

## Briefing Note

To:	Chief Officer (Resources)
From:	Senior Auditor
Date	23/10/14
Subject:	<b>Procurement Strategy Development – Living Wage Considerations</b>

## Introduction

The Living Wage is a non-statutory rate of pay which is set by the Living Wage Foundation and reviewed annually. Lancaster City Council has adopted the principles of the Living Wage with each employee on a contracted hourly rate of pay below the current Living Wage rate of £7.65 receiving a supplement equal to the difference.

The Public Services (Social Value) Act 2012 came into force on 31st January 2013. The Act requires all public authorities to have regard to economic, social and environmental wellbeing factors in relation to *public services contracts* which equal or exceed the EC procurement threshold (currently €134,000). The Act does not itself apply to contracts for *supplies* or *works*. For *service* contracts falling below the EC thresholds, there is no statutory obligation on the Council to take into account the requirements of The Public Services (Social Value) Act 2012.

It is anticipated that in late 2014 or early 2015, Regulations will be made to implement the new EU Procurement Directive 2014 in the UK. These new Regulations will allow the Council to take environmental/social criteria (linked to the subject matter of the contract) into account during the procurement of *works*, *supplies* or *service* contracts, the Living Wage being a potentially relevant factor in the evaluation process.

A briefing note updating Members of the current position was considered by Council at its meeting on 16th July 2014. The briefing note advised Members that a new Procurement Strategy, which will take into account new legal requirements, is currently being developed for consideration by Cabinet in November 2014.

The Chief Officer (Resources) requested that Internal Audit carry out a review of Living Wage implications with a view to informing the review of the Procurement Strategy, and ensuring that associated policy and procedures are appropriate. The scope of this review included arrangements for ensuring that Living Wage considerations, and the requirements of new procurement related legislation, are reflected in council policy and that associated procedures are appropriate.

Work has been carried out with a view to ensuring that:

- a proportionate approach is taken to adopting the principles of the Living Wage, ensuring that arrangements are workable and legally sound;
- the revised Procurement Strategy makes appropriate reference to paying the Living Wage, as agreed by Council;
- the revised Procurement Strategy takes account of relevant legislation, including the new European Procurement Directive and the Public Services (Social Value) Act;

- the council is able to demonstrate, if challenged, that due regard has been given to the requirements of new legislation;
- mechanisms are in place to highlight contracts which have the potential for the council to enforce conditions regarding the payment of the Living Wage;
- appropriate measures are taken to provide relevant staff with the training and support necessary to enable them to apply the new arrangements.

### Findings

The Public Services (Social Value) Act 2012 requires all public authorities to have regard to economic, social and environmental wellbeing factors in relation to *public service contracts* which equal or exceed the EC procurement threshold. It places an obligation on the council to consider how what is being procured might improve these factors and how that improvement might be secured by the procurement process itself.

The new 2014 EU Public Procurement Directive will allow the council to take into account, during the procurement of *works, supplies or service* contracts above EC procurement thresholds, environmental/social criteria on condition that these are linked to the subject matter of the contract. The council will not be allowed to require an organisation to have a particular corporate social responsibility policy in place.

Payment of the Living Wage is a relevant factor in the contract evaluation process. Consideration must be given therefore to the approach taken by the council to ensure policies and procedures are legally sound, proportionate and appropriate. A key element of this decision is a review of whether enforcing the requirement for contractors to pay the Living Wage to their staff could potentially breach EU procurement rules, these stating that fair competition across all potential providers for goods or service must exist.

Professional advice is that, with a view to avoiding potential discrimination, a blanket approach to this issue should not be taken as challenges can occur in relation to competitive disadvantage (if not all similar organisations tendering for work pay the Living Wage). A court case in Germany in 2013 highlighted the risks involved, stating that a minimum wage requirement was capable of constituting a restriction on the freedom to provide services, contravening the treaties between the EU member states. Caution must therefore be exercised by the council to avoid potential challenge.

As reported in the motion to Council in July 2014, the EU Parliament provided guidance on this issue stating that “Living wage conditions may be included in the contract performance clauses of a public procurement contract 'provided they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents'. In addition, they must be related to the execution of the contract. In order to comply with this last condition, contract performance clauses including living wage conditions must concern only the employees involved in the execution of the relevant contract, and may not be extended to the other employees of the contractor”.

The approach taken by the council therefore needs to be proportionate, relevant and informed by the need to comply with legislation. Whilst it is important for the council to demonstrate its support of the Living Wage principles, recognising that procurement is a key area in which to promote this, any action taken has to ensure compliance with legislation.

With a view to minimising risk, and ensuring that arrangements are appropriate and legally sound, it is recommended that a standard approach i.e. that all contractors must pay the living wage, is not adopted. Alternatively each contract should be considered on a case by

case basis, in consultation with Legal Services, as taking a blanket approach and enforcing the payment of the Living Wage may present the council with the risk of legal challenge.

Discussions have taken place with the Procurement Manager regarding the Procurement Strategy, this currently being reviewed and revised with a view to ensuring it reflects corporate priorities, legislative developments and professional guidance. As agreed by Council in July 2014, the Strategy is to take into account the new European Procurement Directive and the Public Services (Social Value) Act. Specific reference is also to be made to the Living Wage, demonstrating the council's support of the Living Wage principles and recognising that procurement is a key area in which to promote these. The Strategy is also to make clear that any action taken has to ensure compliance with relevant legislation.

With a view to ensuring that the council is able to effectively demonstrate, if challenged, that due regard has been given to economic, social and environmental wellbeing factors when tendering *public services contracts*, it is important that documentation is maintained to evidence decisions made. With a view to achieving transparency it would also be good practice if tender documentation stated that the requirements of the Public Services (Social Value) Act 2012 have been fully considered. This is to be addressed through guidance to be provided to appropriate officers.

The Procurement Manager has confirmed that the council is unlikely to procure *works, supplies or service* contracts, above EC procurement thresholds, where it may be appropriate to require contractors to pay the Living Wage, however, at present there are no formal mechanisms in place to highlight these. Current procedures need to be reviewed therefore to address this, and arrangements put in place to raise awareness of the need to liaise with the Procurement Manager regarding contracts where this may be applicable. This is to be addressed through training and guidance.

If the council is to effectively comply with the requirements of recent procurement related legislative developments, it is essential that those with procurement responsibilities receive ongoing training and guidance. The Procurement Manager has confirmed that this is to be addressed through the awareness raising sessions, and/or training and guidance as necessary, 'Enabling those with procurement responsibilities to undertake their responsibilities' being a key objective in the Procurement Strategy.

### Conclusions

A compulsory requirement for all contractors to pay the Living Wage could present the council with a potential risk of legal challenge. Therefore a proportionate response to adopting the principles of the Living Wage needs to be taken. Policy and procedures should be robust in that they ensure compliance with legislation, but appropriate in that they do not put the council at risk. The approach taken by the council needs to ensure that contracts are considered on a case by case basis, taking guidance as necessary from Legal Services. The most appropriate approach would be to encourage rather than require contractors to pay the Living Wage, this being reflected as appropriate in tender documentation.

The Procurement Strategy is to be revised in line with the council motion passed in July 2014 requiring the revision to take into account European Procurement Directive, the Public Services (Social Value) Act, and the Living Wage.

With a view to ensuring transparency appropriate officers are to be made aware of the need to be able to demonstrate, if challenged, that due regard has been given to the requirements of new legislation. Officers are also to be reminded of the need to liaise with the Procurement Manager regarding contracts where it may be appropriate to require contractors to pay the Living Wage.

Awareness raising sessions, and/or briefing notes are to be provided to staff as necessary to enable them to apply new arrangements arising from the introduction of the Public Services (Social Value) Act 2012. Officers are to be kept up to date with the implications of the EU procurement directive.

### Recommendations

- The council should not apply a standard approach which enforces the payment of Living Wage by contractors. Contracts should be considered on a case by case basis, in consultation with Legal Services, to avoid the risk of legal challenge in terms of discrimination.
- In line with professional guidance, if applied, care should be taken to ensure Living Wage requirements do not directly, or indirectly, discriminate and should be included as contract performance conditions, rather than award criteria.
- The council should demonstrate its commitment to the principles of the Living Wage through encouraging contractors to adopt it, this being reflected in the Procurement Strategy.

## APPENDIX E

- Training/guidance to be delivered to ensure those with procurement responsibilities remain up to date with legislative developments, and professional guidance, should address the following:
  - The requirement for Living Wage issues to be considered on a case by case basis, in consultation with the Procurement Manager and Legal Services.
  - Due regard being given to economic, social and environmental wellbeing factors when tendering public services contracts, this being clearly evidenced through documentation maintained.