

13-11 Mainstreaming equality considerations in procurement: A guide for public authorities in England

Key issues;

- This briefing explores the way in which the Public Sector Equality Duty can be incorporated into procurement decisions
- A new guide has been published by the Equalities and Human Rights Commission
- There are certain elements of the new guide which cross-over the matters already incorporate into procurement through the new Social Value Act.

1. Introduction

The Equalities and Human Rights Commission has issued guidance explaining how public authorities should ensure that they comply with their Public Sector Equality Duty (PSED) obligations at different stages of the procurement cycle.

Public authorities spend around £236 billion each year on buying goods, works or services from other organisations across every sector. The Equalities and Human Rights Commission suggests that this purchasing power can be used by public authorities as a way to advance equality and, where appropriate, achieve wider social benefits, such as creating training or employment opportunities. These recommendations are consistent with research publications by APSE including *'More bang for the buck: Achieving community benefits through procurement'* [APSE 2008] and *'Tackling Youth unemployment: local authorities leading the response'* [APSE / De Montfort University 2013].

2. The Public Sector Equality Duty

The Equality Act 2010 (the Act) sets out anti-discrimination law and the requirements of the public sector equality duty (PSED). Compliance with the PSED ensures that public authorities procure goods and services that are fit for purpose and meet the needs of their users. The Government is however undertaking a review of the PSED, as part of its deregulatory approach to perceived 'bureaucratic burdens'.

The PSED currently applies to most public authorities in England, such as local authorities, police, schools, universities and central government departments. It also applies to organisations carrying out a public function. It therefore includes private companies or voluntary sector organisations that have been contracted to carry out public functions on behalf of a public authority. The duty only applies in respect of the public function being carried out and not the wider business of the contracted body. Amongst other things the PSED requires public authorities to have due regard to the need to:-

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people who share a protected characteristic¹ and those who do not, and
- Foster good relations between people who share a protected characteristic and those who do not.

The Act also explains that advancing equality of opportunity involves having due regard to the need to:

- Remove or minimise disadvantages suffered by people due to their protected characteristics.
- Take steps to meet the needs of people with certain protected characteristics where these are different from the needs of other people, and
- Encourage people with certain protected characteristics to participate in public life or in other activities where their participation is disproportionately low.

To have 'due regard' means that when making decisions (and in its other day-to-day activities) an organisation subject to the duty must consciously consider the need to: eliminate discrimination, advance equality of opportunity, and foster good relations. This includes when they plan and make decisions about their procurement. How much regard is due is proportionate to circumstances. For example the regard would be greater on procuring services for older people compared to procuring, for example, a stationary order.

Responsibility for PSED remains with the organisation subject to the duty. It cannot be delegated although a public authority would normally place requirements on its contractors - for example to provide and consider effective monitoring information on a contract.

3. How can public authorities ensure equality outcomes and community benefits?

When buying goods and services public authorities, and private contractors, need to make sure that the goods and services meet the needs of different users. Equality outcomes are practical improvements for people who may experience discrimination and disadvantage, and delivering them may help meet a public authority's corporate objectives.

The guidance suggests that incorporating equality outcomes, in a proportionate way, should be:-

- A normal part of designing and specifying a service
- Be considered upfront before the procurement process starts

This will help identify the specific needs of different potential users and allow them to be appropriately reflected in the process.

Equality issues which overlap with 'community benefits' include:

- Community cohesion objectives, for example developing positive relationships between people of different backgrounds

¹ There are nine protected characteristics which are Age, Disability, Gender Reassignment, Marriage and Civil Partnership, Pregnancy and Maternity, Race, Religion and Belief, Sex, Sexual orientation

- Targeted recruitment and training, for example to support disabled people into the workplace, or to ensure that women have an equal opportunity to reach senior positions
- Equal opportunities training for an existing workforce
- Supply-chain initiatives, for example to facilitate the capacity of suppliers to meet equality criteria
- Community consultation
- Promotion and support of social enterprises or minority businesses
- Resources for any number of community initiatives, for example lunchtime social events for older people who are at risk of isolation.

Community benefits are a way for a public authority to deliver its broader strategic objectives, in addition to the core purpose of a contract and value for money. APSE recently produced supportive guidance² for its member authorities together with a toolkit which demonstrates practically how local authority can integrate community benefits in procurement.

4. Equalities and procurement

The new guidance refers to the fact that the EU legislative framework supports achieving equality outcomes through procurement. The European Procurement Directive 2004/18/EU and the subsequent UK Public Contract Regulations 2006, provides that social issues may be taken into consideration in different ways at different stages in the procurement process. Social issues may include equality issues. It should be noted however the EU public procurement directive is currently being considered for amendment although the proposed amendments are not of a nature which would prohibit consideration of social issues in procurement.

In addition to the specific requirements of the relevant Directive and UK Regulations, the EU law principles of equal treatment, transparency, proportionality, non-discrimination on grounds of nationality, and free movement of goods and services also apply to all public sector contracts; therefore it stands that public sector procurement should not hinder these principles (even in an attempt to promote outcomes under the PSED). More recently the *Public Services (Social Value) Act 2012* places an obligation on public authorities to actively consider how a service being procured might improve the economic, social and environmental wellbeing of the relevant area; and how a public authority might secure that improvement through procurement.

To help meet the public sector equality duty requirements through the procurement cycle the Equalities and Human Rights Commission guidance suggests a number of measures which are briefly detailed as follows: -

- That as PSED is a continuing duty; public authorities should consider potential equality considerations at the different stages of the procurement cycle.
- 'Relevance and proportionate' are the key guiding principles. Where it is clear that a product or service is likely to have little or no relevance in terms of equality, you may not need to take action beyond some standard clauses in the terms and conditions.

² 'Towards Sustainable Procurement [with e-toolkit]' 2011 [APSE / Walker Morris Solicitors]

- Procurement strategies should explain how it supports the aims of the general equality duty as well as the organisation's corporate vision and objectives.
- Procurement policies and procedures should be reviewed to ensure they comply with the Equality Act.

In terms of procurement policy the guidance suggests consideration of:-

- Corporate equality objectives and policies on economic development; To include, for example, reducing unemployment for groups not in employment, helping to develop the capacity of SMEs and voluntary sector organisations to compete for contracts, or reducing negative attitudes experienced by people sharing a particular protected characteristic.
- The corporate approach to procurement; should ensure that procurement processes include consideration of equality issues, and clarify areas of responsibility.
- Buying with other partners; check arrangements to ensure PSED obligations are met, and in particular check whether the use of particular frameworks do not have any unintended negative equality consequences.
- Increasing supplier diversity; meeting with potential new contractors and identify barriers to entry for smaller businesses by finding out why they don't respond to advertisements or invitations to tender.
- Consider using e-tendering systems³, supplier portals and accreditation systems to simplify the tender process
- Introduce small lots or identify opportunities where smaller organisations already working with particular communities can provide specialist support to larger contractors where appropriate.
- Encourage, support and give sufficient time for small suppliers to join or form consortia so they can bid for larger contracts, meet pre-qualifications requirements, and become more competitive by reducing their overheads.
- Improve your communication strategies by advertising in a wider range of media likely to be read by smaller businesses or voluntary sector organisations; advertising on government's Contract Finder portal; holding 'meet the buyer' and 'innovation' events to attract specialist providers who may come from protected groups or have different ways of meeting your requirements.
- Include in the core requirements of the contract specification, a requirement for the prime contractor to support small, specialist or voluntary sector organisations.
- Use voluntary agreements after awarding a contract to encourage prime contractors to create sub-contracting opportunities.
- Improve accessibility of your procurement documentation and guides by writing in plain English or providing alternative formats and languages for specialist contracts if appropriate.

The guidance suggests that as part of the procurement process public authorities should identify need and build a business case.

³ APSE would urge caution on the use of e-tendering systems where there are prospects of a TUPE transfer of staff and suggests they are not generally suitable for tendering for local authority services as opposed to goods

As part of the business case development therefore public authorities should question whether:-

- Current arrangements adversely affect some people with protected characteristics
- Do service satisfaction levels indicate that it is not being provided fairly or that there is unlawful discrimination in the way it is delivered?
- Are there population changes that might indicate new needs?
- Are there alternative ways of meeting your requirements that could advance equality?
- Trade unions and employees may provide information about equality issues in employment.
- Cost and benefits: What are the costs of meeting equality measures and are they justified in terms of the expected immediate or wider social benefits?
- What procurement and contract options are available and what affect might they have on equality? APSE would suggest that this point ought to be considered when there is a proposal to outsource a service from public sector provisions to ensure that a full equality impact assessment is developed at the appropriate point within the review and commissioning cycle.
- Consider any legal, financial, reputational or even political risks that may be incurred by the public body and potential suppliers.

Where equalities considerations form part of a core contract (for example the provision of transport for disabled people, domiciliary care for the elderly or childcare facilities) public authorities should consider dealing with relevant issues that are not the main requirement through the contract conditions. However the matters that relate to the performance of the contract should be proportionate and public authorities should ensure that the contract adheres to legal requirements.

The guidance suggests that public authorities should consider how to incorporate additional equality or social outcomes that generate added value, but are not absolutely necessary for fulfilment of the contract; .e.g. Training, employment opportunities, regeneration objectives, or improved labour standards.

Public authorities seeking to gain added value from the contract or to contribute to the wider objectives of the authority can do so in three ways:

- making them part of the specification
- including them as part of the terms and conditions, or
- by using voluntary measures.

Whilst the criteria would need to meet all the other principles of EU law, such as transparency and non-discrimination, if public authorities are acting reasonably and proportionately and transparently the Commission Guidance makes a strong argument that there can be achievable additional benefits to the process of procurement.

Other ways in which the PSED can be considered as part of procurement process

The comprehensive guidance provides case studies and suggestions which include integration of PSED and social value in procurement through different stages of the procurement cycle including Pre-qualification questionnaires, ITT, advertising of tenders, tender evaluation and voluntary agreements. The Commission's publication is available to download on www.equalityhumanrights.com

APSE comment

The Equalities and Human Rights Commission guidance provides a useful reference point for public authorities looking to review procurement processes and ensure that both equality considerations, and greater social, economic and employment outcomes, can be attained through public procurement strategies.

However APSE would urge local councils to go beyond exploring these matters for the purposes of outsourced contracts and procurement exercises. The achievement of community benefits and equalities considerations can and should be integral to all council services. Services which are less obvious to equalities considerations, outside of, for example, social care based services; can make a very positive contribution to equality and social value outcomes.

Frontline services can assist older people or people with protected characteristics in different ways and in-house services are able to develop comprehensive holistic strategies through inter-service cooperation arrangements. For example referrals from adult care for assisted bin collections or supported living teams for assisted gardening schemes. It is important to make a distinction between service commissioning which could incorporate PSED outcomes into services whether delivered by in-house teams or by an external contractor and procurement – which implies a ‘buy’ rather than ‘make’ decision has already been arrived at.

In exploring PSED requirements, and reviewing improvements in equalities outcomes and social value in procurement, local councils should be able to take into consideration some of the equality outcomes already provided by in-house teams. In addition many frontline services have already adopted their own social value outcomes through integration of apprenticeships and training schemes, local supply chains and internal assessments, customer satisfaction and demand management systems which help to both assess and identify equalities considerations.

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