

Buying better outcomes

Mainstreaming equality considerations
in procurement

A guide for public
authorities in England

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Introduction

Public authorities spend £236 billion each year on buying goods, works or services from other organisations across every sector. 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.

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 should help public authorities ensure that the goods and services they procure are fit for purpose thus ensuring they meet the needs of their users. As such it should also be seen as an effective tool for improving economy, efficiency and effectiveness and therefore value for money.

This guidance explains how public authorities may approach the task of ensuring that they comply with their PSED obligations at different stages of the procurement cycle and takes you through equality issues that you may need to consider at each stage.

A resources section on our website¹ includes links to useful reference materials such as complementary guidance products, case studies and training modules.

Who should read this guide?

This guide is aimed at commissioners, procurement officers, contract managers and people involved in the procurement process. It assumes technical knowledge of procurement. It is not a definitive guide to the law and if you are unclear about what the law allows or requires you should seek legal advice. This guide is for England only.

Readers will wish to be aware that the Government is currently undertaking a review of the PSED, which should report later this year. The review was set up in the light of concerns expressed in some quarters about perceived bureaucratic burdens. This, and other guidance from the Commission, aims to identify for public

¹ <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-procurement>

authorities how they can comply with the law, and deliver fair and effective services, without unnecessary bureaucracy.

What are 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. For example an equality outcome might be an increase in the proportion of disabled people living in homes suitable for their disability, which would satisfy a corporate objective to support disabled people to live in the local community.

Incorporating equality outcomes, where relevant and in a proportionate way, should be a normal part of designing and specifying a service. It is important that they are 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. Properly done, this should help you buy better outcomes and therefore achieve value for money, while helping to meet your corporate objectives.

Equality outcomes often overlap with community benefits and are part of the social and economic elements of sustainable procurement.

Equality issues which overlap with 'community benefits' include:

- community cohesion objectives, for example developing strong positive relationships between people of different backgrounds
- 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 elderly 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.

For example: A North East local authority had a corporate equality objective to challenge negative attitudes to disability, and promote integration and community cohesion through practical actions. This equality objective was considered relevant when the authority decided to renovate its children's play areas. It consulted with parents and found that parents of disabled children said the area lacked play areas suitable for both disabled and non-disabled children.

The successful procurement exercise means that parents of disabled children now have more play areas to choose from. The feedback from children and parents has been extremely positive and there has been a noted increase in usage. Interaction through play is helping to break down barriers and challenge understanding and perceptions of disability by parents of non-disabled children encouraging social inclusion.

An additional outcome was an improved service from their suppliers. The local authority initially found that its approved suppliers list did not provide this type of equipment and had to source it from overseas. This prompted their existing suppliers to broaden their range, making it easier for other authorities to procure these products.

The legal framework

The Equality Act

The Equality Act (2010) (the Act) sets out anti-discrimination law in the UK. It identifies 'protected characteristics', age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, pregnancy and maternity and marriage and civil partnerships.²

The Act sets out the public sector equality duty (PSED) which applies to most public authorities in England,³ such as local authorities, police, schools, universities and central government departments. It also applies to organisations carrying out a public function.⁴ 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.

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 characteristic 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:

² Equality Act 2010 Public Sector Equality Duty: What do I need to know? A quick start guide for public sector organisations Equality and Human Rights Commission 30.6. 2011, available at: <http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/equality-act-guidance/equality-duty?view=Binary>

³ For the list of authorities subject to specific equality duties and the duties themselves see: The Equality Act 2010 (Specific Duties) Regulations 2011, available at: <http://www.legislation.gov.uk/ukSI/2011/2260/contents/made> and [Schedule 19 of the Equality Act 2010](#).

⁴ For the definition of whether an organisation is providing a service or exercising a public function see Code of Practice on Services, Public Functions and Associations, available at: http://www.equalityhumanrights.com/uploaded_files/EqualityAct/servicescode.pdf

- 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 will depend on the circumstances and in particular on the relevance of the aims of the general duty to the decision or function in question. For example, decisions a local authority makes about the provision of social care for older people compared to those regarding the purchase of stationery, will have greater potential impact and more relevance to the aims of the duty, and so it will need a higher degree of regard.

The requirement to have due regard needs to be fulfilled before and at the time a particular policy is under consideration as well as at the time a decision is taken. It is good practice for organisations covered by the duty to keep an accurate record showing that they had actually considered the duty. Proper record keeping encourages transparency and if records are not kept it will make it more difficult to persuade a court that the duty has been met. This is the case for public authorities covered by the general duty as well as for organisations that are exercising public functions.

The PSED is non-delegable. This means that the duty will always remain the responsibility of the organisation subject to the duty. In practice, this may mean that public authorities need to ask their suppliers to take certain steps (such as monitoring service users), in order to enable the public authority to meet their continuing legal obligation to comply with the PSED.

The wider legislative framework

The wider 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 and these social issues may include equality issues⁵. 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.

These general principles are primarily intended in this context at ensuring that your actions are transparent and do not unfairly obstruct the ability of economic operators (i.e. economic contractors, suppliers and service providers) within the EU. Provided that your actions do not unfairly hinder the ability to compete of economic operators, these general principles are unlikely to prevent the social issues being taken into account in the ways permitted by the Directive and the UK Regulations.

Under Article 19 of the European Procurement Directive (Reg 7 of the UK Public Contract Regulations), you can reserve some contracts in some circumstances for supported factories and organisations (where more than 50 per cent of the workers are disabled persons). If in doubt about a particular situation seek legal advice.

New domestic legislation also supports delivering equality outcomes through procurement. The [Public Services \(Social Value\) Act](#) (2012), places an obligation on public authorities actively to 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.⁶

⁵ For further information see *Buying Social: A guide to taking account of social considerations in public procurement* EU 2010, available at: <http://ec.europa.eu/social/BlobServlet?docId=6457&langId=en>

⁶ See cabinet office policy note on the Act, available at: http://www.cabinetoffice.gov.uk/sites/default/files/resources/Public_Services_Social_Value_Act_2012_PPN.pdf

Meeting public sector equality duty requirements through the procurement cycle

The public sector equality duty (PSED) is a continuing duty, and you should consider potential equality considerations at the different stages of the procurement cycle. This section takes you through the process and highlights the potential equality issues you may need to consider at each stage. Additional reference material and further reading are listed in the resources section on our web site.

Relevance and proportionately 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.

1. Equality and procurement strategy

It is advisable that your procurement strategy explains how it supports the aims of the general equality duty as well as your organisation's corporate vision and objectives.

You should review your procurement policies and procedures to ensure they comply with the Equality Act. Some things to consider are:

- **Corporate equality objectives and policies on economic development:** These may 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:** You should ensure that your procurement processes include consideration of equality issues, and clarify areas of responsibility.
- **Buying with other partners:** These arrangements need to be checked to ensure you meet your PSED obligations. In particular check whether the use of particular frameworks or the introduction of category management do not have any unintended negative equality consequences.

For example: Three public authorities adopted a joint approach to meeting the general equality duty, by producing documents including a statement for partners, contractors and service providers, which sets out the requirements on them under the PSED when they deliver a public function.

- **Increasing supplier diversity:** This may be part of a procurement strategy, as it has the potential to widen the pool of bidders and result in more creative and cost effective proposals. To broaden your supplier base you may:
 - Meet 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 systems, supplier portals and accreditation systems to simplify the tender process, reduce the bureaucratic burden for all suppliers and make it easier to tender for all suppliers, and so improve smaller organisations' ability to bid.
 - 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-qualification 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 need if appropriate.

2. Identifying need and building a business case

To build a business case you need to identify legitimate and reasonable need. This information should help you to establish how relevant equality is to the procurement and whether it needs to be a core requirement. By demonstrating that it is a cost effective way of achieving outcomes, and of meeting your organisation's operational and equality objectives, you can demonstrate a strong argument for the inclusion of equality requirements.

To identify need you should begin by reviewing the current provision. There is no prescribed methodology for doing this, but a systematic assessment of the impact of equality should assist in determining the degree of relevance.

To help you demonstrate due regard to the aims of the PSED, it is good practice to ask the following questions:

- Do current arrangements adversely affect some people with shared protected characteristics or unlawfully discriminate against them?
- Do differences in service take up or satisfaction levels indicate that it is not being provided fairly or that there is unlawful discrimination in the way it is delivered? If there have been cuts or changes to the service or related resources (such as the voluntary sector), has this affected some people disproportionately, relative to others, as a consequence of their protected characteristics?
- Are there population changes that might indicate new needs?
- Are there alternative ways of meeting your requirements that could advance equality?

Engaging with service users and networks of people with shared protected characteristics can help you understand the issues. The current service provider may monitor use of a service by different groups, as might officers managing the contract. Trade unions and employees may provide information about equality issues in employment.

For example: Three local authorities agreed to set up a shared call centre in a remote new site. Consultation with employees and unions identified that the long commute was difficult for carers and disabled employees. As part of the contract specification, potential suppliers had to demonstrate willingness to allow flexible and home working to mitigate this.

For example: A London borough was procuring a fleet of buses to transport older people and children with special needs. It arranged open days to allow children from special needs schools, their carers and older people from care homes to try out the different models before the specification was finalised. The council had intended to buy one model, but as a result of the consultation decided to buy two different models for the fleet.

Other issues you may consider when building your business case are:

- **Strategic fit:** Does the inclusion of equality measures add value to and help meet your authority's vision and objectives including its equality objectives?
- **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? Is your approach affordable, proportionate and value for money?
- **Options:** What procurement and contract options are available to you and what effect might they have on equality?
- **Risk:** You should consider any legal, financial, reputational or even political risks that may be incurred by yourself and potential suppliers. Non-compliance with the PSED may lead to legal challenge and affect your authority's reputation as well as incur financial costs.

Considering all of the elements of the business case will give you a clearer understanding of the impact that inclusion of equalities may have. It will help you present a stronger case for inclusion in both value for money terms and by delivering wider benefits to the community than may have originally been thought.

3. Equality requirements in contract specifications

3.1 Assessing if equality is a core requirement

The relevance of equality to the subject matter of the contract will help determine whether it forms part of the specification. Where equality considerations are central to the service they are normally regarded as a core requirement. For example, the provision of transport for disabled people, domiciliary care for the elderly or childcare facilities are services where equality issues will form part of the core requirements.

Equality considerations may also be relevant where they are not the main requirement of the contract. For example, a contract for providing a web-based service may also specify that the service caters for people who do not speak English as a first language, or those who are visually impaired. You may wish to deal with relevant issues that are not the main requirement through the contract conditions. The inclusion of such conditions need to relate to the performance of the contract and be proportionate and where relevant, adhere to legal requirements, such as for those for website design. Your analysis on the relative weighting of these equality issues should guide your thinking on this.

3.2 Adding value to the procurement

There may be additional equality or social outcomes that generate added value, but are not absolutely necessary for fulfilment of the contract. These might include training and employment opportunities, regeneration objectives, improved labour standards or a more diverse supplier base. (The resources section on our web site contains further reading including case studies, guidance and the use of community benefit clauses.)

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.

Case law recognises that the criteria for the evaluation of contracts need not be purely economic but can, in appropriate cases, include social and

environmental criteria. It may be possible to include the provision of clearly identifiable and measurable social benefits as part of the contract specification and develop appropriate evaluation criteria accordingly. Examples may include the targeted recruitment and training benefits, such as providing a specified number of apprenticeships, or providing work for the long-term unemployed. It may be appropriate to include identifiable and measurable social or community benefits in particular contracts. The criteria would need to meet all the other principles of EU law, such as transparency and non-discrimination, as discussed elsewhere in this document. Key principles to bear in mind are:

- 1) Criteria need to be reasonable, proportionate and transparent. All evaluation criteria need to be properly disclosed to tenderers to ensure that the use being made of economic, social and environmental requirements is understood.
- 2) Criteria should be objective, not involving subjective value judgements by the contracting authority, and should be clear, verifiable, targeted and have measurable outputs.
- 3) Criteria should be proportionate and related to the goods and services being purchased.
- 4) Criteria should not involve any discrimination. The contracting authority is required to maintain a level playing field for non-local contractors who may otherwise be disadvantaged in the tendering process. This is important at the tendering stage to ensure compliance with the EU Procurement Directives and the general principles of EU law.

For example: The Olympics construction programme included the extension of the East London line. The procurement of the project set out specific contractual requirements around Equality, Diversity and Inclusion, as part of delivering on the broader regeneration and legacy goals, in the tender documentation. There was a need for the initial bid to meet these requirements through the inclusion of well developed proposals. The winning bid set out how they would meet

these and included proposals around increasing access to employment and training.

3.3 Writing the specification

Once you have determined your need and decided when equality is a core requirement, you can use the contract specification to set out explicitly what you require the contractor to do. In a time when demand for public services is increasing significantly, procurers should see this stage as an opportunity to re-think services outcomes and identify better targeted, innovative and radical service delivery solutions. There is potentially wide scope in drafting the specifications, providing they are legal, non-discriminatory and underpinned by the business case. Consider at this point how you will evaluate these aspects and score them according to their importance within the overall evaluation. You should be able to verify, monitor, and evaluate whatever you specify. This means the requirements on promoting equality, like the rest of the specification, should be objective, and stated in terms that are clear and explicit.

Specifications can be written as outcome, output or input specifications but in reality often include a combination of these approaches.

a) Specifying outcomes (functional specifications)

You can ask a contractor to meet specific equality outcomes, but leave it to the contractor to set out in their tender how they propose to achieve these outcomes. Specifying outcomes can allow tenderers to develop more innovative ways of achieving outcomes. You can assess the approaches they propose at the tender evaluation stage. Outcomes are also measurable. For example, the specification could require year-on-year improvements, such as increased take up of services by people with certain protected characteristics who were previously under-represented amongst users.

For example: In a specification for mental health day care provision, tenderers are invited to demonstrate how they will meet a number of outcomes which demonstrate a wider community benefit from the contract. The outcomes include:

- improved mental health for service users
- reduced stigma and discrimination against service users, and
- increased access to skills and employment for older people, carers, parents returning to work, and people with mental or physical health conditions.

This approach led to the successful provider offering an innovative model which involved 'time banking' and user involvement in service provision. This improved mental health outcomes and led to quantifiable benefits to the public authority. (The resources section on our web site contains further details on this case study.)

For example: A health organisation finds that single men, and particularly gay men, over the age of 50 are less likely to consult a GP than women. The ITT for a community health communications contract specifies improved outcomes in male GP attendance and asks tenderers how they will communicate with this group. The successful contractor proposed identifying local pubs used by single older gay men and distributing beer mats and toilet signs with health information and advice about seeing a GP. This led to improved attendance at GP surgeries by this group.

b) Output specifications (performance specifications)

Output specifications dictate what outputs are needed to meet the described requirement. If you know that some of the communities you serve are particularly disadvantaged because of distinct service needs related to their protected characteristic, you can write certain steps into the contract specification. These could include providing services to meet special educational, training, or welfare needs of particular equality groups.

c) Specifying inputs (technical specifications)

The contractor can prescribe specific input or technical requirements in the goods, works or services. The EU Directive and UK Regulations, for example, require public authorities, in drafting any technical

specifications, to take into account accessibility criteria for people with disabilities, for example the suitability of website design for all users.⁷

3.4 Specifying positive action and reasonable adjustments

The Equality Act and the PSED recognise that improving equality for people who share a protected characteristic may sometimes require that they be treated more favourably than others who do not share that characteristic. The Act allows employers or service contractors to take positive action⁸ measures to improve equality for people who share a protected characteristic. Positive action means that services can be provided to encourage people from disadvantaged groups or those who are under-represented to access services. For example, a community health service might be provided for gypsies and travellers to close a significant life expectancy gap relative to other groups.

Positive action also covers reasonable adjustments for disabled people. The Act allows employers and organisations carrying out public functions to treat disabled people more favourably to meet any needs arising from their disability. It also includes a duty to make anticipatory reasonable adjustments.⁹ This requires the taking of positive steps to ensure that disabled people can access services, public functions and have access to and can progress in employment.¹⁰ For example, this may mean making changes to the built environment or providing auxiliary aids to make a service accessible.¹¹

3.5 Specifying workforce requirements

⁷ For example the authority might be expected to specify full compliance with relevant access standards such as BSI 830015 in relation to building construction or BS PAS 7816 in relation to website design.

⁸ Positive action is not the same as positive discrimination which is unlawful. Positive discrimination occurs when one person or a group of people with particular protected characteristics is treated more favourably than another person, or group with different characteristics, would be treated in the same situation. For more information see: <http://www.equalityhumanrights.com/advice-and-guidance/your-rights/religion-and-belief/when-does-the-law-allow-religious-discrimination/positive-action/>

⁹ For further information on reasonable adjustments see: <http://www.equalityhumanrights.com/advice-and-guidance/service-providers-guidance/the-duty-to-make-reasonable-adjustments-to-remove-barriers-for-disabled-people/>

¹⁰ Equality Act 2010: What do I need to know? Disability Quick Start Guide, available at: <http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/equality-act-guidance/disability?view=Binary>

¹¹ For more detailed information on reasonable adjustments see the Commission's Codes of Practice on Employment and on Services, Public Functions and Associations, available at: <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/>

Where the services include provision of services to particular vulnerable or equality groups, the specification (and evaluation criteria) may legitimately include provisions governing matters such as training and management of those employees who will be delivering the services. These can be used to evaluate the bidder and award the contract. The contract conditions, at a later stage in the process, can also include conditions governing the training and recruitment of the workers who will deliver the services forming part of the contract. The conditions, however, must relate to the performance of that contract and cannot be used to regulate the workforce generally.

Where not directly relevant to the performance of the contract voluntary agreements, however, can be an effective mechanism for improving contractor performance in this area. Successful initiatives include codes of conduct on staff behaviour. For example the Considerate Contractors Scheme is widely supported by many private sector businesses who also see it as complementing their corporate social responsibility values.

Likewise, the Government's voluntary *Think, Act, Report*¹² initiative on gender equality is widely supported by the UK's leading companies. By signing up to this, companies demonstrate their commitment to promoting equality of opportunity for women at work, and to being more transparent about this.

3.6 Monitoring obligations in the specification

If you specify the achievement of certain performance targets, you may want to make explicit how you expect the contractor to monitor their performance against these targets. For example, you may consider specifying equality monitoring of people who use the service but also consultation with, or surveys of, those who use and those who don't use the service. You may also make it a requirement for the contractor to make adjustments in light of the monitoring results. You should also specify that the contractor should have procedures for dealing promptly and sensitively with complaints about discrimination, and should adjust the service if complaints highlight significant deficiencies.

¹² See <http://www.homeoffice.gov.uk/equalities/women/women-work/gender-equality-reporting/sign-up/>

4. Terms and conditions and equality clauses

Introducing special clauses under the terms and conditions of the contract can help you meet your legal obligations under the Equality Act, and help ensure your suppliers meet their legal obligations. (The resources section on our web site includes examples of standard anti-discrimination and employment clauses.)

Equality clauses may be introduced under these arrangements relating to the performance of the contract, but they must:

- be compatible with EU rules (as determined by the Public Contract Regulations 2006 and any other related legislative requirements)
- be relevant and related to the performance of the contract
- not be a technical specification in disguise or used in the evaluation process
- not discriminate (directly or indirectly) against any potential tenderer
- be able to demonstrate that value for money is maintained, and that whole life costs are taken into account
- be proportionate and quantifiable
- be referred to in the contract notice or tender documentation, and
- be clear and unambiguous, and understood by tenderers and contractors.

5. Advertising and selection of tenderers

Preparing the contract notice

The tender process itself will normally commence with some form of advertising. For major procurements this will be through an OJEU notice in the first instance. After the contract notice is published you may wish to advertise the contract in relevant publications or linked websites. Use Contracts Finder and provide details to local infrastructure organisations for small businesses and the voluntary sector.

The contract notice must include project requirements to ensure there is a clear understanding of the business goals. It should set out the equality requirements clearly so that any potential supplier can understand them.

The contract notice should state whether the organisation awarded the contract will be carrying out public functions, and make clear that it will be subject to the PSED.

6. Assessing contractor technical capacity and ability

The next step in the selection process may include use of a pre-qualification questionnaire (PQQ) or some other supplier selection process such as a supplier portal, which is the appropriate point to assess a supplier's status with regard to equality requirements.

The PQQ is a good opportunity to find out about a potential supplier's track record on equality, both in terms of their technical competence or to determine any grounds of exclusion as permitted by relevant procurement law.¹³ Many standard PQQs and several accreditation systems ask about:

- equality performance¹⁴
- equal employment opportunities¹⁵
- supporting evidence of compliance with the Equality Act, such as copies of policies and procedures.¹⁶

The PQQ also asks about a potential supplier's technical ability to perform the contract. This usually includes the supplier's professional and technical ability, as reflected in its staff qualifications or training,¹⁷ and its track record in performing similar contracts.

¹³ Procurement Policy Note 01/12 (dated 10 February 2012), mandates the use of standard core questions and the elimination of PQQs for contracts under the EU thresholds for all central government departments, including their non-departmental public authorities and arms length authorities. However local authority purchasing organisations are not required to do this.

¹⁴ See, for example, the West Midlands Common Standard used by a number of local and other public authorities <https://www.wmf-commonstandardforequalities.gov.uk> and the GLA group standard, Diversity Works for London: <http://www.diversityworksforlondon.com/>

¹⁵ Most standard PQQs are based on the Employment Codes of Practice: http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf

¹⁶ There is no legal requirement to have a written equal opportunities policy, However, where relevant, it may be permissible to ask an economic operator how it meets its equalities obligations if it does not have a written equal opportunities policy, see: <http://www.cabinetoffice.gov.uk/sites/default/files/resources/ppn-update-april-2011.pdf>

¹⁷ Where qualifications are specified you must allow for equivalent qualifications.

Where equality is relevant, it is appropriate to ask for evidence of compliance with the Act (or equivalent legislation in other European countries), or evidence of liability in discrimination claims.

You may exclude a prospective tenderer who has been found in breach of national laws about equal treatment of workers,¹⁸ unless they can show they are taking steps to remedy the issue. Discretionary exclusion is permitted under the EU Directive and you should consider the nature and gravity of the breach, when it took place, and the degree of relevance to the subject of the contract itself.

Where tender applicants are deemed unacceptable, they should be informed of the reason why they have not been selected to enable them to understand why and how they can improve their equalities performance and be better placed to win public sector contracts.

7. The invitation to tender (ITT)

The ITT sets out your requirements and expectations based on your business case. It offers you the opportunity to explain how equality issues may be relevant to the aims, delivery and outcomes of the tender and to specify what information you require from tenderers to demonstrate how they meet this.

Equality requirements in an ITT should be objective, and stated in clear, explicit terms. You should be able to verify, monitor, and evaluate whatever you specify. The equality requirements in an ITT may relate to the:

- statutory obligations of employers
- desired outcomes from the contract
- technical or workforce requirements
- desired wider community benefits.

You can inform tenderers that they are expected to comply with relevant discrimination law if awarded the contract.¹⁹ While it is not a mandatory

¹⁸ Recital 43 of the EU Directive.

¹⁹ If the contract is performed outside the UK, the contractor would not be subject to UK legislation. However, if the contract is performed in the EU, it will be covered by similar legislation which you should specify.

requirement under the Directive or UK Regulations to provide this information it is permitted to do so. A public authority is likely to be seen to be failing to meet its duty to eliminate unlawful discrimination and harassment and promote equality if it failed to inform prospective contractors of the anti-discrimination legislation under which its proposed contract would be carried out. You should inform tenderers in the ITT where they can find information about obligations under the Equality Act. Tenderers are required to indicate in their tender submission that they have taken these obligations into account when preparing their tender.

The ITT can ask how the tenderer intends to meet equality obligations or other social requirements through method statements. In higher risk areas such as social care, asking 'open' questions should enable a much more meaningful assessment of the contractor's approach than a 'closed' tick box type approach. Responses could include equality training for managers and staff, or staff in certain roles to have particular language skills to meet the needs of service users more effectively.

You can ask prospective tenderers to ask similar questions to those in the PQQ to assess the capability of sub-contractors to meet equality requirements specified in the contract.

8. Developing an award process

Your ITT should give tenderers clear information about how you will evaluate their submissions, including their proposals for meeting the social or equality requirements.²⁰ You must specify the award criteria and the relative weighting for each aspect. The award criteria may include equality-related criteria, or combine equality factors with quality, technical merit and cost-effectiveness criteria, so that you have the full information to assess the most economically advantageous tender.

Method statements can be an effective way of assessing equality performance. They provide the tenderer with the opportunity to demonstrate their understanding of equality criteria, and how they propose to deliver this. The weighting, however, needs to be agreed

²⁰ See EU Directive, in Recital 46 cited in footnote 17.

early on in the process, and non-core elements to the method statement should not be scored.

9. Implementing the contract conditions and monitoring it

The success of your investment in equality depends on the relationship you establish with the successful supplier, and how you monitor, manage and enforce the contract. Equality considerations are typically weighted towards the start of the procurement process with less attention given at the monitoring and management stage. However, the obligation to give 'due regard' to the PSED continues through the whole of the procurement cycle, and so should be included in the monitoring and management stage.

A good working relationship requires clear communication about your expectations and agreement about what is required from the contract. This means you need to make sure the provider understands the equality requirements, and how you will monitor them.

If equality is part of the core purpose of the contract, you should include monitoring requirements in the specification. The contract should set out what should be measured, how information should be analysed, and how frequently and in what form it should be provided to you.

The contractor should appreciate that monitoring is not an end in itself, but a means of identifying where changes or improvement in performance is required.

For example: A joint procurement unit consisting of several small local authorities uses a simple tool that measures cost and level of contact with service users, to decide how much monitoring to do on equalities aspects. Where contact was high and value was high, for example for outsourced recycling collections, close monitoring was required. Where there is high contact but low value such as leisure instructors, some monitoring is required. For others such as stationery orders, with little or no contact with service users, little or no monitoring is required.

It may not be cost-effective or prudent from a risk perspective for the provider to monitor delivery or outcomes on certain contracts due to their

low value and/or low contact with the public. In this case the purchasing body may wish to draw on other sources of intelligence, such as consulting with service users or trade unions, reviewing complaints, undertaking mystery shopping or site visits.²¹

The monitoring information helps the contract manager ensure successful delivery of a contract. But the information can also help a public authority meet its duty to be transparent in reporting how it uses its resources, and to what effect.

As part of your continual improvement agenda, you may want to improve the equality performance of suppliers in a way that goes beyond their contractual obligations. You should discuss this at the start of the contract to get their voluntary agreement, and agree how you will work together.

10. Termination, exit and learning lessons

Sometimes things go wrong. If during the delivery of the contract your monitoring indicates breaches of the equality requirements, you should discuss this with the supplier and agree steps to rectify this. A serious breach may mean you need to use sanctions provided for in your contract, but it is good practice to work with the provider to achieve improvements before taking such a step.

You should try to understand the reasons for the contract not working as was planned, particularly if it is a long-term contract, to avoid making similar mistakes again. If a contract is coming to an end, transferring to another supplier, or terminating early, you should:

- ensure staffing matters are properly managed
- apply any lessons on achieving corporate equality objectives to future contracts
- improve future specifications, potentially through clearer equality criteria

²¹ Whether you carry out monitoring or you include monitoring requirements within the contract and offer advice to the contractor, you can find guidance on gathering information in the Equality Duty guidance at: http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/information_guidance_rev.doc

- assess whether there was sufficient scope for real equality benefits to be achieved
- review the options for using different contract terms and conditions
- evaluate performance management
- ask your contractors if there was a genuine partnership approach.

Contacts

www.equalityhumanrights.com

The Commission's publications are available to download on our website: www.equalityhumanrights.com.

If you would like to discuss the option of accessing a publication in an alternative format or language please contact engagementdesk@equalityhumanrights.com.

Equality Advisory and Support Service (EASS)

The Equality Advisory Support Service has replaced the Equality and Human Rights Commission Helpline. It gives free advice, information and guidance to individuals on equality, discrimination and human rights issues.

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Textphone: 080, ; \$\$\$\$ (

Opening hours:

09:00 to 20:00 Monday to Friday

10:00 to 14:00 Saturday

Website: www.equalityadvisoryservice.com

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