SUBMISSION FROM SCOTTISH GOVERNMENT, PROCUREMENT DIRECTORATE

Introduction

As part of its inquiry into a living wage in Scotland, the Local Government and Regeneration Committee intends to examine the extent to which public procurement procedures can include criteria linked to the payment of a living wage. The Committee has requested written evidence from the Scottish Government Procurement Directorate on this issue.

This paper looks briefly at the extent to which public procurement procedures can make it a condition of bidding for a public contract that a supplier pays its staff a living wage as well as what can be done on a voluntary basis. Annex A provides a summary of the legal framework within which public procurement is conducted.

Private sector pay, however, is a matter for individual companies. In addition, including conditions in procurement processes which require contractors or subcontractors to pay their employees more than the national minimum wage could amount to a restriction of the freedom to provide services guaranteed by article 56 of the Treaty on the Functioning of the European Union.

Extent to which public procurement procedures can require a contractor to pay its staff a living wage

The criteria that public bodies can use to award a contract are set out in public procurement legislation. The legislation splits procurement processes into two distinct stages, the selection stage and the award stage.

At the selection stage, the legislation lists the circumstances in which a supplier must (for example, if convicted of certain criminal offences) or may (for example, if guilty of professional misconduct) be considered ineligible to bid and allows the use of selection criteria relating only to a supplier’s economic and financial standing and technical or professional ability. At the award stage, public bodies can only use criteria which are linked to the subject matter of the contract in order to determine which supplier will be awarded the contract.

Public bodies’ ability to use criteria linked to payment of a living wage is not specifically addressed in the legislation.

However, the principle was considered by the Court of Justice of the European Union in the Dirk Rüffert v Land Niedersachsen case (C-346/06). The Court considered the compatibility of a clause in the procurement process which required bidders to comply with a collective wage agreement, which was applicable to the public sector only, with the Posted Workers Directive. It ruled that as the agreement was not universally applicable it was not permitted by EU law.
The judgment suggests that requiring payment of a living wage through public procurement contracts (which therefore would be deemed to be not of universal application) may represent a restriction on the freedom of suppliers to provide services guaranteed by article 56 of the Treaty on the Functioning of the European Union. The UK national minimum wage does not fall foul of article 56 because it is prescribed by law for all purposes in the UK and thus demonstrates its necessity as a measure for the protection of workers.

The Rüffert case suggests that the protection afforded to suppliers by the Treaty principles (see Annex A) limits the extent to which public bodies can require payment of a living wage as part of a procurement procedure.

**Potential for promoting a living wage through public contracts**

We are aware that a number of public bodies encourage their suppliers to agree that they will pay their staff a living wage. This is done on a voluntary basis, not as a requirement of the procurement procedure, which should mean, therefore, that any supplier who indicates that it will not pay its employees a rate of pay commensurate with the living wage is not excluded from the competition as a consequence.

In response to a question from the European Parliament (E-0495/10), the European Commission stated that “prima facie, living-wage conditions would appear to count among the contract performance clauses which may be included in a public procurement contract”. However, the answer contained the following two caveats:

- such a clause must not be “directly or indirectly discriminatory”; and
- “such a contract performance clause must concern only the employees involved in the execution of the relevant contract, and may not be sought extended (sic) to the other employees of the contractor by means of the procurement”.

The Cabinet Secretary for Infrastructure and Capital Investment has recently written to the European Commissioner for Internal Market and Services to request a meeting and to seek the Commission’s view and clarification on:

- whether public bodies are able to include payment of a living wage as a criterion of contract award in a public procurement process or as a contract performance clause; and
- the conditions that public bodies would have to meet to ensure that, in requiring payment of a living wage, they also complied with all other EU obligations, including obligations of non-discrimination.

We would be happy to share the Commission’s response with the Committee in due course.

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Legal framework for public procurement

Public procurement is governed by a legal framework which includes principles deriving from the Treaty on the Functioning of the European Union, European Procurement Directives (as implemented in national legislation) and Court of Justice of the European and national case law. This legal framework establishes procedures which must be followed by public bodies whenever they purchase goods, services or works from suppliers.

The principles deriving from the Treaty on the Functioning of the European Union (the “Treaty principles”) apply to all activities undertaken by a public body. The key Treaty obligations in the context of public procurement include:

- transparency – contract procedures must be transparent and contract opportunities should generally be publicised;
- equal treatment and non-discrimination – potential suppliers must be treated equally;
- proportionality – procurement procedures and decisions must be proportionate to the outcome desired; and
- mutual recognition – giving equal validity to qualifications and standards from other Member States, where appropriate.

European Procurement Directive 2004/18/EC sets out detailed procedural rules for the purchase of goods, services and works above a certain threshold by public bodies. These procedural rules support, and are interpreted by, reference to the Treaty principles. Directive 2004/18/EC is given effect in Scots law by the Public Contracts (Scotland) Regulations 2006 (SSI 2006 No. 1) (the “Scottish Regulations”), as amended. Threshold figures, which are exclusive of VAT and are an estimate of the total value of the contract, vary depending on both the public body undertaking the procurement and the nature of the contract. For contracts for the purchase of goods or services by the Scottish Government and Health bodies, the threshold figure is £101,323; the relevant figure for local authorities is £156,442. There is a common threshold figure for works/construction contracts of £3.9m. Where contracts have an estimated value less than the relevant threshold figure, Treaty principles still apply.

Decisions of the Court of Justice of the European Union (CJEU) and the national courts provide interpretation of the Treaty principles and the European Procurement Directives and can establish precedents which must be observed. Regulation 47 of the Scottish Regulations allows suppliers to bring proceedings in the Sheriff Court or Court of Session against a public body which has breached its obligation to comply with the Regulations or any other enforceable EU obligation which may be relevant to awarding a public contract. The European Commission may also bring proceedings against a public body for an alleged breach of European Procurement Directive 2004/18/EC.