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Dear Joe

During the Committee's inquiry on the Living Wage in Scotland, the Cabinet Secretary for Finance, Employment and Sustainable Growth gave a commitment to share the response I received to clarification I sought from the European Commission on the possibility of requiring contractors, as part of the public procurement process, to pay their staff a 'living wage', higher than the minimum wage. I have now received the following clarification from the commission:

"The current EU public procurement rules allow contracting authorities to take into account social considerations in the award criteria and contract performance clauses of a public contract, provided certain conditions are met¹. In general, social considerations must comply with the Treaty's principles (transparency, equal treatment etc) and with any other EU law that may be relevant.

If social considerations are taken into account in the award criteria, they must be linked to the subject matter of the contract, i.e. to the supply, services, works which are the object of the contract. If they are included in the contract performance clauses, they must be linked to the performance of the contract, i.e. to the tasks necessary for the delivery / provision / execution of the supplies / services / works of the contract.

A requirement regarding the payment of a 'living wage' would in practice most probably be linked to the tasks necessary for the performance of the contract, and therefore be used as a contract performance clause. Such clause would have to be non-discriminatory and known in advance by all candidates for transparency reasons.

¹ For additional details on these conditions, see the sections "award criteria" and "contract performance clauses" of the Guide: "Buying social: A Guide to taking account of social considerations in public procurement": http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm#social

In terms of other relevant EU legislation, it would have to comply inter alia with the Posting of Workers Directive². The 'living wage' to staff involved in the performance of the contract would have to be set in accordance with one of the procedures laid down by Article 3 of the Directive. It was the non-compliance with this requirement which led the Court of Justice to its decision in the Rüffert case³. In addition, the Court held in the Laval case⁴ that requirements regarding the level of wage payable to posted workers may not go beyond the mandatory rules for minimum protection provided for by the Directive. A 'living wage' set at a higher level than the UK's minimum wage is unlikely to meet this requirement."

This clarification confirms my understanding that it is not possible to require contractors to pay their employees a living wage as part of a public procurement process. However we are aware that some public bodies are taking steps to encourage contractors to pay their employees a living wage and we are keen to better understand the implications of this approach. We therefore intend to consult on this issue in our consultation on the forthcoming Sustainable Procurement Bill.

Given the wider interest in this issue we intend to inform our procurement stakeholders about this advice in a Scottish Procurement Policy Note and lodge a copy of this letter with the Scottish Parliamentary Information Centre.



ALEX NEIL

Cc Maureen Watt MSP, Convener of the Infrastructure and Capital Investment Committee

² Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

³ Case C346/06

⁴ The Court held in the Laval case that the "level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited in principle, to that provided for in Article 3(1), first subparagraph (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision" (point 80 of the Laval judgement)