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The Information Centre

## SPICe Briefing

# Public Procurement in Scotland

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This briefing explains the EU rules governing public procurement and how they operate in Scotland, sets out sources of information on Scottish public contracts and examines two case studies in terms of their interaction with the procurement rules – the Forth Replacement Crossing and the introduction of a living wage.



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Pàrlamaid na h-Alba

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## EXECUTIVE SUMMARY

Public procurement relates to the acquisition by the public sector of goods, services and works from third party organisations. It covers everything from the purchase of supplies, such as stationery, IT equipment and furniture through to contracts for major infrastructure projects. The Scottish Government aims, through its public procurement policy, to achieve value for money for the taxpayer.

Where a contract value is anticipated to exceed specified amounts (which depend on the nature of the contract and the contracting authority), EU rules apply to the contractual process in order to ensure fair and effective competition between companies and between member states. This includes a requirement to advertise tenders in the Official Journal of the European Union (OJEU). In 2010, tenders to a total value of £96 billion were advertised by UK public authorities in OJEU. The threshold for advertising tenders in OJEU is £113,057 - £173,934 for goods and services, depending on the contracting authority. For capital works, the threshold is £4.3m.

The overall legal framework for public procurement across EU member states includes principles deriving from the [Treaty on the Functioning of the European Union](#) (OJEU 2010), European Union directives on procurement and European Court of Justice and national court case law. The relevant European Union Directives are Directive [2004/18/EC on The Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts](#) (OJEU 2004) ("the Public Contracts Directive") and Directive [2004/17/EC on The coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors](#) ("the Utilities Directive". The Directives are given effect in Scots Law by the [Public Contracts \(Scotland\) Regulations 2006](#) (SSI 2006/1) and the [Utilities Contracts \(Scotland\) Regulations 2006](#) (SSI 2006/2)

EU rules allow contracting authorities to use a range of criteria when awarding public sector contracts, but they must specify the weighting accorded to each of the criteria. As such, contracting authorities are not obliged to award the contract to the lowest price tender. A recent report published by the Jimmy Reid Foundation has reviewed the way in which the EU procurement rules have been implemented in Scotland and argued that the size of contracts put out to tender and the provisions for sub-contracting have made it harder for small and medium sized enterprises (SMEs) and Scottish firms to successfully compete for public sector tenders.

In 2011, the European Commission launched a review of EU procurement rules. Its consultation, to which the [Scottish Government responded](#), closed in April 2011. On 20 December 2011, the Commission [announced its proposals for reform](#). The Commission's proposals now pass to the Council (Member States) and the European Parliament for negotiation and adoption. If adopted by the end of 2012 as provided for in the Single Market Act, the Directives will have to be implemented by Member States at the latest by 30 June 2014.

In December 2008, the Scottish Government published its [updated Scottish Procurement Policy Handbook](#). Alongside the handbook, the Scottish Government also issues [Scottish Procurement Notes](#) which provide further details of specific elements of the procurement process. There are a number of different sources of information on Scottish public procurement contracts, although not all information is in the public domain.

# INTRODUCTION

Public procurement can be defined as the purchase of works, goods and services from third parties by public sector organisations, ranging in scope from the purchase of routine items (e.g. stationery, temporary office staff, furniture) to complex projects (e.g. construction, IT systems). Effective public procurement is essential in order to achieve value for money for the taxpayer, and this is generally done through competitive tender.

Public procurement for certain goods and services above certain monetary thresholds has to follow EU rules (explained in detail below), which were introduced to open up public purchasing, making member states remove restrictive practices. The EU rules aim to open up public procurement to companies outside the awarding member states and ensure the free movement of supplies, services and works within the EU and the non-discriminatory treatment of suppliers.

In 2010, public sector expenditure on works, goods and services procured from the open market across the EU totalled €2.4 trillion (£2.1 trillion). Of this total, the European Commission estimates that €447 billion (£389bn, or 18%) worth of expenditure is advertised for tender in the Official Journal of the European Union (OJEU). The UK accounts for €389 billion (£338bn) of the total expenditure on public works, goods and services, of which €109 billion (£96bn, or 28%) was advertised in the OJEU (European Commission, 2011c).

The EU rules are concerned with how works, goods and services are procured, and not with what is procured. The focus of EU legislation is therefore primarily on the procedures that individual public bodies must follow when organising a public purchase, and the EU rules impose a number of steps that public purchasers must follow before awarding public contracts.

Effective public procurement is seen by the Commission as a key instrument in achieving its [Europe 2020 strategy](#) (the EU's growth strategy) objectives. The Commission states that—

“The Europe 2020 strategy also stresses that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open EU wide. Obtaining optimal procurement outcomes through efficient procedures is of crucial importance in the context of the severe budgetary constraints and economic difficulties in many EU Member States. In the face of these challenges, there is a greater need than ever for a functioning and efficient European Procurement Market that can deliver on these ambitious goals.” (European Commission 2011a)

The Scottish Government also sees public procurement as a means for supporting economic growth, stating that:

“With an annual spend of around £9 billion each year, public sector procurement in Scotland can help support sustainable economic growth and contribute to many of the Scottish Government's strategic priorities.” (Scottish Government, 2011a)

## EU PROCUREMENT RULES

### LEGAL FRAMEWORK

As noted above, public procurement policy in Scotland is governed by European rules. The overall legal framework includes principles deriving from the [Treaty on the Functioning of the European Union](#) (OJEU 2010), European Union directives on procurement and European Court of Justice and national court case law. The Treaty sets out four key fundamental principles that underpin the public procurement regime in Scotland. These key principles are—

- **Equal treatment:** everyone must be treated equally and given an equal chance of winning a contract, and the procurement processes must be fair and not exclude potential suppliers, intentionally or otherwise.
- **Non-discrimination:** public bodies must not discriminate between individuals or businesses on the basis of the EU Member State in which they are located. They have a duty not to impede the free movement of workers, goods and businesses between EU Member States.
- **Transparency:** public bodies must ensure that their procurement and contracting processes are clear and transparent. Tenderers must be able to clearly understand the process that the public body is following, the qualities that the tenderer is being asked to demonstrate, and the basis on which a contract will be awarded.
- **Proportionality:** public bodies have a duty not to include contract requirements and terms that are disproportionate to the size or value of the contract. Tenderers should not, for example, be excluded on the basis of economic strength where their financial capacity is sufficient to meet the actual requirements of the contract.

Public sector bodies are obliged to consider these principles throughout their procurements, regardless of whether the full EU procurement rules apply.

The detailed procedures with which public bodies must comply when procuring and awarding public contracts are set out in the following Directives—

- Directive [2004/18/EC on The Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts](#) (OJEU 2004) (“the Public Contracts Directive”).
- Directive [2004/17/EC on The coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors](#) (“the Utilities Directive”)

The Directives are given effect in Scots Law by two sets of regulations which are separate from (although very similar to) those applicable in the rest of the UK—

- the [Public Contracts \(Scotland\) Regulations 2006](#) (SSI 2006/1); and
- the [Utilities Contracts \(Scotland\) Regulations 2006](#) (SSI 2006/2).

The European Commission has provided a useful [summary of the Directive](#) (European Commission 2010) on its webpages.

Finally, public procurement in Scotland is subject to decisions of the European Court of Justice (“ECJ”) and the national courts in Scotland, the UK and other Member States which provide direction on the interpretation of the Directives, the Regulations and related procurement principles. Decisions of the ECJ and Scottish Courts and the UK Supreme Court are binding and must be observed.

## APPLICATION OF THE REGULATIONS

The Regulations generally apply when three main pre-conditions are met. The three conditions are set out below.

### 1. The procuring body is a "contracting authority" as defined in the Regulations.

The definition of contracting authority is wide and includes the Scottish Government, local authorities, associations formed by one or more contracting authorities and other "bodies governed by public law". A body which is wholly or primarily funded, governed or managed by a contracting authority will itself be "contracting authority" for the purposes of the procurement rules.

## **2. The contract is a public works, services or supplies contract.**

The contract must be in writing and it must be either:

- **A Public Works Contract:** includes activities such as construction of new buildings, maintenance and repairs, plumbing, joinery and painting.
- **A Public Supplies Contract:** the purchase or hire of goods, including installation where this is incidental to the supply of the goods.
- **A Public Services Contract:** the Regulations divide services into "Part A" services and "Part B" services. Part A services are fully caught by the Regulations. Part B services are subject to a less rigorous regime, with only a few of the detailed rules of the Regulations applying.

## **3. The estimated value of the contract equals or exceeds the relevant financial threshold.**

The Regulations only apply to public contracts where the value is above a prescribed threshold. The rules expressly prohibit deliberately splitting contracts to bring them below the thresholds. The thresholds differ according to the type of contract that is being procured (i.e. works, services or supplies) and the identity of the contracting authority. Authorities in central government will generally have a lower threshold than other public sector organisations such as local authorities. The thresholds are reviewed every two years and may be amended. The current thresholds can be found in Table 1 below.

**Table 1: European Procurement Thresholds**

	<b>SUPPLIES</b>	<b>SERVICES</b>	<b>WORKS</b>
Entities listed in <a href="#">Schedule 1 of the Public Contracts (Scotland) Regulations 2006 (which covers the Scottish Government and selected NDPBs and agencies and NHS Scotland bodies)</a>	£113,057 (€130,000)	£113,057 (€130,000)	£4,348,350 (€5,000,000)
Other public sector contracting authorities (which includes local authorities and other NDPBs and agencies)	£173,934 (€200,000)	£173,934 (€200,000)	£4,348,350 <sup>3</sup> (€5,000,000)
Indicative Notices	£652,253 (€750,000)	£652,253 (€750,000)	£4,348,350 (€5,000,000)
Small lots	£69,574 (€80,000)	£69,574 (€80,000)	£869,670 (€1,000,000)

Source: [OJEU](#)

## **RULES APPLICABLE TO ALL PUBLIC CONTRACTS**

There are a number of rules that apply to all public contracts, which are set out in detail in the [Commission's summary document](#). The Parliament's Procurement Office has provided a summary of the detailed rules and procedures involved in different types of procurement. This is included as an annexe to this briefing.

### **Use of non-price factors in contract awarding**

The criteria used by the contracting authorities in awarding their public contracts are:

- either the lowest price only;
- or, where the contract is awarded to the most economically advantageous tender, various criteria linked to the subject-matter of the contract in question (quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, etc.). The contracting authority should specify the relative weighting it gives to each of the criteria.

Government policy in Scotland is to use the latter approach as this is consistent with the Government's policy that all public procurement must be based on Value for Money (defined as the optimum combination of whole-life cost and quality to meet the user's requirement). This means that various non-price factors can be taken into account when assessing bids. The Scottish Government (2011a) has stated, for example, that it intends to "require recipients of major public contracts to deliver new training, employment and apprenticeship opportunities" and such requirements were built into the Forth Replacement Crossing principal contract.

The Welsh Assembly Government (2010) has issued detailed guidance on the inclusion of "community benefit" clauses in public sector contracts and has encouraged public sector bodies

to actively promote such considerations in procurement activities. In a recent example of a contract relating to a major road-building project, price was only given a weighting of 20% in the tender assessment process, while a weighting of 80% was given to non-price factors and quality factors, including the construction materials and design and the environmental, social and economic impact on the local area. (BBC 2012)

A former head of procurement in Whitehall, Peter Smith, points to risk aversion in contract decisions, with officials fearing criticism for awarding contracts on factors other than cost. He also highlights confusion over regulations, saying: "Most people still don't look too strongly at social factors. There is confusion about what is allowed under the European regulations." The Cabinet Office Minister Francis Maude has also criticised civil servants as "short-sighted and risk averse" in interpreting these rules. (BBC 2012)

## **Issues affecting small and medium sized enterprises**

Many commentators have highlighted concerns relating to the ability of small and medium sized enterprises (SMEs) to effectively compete for public sector contracts. An SME is any firm with fewer than 250 employees. In Scotland, in 2011, SMEs accounted for 99.3% of enterprises, 53.6% of employment and 36.5% of turnover. (Scottish Government, 2011c)

In its report on the 2012-13 Draft Budget, the Scottish Parliament's Economy, Energy and Tourism Committee concluded that "public sector procurement policy must operate in a way which enables smaller, local firms to participate and win business so that government resources are recycled within our communities." (Scottish Parliament Economy, Energy and Tourism Committee, 2011)

In January 2012, the Jimmy Reid Foundation published a report on procurement, [Using our buying power to benefit Scotland](#) (Jimmy Reid Foundation 2012). Chapters 3 and 4 of the report deal with the European procurement rules and how they are transposed to Scotland.

The report, produced by Jim and Margaret Cuthbert, suggests that the Scottish Government's transposition of the EU procurement directives is focussed too heavily in favour of big businesses and as a result Scottish small and medium sized enterprises are being locked out of the process. Specifically the report concludes that—

"We did not need to set up contracts in such large blocks, blocks which in many cases are too big for Scottish firms to cope with. In fact, within the framework of the existing EU Directive, there is ample scope to be pro-active in ensuring that contracts are split up – witness the legal requirement to do this in several EU countries."

The Scottish Government (2011a) notes that three-quarters of all suppliers winning contracts through Public Contracts Scotland, the online advertising portal, are SMEs, but also acknowledges that more can be done to support SMEs in winning public sector contracts. The Scottish Government refers to "thinking creatively about how we develop procurement strategies and set up specific contracts can help ensure a level playing field for small and medium enterprises (SMEs)" and notes that "whilst European Commission rules do not allow us to discriminate in favour of Scottish firms, we will help public bodies to design their contracts in a way which gives Scottish firms, particularly SMEs, a fair chance to compete". (Scottish Government 2011a)

The Jimmy Reid Foundation report also examined the issue of subcontracting and how provisions with regard to subcontractors are dealt with in the EU directives and then transposed in the Scottish regulations. The report states that—

“Paragraph 32 of the preamble, and Article 25, deal with provisions to help small and medium sized enterprises (SMEs). The preamble makes it clear that those drafting the Directive thought it was advisable for contracting authorities to include provisions on subcontracting...Article 25 of the EU Directive, dealing with sub-contracting, states that “the contracting authority may ask or may be asked by member state to indicate what share of the tender it is proposed to sub-contract”. It was thus left open to the individual states whether, on enacting this Article, they would choose to make it mandatory for contracting authorities or leave it optional. In the English regulations, (and hence in the Scottish), the OGC chose the optional route: so weakening a provision which was designed for the benefit of SMEs.”

The issue of subcontractors is relevant to the first case study detailed later in the briefing on the Forth Replacement Crossing.

## **REVIEW OF THE EU PROCUREMENT RULES**

In 2011, the European Commission launched a review of the EU procurement rules. Its consultation, to which the [Scottish Government responded](#) (Swinney, J, 2011), closed in April 2011. On 20 December 2011, the Commission [announced its proposals for reform](#) (European Commission 2012a). The proposed reform aims to “thoroughly modernise the existing tools and instruments”. The main objective is to simplify rules and procedures and make them more flexible. The proposals also aim to encourage access to public procurement for SMEs. According to the Commission, “access will be increased and made easier through measures to cut the administrative burden and strong incentives to divide tenders into lots and limit the financial capacity requirements for the submission of a tender.” (European Commission 2012c)

The Commission's proposals now pass to the Council (Member States) and the European Parliament for negotiation and adoption. If they are adopted by the end of 2012 as provided for in the Single Market Act, the Directives will have to be implemented by Member States at the latest by 30 June 2014.

## **SCOTTISH GOVERNMENT – GUIDANCE AND SOURCES OF INFORMATION**

In December 2008, the Scottish Government published its [updated Scottish Procurement Policy Handbook](#) (Scottish Government 2008), an overarching framework for public procurement in Scotland. Alongside the handbook, the Scottish Government also issues [Scottish Procurement Notes](#) (Scottish Government 2011b) which provide further details of specific elements of the procurement process.

There are a number of different sources of information on Scottish public procurement contracts, although not all information is in the public domain. These are set out in Table 2 below.

**Table 2: Sources of information on Scottish public procurement contracts**

Name of database/source of information	Description and purpose	Extent to which information is in the public domain
<a href="#">Public Contracts Scotland</a>	<p>This is a portal set up to provide a single point of access for potential suppliers to access information on Scottish public sector contracts and covers the vast majority of public sector contracts, from the very small to the very large.</p> <p>Can be used to find details of contracts with Scottish Local Authorities, NHS Scotland, the Scottish Government, Agencies and NDPBs, Higher and Further Education and Emergency Services by browsing the available contracts</p>	<p>Publicly accessible via the Scottish Government website</p>
<a href="#">Tenders Electronic Daily (TED)</a>	<p>The online version of the 'Supplement to the Official Journal of the European Union', dedicated to European public procurement. All contracts subject to the EU Procurement rules must be published here, and can be searched down to Scottish local authority level.</p>	<p>Publicly accessible via the TED website.</p>
<p>Infrastructure Projects Database</p>	<p>Set up in 2010 with the aim of providing a central source of information in Scotland on infrastructure projects with a capital value of £5m or more and for which an Outline Business Case has been prepared.</p> <p>It includes information on project value, budget information, financing method, procuring body, current status and performance of projects against milestones. Quarterly reports based on this database are provided to the Scottish Government's <a href="#">Infrastructure Investment Board</a>, but these are not in the public domain. This database is also the basis for the regular reporting on capital projects valued at £50m+ provided to the Parliament's Public Audit Committee (the most recent of which was in <a href="#">December 2011</a>).</p>	<p>Informs reports to Public Audit Committee every six months on capital projects valued at £50m+, but not otherwise in the public domain.</p>
<p><a href="#">Procurement Information Hub</a> (also known as the Spikes Cavell Observatory)</p>	<p>Provides information on all public sector procurement (whether purchased through a contract agreement or not), so covers a wider range of spending than the two sources above. It was set up to encourage efficiencies in procurement and identify opportunities for collaboration in purchasing activities.</p> <p>It provides a snapshot of accounts payable data and can provide analysis according to size and location of supplier. However, there are some limitations on the data it provides, e.g. currently classifies suppliers (and,</p>	<p>Publicly accessible through the Spikes Cavell website.</p>

	therefore, expenditure) based on their main business, not on the specific goods, services or works that were purchased. Again, there is no regular reporting that is in the public domain.	
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## THE PROCUREMENT RULES IN PRACTICE – CASE STUDIES

As noted in the introductory section of this briefing, there is a high level of parliamentary and public interest in public procurement. To illustrate some of the issues outlined above this briefing now looks at two examples and how they relate to the procurement rules – the Forth Replacement Crossing and the Introduction of Living Wage.

### CASE STUDY 1: FORTH REPLACEMENT CROSSING

#### Procurement process for the Principal Contract

In December 2008, the Scottish Government confirmed the details of the Forth Replacement Crossing, funded by the Scottish Government through Transport Scotland and secured through a design and build contract.

The scope of the Principal Contract includes the design, construction and completion of a new bridge over the Firth of Forth together with approach roads to the North and South of the Crossing and the installation of an Intelligent Transport System.

The procurement of the Principal Contract was subject to the EU rules outlined above – it was a works contract above the specified thresholds, subject to competitive dialogue (explained in the annexe to this Briefing). The Contract Notice was issued for publication in the OJEU on 26 June 2009. Subsequently, on 23 September 2009 prequalification submissions were received from two consortia—

- **Forthspan** comprising of Balfour Beatty, BAM Nuttal, Morgan Est (now Morgan Sindall) and Vinci (later changed to MT Hojgaard); and
- **Forth Crossing Bridge Constructors** comprising of Dragados, Hochtief, American Bridge International and Morrison.

Both these consortia successfully passed the prequalification stage and were invited to participate in Competitive Dialogue on 4 December 2009. Invitations to Submit Final Tender were issued on 17 December 2010, and both Forthspan and Forth Crossing Bridge Constructors (FCBC) submitted a tender on 28 January 2011.

The contract was awarded to FCBC in April 2011 at a price of £790 million.

#### Procurement process for subcontracts beneath the Principal Contract

As noted above, the Principal Contract for the Forth Replacement Crossing was subject to the public sector procurement rules. However, once the Principal Contract was awarded, it was not a requirement on FCBC to follow the same procurement rules for awarding sub contracts – the only requirement to follow the public sector procurement rules was on Transport Scotland in procuring the Principal Contract.

In terms of the EU Procurement rules the options in relation to the subcontracting of any part of the Principal Contract are as follows—

- **Option One:** the Principal Contractor may have complete discretion to sub-contract the works. As the Principal Contractor is not a contracting authority it does not have to comply with the EU procurement rules when letting the subcontracts.
- **Option Two:** regulation 45 of the 2006 Regulations allows contracting authorities to require tenderers to identify any part of the contract that they intend to sub-contract to a third party and also to state the identity of any sub-contractors. The application of this regulation is optional allowing contracting authorities the flexibility to determine whether this appropriate on a case by case basis. However there are certain risks in requiring the Principal Contractor to disclose the identity of subcontractors as part of its bid. The ECJ<sup>1</sup> has held that where the identity of the original subcontractor was a decisive factor in the contracting authority concluding the contract with the Principal Contractor (in other words the subcontractor was included in the evaluation leading to the original award of the contract), then a change of subcontractor (even if permitted in the contract documents) may amount to a material contract change requiring a fresh award procedure.
- **Option Three:** the Contracting authority may nominate the subcontractor which the successful bidder must use. This is likely to be restricted to very specific circumstances, such as a subcontractor who has exclusive rights, because of the risk of the contracting authority assuming responsibility for poor performance if it stipulates a named subcontractor. The contracting authority would also have to exercise care so as not to breach the principles of equal treatment and non-discrimination (for example by nominating Scottish subcontractors on the basis of nationality).

It is not known which of the above options was selected with regard to the Forth Replacement Crossing project as the contract is not in the public domain.

## Subcontracts awarded

On 9 February 2012, following speculation regarding the awarding of steel contracts for the FRC project, Transport Scotland [issued a statement](#) (Transport Scotland 2012) which set out some details on the award of subcontracts for the project. It stated that, as at December 2011, 155 subcontracts had been awarded, of which 118 went to Scottish firms – 76% of the total number of contracts awarded. However, it did not set out the percentage of the total value of contracts awarded. In addition, it looked to clarify the “misapprehension that all the subcontracts...have been awarded.” It stated that there were, at that point, 88 subcontracts advertised and further contracts would come on stream in future (Transport Scotland 2012).

In the answer to a Parliamentary Question (S4W-05504), Keith Brown MSP, Minister for Housing and Transport confirmed the value of subcontracts awarded. He stated that, as at 15 February 2012—

- of about £140 million worth of subcontracts awarded, about £23 million (or 16.4%) had been awarded to Scottish companies; and that
- of about £20 million of supply orders issued, about £13 million (or 65%) had been awarded to Scottish Companies.

In total therefore Scottish companies had secured sub contracts and supply orders to the value of £36m, approximately 26% of the total awarded.

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<sup>1</sup> Case C-91/08 Wall AG v City of Frankfurt

## CASE STUDY 2: INCLUSION OF A LIVING WAGE IN PROCUREMENT CONTRACTS

On 3 February 2012, the Local Government and Regeneration Committee published its [report on the Living Wage in Scotland](#) (Scottish Parliament Local Government and Communities Committee 2012). One of the issues addressed by the Committee was the question of the extent to which it would be possible to build living wage requirements into contracts, and through that process, extend the living wage across workforces engaged on local government contracts.

The evidence the Committee received on whether the EU rules would permit the living wage being built into contracts was mixed. The Scottish Government's Head of Procurement Policy Branch, Iain Moore, told the Committee—

“Interestingly, when the European Commission gave a view on the incorporation of a living wage in public procurement processes, it said that a living wage would appear to count among the contract performance clauses that may be included in public procurement contracts. Quite tellingly, however, it went on to attach two caveats to that. First, it said that such a clause could apply only to the contract workers who were working directly under the public contract and not to all the workers. Secondly, it said that such a clause must not be directly or indirectly discriminatory. It is not very clear what that would mean in practice. That is why the Cabinet Secretary for Infrastructure and Capital Investment has written to the Commission to ask it to explain the circumstances in which it believes that it would be possible to incorporate a living wage clause without being directly or indirectly discriminatory”. (Scottish Parliament Local Government and Communities Committee 2012)

The Scottish Government has written to the European Commissioner for Internal Market and Services to seek guidance on whether the inclusion of a living wage requirement within public procurement contracts would be compliant with European Union law.

The inclusion of a living wage requirement in procurement contracts is a complex area and it is not entirely clear how far contracting authorities may go in terms of including wider social benefits, such as a living wage, in a procurement context without being in breach of EU procurement rules and Treaty principles.

Certainly, it is now accepted that there is some scope for including community benefits in the procurement process and the EU Commission has published guidance on this matter which sets out the current position in respect of public procurement rules and explains the opportunities offered by the existing EU legal framework for public bodies to take into account social considerations in their public procurement.

The extent to which community benefits can be integrated into the procurement process is largely determined by the degree to which such issues can be said to relate to the subject matter of the contract. In relation to the drawing up of specifications, community benefits should only be included where these are directly relevant to what is being procured and are core requirements. For example, when awarding contracts connected with an urban regeneration project, the contracting authority may legitimately include a requirement relating to providing training opportunities for the unemployed.

The award criteria must also relate to the subject matter of the contract. The difficulty with using a living wage requirement or criteria at the specification, selection and award stages of a public procurement is that it is unlikely to apply to supply contracts (as provision of labour will not form part of the contract) and it is difficult to envisage works or services contracts where such a requirement would be directly relevant to the subject matter of the contract.

Another issue is that such a requirement may amount to a restriction of the freedom to provide services guaranteed by article 56 of the Treaty on the Functioning of the European Union.

It has been suggested that it may be possible to include a living wage requirement in the contract performance clauses. The EU Commission's guidance provides that there is more scope for including community benefits in the contract terms and conditions which govern the performance of the contract post-award, provided these do not amount to disguised specification or award criteria. This is because whilst compliance with the contract performance conditions must be accepted by all bidders, it does not form part of the evaluation process. The contract performance clauses must be linked to the performance of the contract and may include provisions relating employment conditions.

It is clear that suppliers must comply with national laws relating to employment conditions such as equalities and the minimum wage. Both Procurement Directives make it clear that 'the laws, regulations and collective agreements, at both national and EU level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing such rules, and the way they are applied, comply with EU law'.

In addition the Posted Workers Directive 96/71/EC requires employers to apply terms and conditions that are no less favourable to staff that are temporarily sent to work abroad than to those applying in the host country. It requires that working conditions and pay in a member state should be applicable both to workers from that state, and those from other EU countries posted to work there by employers who have won a contract there.

In order for contract compliance with a "living wage" to be lawful it must comply with Art 3(1) and 3(8) of the Posted Workers Directive meaning that the living wage must be a law, regulation or universally applicable collective agreement. For a collective agreement to be universally applicable, it must apply to all undertakings in a geographical area and industry. This was considered in a procurement context in the Rüffert case. In this case, the ECJ held that a clause in the procurement process which required bidders to comply with a collective wage agreement which was applicable to the public sector only was not compatible with the Posted Workers Directive as the provision was not universally applicable.

The ECJ went on to suggest 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.

# ANNEXE: PUBLIC PROCUREMENT PROCEDURES AND PROCESSES

This information has been provided by the Scottish Parliament's Procurement Office.

## PUBLIC PROCUREMENT PROCEDURES

Where each of the pre-conditions referred to above is satisfied, the contracting authority must normally advertise the contract in the Official Journal of the European Union (OJEU). In addition to the requirement to advertise, the contracting authority must also follow the procedural rules and comply with the timescales set out in the Regulations. The procedures and timescales to be followed vary depending on the type of procurement procedure that the contracting authority considers to be most appropriate for the type of contract.

**Open Procedure:** a single stage procedure where the contract is advertised in OJEU and any potential bidder can express an interest, ask for the contract documents and submit a bid.

**Restricted procedure:** a two stage procedure where the contract is advertised, and a prequalification stage ("PQQ") is used to eliminate bidders that do not meet the contracting authority's minimum requirements. The contracting authority then invites the qualifying bidders to tender.

**Negotiated Procedure:** the contract is advertised and a PQQ is used to eliminate bidders that do not meet the contracting authority's minimum requirements. The contracting authority invites the qualifying bidders to tender and can carry out post-bid negotiations with selected bidders. The negotiated procedure may only be used where certain conditions laid down in the Regulations have been met and is normally only used in exceptional circumstances.

**Competitive Dialogue Procedure:** the contract is advertised and a PQQ is used to eliminate bidders that do not meet the contracting authority's minimum requirements. The contracting authority invites the qualifying bidders to tender and can then undertake one or more dialogue stages of comparing the technical solutions proposed by bidders to arrive at the best solution to meet the contracting authority's requirements.

All the procedures, with the exception of the open procedure, include an element of prequalification which provides a filtering process and enables the contracting authority to restrict the number of tenders to be assessed to those suppliers who are suitably qualified, making the process more manageable. The Regulations specify the minimum number of qualified bidders who must be invited to tender.

The most commonly adopted procedure is the Restricted Procedure which typically follows the following pattern:

- An OJEU notice is published to advertise the contract;
- Bidders expressing interest complete a PQQ, which is assessed to ensure that the bidder meets the minimum requirements for technical ability and financial capacity;
- Short-listed bidders are selected to be invited to tender (a minimum of 5 qualified bidders), and issued with an invitation to tender (ITT);
- Tenders are evaluated on the basis of the award criteria. No negotiation with bidders is permitted ;

- The contract is awarded to the successful bidder(s). Unsuccessful bidders are provided with a debrief on their bid;
- a standstill period is observed during which an authority is not permitted to enter into a contract with the successful bidder; and
- the contracting authority and the successful bidder enter into the contract.

### **Standstill**

The standstill period is a period of between 10 to 15 days from the date potential suppliers are informed of the outcome of the tender process to the date on which the contracting authority intends to enter into the contract with the successful bidder. Contracting authorities must not enter into a contract with the successful bidder in a procurement process before the end of the applicable standstill period. The purpose of the standstill period is to allow unsuccessful bidders who may wish to challenge an authority's contract award decision to do so before the contract has been entered into. The standstill period gives unsuccessful bidders the opportunity to receive and consider information concerning the reasons why their bid was unsuccessful and to decide whether to raise legal proceedings against an authority.

## **STAGES IN THE PROCUREMENT PROCESS**

The Regulations set out criteria designed to ensure all suppliers are treated on equal terms, to avoid discrimination on the grounds of origin in a particular Member State. These criteria cover:-

### **Specification**

The contracting authority must specify its requirements, defining the subject-matter of the procurement through non-discriminatory technical specifications. Specifications must not be written so as to distort or restrict competition. The specification must avoid brand names and other references which would have the effect of favouring or eliminating particular providers, products or services. Contracting authorities may use performance specifications rather than technical specifications.

### **Selection**

Suppliers convicted of certain offences (organised crime, fraud, corruption, money laundering) must be excluded from public contracts. Contracting authorities also have discretion to exclude suppliers from the tender process where certain grounds concerning the supplier's personal position are met (e.g. bankruptcy or professional misconduct).

The selection of the suppliers to be invited to tender must be objective and non-discriminatory. Only information concerning a supplier's economic and financial standing (for example annual turnover for the past three years) and technical capacity and ability (for example experience of similar contracts over the past five years) can be considered at the selection stage.

### **Award**

A contracting authority must award a contract on the basis of either:

- Lowest price: The lowest priced tender wins. No other element of the tender may be taken into account; or
- The most economically advantageous tender: Factors other than or in addition to price, like quality, technical merit and running costs can be taken into account

Government policy in Scotland is to use the latter criterion as this is consistent with the Government's policy that all public procurement must be based on Value for Money (defined as the optimum combination of whole-life cost and quality to meet the user's requirement).

## **REMEDIES AND ENFORCEMENT**

The principal means of enforcement for a breach of the Regulations and other relevant principles of EU law such as enforceable obligations which arise directly from the EU Treaties are:

- Action by suppliers against contracting authorities in the Sheriff Court or Court of Session (within the timescales set out in the Regulations); and
- Action by the European Commission against the Member State in the European Court of Justice (ECJ)

The European Commission views the application of EU Law in Public Procurement as a priority and has taken action against member states in over 150 cases of alleged infringement

The Court's powers include both pre-contractual and post-contractual remedies. Remedies available before the contract is awarded include interim interdict to suspend contract award proceedings; the set aside of unlawful decisions; an award of damages and automatic suspension of the award procedure. Remedies available after the contract has been awarded include an award of damages; an ineffectiveness order and alternative penalties where ineffectiveness is inappropriate (such as fines or contract amendment).

In 2009, the remedies available to suppliers were further strengthened with the introduction of the Remedies Directive which was implemented into Scots law through the Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009. The Remedies Directive was intended to shift the balance of power from the contracting authority to the supplier by introduced two key additional remedies:-

### **Automatic Suspension**

Previously, a supplier had to go to court to obtain an interim interdict in order to prevent the contracting authority from entering into a contract. In practice this could be difficult as the supplier had limited time to obtain the interdict (within the 10 day standstill period) and, in addition had to persuade the court that there was a serious breach of the procurement regulations, that damages was not a sufficient remedy and that the balance of convenience favoured granting the interdict; this was both technically difficult and costly. Now, the procurement process is automatically suspended if a supplier raises court proceedings and a summons is served on the contracting authority, meaning that the contract cannot be entered into, and it is the contracting authority that is now required to go to court to have the suspension lifted.

### **Ineffectiveness**

Previously once a contract had been awarded it could not be overturned and the suppliers' only remedy was damages. However there is now the remedy of ineffectiveness, where a court must deem the contract null and void when it finds that the contracting authority has failed to advertise a contract when required to do so, or to observe a standstill period or automatic suspension. This remedy is intended to apply where a supplier has been deprived of an opportunity to bid for a contract or to pursue a legal action against a contracting authority before the contract is awarded.

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