

Delivering Healthy, Safe and Fair Work

- using procurement to drive change



SCOTTISH HAZARDS

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Introduction

Tens of thousands of businesses receive work through public bodies each year, from construction of huge public sector infrastructure projects to supply of office equipment and stationery, businesses of all sizes can tender for public service contracts and many survive on this source of income alone.

[*The Scottish Government Procurement Strategy 2020-23*](#) outlines how the Scottish Government plans to use the £13.6 billion spent every year procuring goods and services to boost our economic recovery post COVID. The introduction to the strategy makes it clear that the Government wants to ensure the power of procurement is used for the benefit for all and not just the employer securing the contract.

Scottish Hazards totally support this position, and no one should underestimate what the Scottish Government refers to as the power of procurement to influence the behaviour of employers in many different ways. It can be used to address inequalities in the workplace and communities and improve environmental sustainability as well as delivering safer, healthier and fairer work for those employed delivering public contracts in Scotland.

Trade unions have a key role to play and the STUC and its affiliates have led the way in developing Scotland's fair work agenda. The existence of collective agreements and trade union health and safety reps ensure unionised workplaces have always been safer, healthier and fairer.

The challenge for Scottish Hazards and trade unions is four-fold

- how do we ensure employers deliver on their commitments to provide fair, healthy and safe work after securing public sector contracts
- what additional skills and development do trade unions reps require to understand and influence procurement decisions in their workplaces
- how can we identify union organising opportunities arising from public procurement in businesses and organisations receiving taxpayers' money to deliver public contracts.
- what can be done for workers in businesses where recognition is not a viable proposition.

More needs to be done to deliver healthier and safer work through the fair work agenda , including ensuring that only responsible organisations receive publicly funded contracts.

This briefing is an attempt to explain the interaction between procurement, health and safety and fair work and promote discussion between Scottish Hazards, the STUC, its affiliates and others on what more can be done to drive health and safety improvement through fair work.

Scottish Hazards is clear, it is impossible to have fair work that is neither healthy nor safe.

What is procurement?

The Scottish Government currently spends around £13.6 billion per year buying goods services and other works from suppliers across a wider range of sectors including, construction, health and social care, educational materials etc.

Legal obligations are placed on public bodies (contracting authorities) to ensure they have processes in place to ensure openness, transparency and fairness in their processes and information on these arrangements is publicly available. This is something the current UK Government appear to have and issue with, particularly in relation to COVID contracts, arguing that emergency measures justify giving contracts to friends and Conservative party supporters.

As is the case with health and safety the legislation covering public procurement in the UK is derived from EU directives, initially [EU Directive 2004/18/EU in 2004](#) later superseded by [EU Directive 2014/25EU](#).

Development and implementation of public procurement policy is devolved to the Scottish Parliament including how the EU directives are transposed into domestic legislation.

In 2012 the Jimmy Reid Foundation published a report [Using Our Buying Power to Benefit Scotland - the case for change](#) examining the potential for greater social and economic benefit to be derived from public procurement. As the authors point out the Scottish Government at the time recognised this was devolved issue but chose to transpose the 2004 directive practically word for word to the legislation applying in England which was undoubtedly aimed at supporting big businesses. This is perhaps a timely reminder that putting the interests of big business first through deregulation is not the sole domain of the Tories.

A public body can award unregulated contracts based on either the lowest priced tender or the one that is most economically advantageous (best value). Prior to the latest Scottish Government procurement strategy, regulated contracts (£50,000 +) could also be awarded on lowest price.

When considering regulated contracts, a contracting authority must specify the criteria it will use to justify making an award under best value and the weighting that will be applied to each of the individual criteria when reaching a decision.

Contracting authorities appear to be responsible for selecting procurement criteria and the weighting given to each, Scottish Hazards is concerned, without any central oversight of procurement decisions, weighting given to both fair work and health and safety may be far less than value for money and other economic drivers.

The [Public Contracts \(Scotland\) Act 2016](#) also provides for contracting authorities to be excluded from public contracts on two grounds:

- Mandatory exclusion is where an economic operator has been convicted of one or more offences such as bribery, corruption, tax evasion, money laundering, trafficking of humans and drugs or has "***committed an act prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010***". Selection of tenderers: exclusion criteria 9. (1)
- Discretionary exclusion includes instances where, for example, an economic operator is bankrupt, subject to insolvency or winding up proceedings or in administration, the contracting authority can demonstrate the economic operator is guilty of grave misconduct, where there is evidence of deficiencies in a prior public contract or "***the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria***". Selection of tenderers: exclusion criteria 9. (5) (h)

The maximum amount of time an economic operator can be disqualified for tendering for public contracts is 5 years under mandatory exclusion (except for blacklisting which is 3 years). In case of discretionary exclusion, it is 3 years.

It is unclear if any economic operator has ever been excluded on either ground. It would appear unlikely as, despite the grounds for mandatory exclusion including some serious criminal offences as well as blacklisting, economic operators known to have acted in a way justifying exemption on either ground have to be given the chance to demonstrate they have taken remedial action.

Contracting authorities must consider the evidence put forward arguing against exclusion, having considered the arguments of the economic provider, and cannot bar them from taking part in a tender unless they have convincing arguments to do so.

Where providers are being excluded for a procurement process the contracting authority must provide a statement outlining reasons for doing so. This would obviously be potentially subject to legal challenge and begs the question if contracting authorities may be risk averse to sanctioning offenders taking part in public procurement exercises.

Scottish Government, Blacklisting and Procurement

The practice of blacklisting is without doubt the greatest crime perpetrated against trade union reps in modern times, workers were denied employment on the evidence of an illegal blacklist owned and operated by The Consulting Association.

This company itself was founded (and funded) by construction company Sir Robert McAlpine in 1974 investing £20,000 in buying the database of the Economic League, itself a far-right organisation with membership from companies and individuals across all business sectors as well as senior military personnel and judges.

As pressure mounted on the Economic League, membership fell and it folded in 1993, the year before the formation of the Consulting Association.

The key members of The Consulting Association were large household names in construction Sir Robert McAlpine, Balfour Beatty, Carillion, Costain Group, Kier Group, Laing O'Rourke Skanska and Vinci SA. Around 40 other construction companies subscribed to the Consulting Association, denying employment to trade union activists while unashamedly picking up public contracts worth many billions of pounds.

All these companies and many more continued the practice of blacklisting construction workers right up until the moment the Information Commissioner raided the office of The Consulting Association in 2009 and seized files containing personal information relating to construction workers, other trade union members, political activists and others.

The fact that illegal blacklisting happened at all is disgraceful, that companies guilty of this abhorrent practice grew and thrived on public sector contracts is outrageous, but perhaps even more disgusting is undercover police involvement used in gathering information on workers and their trade union activism and the extent to which the United Kingdom Government was aware of the practice.

In a parliamentary meeting to consider the ongoing Mitting's Inquiry into undercover policing Lord Tebbit revealed when he was Secretary of State for Employment in the Thatcher government (1981-83), he received reports from

senior Special Branch officers about union activists, which apparently included such specific detail as where the union members went on holiday!!

So, what steps have been taken in Scotland to ensure blacklisters do not get access to taxpayers' money?

In November 2013 the Scottish Government, following consultation with trade unions produced [Scottish Procurement Policy Note SPPN 04/2013](#) providing advice on how contracting authorities should deal with blacklisting in their tendering processes.

Paragraph 11 states, "***Any supplier which has committed a breach of the relevant legislation should be considered to have committed an act of grave misconduct in the course of its business and should be excluded from tendering under regulation 23(4)(e) of the Public Contracts (Scotland) Regulations 2012* until and unless it can demonstrate that it has taken appropriate remedial steps. Any exclusion must be proportionate to the scale and nature of the offence or misconduct***".

Again, self-cleansing is at the heart of decisions on whether companies should be excluded from public contracts or not, what steps are taken to verify self-cleansing measures claimed to have been implemented? Can companies prove they are employing previously blacklisted workers?

The [Scottish Affairs Committee in an interim report on its inquiry into Blacklisting](#) suggested a lack of genuine remorse by certain companies, perhaps sorry they got caught rather than for being involved in the illegal activity of the Consulting Association. The Scottish Affairs Committee also pointed out that there is little, or no evidence of individuals being held to account for involvement in illegal activity. If these huge construction companies can display such contempt for a parliamentary committee, can we really believe in their self-cleansing claims.

Scottish Government - Health, Safety and Procurement

The [Scottish Government Procurement Strategy 2021-23](#) outlines steps the Scottish Government will take in its business dealings with contractors and sub-contractors, including how they expect compliance with health and safety laws. A second strand of the strategy deals with how other public bodies have dealt with their own procurement since the [Procurement Reform \(Scotland\) Act 2014](#) was introduced promoting local accountability and decision making in public procurement.

While decentralising of procurement decision making may be welcome and less bureaucratic, our concern would be that less central control could lead to an inconsistent approach by public bodies about the emphasis placed on criteria such as health and safety and fair work.

The Scottish Government's procurement strategy outlines what they expect from suppliers of goods and services

“6.4 Making sure our contractors and subcontractors comply with the Health and Safety at Work etc. Act 1974 and any provision made under that Act

Background

Our aim is to be a leading employer in the delivery of health and safety and to ensure the wellbeing of our staff and those that deliver our contracts. Guidance is included within the Procurement Journey to support buyers in effectively incorporating appropriate health and safety considerations within procurement exercises.

Our policy

We want to prevent or reduce any workplace factors that may cause ill health and injury by managing risk proportionately, sensibly and practically. We believe that it is important that those bidding for our contracts are also able to show that they are responsible and respect any health and safety obligations. That is why it is a standard condition of our contracts that the contractor must keep to all laws that apply, all requirements of regulatory organisations and industry good practice. This includes any relevant health and safety law. Also, whenever a contractor's staff are on our premises, under the terms of our standard contracts, they must keep to our own health and safety requirements.

Monitoring

We revise our contract management arrangements to make sure that we include information about health and safety incidents related to delivering our contracts and any measures that we take to put things right. This information will be included in the annual procurement report of our performance against this strategy.

Impact of Scottish Government policy

The Single Procurement Document (SPD) is a document that is used by bidders to self-declare that they have the capability and capacity to deliver a contract. More detail about the SPD can be found in section 1 of this document. Our SPD guidance gives all public sector buyers advice about how to apply selection criteria about, amongst other things, a bidder's approach to health and safety".

The [Scottish Government's Annual Procurement Report](#) provides a summary of measures taken to monitor health and safety performance of providers. While it is welcome to see that steps are taken through contract management processes to gather information on health and safety incidents and to have regular discussions on health and safety discussions with contractors, there is no information about suppliers' approach to general management of health and safety such as employee consultation or risk assessments. Similarly, in contrast to fair work practices, there appears to be no encouragement for suppliers to go beyond compliance with legal obligations on health and safety.

Other public bodies, health, safety and procurement

One local authority has a health and safety section on their procurement web pages, it says *"Health and Safety matters will be given appropriate consideration with a view to ensuring the roles, responsibilities and risks in relation to the performance of any contract are clearly defined from the outset"*. It goes on to outline how health and safety performance will be checked during the tendering process prior to any award, as well as ongoing monitoring during the lifespan of the contract. Yet their Annual Procurement Report makes no mention of outcome of this monitoring process.

Police Scotland make reference to health and safety, they say in the last publicly available procurement strategy for 2017-20 that they will ensure *"that workplace activities are carried out in such a manner that risks to the health, safety and welfare of staff, the public and those that deliver contracts are eliminated or reduced, so far as is reasonably practicable"*. Despite awarding upwards of 120 regulated contracts Police Scotland's Annual Procurement Report make no reference to health and safety or checking processes they have in place to ensure businesses awarded tenders are complying with at least their legal obligations to protect the health, safety and wellbeing of their workers. However, they do provide a community benefits summary *"During the year, Police Scotland secured community benefits which delivered 8 new jobs in Scotland, 5 jobs for long term unemployed people, 3 apprenticeships, 32 work experience/placement/training opportunities offered along with a number of other benefits such as donations to local charities, local employment and subcontracting opportunities."* Similarly, they report on reserved contracts for supported businesses with two positive outcomes in this area but no health and safety summary and therefore no sign they are taking active measures to improve health and safety throughout their supply chain.

Scottish Fire and Rescue Services make specific mention in their procurement strategy to involving the SFRS health and safety team in procurement activity to identify **preventative** measures to be included in tenders. Their procurement report also outlines what they do to check health and safety performance and refers to addressing specific health and safety issues that may relate to particular contracts. While this goes further than other Annual Procurement Reports any findings arising from this ongoing monitoring are not included in the report. Again, reporting on community benefits and reservation of contracts for supported business appear to get far more attention than health and safety.

Fair Work First

Fair Work First is the Scottish Government's strategy to use public procurement to create a wellbeing economy.

The guidance published by the Scottish Government, [Fair Work First: guidance to support implementation](#) defines how Fair Work First plans to achieve this aim,

"This means creating a more resilient economy where businesses can thrive, innovate and create good quality jobs in a way that enhances quality of life, reduces inequalities and is compatible with a net zero, sustainable economy".

Through Fair Work First Scottish Government is asking employers to adopt fair working practices, specifically:

- 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
- payment of the real Living Wage.

There is no specific Fair Work First "ask" by Scottish Government on occupational health and safety, an omission that at first seems surprising and certainly disappointing.

But should we be surprised, not if we look at the Scottish Business Pledge, of the 10 elements in the pledge there is not one for health and safety.

The right to work in healthy and safe working environments is a legal right and we believe is a fundamental right of workers across the world. For this right not to be given due prominence in the Scottish Government's fair work agenda and not even be mentioned in the Scottish Business Pledge is disappointing.

COVID 19 has taught us workers in non-unionised workplaces are less likely to have effective voice mechanisms, predetermined decisions are communicated to workers despite their concerns and, in far too many cases there is no

consultation on health and safety issues or COVID risk assessments, two breaches of legislation the HSE seems to have been willing to ignore.

Demonstrating channels for effective voice does not in itself mean safe and healthy workplaces particularly if the existence of these channels cannot be confirmed. Employers should have to prove they meet their legal obligations.

In most workplaces health and safety is self-regulated, workplaces are not subject to enforcement unless a tragic incident has occurred. In non-unionised workplaces we do not know if employers are meeting their legal obligations under the HSAW Act 1974 or later regulations but Scottish Hazards experience throughout COVID would suggest some are not.

Scottish Hazards believes to have fair work you must have safe and healthy workplaces and those employers who engage with trade unions and safety representatives will be best placed to meet contracting authorities Fair Work First demands in public sector tender document.

Fair Work practices are those practices which go beyond an employer's legal obligations and where an employer actively ensures its employees are aware of their legal rights.

John Monks, former General Secretary of the TUC once said there are [4 different types of employers when it comes to health and safety, criminal, clueless, compliant and committed](#) (those who go beyond their legal obligations in protecting the health safety and welfare of their workers). Fair Work First appears to be focused on encouraging employers to become exemplars in some workplace practices, while being allowed to settle for only having to comply with health and safety laws and, in the absence of enforcement, how do we know they are even doing this.

No one would argue that organisations who commit to tackling low pay, making their workplaces more inclusive, tackling the gender pay gap or providing more secure employment contracts should have that commitment recognised in the procurement process. However, occupational health and safety must be treated in the same manner and given its rightful place in Fair Work First and the wider Fair Work agenda.

Conclusion

Scottish Hazards believes opportunities exist to deliver healthier safer and fairer work through procurement but some radical thinking and investment will be required to make this happen.

Other than the Scottish Government we are not convinced adequate monitoring of the health and safety performance of those businesses in receipt of public funding is evident. Such monitoring should ensure health and safety policies are in place but that they are living documents and the employer's adherence to health and safety laws are evident including review of risk assessments and consultation with workers on health and safety matters.

Our next briefing will look at some potential to make more out of the opportunities public procurement provides to make work healthier, fairer and safer.

**Scottish Hazards
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