
Procurement Alert: Minimum or Living Wage Requirements in Procurement

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A recent European case has confirmed that the inclusion of a requirement for tenderers to ensure a minimum wage was paid to employees of sub-contractors was unlawful where those employees would be performing the services entirely in another EU member state.

In the UK, we have a statutory minimum wage for employees but many public bodies adopt voluntary "Living Wage" policies for their own workforces. Increasingly, we are seeing the inclusion of social award criteria and social contract conditions in procurement processes which require contractors to pay their employees a "Living Wage" when carrying out outsourced public services.

Can these requirements comply with procurement law? It has long been the case that environmental and social considerations can be taken into account in procurement, and in fact authorities are obliged to consider how their procurement of services contracts can secure improvement of the economic, social and environmental wellbeing of their area under the Public Services (Social Value) Act 2012.

In procurement terms, award criteria must be linked to the subject matter of the contract being procured and it can be difficult to establish that direct link for social considerations. Contract conditions are easier to include (provided that they are not disguised evaluation criteria) - there is simply a requirement for the successful bidder to comply with the requirements set out in the contract.

The EU Parliament, in response to a Parliamentary question about living wage contract requirements, has previously stated that living wage conditions should only be imposed in contracts where they relate to those employees of the contractor involved in the performance of the contract and not to other employees of the contractor.

This case clarifies that such contract conditions should not require a sub-contractor based in another member state (where economic conditions and cost of living are likely to differ) to pay its employees a minimum wage which would not otherwise apply. The ECJ agreed that the imposition of such a requirement could constitute an unjustified restriction on the freedom to provide services across member states, a cornerstone principle of the TFEU, and "*would impose an additional economic burden liable to prevent or make less attractive the cross-border supply of services by the undertaking concerned*".

So where does this leave minimum wage and living wage requirements? It seems that we can continue with business as usual in most cases but without seeking to impose conditions on how non UK based employees should be treated.

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