

Public Procurement: A valuable tool for equality

What is public procurement?

All public bodies, large and small, local and national, spend significant parts of their budgets on purchasing goods, works and services from external contractors. This includes contracts for major construction projects such as schools, roads or office buildings, for equipment or supplies, buying in specialist services, such as IT support, or 'contracting-out' services which the public body itself previously carried out, such as school dinners, hospital cleaning, training, or management of a prison.

Public procurement is the term used to describe how public bodies undertake such purchases including planning and drafting contracts, selecting tenderers, awarding the contracts and monitoring and managing contract performance.

Commissioning is a term which may be used to describe this process, for example, in relation to health or social care services, often at a strategic level. Commissioning, which may itself be contracted-out, can result in the award of contracts to a number of different private or voluntary sector or in-house providers.

How significant is public procurement?

Overall, excluding major defence contracts, public bodies are spending more than £175 billion¹ each year in contracts for works, goods or services, which represents approximately one-third of total public expenditure. This makes public bodies vital customers for private firms of all sizes, including small and medium sized enterprises (SMEs). The size, length and security of payment offered by public contracts makes them especially attractive.

This gives public bodies real leverage in the market. If public bodies are working to promote equality and use their purchasing power to ensure that the private or voluntary sector organisations with which they contract do the same, the impact could be huge.

Where does equality fit in?

Public bodies now have statutory race, disability and gender equality duties requiring them to have due regard to the need to eliminate unlawful discrimination and to promote equality on these three grounds in all that they do, which should include procurement.² To meet its equality duties, a public body should ensure that

when it spends public money it is not supporting unlawful discrimination but is encouraging and supporting the promotion of race, disability and gender equality.

There is no equivalent obligation on private and voluntary sector organisations, hence the importance of procurement policies and practices that promote equality.

Are there laws regulating public procurement ?

European Rules

In carrying out public procurement, public bodies in all parts of the European Union (EU) must comply with EU rules, which include European Commission (EC) Treaty principles of non-discrimination (between contractors in different member states), equal treatment of individuals, proportionality and transparency, EC procurement directives and relevant decisions of the European Court of Justice. The most recent EC procurement directive³ clarifies the scope for social issues, including equality in employment and service provision, to be taken into account.

There are UK regulations⁴ that give effect to the EC Directive, specifying procedures to be followed by UK public bodies for contracts above certain total cost thresholds, with a less rigorous regime for contracts for certain services including health and welfare, education, recreation and catering.

UK policy

Public bodies are expected to achieve 'value for money' in every procurement project. This does not mean lowest price; it is the optimum combination of cost and quality (or fitness for purpose) to meet the requirement of the public body as purchaser. In every contract, a public body's requirement will include compliance with any relevant legal duties including, for example, health and safety or its duties under equality laws.

In addition, all public bodies have a fiduciary duty, that is a duty to act responsibly when they spend public money.

EU equality laws

Alongside EC procurement directives are the EC equality directives, which require the UK and all other member states to have national laws that prohibit discrimination in all aspects of employment on grounds of racial or ethnic origin, sex, disability, religion or belief, sexual orientation and age and outside the field of employment on grounds of racial or ethnic origin and sex. This fact makes it reasonable for UK public bodies to expect prospective contractors from all member states to have a good record of compliance with equality laws in their countries equivalent to UK equality laws.

Equality can be taken into account in public procurement in five basic ways:

a) *Planning* – how should equality be reflected in the contract, and what should the contract look like?

This is when a public body decides what it wants to 'buy'. It is an opportunity to consult users or potential users and to review equality outcomes under an existing or previous contract. At this stage the public body will also decide the best way to

meet the needs it has identified, for example, the size or length of the contract, so that in some cases contracts will be particularly suited for SMEs (including SMEs led by people from ethnic minorities, women or disabled people).

- b) *The subject of the contract* – what is the public body asking the contractor to do in relation to equality: what equality outcomes is the public body seeking? Equality will be more relevant in some contracts (for example, a contract to provide health services to the public or a section of the public) than others (for example, a contract for the supply of sterilised surgical instruments).

Following from the planning stage, a public body can incorporate into the contract specification the equality requirements that need to form part of the subject of the contract, for example:

- to ensure IT equipment to be supplied is suitable for use by disabled people,
- to meet the needs of women and men, including those from different ethnic groups, and of disabled people when providing services such as information services or sports and leisure services.

- c) *How the contract is to be performed* – conditions to ensure good equality practice by the contractor in carrying out the contract.

Every public body with statutory duties to eliminate discrimination and to promote equality will want to use contract conditions to make sure that the contractor does not discriminate unlawfully and that the workforce the contractor uses to carry out works or provide services on the public body's behalf is recruited and managed in ways that are consistent with the public body's equality duties.

In addition, in some cases the subject of the contract may itself impose equality requirements, for example, the specification for the provision of sexual health counselling services for young people could require the contractor to try to employ both men and women as counsellors.

- d) *The procurement process* – how the public body builds equality into each stage in ways that are compatible with EU rules.

In selecting tenderers, a public body can take account of any findings of discrimination against a contractor by a court or tribunal and, for works or services contracts, their past record on workforce equality or, where relevant, their past record in meeting equality service requirements in previous contracts.

Where equality forms part of the subject matter of the contract and there are therefore explicit equality requirements or outcomes in the contract specification, one of the criteria for the contract award can be how well tenderers are able to meet those requirements or outcomes. This must be clearly stated in the contract documents.

- e) *Monitoring and management* – ensuring equality requirements are being met by the contractor.

Critically, to meet its equality duties, a public body will need to monitor how well the contractor is complying with the equality requirements in the specification and contract conditions.

This all sounds very obvious – is it happening?

There are no comprehensive data. It is likely that the pattern is extremely varied, not only across different public bodies but also within a single body. There are some examples of contractors meeting well-drafted equality requirements – and even doing more – and other examples that suggest that some public authorities are ignoring equality at each of the above stages.

Does it matter?

- Some 80% of the British workforce are employed by the private sector, and with the continuing trend to rely on the private sector to provide public services this proportion is only likely to increase;
- Thirty per cent of British companies are contracted by the public sector;
- The Equalities Review⁵ disclosed persistent serious inequalities based on gender, race and disability, and highlighted the extent to which discrimination is a contributing factor;
- The Business Commission on Race Equality in the Workplace, established by the National Employment Panel at the request of the Chancellor of the Exchequer, reported, ‘Our survey [of more than 1,000 businesses] and the evidence of the persistent ethnic minority employment gap, shows that business as a whole does not see a reason to improve its practices’.⁶

A closer look at the power of public procurement to promote equality

Experience in Northern Ireland, the USA, Canada and other countries has shown that state purchasing power can be a highly effective tool for achieving change within the private sector. This is now well recognised and accepted:

The Confederation of British Industry (CBI) has said:

*Employers believe public procurement is a highly effective lever for increasing diversity... This lever should be used more effectively by the public sector to further spread good practice in the private sector.*⁷

Gordon Brown, as Chancellor of the Exchequer, in his Budget Report 2005 stated:

*the Government should promote the incorporation of race equality into public procurement within current legal and policy frameworks.*⁸

The Business Commission on Race Equality in the Workplace recommended in relation to race equality:

*that Government, through its position as the UK’s major purchaser, uses its leverage over, and relationships with, private sector companies to motivate the private sector to promote race equality.*⁹

The 2006 Report of the Women at Work Commission recommended that:

*Public authorities should ensure that their contractors promote gender equality in line with the public sector Gender Duty, and equal pay in line with current legislation. This intention should be flagged up in contract documents to ensure that it is built into contractors’ plans and bids.*¹⁰

The final report of the Equalities Review proposed that:

The new public sector duty should incorporate a specific requirement for public bodies to use procurement as a tool for achieving greater equality.¹¹

In its response to the Consultation on the Discrimination Law Review¹², the Government states that it is:

exploring how public procurement can be used to further equality outcomes, and will examine a range of both legislative and non-legislative options.¹³

How could these benefits be achieved?

Public bodies must not ignore the obligation to meet their equality duties in carrying out procurement.

One way for public bodies to meet their equality duties and to secure effective employment equality is to include equality requirements in their contracts for works, goods or services, as discussed earlier. This is already permitted under UK and EU law, but, as the Discrimination Law Review identified, many public bodies remain uncertain about the extent to which they can use procurement to promote equality. And some public bodies lack the motivation to take up these levers.

It is also important to ensure that employees working on public contracts in the private sector do not have second-class employment protection compared with their public sector colleagues. For example, over many years there has been good evidence that the job segregation that often occurs as a result of contracting out certain local authority services has operated as a bar to women in the contracted out workforce claiming equal pay with former male colleagues.

There is therefore a need to remove the reluctance and uncertainty that is inhibiting action. This can be achieved most simply by incorporating into the Equality Bill an explicit requirement on public bodies to build equality into all aspects of procurement. This would make it clear that public bodies are both entitled *and* obliged to use procurement to reduce inequality.

Is a legal requirement needed?

The Discrimination Law Review saw that, despite considerable guidance on equality and public procurement already available to public bodies, the barriers to better use of procurement to promote equality remained. Providing additional guidance would, of course, be useful, but guidance on its own is unlikely to bring about better action.

To overcome the uncertainty and confusion that is inhibiting progress, the Bill should state in general terms what would be expected of the public bodies listed in regulations. Regulations and a Code of Practice could set out in fuller detail what public bodies should do at the different stages of the procurement process, within the context of EU and UK law, giving them far greater certainty. An immediate benefit would be that all prospective contractors could refer to the legislation to know in advance what may be required of them in terms of equality if they choose to enter into contracts with a public body. This will particularly help SMEs with more limited resources, who will be able to take appropriate steps to be prepared to compete for public contracts.

How would this fit with 'value for money'? Would it impose an unacceptable burden on business?

The Business Commission on Race Equality in the Workplace commented in relation to its recommendation to government to use its purchasing power to motivate the private sector to promote race equality:

The Commission believes that these proposals are consistent with the need to obtain value for money in public procurement. We have not seen convincing evidence that companies would incur large costs in complying with these proposals. Moreover, even if compliance with workplace race equality provisions should, at least in the short term, increase the cost of performing some contracts, it would be wrong to see it as a loss of value.¹⁴

If public bodies had an explicit legal duty to make equality part of procurement then they would not be able to allow a contractor who had cut costs by adopting poor equality practices to benefit from their disregard of equality. The law would ensure that public contracts would consistently be awarded to those who are prepared to provide equal opportunities.

Outcomes for people facing discrimination could be significantly improved if the law stated clearly what public bodies can and should do to tackle inequality.

Equality and Diversity Forum, October 2008

- 1 Figures taken from the Office of Government Commerce (OGC) press release regarding the Government Procurement Service Graduate recruitment scheme. See http://www.ogc.gov.uk/About_OGC_news_8620.asp
- 2 The government has indicated that the Equality Bill will introduce a single equality duty on public bodies covering race, disability, gender, gender reassignment, sexual orientation, religion or belief and age.
- 3 2004/18/EC.
- 4 Public Contracts Regulations 2006 and parallel regulations that apply in Scotland.
- 5 'Fairness and Freedom: The Final Report of the Equalities Review' is available at <http://archive.cabinetoffice.gov.uk/equalitiesreview/>.
- 6 '60/76 The Business Commission on Race Equality in the Workplace. A Report by The National Employment Panel', October 2007, p25, para 72, available at <http://www.dwp.gov.uk/ndpb/nep-pdfs/BusCommissionReport.pdf>.
- 7 'Evidence to the Equalities Review', Confederation of British Industry, 2005, p35, para 118.
- 8 (p. 93) http://62.164.176.164/d/bud05_chap04_188.pdf
- 9 '60/76 The Business Commission on Race Equality in the Workplace. A Report by The National Employment Panel', October 2007, p25, para 76, available at <http://www.dwp.gov.uk/ndpb/nep-pdfs/BusCommissionReport.pdf>.
- 10 'Shaping a Fairer Future', Women and Work Commission, 2006, pxvi.
- 11 Fairness and Freedom: The Final Report of the Equalities Review, February 2007, p119 available at <http://archive.cabinetoffice.gov.uk/equalitiesreview/>.
- 12 the Discrimination Law Review (DLR) was launched in February 2005 to consider 'the opportunities for creating a clearer and more streamlined equality legislation framework which produces better outcomes for those who experience disadvantage ...while reflecting better regulation principles'. See www.equalities.gov.uk for further information.
- 13 'The Equality Bill – Government Response to Consultation', July 2008, CM7454, p52, para 4.13.
- 14 '60/76 The Business Commission on Race Equality in the Workplace. A Report by The National Employment Panel', October 2007, p27, para 87, available at <http://www.dwp.gov.uk/ndpb/nep-pdfs/BusCommissionReport.pdf>.



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