

Scotland Excel

To: Executive Sub-Committee

On: 18 February 2022

**Report by:
Chief Executive of Scotland Excel**

Fair Work and Living Wage Update

1. Introduction

The purpose of this report is to provide the members of the Executive Sub Committee with an update on matters related to Fair Work including the Living Wage.

2. Background

Scotland Excel have been addressing Fair Work in procurement since the introduction of Statutory Guidance in October 2015 and working within the applicable legislative framework, has been committed to encouraging suppliers/contractors to pay the real Living Wage.

Statutory guidance on addressing Fair Work practices states the following guiding principles:

- 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

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. These figures are calculated annually and announced in October / November. The real Living Wage should not be confused with the mandatory 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 calculation takes into account the Joseph Rowntree Foundation Minimum Income Standard research in which members of the public identify what is needed for a minimum income standard of living. This is then combined with an analysis of the actual cost of living, including essentials like rent, council tax, childcare, and transport costs for different family types to produce the hourly real Living Wage figure, sufficient to ensure that the recipient may enjoy an acceptable standard of living of living in United Kingdom (outside of London where a different living wage is set) to ensure good health, adequate child development and social inclusion.

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 that Living Wage accreditation has improved their reputation.

To date Legal advice and policy has allowed encouragement of the Living Wage but prohibited imposition. Additionally, it has been the case that even in circumstances where the Living Wage is negotiated with suppliers/contractors, supplier/contractors who do not to pay the Living Wage cannot be penalised in the tender or subsequent contractual process. This has meant that public bodies are unable to make payment of the real Living Wage a mandatory requirement as part of a competitive procurement process

3. Recent Updates

In December 2020, Ministers wrote to public bodies setting out the clear expectation that public sector partners must lead the way by embedding Fair Work in our organisations and through supply chains, including through procurement, by applying the five Fair Work First criteria in public procurement processes from April 2021.

The five Fair Work criteria being:

- appropriate channels for effective voice, such as trade union recognition;
- investment in workforce development;
- no inappropriate use of zero hours contracts;
- action to tackle the gender pay gap and create a more diverse and inclusive workplace;
- providing fair pay for workers (for example, payment of the real Living Wage)

On 15th March 2021 the Scottish Government published a Scottish Procurement Policy Note (SPPN 3/2021) setting out action for public bodies to apply Fair Work First criteria in regulated procurement processes that commence from 1 April 2021.

On 24th September 2021 the Scottish Government published a Scottish Procurement Policy Note (SPPN 6/2021) advising that Fair Work First has been expanded from 5 elements to 7 elements and that SPPN 6/2021 superseded SPPN 3/2021 which was now withdrawn.

The additional 2 elements/criteria are:

- offer flexible and family friendly working practices for all workers from day one of employment; and
- oppose the use of fire and rehire practices.

On 15th October 2021 we received a general communication from Nick Ford, Director, Procurement & Property, The Scottish Government informing us that Scottish Government believe it is possible to mandate the real Living Wage in public contracts where:

- Fair Work First practices, including payment of the real Living Wage is relevant to how the contract will be delivered;
- it does not discriminate amongst potential bidders;
- it is proportionate to do so, and
- the contract will be delivered by workers based in the UK.

Additionally, the Minister for Business, Trade, Tourism and Enterprise announced that, the Scottish Government will be implementing this change to all new contracts with immediate effect.

4. Issues Arising/On-going Considerations

It should be noted that the Scottish Government advise that the content of Scottish Procurement Policy Notes (SPPNs) are not legal advice, should not be construed as such and public bodies are advised to seek their own legal advice in relation to any questions and issues they may have

Contracting authorities that are covered by Public Procurement Regulations (this includes Scotland Excel and Councils) are obliged to treat bidders equally and without discrimination and to act in a transparent and proportionate manner. This requirement is already embedded in Scotland Excel's Contract Standing Orders.

At time of writing this report the existing suite of Fair Work in Procurement guidance, including the Statutory Guidance and Best Practice Guidance has not as yet been updated to reflect the change indicated in the most recent communication from Scottish Government regarding their revised approach to mandating payment of the real Living Wage.

Public bodies should apply the Fair Work First criteria in any regulated procurement process, where relevant and proportionate to do so. Fair Work First criteria will be relevant where the way the workforce is engaged will impact on the way the contract is performed. This will be particularly relevant in service and works contracts, where the workforce makes a significant contribution to the way the

contract is delivered. In goods contracts the Fair Work First criteria may also be relevant.

Mandating of the real Living Wage at a Framework level could potentially have significant financial implications for Councils in terms of overall contract costs (particularly in areas such as Social Care, Security and Food related contracts). Management of the extent of these potential implications could be limited if the mandating is prescribed at a framework level. It should be noted, however, that good progress has been made to date in consideration of fair work practices across the Scotland Excel framework portfolio. For example, of the 1138 suppliers appointed since formal consideration was embedded in tender activity, 981 (86.2%) have confirmed that they pay the living wage. Visibility of this included within mobilisation packs issued to councils at framework commencement, and work is ongoing to establish the value of the contracts awarded by councils to those suppliers.

Whilst we require that all contractors comply with their obligations in law relative to employees (such as to pay the 'national living wage' as a minimum) the legal position regarding mandating the real Living Wage is not fully clear and questions have been raised such as:

- *Will suppliers be required to provide any evidence (what form will this be) re the payment of the real Living Wage or will this be a self-declaration?*
- *Will real Living Wage conditionality require the supplier to pay all/majority of staff the real Living Wage or is it acceptable for the supplier to only pay the staff supporting delivery of the specific contract*
- *How will it be determined that real Living Wage conditionality will not discriminate amongst bidders?*

It is hoped that these areas and the position overall should be clarified further upon the planned update to the current Statutory Guidance and SPPN's.

5. Conclusion

To date and in line with general Legal advice Scotland Excel have consistently applied Fair Work Criteria and strongly promoted/encouraged payment of the real Living Wage

Scotland Excel will continue to drive the relevant, social, economic, and environmental outcomes through our procurement activity.

Fair Work will continue to be included within the quality evaluation of all frameworks. The weightings attributed to each framework will be proportionate to the likely impact on quality for that particular framework and will therefore be assessed on a case-by-case basis. It is anticipated that this will continue to deliver improved employment conditions, better value frameworks and minimise potential for increased costs to councils.

In light of the most recent communication from Scottish Government regarding their revised approach to mandating payment of the real Living Wage Scotland Excel will now, on a contract by contract basis, look further into the ways in which where appropriate we could, within the law, consider and mandate the real Living Wage.

Members of the Executive Sub Committee are invited to note this update on matters related to Fair Work including the Living Wage.