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Calm seas or choppy waters? The role of procurement in supporting Fair Work

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Abstract

Fair work is now firmly on the political agenda in Scotland and there is ongoing debate about how best to drive it. After considering the policy context in which debates on fair work have emerged, and examining the Scottish approach to fair work, this article considers the role of public procurement as a lever of fair work. While not focussing in any depth on the procurement of lifeline ferry services, the arguments presented here are relevant to any competitive tendering process for these services. This article argues that recent statutory guidance illustrates the potential of procurement to support fair work due to the impact of fair work on the quality of service provision and its role in delivering economically advantageous outcomes. While there may be medium term changes to the procurement environment post-Brexit, devolution of responsibility for procurement means that scope to support fair work should remain in relatively calm waters, so long as there is political will to use procurement creatively for this important purpose.

I Introduction

A commitment to fair work is now a key focus of Scottish Government, central to Scotland's Economic Strategy and at the heart of efforts to deliver inclusive growth. Charged with advising Scottish Government in relation to fair work, the Fair Work Convention in its Fair Work Framework (2016a; 2016b) has identified procurement as one of the levers available to government and to the wider public sector in supporting and driving this agenda across private and third sector employers, using public spending to leverage fair work practices and outcomes. Under current EU and Scottish procurement legislation and regulations, most of that procurement will be competitively tendered.

Fair work provides one example of the potential and challenges of using public procurement to support government policy objectives. This article examines the policy context of fair work in Scotland, the role of procurement in delivering fair work and the implications of fair work for competitive tendering, as well as the implications of competitive tendering for fair work, in the current context. Given prevailing Brexit and constitutional uncertainties, the article explores future scenarios for using procurement to drive fair work in Scotland. While making few specific arguments in relation to the provision of lifeline ferry services – the focus of this special issue - the arguments presented here are relevant to any competitive tendering process in relation to such provision.

II Fair Work for Scotland

The Fair work agenda in Scotland emerged over recent years as a response to economic and social challenges including the need for action to address Scotland and the UK's low relative productivity; the need to promote higher value business models; the need to address relatively low levels of business innovation; the need to improve job quality, and in particular to address low pay, under-employment, skills under-utilisation and work intensification; and the need to address income inequality and limited social mobility. As Findlay et al have argued, "... these challenges are complex and interconnected – genuinely 'wicked problems' – and require smart, joined-up and holistic policy solutions" (2016a:1).

Scottish Government's commitment to fair work, and the establishment of the Fair Work Convention in 2014, represented a culmination of a series of debates across a group of stakeholders in Scotland over the preceding decade on substantive policy in relation to the workplace and over how to support greater policy consensus around work, employment and workplace issues. In the early to mid-2000s, both Scotland and the rest of the UK emphasised the importance of improving skills supply through investing in learning, skills and qualifications at all levels to address productivity and other challenges (as exemplified in the Leitch Review of Skills, 2006). Policy debates in Scotland responded more quickly thereafter to the limitations of a skills-supply driven approach to productivity by focussing on the need for more effective skills utilisation and identifying the workplace conditions that support better skills utilisation, leading to a distinctive trajectory of debates in Scotland around the concept of workplace innovation (Findlay et al, 2015). An expansive approach to workplace innovation in Scotland has explored how to improve job quality and fair work (including addressing in-work poverty) while simultaneously improving business performance (Findlay et al 2016a). In addition to developing distinct policy priorities, the process of policy formation around the workplace in Scotland has reflected an informal social partnership approach that values collaborative partnerships between policy makers, practitioners and academics (Findlay et al 2016b).

Fair work is defined by the FWC as work that offers effective voice, opportunity, security, fulfilment and respect, that balances the rights and responsibilities of employers and employees and that can deliver benefits for individuals, businesses/organisations and society. Behind this definition is a recognition that the absence of fair work, broadly defined, can damage individuals, businesses, the economy and society while its presence can generate a virtuous circle of individual, business, economic and societal benefits (Fair Work Convention, 2016b)

There are a wide range of stakeholders who might drive the adoption of fair work practices in Scotland. In very simple terms, the state and employers – at their own behest or responding to influence from trade unions, researchers, campaigning organisations and other stakeholders – hold the key levers to deliver fair work. Government, public authorities and other employers have a direct role in ensuring fair work for their own workers, while government also has a more direct role in shaping fair work practices across parts of the public sector for which it has direct authority, including public sector bidders for procured contracts.

Beyond public sector and public bidder workforces, government can influence the adoption of certain fair work practices (for example, minimum wage levels; rights in relation to training; rights in relation to employee voice) by legislation and regulation, but this lever is not open to the Scottish Government given that employment law powers are reserved to Westminster. Scottish Government can, however, exhort, encourage or incentivise employers to adopt fair work practices (for example, through the provision of business support services by public agencies), with varying degrees of effectiveness. An additional, and potentially powerful lever, however, for government and the wider public sector is to use purchasing power to shape fair workplace practice.

III Procuring Fair Work

There is growing global recognition of the potential of procurement as a strategic instrument for the economy, delivering efficient and effective services and promoting policy priorities (OECD, 2013). Procurement encompasses a third of government expenditures across the OECD, constituting 13% of GDP on average. In Scotland, public sector spend of over £10bn per year on goods and services is recognised by government not only as a route to delivering improved public services but also as a platform for delivering a more prosperous, fairer and more sustainable Scotland. Derived from EU Procurement rules and governed by the Procurement Reform (Scotland) Act 2014, the aspiration is for “business friendly, socially responsible procurement that delivers better outcomes for Scotland”.

In thinking about the potential for public procurement to support the fair work agenda, it is important to address the scope in current competitive tendering arrangements to support particular fair work practices and greater emphasis on fair work approaches. Certain fair work practices, such as support for equality and diversity, have long featured in competitive tendering procedures in Scotland. Public procurement can take into account how bidders can generate community or social benefits through their activities within any particular contract. These Community Benefit Clauses (CBCs) are contractual and relate to economic, social or environmental conditions that are built into the specification and delivery. CBCs

used appropriately – that is, linked to core purpose of the contract, not disadvantaging suppliers from other EU Member States and representing value for money - are lawful tools under EU procurement rules. Notwithstanding concerns over limitations in the data available on CBCs, there is some evidence to suggest that CBCs can have a positive impact and can help deliver key National Outcomes for Scotland particularly in relation to employment opportunities, education and skills – especially for young people - and tackling inequality (Sutherland et al 2015).

There is, therefore, some overlap in the areas highlighted in CBCs and elements of the fair work agenda and adopting a broad approach to defining ‘economically advantageous’ may allow even more scope for CBCs to support some fair work practices. More directly, in October 2015, Scottish Government published *Statutory Guidance on the Selection of Tenderers and Award of Contracts: Addressing Fair Work Practices, including the Living Wage, in Procurement*. This Guidance is noteworthy in making a strong statement not only of the potential social or community benefits of supporting fair work practices, but of the critical importance of fair work in ensuring service quality, thus defining fair work as crucial to contract performance.

The fair work practices illustrated in the Guidance are broad ranging – not just in ensuring that public contractors comply with relevant employment, equality and health and safety law, human rights standards and collective agreements - but going far beyond compliance to include consideration of fairness in recruitment, remuneration, contractual arrangements, skills utilisation, job support, employee engagement and worker representation, specifically but not limited to representation through trade unions. Moreover, the Guidance highlights not just the direct employment practices of any potential contractor, but also those in any sub-contracting chain. The Guidance thus highlights the need for those supplying public contracts to be ‘good’ employers and for contracting authorities to be mindful of poor employment practices that might impact on the quality of the contract to be delivered.

As with all procurement requirements, consideration of a tenderer’s fair work practices must be proportionate. Distinction is made between circumstances whereby a bidder/tenderer’s fair work practices are more or less related to the subject matter of the contract. The Guidance suggests that fair work practices are likely to be more relevant to contracts for the delivery of services rather than of goods, though fair work practices should be considered where the workforces supplying the goods impact on their quality.

On the face of it, therefore, in any public competitive tendering scenario, it is appropriate for a contracting authority to ask how tenderers commit to fair work practices for workers (including any agency or sub-contractor workers) engaged in the delivery of the proposed

contract. It is also appropriate for management and monitoring of contracts to take place to ensure that fair work practice continues throughout the contract duration.

Taken alongside the potential of CBCs, procurement in line with this Statutory Guidance could offer a powerful lever for change. The Guidance does not specify what fair work must look like, allowing bidders to define fair work in their specific context, albeit against the backdrop of the Fair Work Framework and its key dimensions, thus offering some flexibility to bidders to reflect particular product and labour market factors. Bidders are invited to specify fair work in their own terms and the Guidance is explicit that distinct fair work practices – in particular, payment of the Living Wage Campaign Living Wage – are not required, though might be indicative of a commitment to fair work.

Public bidders for publicly procured work may find that their suite of work and employment practices are well aligned with the Statutory Guidance on fair work. Evidence suggest that public organisations are more likely to be able to point to specific practices that are consistent with fair work and are cited as examples in the Guidance, such as involving employees in decision making and encouraging employees to join and be active in trade unions, undertaking equal pay audits and paying the Living Wage. Given the focus of this special issue on competitive tendering for lifeline ferry services, there is evidence that the current practices of the public sector ferry operator (Cal-Mac) resonate with elements of the Statutory Guidance on fair work in procurement. The quality of the service provided is crucially important, not simply in terms of routine customer service, but crucially in terms of the duty to ensure safety at sea which impacts not only on the training, certification and experience of seafarers but extends also to the training of catering and other staff to respond in emergency situations and to support flexibility in roles and deployment (Findlay, Commander and Warhurst, 2011). Cal-Mac is also a Living Wage accredited employer, provides effective voice through recognised trades unions; offers opportunity and fulfilment through long-established career progression mechanisms; and offers security which is evidenced by the very long average service lengths of its employees and its above-average wage structure. These fair work practices that deliver flexible, highly trained and experienced staff are crucial to the delivery of ferry services, their outstanding safety record and their economic impact (Fraser of Allander Institute, 2015).

The Guidance does not, however, offer any specific advice on the weight to be attached to a tenderer's fair work approach, and very little is currently known on how these Guidelines are being operationalised or are impacting on procurement practice, although this issue is currently on the radar of the Fair Work Convention. A recent analysis by Unison (2017) of the impact of fair work on the procurement of social care services posed the view that the fair work element should be weighted heavily, given that the quality of social care provision

is heavily reliant on the quality of social care staff. Unison's inquiries of councils indicated that the weighting for fair work ranged from 4% to 40%, with 11 out of the 15 councils who responded reporting a weighting of 10% or less. Unison argue that "For a service that is almost entirely dependent on people for quality delivery, a weighting of less than 20% is unacceptable. We are also aware that very little hard evidence is sought from bidders under this heading" (2016:2).

A key issue, therefore, will be the willingness of public bodies to use the Statutory Guidance to promote fair work. Some concerns have been raised at a UK level over an over-complex interpretation of existing EU procurement legislation, which if replicated in Scotland could in turn limit the impact of the Statutory Guidance on fair work. Moreover, procurement in Scotland is spread across multiple public authorities and while this Statutory Guidance envelops all, there is as yet no data that can point to its overall impact. Given that the Guidance is just over a year old, some time is required to appreciate and evaluate its effect.

IV Brexit implications

Of course, the coming years will not serve solely as a testbed for the impact of the statutory guidance in relation to fair work, given Brexit and other constitutional uncertainties. It is clear that, for a number of years at least, EU procurement rules will govern public procurement in Scotland. As Arrowsmith notes, existing regulations will remain during negotiations for Brexit, which will probably last at least until the end of 2019 and possibly much longer. How procurement will be regulated after that, however, is hard to predict." (2016: 3). She outlines 3 options. In scenario 1, the UK negotiates a trade agreement with the EU that results in the procurement regime applying exactly as it does now. In scenario 2, a more limited agreement with the EU based on the WTO's Government Procurement Agreement could reduce EU procurement application in utilities, defence and concessions (with reduced opportunities for UK suppliers in those markets elsewhere). In scenario 3 there is no concluded agreement on procurement, resulting in no access to foreign procurement markets but greater UK flexibility to design its own procurement regulations.

While scenario 2 and more substantially scenario 3 in theory give opportunity to change the national procurement system, it is worth bearing in mind that the UK was very influential in the drafting of the latest EU procurement directive, so current arrangements may already largely reflect what the UK wants and needs from, and is likely to design into, a procurement system (The Guardian, 2016). Notwithstanding what this suggests about any new 'national' procurement rules, Arrowsmith has also noted that if the UK is outside of EU procurement rules, in the context of the devolution of public procurement since 1998, a likely consequence is greater divergence in procurement rules in Scotland, England, Wales and Northern Ireland,

not least in terms of what she refers to as “... the strong political pressure outside England to use procurement as a tool to promote local industry and social policies (2016: 15).

Of course, the macro-economic impact of Brexit and the macro-economic policy adopted at a UK level in response to emerging challenges may make it more difficult to deliver on a commitment to fair work in Scotland. While some recent comments from the UK government may reflect sabre-rattling, any moves to a low-cost, low value competitive model for Britain post-Brexit is a real and significant threat to the fair work agenda in Scotland.

V Conclusion

This article has discussed the role of public procurement in supporting the delivery of the policy objective of fair work, though some of the arguments considered here could also apply to other policy aspirations. It contends that there is scope in existing procurement rules to support and develop fair work practices in Scotland by influencing the activities and approaches of private and public bidders in competitive tendering processes. Moving from potential to action and impact requires a consistent political will in supporting fair work – and in recognising the link between fair work and high quality service delivery - and a willingness to use existing levers appropriately. Brexit may or may not result in a changed procurement scenario. Any additional potential to use procurement in support of fair work will be highly dependent on sustained political commitment to the central role of fair work in driving inclusive growth in Scotland.

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