditions and labour standards, which are relevant to the products/services to be delivered.’

‘The Contract/Framework Agreement supports the Scottish Government's National Performance Framework, and the National Outcomes which articulate the Government's Purpose ‘To focus Government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth’. This Framework supports the following National Outcomes, and Contractors are expected to support the Authority’s aim to achieve these.’ [Insert relevant National Outcomes - see above].

‘The Contracting Authority expects those it contracts with to adopt ethical business practice and to ensure transparency in their supply chains. Criteria will be included to ensure that bidders support these principles in practice.’

#### **Supplier selection**

##### **Exclusion grounds**

A contracting authority can exclude a bidder from tendering for public contracts where they fall within a ground for exclusion, for example Child labour and other forms of trafficking in human beings; any offence under Part 1 of the Human Trafficking and Exploitation (Scotland) Act 2015, or under any provision referred to in the Schedule to that Act. And breach of any obligations in the fields of environmental, social or labour law. These obligations include any relevant national and European law, as well as relevant collective agreements and specific international agreements, and for example would include obligations under the Modern Slavery Act.

Where a contracting authority decides that there may be a risk of exclusion grounds applying to a sub-contractor, they can choose to verify this at any stage in the

procurement process. This can be an effective way to help ensure a robust approach is taken throughout the supply chain.

A contracting authority should only ask for verification of exclusion grounds from sub-contractors in circumstances where it is regarded as proportionate and necessary to do so. A full list of the exclusion grounds can be found in the [Procurement Journey](#).

It is mandatory that the relevant exclusion grounds statement from the [standardised statement document](#) is included in the Contract Notice at II.2.14 Additional Information. A contracting authority can provide more information about specific exclusion grounds in Section II.2.14 Additional information of the OJEU Contract Notice.

It is possible to clarify what bidders should consider when responding to the questions in respect of environmental, social or labour law.

For example: 'Economic operators may be excluded from this competition if they are in any of the situations referred to in regulation 58 of the Public Contracts (Scotland) Regulations 2015.'

'Bidders will be required to adhere to, and fulfil all obligations relevant under the Human Trafficking and Exploitation (Scotland) Act 2015 and the Modern Slavery Act 2015'

'Bidders will be required to adhere to, and fulfil all obligations relevant under The Waste Electrical and Electronic Equipment Directive (WEEE Directive) (2012/19/EU) and The Restriction of Hazardous Substances Directive (RoHS) (2002/95/EC)'

If a bidder is in a situation which might result in its exclusion due to breach of any of the exclusion grounds, it must be given the opportunity to provide evidence to show that it has taken remedial action to demonstrate its reliability, this is known as self-cleansing.

The contracting authority must not exclude the bidder on those grounds if they are satisfied that the evidence provided is sufficient to demonstrate their reliability.

### **Selection criteria**

Selection criteria that contracting authorities apply to individual procurement processes must be relevant and proportionate to the subject matter of the contract.

It is possible that selection criteria may address social issues within supply chains - for example by applying relevant criteria in respect of the technical and professional ability of those involved in the performance of the contract.

Any selection criteria deemed appropriate must be tested through the format of the European Single Procurement Document (ESPD).

For example, it may be appropriate to require bidders to demonstrate their experience of managing their supply chain as a means of determining their ability to tackle ethical and social issues.

This could be worked into the experience related sections of the ESPD parts 4C.1 and 4C.1.2, or part 4C.4 Supply chain management: 'Bidders will be required to confirm that they have (or have access to) the relevant supply chain management and tracking systems used by them to deliver the types of requirements detailed in II.2.4 in the OJEU Contract Notice or the relevant section of the Site Notice.'

'Relevant protocols, standards, systems include those by the International Labour Organisation, Fairtrade Foundation, Ethical Trading Initiative, SA8000 or ISEAL, or equivalent'

### **Specification development**

Sustainable requirements can be incorporated into technical specifications, award criteria or contract conditions; however, the principals of equal treatment, non-discrimination, transparency and proportionality are essential and require clarity and precision.

To highlight the requirement to meet ethical criteria the following wording could be included in a specification:

"The Contractor is expected to have appropriate standards for its organisation and its supply chain regarding legal, ethical and social issues."

"The Contractor will perform its obligations in accordance with the Authority's ethical sourcing policy, which is to promote appropriate standards regarding legal, ethical and social issues including, for example, health and safety, security of employment rights, equality, corruption and fair trade, in particular in developing or countries with low production costs."

"The Contractor must take all reasonable steps to ensure that all Goods supplied under this contract / framework agreement are produced in accordance with all International Labour Organisation (ILO) conventions that have been ratified by the country of their origin, in particular, in relation to labour standards, working conditions and the use of child labour."

Technical specifications must relate to the characteristics of the particular work, supply or service being purchased, and not to the general capacities or qualities of the bidder.

All central government departments and their related organisations must ensure that they meet the [Government Buying Standards](#) (GBS) - a set of product specifications for public buyers when buying goods and services for those product groups covered.

They are mandatory for core Scottish Government and their use is encouraged across the wider public sector, except for construction related procurement where [Building Standards](#) apply.

The GBS for food and catering services includes a requirement for fairly traded products and the standard for textiles goes further to include demonstration of suppliers addressing ethical and social issues such as living wage provision, avoidance of child labour, application of fair trade principles and adequate working conditions.

### **Labels**

A buyer can ask for what they are buying to have been given an independently verifiable label which certifies that it meets specific environmental, social or other characteristics, for example [SA8000](#) or [Fairtrade](#).

The use of labels needs to be approached with care as if a buyer does ask for a label, it must be:

- Linked to the subject of the contract (and all criteria must be relevant);
- Clear to judge in an open and fair way which does not discriminate;
- Open to anyone who meets the standards;
- Certified by a third party.

This means that a particular label should only be requested where all of its certification characteristics correspond to a procurement.

Where not all of a label's certification characteristics apply to a procurement, it would be more appropriate to provide a full description of the requirements in the tender documentation, instead of asking for the label itself.

Additionally, if a specific label is requested evidence of compliance with an equivalent standard or label must also be accepted.

A buyer could also just use the criteria behind labels to help draw up contract conditions in order to define the conditions in which the products originate, and then for checking compliance with these requirements, by accepting the label as a means of proof of compliance with the technical specifications.

The European Commission published a fully revised version of the [Buying Green Handbook](#) in April 2016 which contains further guidance on using labels.

### **Award**

Below are some examples of wording that could be used as award criteria where there may be concerns over working conditions and labour standards in the supply chain.

It is important to consider the relevance of individual award criteria taking account of the subject matter of the contract:

'The Contractor must put in place processes that will ensure that labour standards are being maintained in line with ILO core conventions and local labour laws, throughout its supply chain(s) for Goods relevant to the Framework Agreement.'

'Bidders must provide information to illustrate that suppliers and production sites should hold an independently audited and internationally-recognised standard relevant to the product, in order to demonstrate how they are addressing ethical and social issues such as the avoidance of child labour, application of fair trade principles and adequate working conditions, in the manufacture of [textiles].'

'The Contractor will perform its obligations in accordance with the Authority's, and Framework Public Bodies ethical sourcing policy, which is to promote appropriate standards regarding legal, ethical and social issues including, for example, health and safety, workers' rights, equality, corruption and fair trade, in particular in developing or countries with low production costs.' \*this should be edited as appropriate to reflect the relevant risk elements prevalent for the contract.

'The Contractor must take all reasonable steps to ensure that all goods supplied under this Framework Agreement are produced in accordance with all International Labour Organisation (ILO) conventions that have been ratified by the country of their origin, in particular, in relation to labour standards, working conditions and the use of child labour.'

'The Contractor will be expected to have a comprehensive system which demonstrates an on-going and systematic approach to identifying and managing risks relating to labour standards, working conditions and use of child labour in the supply chains relevant to the Framework Agreement. This should include policy, roles and responsibilities, objectives, targets and programmes, training and awareness, communications (including whistle blowing), documentation and procedures, supply chain management, emergency response, monitoring and reporting (including identification of all suppliers, changes made and audits undertaken in accordance with appropriate standards for example ETI Base Code, SEDEX, or equivalent), corrective action and review. '

'The Contractor will be required to demonstrate continual improvement in working conditions and labour standards, while enhancing policies and systems and, where relevant, work with the Authority during the term of the Framework Agreement to ensure compliance with new and emerging legislation.'

### **Abnormally low bids**

Contracts must not be awarded where a tender price is abnormally low due to breaches of social, environmental or labour law, and contracts must include relevant clauses to allow for termination in the case of similar breaches.

[Supporting guidance](#) has been issued, which includes contract conditions that contracting authorities can adapt for use in their contracts.

The approach taken by Scottish Procurement when establishing a new suite of national frameworks for the supply of ICT client devices has been outlined in a [case study](#).

[Case studies](#) are also available on the approach taken by the University of Edinburgh when establishing their formal academic dress hire services contract, and Scotland Excel when establishing their hot beverage machinery and supplies framework.

### **Contract management**

Contract performance clauses may address sustainable issues within supply chains on condition that they are linked to the performance of the contract, for example the pay and labour conditions for the workforce involved in the performance of the contract.

Where clauses in respect of supply chain conditions and worker exploitation have been built into the contract, performance monitoring methods must be developed to ensure delivery.

This may include a requirement to provide details of the supply chain and any changes to this, audits undertaken on supplier sites by the main supplier, and review of suppliers slavery and human trafficking statements published as a requirement (where applicable) of the [Modern Slavery Act 2015](#).

Contractual requirements must be quantifiable and measureable; otherwise there is a risk that it may be unenforceable. The buyer must also consider whether this requirement is core to the contract or a secondary issue, as any remedy for breach of performance may be difficult to quantify.

At the point of potential award there is always scope to reach a voluntary agreement with the supplier that both parties will work together through the period of the contract with the aim of improving working conditions and labour standards, and to deliver identified (and agreed) sustainable outcomes that can be captured as contract commitments.

The approach taken to working with supply chains can make a difference. For example, upon discovering potential issues with child exploitation, rather than prohibit procurement (and thereby potentially increase poverty), it can be better to work with the supplier to improve conditions and introduce social benefit (such as education and health care) for current employees whilst seeking to eliminate the need for child labour.

Finally, on-going improvement and innovation can be built into the management of the contract to further develop the products and services required by the contracting organisation and key performance indicators can be developed in order to focus on areas where continuous improvement is sought.

### **Summary**

Embedding sustainability into procurement can support the objectives of the organisation as set out in relevant policies and / or strategies and can be adapted to reflect the nature of the contract.

Many sustainability benefits can be achieved through supplier engagement before the procurement process begins which is essential to allow the market to understand and prepare their response to tender requirements.

Also key is the approach to selection of suppliers, the inclusion of relevant and proportionate requirements in the specification, and the evaluation of relevant and proportionate award criteria.