



Implementation of Fair Work First in Scottish Public Procurement

Purpose

1. This policy note sets out action for public bodies to apply Fair Work First criteria in regulated procurement processes that commence from 1 April 2021.
2. The content of this SPPN is not legal advice and should not be construed as such. Public bodies are advised to seek their own legal advice in relation to any questions and issues they may have.

Key Points

- Fair Work is central to achieving the Scottish Government's priority for sustainable and inclusive growth and as we transition out of the COVID-19 pandemic and into a period of economic recovery and renewal, Fair Work is more important than ever and must be at the heart of employment practices, funding and procurements.
- 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.
- Fair Work First asks businesses bidding for a public contract to commit to progressing towards adopting the five criteria.
- The Fair Work First criteria are:
 - 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; and
 - providing fair pay for workers (for example, [payment of the real Living Wage](#)).

- This policy note explains how public bodies should apply the Fair Work First criteria in regulated procurement processes. Annex A contains an example Fair Work First criterion that can be used in relevant procurement processes to be evaluated alongside other relevant criteria. This question replaces the example criterion contained in [Statutory Guidance](#).
- The existing suite of Fair Work in Procurement guidance, including the [Statutory Guidance](#) and [Best Practice Guidance](#) and the [Toolkit](#), are still relevant and are being updated to reflect the focus on the five Fair Work First criteria.

Applying the Fair Work First Criteria

3. Scottish public bodies have been addressing Fair Work in procurement since the introduction of [Statutory Guidance](#) in October 2015.
4. Public bodies should apply the five 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 are engaged will impact on the way the contract is performed. This will be particularly relevant in service and works contracts, where the workforce make a significant contribution to the way the contract is delivered. In goods contracts the Fair Work First criteria may also be relevant.

Evaluating the Fair Work First criteria

5. Those wishing to bid for public contracts are expected to commit to progress towards adopting the five Fair Work First criteria in their performance of the contract.
6. When evaluating a bidder's response, consideration should be given to the bidder's context. This will include the type of organisation, its size and sector, and how the five Fair Work First criteria will apply to the delivery of the contract. Evaluators must take into account the complete package of practices a bidder offers, including their commitment to progressing towards adopting the five Fair Work First criteria, any wider fair working practices, and the impact that this complete package can have on the way the contract is performed.
7. In January 2021 [Fair Work First: guidance](#) was published to support the implementation of Fair Work First. The guidance supports those bidding for, and those awarding public contracts. The guidance includes good practice examples of what each of the five Fair Work First criteria mean in practice, helping to guide organisations in their approach. The examples are not prescriptive nor exhaustive and have been extracted in Annex B.

Monitoring Fair Work First in procurement

8. As part of the contract management process, contractors may be asked to provide evidence that they are progressing towards adopting the five Fair Work First criteria, in line with their tender response.

9. In addition, and in line with the [Fair Work First Guidance](#), suppliers that have committed to progressing towards adopting the five Fair Work First criteria in the delivery of the contract, should be asked to include a short statement on their own website highlighting their commitment to progressing towards adopting the Fair Work First criteria for those workers engaged in the delivery of the contract. The statement should be agreed jointly with an appropriate workplace representative.
10. Public bodies will be asked to report, as part of the established annual reporting cycle through their Annual Procurement Reports, on the number of regulated contracts awarded during the period that included a Fair Work First criterion.

Action Required

11. Public bodies are asked to update their current procurement processes to ensure that, wherever relevant and proportionate to do so, the five Fair Work First criteria are applied to regulated procurement processes which commence on or after 1 April 2021.

Dissemination

12. Please bring this SPPN to the attention of all relevant staff, this can include customers, end-users of a procurement and other relevant stakeholders who may have an impact over the decisions made in a procurement.

Further information

13. For further information about sources of support and guidance please see Annex C.

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Fair Work First - Example Invitations to Tender question

Note: the contents, and inclusion, of this example Fair Work First question should be considered on a case by case basis and be adapted to take account of your organisation, the particular circumstances surrounding the goods, works or services being procured and to reflect how the Fair Work First criteria are relevant to the subject matter of the contract.

The Scottish Public Sector is committed to the delivery of high quality public services, and recognises that this is critically dependent on a workforce which is well-rewarded, well-motivated, well-led, has access to appropriate opportunities for training and development, is diverse and inclusive, and can influence decision making. These factors are also important for workforce recruitment and retention, and thus continuity of service delivery.

Public bodies in Scotland are committed to applying the [Fair Work First](#) criteria in their own organisation and in publicly funded supply chains

[Fair Work First](#) is the Scottish Government's policy for driving good quality and fair work in Scotland. Through this approach, the Scottish Government, and its public sector partners, are asking bidders to describe how they are committed to progressing towards adopting and how they intend to continue embedding the five Fair Work First criteria:

- 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; and,
- providing fair pay for workers (for example, [payment of the real Living Wage](#)).

In order to ensure the highest standards of service quality in this contract we expect suppliers to commit to progressing towards adopting the five Fair Work First criteria in the delivery of this contract as part of a fair and equitable employment and reward package as a route to progressing towards wider fair work practices set out in the [Fair Work Framework](#).

Fair Work First (xx%)

Q - Please describe and demonstrate how you will commit to progressing towards adopting the five [Fair Work First](#) criteria for workers (including any agency or sub-contractor workers) engaged in the delivery of this contract. This should include current and planned actions that show how you will embed these practices during the lifetime of this contract. Answers should include tangible and measurable examples and should also describe how you will report on, and demonstrate progress, to the contracting authority during the lifetime of the contract.

Good answers will reassure evaluators that your company is committed to progressing towards adopting the [Fair Work First criteria](#) and to progressing towards wider fair work practices set out in the [Fair Work Framework](#) for the workers engaged in the delivery of this contract and those in the supply chain working on this contract.

Answers need not be constrained to, or be reflective of, any examples given alongside this question.

Note : Questions can

- identify any examples of how the Fair Work First criteria are relevant to the contract, for example, investing in workforce development through specifically focused health and safety training if relevant to a particular construction contract. See [the Fair Work First guidance](#) for further examples
- identify any wider fair work practices that might be particularly specific and relevant to the contract. See the [Fair Work Framework](#).

FAIR WORK FIRST CRITERIA: WHAT IT MEANS IN PRACTICE

Fair Work First guidance was published in January 2021, to support its implementation. The guidance supports those bidding for and those awarding public contracts and it provides good practice examples of what each of the five Fair Work First criteria mean, in practice, helping to guide organisations in their approach.

The examples below, have been extracted from this guidance and are neither prescriptive, nor exhaustive.

In considering how each of the criteria can be applied, account should be taken of an organisation's context. This will include the type of organisation, its size and sector, as well as how much progress has already been made in adopting fairer work practices. The approach should be progressive, relevant and proportionate.

Appropriate channels for effective voice, such as trade union recognition

What This Means

Effective voice is much more than having a communication channel available within an organisation. It requires a safe environment where dialogue and challenge are central to the organisational culture, are dealt with constructively, and where employee views are sought out, listened to and acted upon, and can make a difference. Effective voice requires workers, employers and trade unions or worker representative groups to work in partnership to make sure the right decisions are made to ensure workers are treated fairly and equitably. The co-determination of working practices is key to delivering all of the dimensions of Fair Work effectively.

Good practice examples

Unions

- Involving trade union/employee representatives in key governance and decision-making structures.
- Recognising trade unions for the purpose of collective bargaining and encouraging membership, where this is the workforce's preferred route, and providing appropriate facility time for supporting regular engagement between union/s and members.
- Constructive dialogue between the employer, workers and where appropriate a relevant trade union/s to address workplace issues or disputes, e.g. absence management, grievance, health & safety.

Structures and surveys

- Regular surveys are carried out to understand worker views, including how well they feel effective voice is facilitated in the organisation, and are involved in agreeing and progressing improvement action.
- Formal and informal arrangements are in place through which meaningful individual and collective dialogue take place, including one-to-ones between workers and management, appraisal/feedback processes, team/organisation meetings;
- Appropriate collective consultation and a clear route for resolving issues at both individual and collective levels, such as through a grievance or collective disputes procedure.
- The organisation promotes a strong culture of openness and transparency and encourages acceptance of different viewpoints.

Interpersonal

- Regular supportive contact is offered through one-to-one conversations with managers.
- Employees' experiences are used to influence organisational policy and practice, e.g. how their terms & conditions affect them and any barriers women and minority ethnic and disabled people may be experiencing.
- Worker representation on boards is sought and welcomed.

Conflict Resolution

- Dealing with issues/concerns which have been formally raised fairly in a timely and constructive manner and which promotes confidence that, whatever the outcome, fair processes have supported fair resolution.
- Appropriate measures are in place to support dignity in the workplace and implement zero tolerance of workplace bullying and other forms of abuse and harassment.

Investment in workforce development

What This Means

Effective workforce development involves employers providing opportunities for their staff at all levels of the organisation and should be a shared responsibility and shared commitment between the employer and workers. Everyone should be able to engage in lifelong learning.

Good practice examples

- Learning & development is integrated in the organisation's strategic planning and workers and management jointly identify development needs and priorities, ensuring both individual and organisational needs are met.
- Regular equality and diversity training is provided for all staff.
- Learning & development opportunities are provided, and regularly reviewed, to help build the organisation's resilience and responsiveness to change.
- Managers have development discussions with individuals and teams and prioritise this as part of operational activity.
- Workforce Development Plans and Succession Management Plans are in place.
- Formal and informal learning is offered across the workforce, relating to people's particular role and wider development.
- The organisation is committed to providing [apprenticeships](#).
- The organisation is committed to supporting the [Young Person's Guarantee](#).
- Staff are supported to keep their professional qualifications up-to-date.
- The organisation has an appropriate charter mark achievement such as [iIP](#) or [EFQM](#).
- The organisation invests in and utilises the skills and knowledge of union equality, learning and other workplace representatives and resources.
- Constructive engagement with union learning reps and Scottish Union Learning activities.
- Carbon literacy training is provided for all staff.

No inappropriate use of zero-hours contracts

What this means

Although there is no legal definition of a zero-hours contract, in the context of Fair Work, such a contract is one which does not guarantee any work to the individual and does not set out a minimum number of hours (whether ongoing or for a set period).

An employer is likely to be using a zero-hours contract inappropriately if:

- they offer a worker a regular pattern of work or regular number of hours but offer only a casual/zero-hours contract;
- a worker has had no say in the zero-hours contract and actually wants a contract of employment guaranteeing a minimum number of hours;
- they put pressure on a worker to accept the terms of a zero-hours contract (where challenged) in order to keep their job;
- there is an expectation that workers will accept all hours offered but no reciprocal expectation that the employer will guarantee hours of work.

Those employers using zero-hours contracts should be able to credibly explain their exceptional circumstance which leads to them using such contracts and the steps they are taking to review their business model to eliminate these circumstances.

Good practice examples

- All staff are employed on open-ended or fixed term contracts with confirmed hours and work pattern.
- All staff have a contract which accurately reflects the hours worked, guarantees a fair minimum number of hours per week and does not involve compulsory overtime.
- Staff get reasonable notice of shifts – at least 4 weeks ahead of time, and are paid for cancelled shifts within this period.
- Core and flexible staff resources are reviewed at least annually to determine if any staff on a zero-hours or minimum-hours contract can be moved to a permanent or fixed-term contract with a fixed number of hours and/or a regular pattern.
- Zero-hours contracts are not used to the detriment of workers with protected characteristics and where this is happening, the organisation is taking remedial action.
- Zero-hours contracts are not used to fill actual longer-term vacancies.
- There is a clear, published policy and process to enable someone to request a move from a zero-hour contract with guaranteed and set hours.

Action to tackle the gender pay gap and create a more diverse and inclusive workplace

What this means

Fair Work expects employers to go beyond their legal obligations under the [Equality Act 2010](#), enhancing the protections for workers on the basis of their [age](#), [disability](#), [gender reassignment](#), [marriage and civil partnership](#), [pregnancy and maternity](#), [race](#), [religion and belief](#), [sex](#), and, [sexual orientation](#).

The [gender pay gap](#) exists because women earn significantly less than men over their careers. As women are still regarded as the primary care giver, their work choices can be limited to typically lower-paid and part-time roles. This also limits their opportunities to progress in the same way men can, which dilutes diversity at senior management levels. The [Close your pay gap toolkit](#) provides a range of guidance and advice to help employers calculate their gender pay gap and identify actions to reduce it.

Employment can play a major part in addressing racial inequality. The gap in employment rate for the minority ethnic population in Scotland is consistently and persistently high. Through fair working practice, minority ethnic workers will be able to access and sustain employment commensurate with their skills, experience and/or employment goals and in working environments that are diverse and inclusive. Employers should use the [Minority Ethnic Recruitment Toolkit](#) to improve the diversity of their workforce by recruiting more people from minority ethnic backgrounds.

Disabled people also experience discrimination and a lack of access to opportunity. We need to ensure our workplaces are not designed or operating in ways that can create barriers and exclude disabled people. Fair and equal access, and the provision of appropriate support, can greatly improve disabled people's chances, enabling access to jobs, job retention and career progression. Information about employment issues for disabled people is available from Inclusion Scotland through [We Can Work](#) and from [Scottish Union of Supported Employment](#) (SUSE).

Good practice examples

- Recruitment, retention and promotion processes prevent bias and barriers, e.g. 'blind' recruitment; providing any additional support/adjustments at interviews; diversity in interview panels; exit interviews are used to understand why a person is leaving.
- Workers have opportunities to influence the organisation's approach to workplace equality, including by sharing their own experiences.
- The organisation gathers data to understand its workforce diversity and has a plan in place to address under-representation.
- Governance structures are gender balanced and the organisation is working to ensure parity for minority ethnic, disabled and younger people.
- Workplace adjustments are made for disabled staff who need it, e.g. Access to Work.
- Flexible working is encouraged across the organisation, subject to business need.
- [Enhanced maternity, parental and adoption leave](#) and pay are available for all staff, and staff are supported to return to work through keep in touch days and refresher courses.
- Everyone has equal access to appropriate learning & development opportunities.
- All staff have opportunities to discuss their support needs with management.
- There are clear career pathways for women, with support for those returning to work after a career break and to help minority ethnic, disabled and older workers to progress.
- The organisation is a recognised [Carer Positive](#) employer.
- Employers are able to provide safe spaces for workers to express their concerns and raise issues and where workers are confident that their concerns are dealt with appropriately by trained personnel.

Payment of the real Living Wage

What this means

The Scottish Government promotes payment of the [real Living Wage](#) as the minimum rate for everyone in paid work; this is distinct from the statutory National Living Wage and National Minimum Wage which are set by the UK Government. The real Living Wage is a voluntary hourly pay rate based on what families need for an acceptable living standard. The rate is calculated by the Resolution Foundation and overseen by the independent Living Wage Commission; it is reviewed annually to reflect the cost of living, and the rate is announced each November.

Payment of the real Living Wage should not be used to limit pay rates, and where sectorally bargained rates have been agreed these should be applied provided they are not below the real Living Wage.

Good practice examples

- Having an agreed pay structure which means the whole workforce is paid at least the real Living Wage;
- The organisation is recognised as a [Living Wage Accredited Employer](#) or an All Time Service Provider;

- Applying the pay rates collectively bargained between the relevant employer and trade union negotiating body;
- Apprentices are paid at least the real Living Wage rate throughout their apprenticeship.
- The organisation is part of a local partnership working towards [Living Wage Place](#) recognition.
- The employer is actively reviewing the pay structures and developing an incremental plan for paying all staff at least the real Living Wage.

Note: * those involved in procurements should refer to the Statutory Guidance, Best Practice guidance and toolkit to understand how to consider fair pay for workers which can include payment of the real Living Wage,

Where can I go for more information

In addition to the information and example question provided in this policy note please consider these additional documents:

- [Fair Work First: guidance to support implementation](#) which can be used by buyers and bidders to help understand how to consider Fair Work First in the procurement process and what each of the criteria could mean.
- [Statutory Guidance](#) and [Best Practice Guidance](#) and accompanying [toolkit](#) are in the process of being updated to include Fair Work First.
- The Scottish Government's [Fair Work Action Plan](#), which sets out the Scottish Government's strategic approach to achieving the Fair Work vision by 2025. Particularly this action plan includes a commitment to extend the range of Scottish Government and public sector contracts that the Fair Work First criteria will apply to, wherever possible, by the end of this parliament.
- Buyers may wish to point suppliers towards the [Fair Work Employer Support Tool](#) which has been designed to help employers create new and improved workplace practices by assessing and benchmarking their workplace practices against the dimensions of Fair Work.
- [Fair Work within the COVID-19 crisis and beyond](#) and [Coronavirus \(COVID-19\): fair work statement](#) (19 July 2020).