

MACROBERTS

White Paper Conference

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**Do you have a reasonable course of action,
should a winning tenderer deliver the bare
minimum on the Fair Work First ITT question?**

Robin Fallas, Partner

In order to explore

- Reminder: background to Fair Work First (**FWF**)
- Reminder: areas for care in use of FWF
- The ITT question(s) for FWF
- FWF use in practice – supporting a “reasonable course of action”?
- Options / courses of action where a tenderer falls short on FWF

Reminder: FWF – The seven principles

- 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
- Providing fair pay for workers (for example, payment of the real Living Wage)
- Offer flexible and family friendly working practices for all workers from day one of employment
- Oppose the use of fire and rehire practices

Reminder: Scotland's 'directional' approach to achieving sustainable procurement (and FWF within)

(EU law/EU derived law)
Public Contracts (Scotland)
Regulations 2015
Case law (Postal Workers
Directive/wages):
- non-discrimination and linked
to subject matter

Carefully
constructed
approaches to:
FWF,
Community
Benefits, etc.

National law:
PRSA14 pushes to embed
'sustainable procurement' in
so far as reconcilable with the
PC(S)R15

Reminder: FWF background – October 2015 to now

- **Procurement Reform (Scotland) Act 2014 (PRSA14)** (section 15(5)(b)(3))
- **Public Contracts (Scotland) Regulations 2015** (regulations 19/70)
- **Initial Statutory Guidance** 7/3/2016
- **SPPN/4/21** – 14/7/21 – focus on annual reporting obligations within PRSA14
- **SPPN/6/21** – 24/9/21 (subsuming SPPN/3/21)
- **FWF guidance** 24/9/21
- **Sustainable Procurement Toolkit / Procurement Journey** – Best practice / model questions / further information
- **Updated version of Statutory Guidance** 31/5/22

Reminder: areas for care in use of FWF

- Equal treatment/non-discrimination(EU cases:*Ruffert/Dortmund/Regio-post*)
- Proportionality and relevance
- Ensuring approaches are ‘related to the subject matter of the contract’
- Local authorities and section 17(5) Local Government Act 1988
- Structural impacts on suppliers / supply chain
- and then a shifting base/framework?
 - ‘Meanings’ post Brexit
 - UK Government procurement reform
 - Grey area around intra-UK ‘discriminatory impacts’

Summary factors from background relevant to an ultimate 'reasonable course of action' on FWF

- 'Relevance and proportionality' loom large in approaches to FWF
- General approach of including a scored question on FWF in which the procurement documents often do not mandate a particular approach

A quick snapshot of PR(S)A14 (s15) in practice

- **(15(5)(b)(3) strategy statement required on: payment of a living wage – to persons involved in producing, providing or constructing the subject matter of regulated procurements**
- *“A Fair Work practice (referencing living wage) criteria is included in all relevant procurement exercises and is scored as a minimum 5%” (Local Council example strategy wording)*
- *“Our policy is to consider Fair Work practices as early as possible in all of our procurements and to target this by including award criteria in contracts, where proportionate and relevant to the contract. We are an accredited Living Wage employer. This requires us to commit to paying at least the ‘real’ Living Wage to all of our directly employed staff and to address the payment of the ‘real’ Living Wage to contractors working on our premises. We also ask if bidders are Accredited as Living Wage employers and whether they have signed up to the Scottish Business Pledge” (Other contracting authority example wording)*

The (*main use*) FWF template ITT question

“Fair Work First (xx%)

Question - Please describe **how you will commit** to adopting Fair Work First for workers (including any agency or sub-contractor workers) involved in the delivery of this contract.

This should include **current and planned actions** that show how you will embed these practices during the lifetime of this contract.

Answers should include **tangible and measurable examples** and should also describe **how you will report on, and demonstrate progress** to, the public body during the lifetime of the contract.

Good answers will reassure evaluators that your **company is committed to adopting [Fair Work First](#) and to progressing towards wider fair work practices** set out in the [Fair Work Framework](#) for the workers engaged in the delivery of this contract and those in the supply chain working on this contract. Answers need not be constrained to, or be reflective of, any examples given alongside this question.”

(Source: Sustainable Procurement Toolkit)

The (*other*) FWF ITT question

“[Note: comes with warning/guidance on proportionality/relevance/non-discrimination in use]

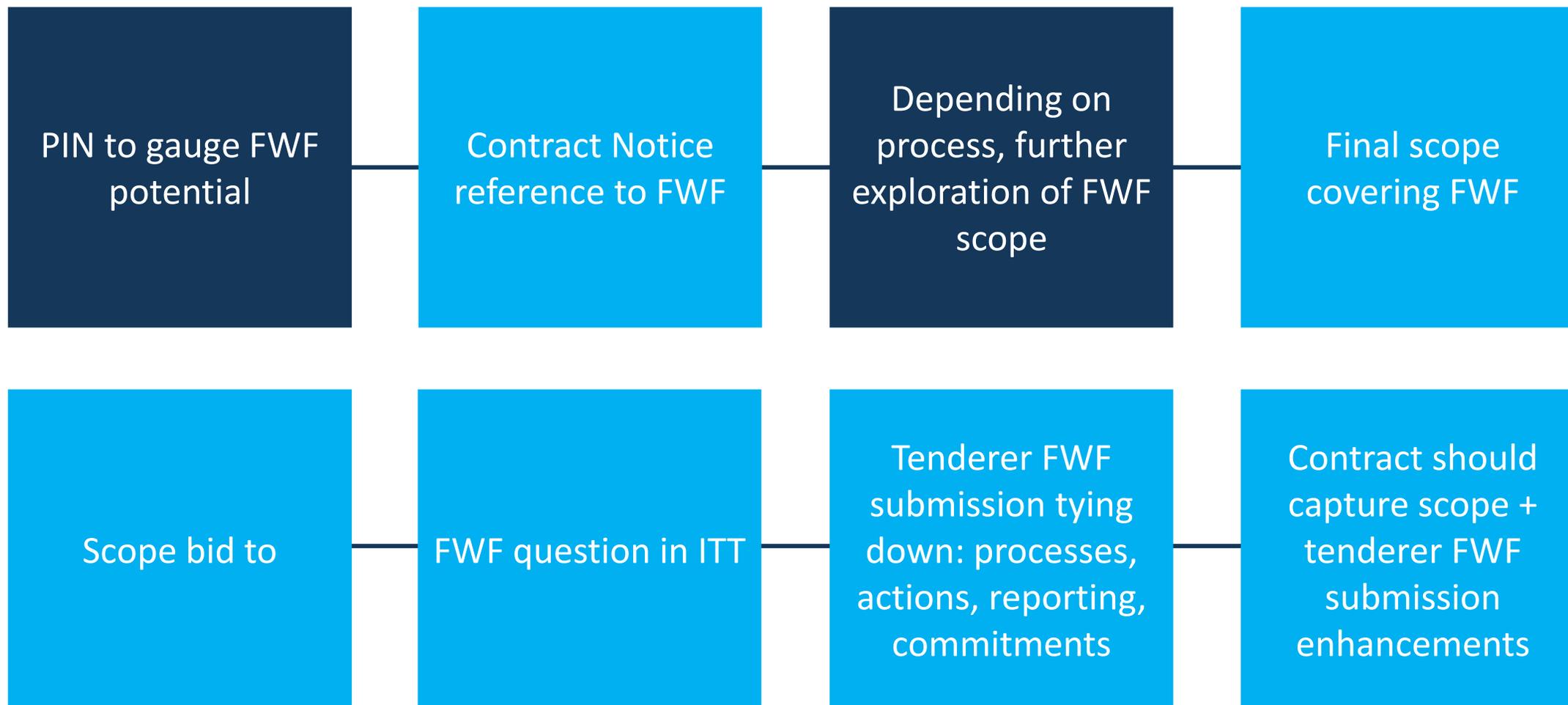
Question: Tenderers are asked to confirm that they will pay staff that are involved in the delivery of the [framework agreement / contract, and/or any subsequent call off contract] (including any agency or sub-contractor staff) directly involved in the delivery of the [framework agreement / contract, and/or any subsequent call off contract]), at least the real Living Wage.

- **Answer:** Yes/No

Please note that tenderers who fail to answer “Yes” to this question will not have their tender considered further or proceed to the Price/Quality ratio calculation.”

(Source: Sustainable Procurement Toolkit)

Use of FWF in practice



Do you have a reasonable course of action?

Point in time	Options
Pre-contract	<ul style="list-style-type: none"> • Non-conclusion of contract <ul style="list-style-type: none"> - Material change - Misleading information (<i>PC(S)RA15 58(8)(j)(iii)</i>)
Contract non-performance	<ul style="list-style-type: none"> • Follow contract management / remedial processes • Contractual mechanism leading to payment/liquidated damages* • KPI/service credits involving contractor deduction* • Alternative contractual mechanism of “incentive schedule” • Termination • No action • Public facing reporting on FWF / Misleading information (<i>PC(S)RA15 58(8)(j)(iii)</i>) <p><i>*options of “authority stipulated” or “bidder bids”, often linked to reporting</i></p>

Some further comments on use of contract mechanisms

Options of:

- Authority setting KPIs/values for deduction/LDs
- Bidders “bidding” the KPIs/deductions/LDs

Conclusion: do you have a reasonable course of action?

- “It depends” with the key factors being:
 - Sufficiently clear contract scope;
 - Use of appropriate contract mechanisms;
 - Following of appropriate contract mechanisms;
- General background risks of unenforceability
 - If a contractual financial payment mechanism is “punitive”
- Often the contract mechanisms tie to reporting obligations to mitigate risk
- Economic operators aware of potential wider reputational implications

Questions?



Contact

Robin Fallas

Partner

robin.fallas@macroberts.com

0131 248 2158



www.macroberts.com

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