

# Social Issues in Public Procurement



## A GUIDANCE NOTE BY THE SCOTTISH PROCUREMENT DIRECTORATE

### INTRODUCTION

This guidance note is intended to provide advice to purchasers on how and when social issues may be taken into consideration in public procurement. It includes questions which a contracting authority should ask itself when considering the inclusion of social issues in its procurement procedures and is also intended to remind purchasers that only companies with acceptable standards of conduct and business ethics/practices should be considered as suitable to be awarded public contracts.

Incorporating social issues as part of a procurement is just one means by which public bodies can achieve/meet their objectives; other means may include, for example, grant funding. Public bodies will, therefore, need to satisfy themselves that choosing to use the procurement process will represent the best Value for Money outcome.

The note has been issued to all local authorities and other public bodies in Scotland by the Scottish Procurement Directorate. It can also be downloaded from our website.<sup>1</sup>

It is not a comprehensive guide and public procurement officials are advised to consider taking legal advice in any case where there is doubt as to whether it is possible to take social issues into account.

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<sup>1</sup> <http://www.scotland.gsi.gov.uk/Topics/Government/Procurement/PublicProcurement/policy-notes/sppn062007guidance>

Additional material on incorporating social issues into public procurement is available from the EU <sup>2</sup> and the Office of Government Commerce<sup>3</sup>.

## BACKGROUND

What is meant by “social issues” in this context? They might broadly be defined as issues which impact on society or parts of society and cover a range of issues including equalities issues (i.e. age, disability, gender, race, religion and sexual orientation), training issues, minimum labour standards and the promotion of small and medium-sized enterprises (SMEs), including black and minority ethnic enterprises and the third sector including social enterprises.

The priority for all public procurement is to achieve the best Value for Money (VFM). VFM does not mean accepting the cheapest price. It means obtaining the best possible balance between price and quality in meeting the customer’s requirements. The requirements of the Scottish Government and other public sector bodies include the promotion of sustainable development, which includes social, economic and environmental objectives.

## EU TREATY AND PROCUREMENT LAW

EU law applies to the award of almost all public contracts. There are some exceptions, for example for military equipment, but for all practical purposes public procurement has to be conducted within a framework of fundamental EU Treaty principles and, for higher value contracts, within a framework of detailed procedural rules set out in the consolidated public contracts directive (2004/18/EC) and in The Public Contracts (Scotland) Regulations 2006, SSI 2006 No. 1.<sup>4</sup>

EU Treaty principles are intended to promote the single market. They include, for example:

- Non-discrimination on grounds of nationality or locality
- Transparency of award procedures and related decisions

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<sup>2</sup> Interpretative Communication of the Commission “Possibilities for Integrating Social Issues” dated 15.12.2001:

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/01/324&format=HTML&aged=1&language=EN&guiLanguage=en>

<sup>3</sup> [http://www.ogc.gov.uk/documents/Social\\_Issues\\_in\\_Purchasing.pdf](http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf)

<sup>4</sup> <http://www.scotland.gov.uk/Resource/Doc/1265/0022259.pdf>  
<http://www.scotland.gov.uk/Resource/Doc/1265/0022260.pdf>

- Equal treatment of those wishing to be awarded a contract
- Proportionality
- Free movement of goods, services and workers

## STANDARDS EXPECTED OF CONTRACTORS TO THE PUBLIC SECTOR

Taxpayers expect that public contracts are awarded to companies who maintain acceptable standards of business probity and ethics. Where possible and where it is consistent with legal requirements, procurement procedures should be designed to ensure that public sector contractors:

- are good employers who comply with all relevant employment legislation;
- maintain acceptable standards of health and safety and comply fully with all legal obligations;
- meet all tax and national insurance obligations;
- meet all equal opportunities legislation;
- are reputable in their standards of business conduct;
- respect the environment and take appropriate steps to ensure that they minimise their environmental impact.

Consideration should be given to excluding a company which has been convicted of offences in the conduct of its business or committed an act of grave professional misconduct in the conduct of its business, such as breaches of employment, equal opportunities or environmental legislation. However, any corrective/remedial action taken by the company in response to such an offence should also be taken into account in determining its suitability as a bidder.

## SOCIAL ISSUES AND VALUE FOR MONEY

Value for Money does not mean “lowest price”. It is defined in the Scottish Public Finance Manual as the optimum combination of whole life cost and quality to meet the end user’s requirement. It is important that, in seeking value for money, purchasers do not allow quality standards to fall below an acceptable level. Purchasers and contractors should not seek cost improvements by cutting

corners on compliance with obligations to employees under employment, equal opportunities and health and safety legislation. Under regulation 38 of the Public Contracts (Scotland) Regulations 2006, in contracts for works or services, tenderers can be required to confirm that they have taken account of all relevant legislation regarding taxes, environmental protection, employment protection and working conditions when submitting their tender (providing they have been advised of where to find out about applicable legislation). While regulation 38 is optional in legal terms (it is for individual authorities to decide on a case by case basis whether it should be applied), as a matter of policy and good practice it is expected that it will be applied in all cases where:-

- staff may transfer under the contract,
- the contract is of a high value or will run for a long duration,
- there may be concerns about compliance in the specific sector/market.

## WIDER SOCIAL BENEFITS

There may be circumstances where it is appropriate to consider wider social benefits (sometimes also referred to as “social added value”) in a procurement context. For example, when awarding contracts connected with an urban regeneration project, the purchaser may reasonably be expected to consider how those contracts might aid the regeneration project, perhaps by providing training opportunities for the unemployed. Contracting authorities should ensure that any such requirements are permissible in domestic and EU law. A report by the Scottish Government on Community Benefits in Procurement will be published later in the year to provide more detailed guidance.<sup>5</sup>

## ASPECTS OF THE PROCUREMENT PROCESS

[Although what follows relates to the Restricted procedure, the principles will apply equally - and should be followed as far as possible - where other procurement procedures are being used.]

### **Before the procurement process begins**

Many organisations, including small and medium sized enterprises, social enterprises and the wider third sector do not routinely take part in public

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<sup>5</sup> When published, the report will be available from <http://www.scotland.gov.uk/Topics/Government/Procurement/PublicProcurement/policy-notes>

procurement processes. This may be because, for example, they are unaware of the opportunities which exist or they fear that the procurement process will be tilted in favour of larger, experienced suppliers or that the procurement process and associated documentation will be overly complicated.

Public procurement bodies should consider investing time and effort in allaying some of the concerns and addressing some of the obstacles which may exist. For example, “Meet the Buyer” events can be a helpful way of explaining procedures and advertising policies and generally raising awareness of the opportunities which exist for all organisations to compete for public business.

Agencies which can assist with such events and may be able to suggest other ideas include trade bodies, trade unions, employer federations, local social economy partnerships, other bodies from the social enterprise and voluntary sector and local ethnic support groups as well as other public procurement bodies.

### **Drawing up the requirement and drafting the Invitation to Tender documentation**

As with the incorporation of environmental issues<sup>6</sup>, it is particularly important to consider social issues early on in the procurement process, when customers and purchasers are identifying and developing their requirements. At this stage it is important to consider the requirement and its potential impact.

- Does the requirement have particular relevance for any particular groups? Is that fully reflected in the requirement?
- Has the contracting authority considered all potential social, economic and environmental benefits that could be delivered as part of the performance of the contract, whilst still being able to demonstrate Value for Money?
- Does the requirement affect the authority's ability to comply with its positive equality duties and if so, what considerations are appropriate?
- Would it be a suitable opportunity for particular groups to compete for business?
- Is the requirement and associated documentation written in such a way that it is easily understood by potential bidders who might not be familiar with public procurement procedures?

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<sup>6</sup> <http://www.scotland.gov.uk/Resource/Doc/1265/0009333.pdf>

- Is the requirement being adequately advertised to attract those potential bidders?
- Is the requirement sufficiently outcome-based to encourage a range of solutions?
- Can variants or lots be used effectively to produce a value for money solution?
- Are the requirements in tender documents and pre-qualification documents, to assess financial standing and technical capacity, for example, appropriate for the size and associated risk of the requirement?
- Are the conditions of contract written in simple language and not too onerous in relation to the nature of the requirement and its associated risk?

### **Advertising the requirement**

Selecting an appropriate list of potential suppliers to compete for public contracts means first attracting their interest. Public bodies should consider whether requirements are being adequately and appropriately advertised. Consideration should be given, for example, to whether the plans for advertising the requirement are likely to attract interest from those groups and other potential suppliers who might not routinely take part in public procurement?

### **Selecting tenderers**

The selection process has to be conducted transparently and fairly without favouring or disadvantaging any particular group or individual. When drawing up selection criteria for use in pre-qualification questionnaires, for example, contracting authorities can only ask questions which are relevant to a potential bidder's ability to perform the contract in question. So, it would not be permissible to ask potential suppliers about their overall company policy on equality issues if the subject matter of the contract was stationery supplies. On the other hand, if a requirement was for, say, training on equalities issues, it would be quite legitimate to ask a company what training it gives its own employees on equalities issues, since that is directly related to the subject matter of the contract.

EU rules allow the exclusion of potential suppliers at selection stage if they have been convicted, amongst other things, of a criminal offence relating to the conduct of their business or profession or if they have been found guilty by other

means (a tribunal, for example) of grave professional misconduct relating to the conduct of their business or profession. In relation to social matters this might include, for example, breaches of anti-discrimination or equalities legislation. Exclusion on such grounds has to meet the Treaty principle of proportionality, so the seriousness of the offence and any steps taken to rectify problems or prevent recurrence should be considered.

All procurement procedures which include a formal examination of contractors' credentials (e.g. a pre-qualification process) should include a requirement that the tenderer should disclose any previous convictions or adverse judgements by a court or tribunal.

It should also be noted that the Public Contracts (Scotland) Regulations 2006 contains a provision<sup>7</sup> which makes it mandatory for public bodies to exclude any potential supplier who has been convicted of certain offences, including participation in a criminal organisation, fraud affecting the EC's financial interests, corruption and money laundering.

### **Award Criteria/Tender Evaluation**

This is a different stage of the process from the selection procedure. Public bodies must only invite bids from suppliers to whom they would be prepared to award the contract.

Procurement legislation covering the award of public contracts in Scotland requires a contracting authority to either award the contract to the bidder who offers/submits the most economically advantageous tender (Value for Money) from the point of view of that contracting authority, or to award the contract to the bidder who offers/submits the lowest price.

Where, as should be the norm, the award criteria is a Value for Money assessment, the criteria must be notified to bidders either at the "advertising the requirement stage" or in the Invitation To Tender documents. The legislation states that the award criteria upon which the evaluation will be based must be linked to the subject of the contract. Where the social benefits form part of the subject matter of the contract they should form part of the value for money assessment. However, it is not permissible to consider wider social benefits in this process – i.e. social benefits which are not linked to the subject matter of the contract. Contracting authorities, including local authorities, may have a number of social and economic criteria which they are trying to meet and provided such criteria are linked to the subject matter of the contract, they may be included as

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<sup>7</sup> <http://www.opsi.gov.uk/legislation/scotland/ssi2006/20060001.htm#23>

part of the tender evaluation/contract award criteria. In these circumstances they will form part of the assessment of which tender offers best overall value for money for the contracting authority concerned.

### **Post Award/Contract Management**

Conditions of Contract relate to the performance of the contract and can offer scope for working with suppliers in a way which maximises the social impact of the contract. Similarly working co-operatively with a supplier after they have been awarded a contract offers an opportunity to contribute to social objectives.

Conditions of Contract must be compatible with the provisions of the Treaty, including the provision about non-discrimination on grounds of nationality, and must be notified to all potential tenderers in advance, usually when tenders are being invited.

After contract award, it is permissible for public bodies to work with suppliers on a voluntary basis to promote social issues, for example, by encouraging a catering supplier to provide Fair Trade products as an option in staff restaurants.

## **RESERVED CONTRACTS**

It is Government policy to, as far as possible, give people who are recognised as disabled within the meaning of the Disability Discrimination Act 1995 the opportunity to enter the labour market. Public funds should be spent in a way that supports this objective wherever practical. One route is by restricting participation in a tendering exercise to supported factories and businesses (companies with more than 50% of their workers being disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market). This Reserved Contracts process is expressly permitted under regulation 7 of the Public Contracts (Scotland) Regulations 2006. The use of supported factories and businesses contributes towards meeting public bodies' Corporate Social Responsibility objectives.

By indicating in the EU advert (the OJEU notice) that a particular contract is "reserved for sheltered workshops under Article 19 of the Directive" only organisations with more than 50% disabled employees (from anywhere within the EU) can bid for the contract.

Public bodies seeking to award a contract which has an anticipated value below the relevant threshold at which the Regulations apply should still consider whether the requirement is one where participation in the competition could be restricted to supported factories and businesses. In circumstances where it is

deemed appropriate to do so, public bodies are encouraged to “reserve” participation to supported factories and businesses only. As with contracts above the threshold, the advertisement for the requirement should clearly identify it as being “reserved”. The requirement has to be advertised adequately and appropriately and competed in accordance with usual procurement rules. It cannot be limited to particular supported businesses and factories or to those who are locally based.

An indication of the types of goods and services provided by supported factories and businesses can be found on the Supported Business Directory website at [www.supportedbusiness.org.uk](http://www.supportedbusiness.org.uk).

Every public body should aim to have at least one contract with a supported factory or supported business. In addition, main contractors should be alerted to the possibility of using supported employment organisations as sub-contractors on public sector (and other) contracts. The use of supported employment sub-contractors helps private sector organisations to meet their Corporate Social Responsibility targets.

## CONCLUSION

It is important to consider the social aspects of a procurement at:

- the outset, to ensure that the social dimension is fully taken into account when requirements are being drawn up,
- at advertising,
- at selection stage, where thought has to be given to ensure that the target audience is aware of requirements and how to respond to them, and
- after contract award, where working co-operatively with contractors can make further improvements in social issues and at the same time send out a clear signal to suppliers about the public body’s objectives in this area.

Whilst procurement rules impose some restrictions on promoting social issues through public procurement, particularly where the social issue is not directly related to the subject matter of the contract concerned, there is still considerable scope for promoting such issues.

**Suggested text for inclusion in “Invitation To Tender” documents for works and services contracts:**

“Information on obligations relating to taxes, environmental protection, employment protection and working conditions relevant to this contract may be obtained from the following websites:-

<http://www.bgateway.com>

<http://www.sepa.org.uk/regulation/index.htm>

<http://www.businesslink.gov.uk>

When submitting your tender, you must confirm in writing that you have taken full account of these obligations in drawing up your tender (or in negotiating the contract). Failure to do so may result in your exclusion from the competition.”