

Equality and Fairness

in Procurement

Guidance for Contractors

DRAFT

Introduction

Procurement is the process of acquiring goods, works and services from a third party to achieve the optimum combination of costs and benefits to meet the needs of the Council and its stakeholders.

As a public body, the Council must discharge its duties in a legal, responsible and non-discriminatory way.

Getting procurement right is essential to securing the delivery of efficient, quality services in Barnet. How effectively we procure will have considerable influence on the successful achievement of Council priorities and towards making a lasting difference to the services we provide.

This guidance is to be read in conjunction with the Council's policy statement on fairness and equality in procurement.

Objectives

Two of the Council's procurement objectives are ;

- **To ensure that the procurement activities reflect the Council's approach to equality.**
- **To fulfil the Council's duty of ' Best Value'.**

The Council aims to fulfil those objectives by;

- **Promoting equality and fairness through its procurement processes and practices**
- **Striving to ensure equal opportunities for all, when procuring goods, works or services.**
- **Purchasing works and services from contractors who can demonstrate a commitment to making sure that their employees and their customers are not discriminated against because of age, sex or sexuality as well as race, colour, ethnic origin or religion.**
- **Securing fair employment terms and conditions for comparable employees when purchasing works or services.**

- **Securing compliance with our duty to provide works and services that demonstrate Best Value, whilst ensuring that our policies support diversity and do not lead to unfair discrimination or social exclusion.**
- **Recognising the connection between service quality and the management of workforce issues. Good quality works/services depend on appropriately skilled and motivated workforces. Neglecting relevant workforce matters in order to drive down costs could have adverse effects on the desired quality and value for money.**
- **Undertaking transparent, open and fair procurement.**

At various stages in the procurement process the Council may take into account social issues.

A list (which is not exhaustive) of social issues is set out below;

- **Race equality**
- **Gender equality**
- **Age equality**
- **Sex equality**
- **Workforce matters**

In taking into account social considerations on each procurement (as appropriate) the Council will ensure that

- ❖ such issues must be relevant to the subject of the contract;
- ❖ its actions must be consistent with the EU Treaty and EU Directives;
- ❖ its actions must be consistent with the government's view on achieving value for money;
- ❖ its actions taken on sustainable development considerations can have implications in the shorter, medium or longer term. Sustainable procurement must be approached from a whole life cost basis.

(Source OGC Guidance on Social Issues in Purchasing - February 2006)

When can Social issues be incorporated?

The Council will decide which social issues are relevant to the particular procurement and when they can be most effectively included. This may be

- before a procurement begins
- when deciding a user requirement
- when writing the contract documents
- once the contract is being performed

Contractors therefore need to be aware that social issues may be considered at each stage of the procurement process namely;

- specification
- selection
- tender evaluation
- contract management /conditions

Exclusion from Participation

Contractors may be excluded from participating in a tender process on certain grounds. These circumstances may include where they have

- been convicted of an offence concerning professional misconduct
- been guilty of grave professional misconduct on a proven basis by the Council

NOTE: These might relate to social matters for example breaches of the Race Relations Act 1976 (as amended); Disability and Discrimination Act 1995; contraventions of the Sex Discrimination Act 1975 or Equal pay Act 1970.

Contractors from abroad may also be excluded for convictions under the national laws of the country from which they are based.

All contractors will be treated equally and the decision to reject a contractor will be proportionate to the contract and the seriousness of the breach.

The Council will exclude contractors if contractors have been convicted of certain offences e.g. corruption and money laundering, participation in a criminal organisation (in accordance with the Public Procurement Directive). Many of these offences have been linked to abuses of human rights and could be an important provision underlining sustainable considerations and helping to protect vulnerable groups of people at risk from these crimes (Source OGC Social Issues in Purchasing February 2006)

The Legislation

Contractors need to be aware of some of the relevant legislation when contracting with the Council and carrying on business. A list (not exhaustive) is set out below;

- ❖ The Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000 (RRA)
- ❖ The Disability Discrimination Act 1995 (as amended by the Disability Discrimination Act 2005 (DDA))
- ❖ The Sex Discrimination Act 1975 (SDA)
- ❖ The Equal Pay Act 1970 (EPA)
- ❖ Employment Regulations

The Council will endeavour to appoint contractors who are committed to promoting fairness and equality in their service delivery and who can demonstrate the ability to assist the Council in complying with its statutory responsibilities.

Race Relations (Amendment) Act 2000

The RRA amended the 1976 RRA and it has important implications. It now outlaws discrimination in all functions of the Council, including procurement.

The RRA 2000 gives the Council a clearer, more direct, positive legal duty to eliminate discrimination and to promote equality of opportunity and good relations.

Compliance with the RRA in carrying out procurement is comparable with the Council's obligations under UK Law, EU Directives, the Council's Contract Procedure Rules and best practice.

The legislation requires the Council to take proactive steps to assess whether there is equality of opportunity for everyone - our staff, the public we serve and the businesses who work for us and to make changes where this is not the case.

Where one or more function is carried out by an external supplier on its behalf, the Council remains responsible for meeting the duty.

Contractors must not discriminate.

The Council is complying with its duties under the RRA will build in relevant race equality considerations in the procurement process to ensure each function meets the RRA requirements regardless of who is carrying them out.

The Local Government Act 1988

The Local Government Act 1988 controls the way local authorities manage their tendering procedures for all goods, works and services.

Particularly section 18 of the 1988 Act allows the Council to consider race relations matters that relate to contractors and their workforce.

The Act allows the Council to include written questions about racial equality in employment in the procurement process.

As a potential contractor, you will be asked questions about racial equality in employment and these answers will be used in the selection process.

Commissioner for Racial Equality (CRE)

The Race Relations legislation is supported by codes of practice produced by the Commissioner for Racial Equality. Advice and assistance to employers in removing racial discrimination and providing equal opportunities can be obtained from the CRE and their website www.cre.gov.uk.

Disability Equality

It is unlawful for an employer or service provider to discriminate against a disabled person by treating them less favourably than another person, for reason that relates to that disability.

This includes people with mobility, visual or hearing difficulties and people with learning difficulties. People, for example with heart disease, disfigurement, speaking difficulty, diabetes, epilepsy, a mental illness or progressive condition (e.g. cancer, HIV or multiple sclerosis) are also included.

The DDA 2005 places a duty on public bodies to promote equality of opportunity for disabled people in a similar way to the duties of the Race Relations (Amendment) Act 2000.

These duties also apply to any public function which is contracted out to external organisations to deliver. A contractor therefore must not discriminate on grounds of disability.

The Council, in complying with its duties under the RRA 2000, will build in relevant disability equality considerations in the procurement process to ensure that each function meets the DDA 2005 regardless of who is carrying them out.

Disability Rights Commission

The Disability Rights Commission was set up by the government to get rid of discrimination against disabled people and promote equal opportunities. Advice is given to employers through their helpline, free publications and website www.drc-gb.org.

Sex Discrimination Act (SDA) 1975 (1986)

The Sex Discrimination Act (SDA) was introduced in 1975 and was changed in 1986.

The SDA makes it unlawful to discriminate on the grounds of someone's sex. Specifically, sex discrimination is not allowed in employment, education, advertising or when providing housing, goods, services or facilities. It is against the law to discriminate because someone is married, either in employment or in advertisements for jobs. The EPA says women must be paid the same as men when they are doing the same work.

The SDA applies to two kinds of discrimination:

- ❖ Direct discrimination means treating someone unfairly because of their sex.
- ❖ Indirect discrimination means setting unreasonable conditions that appear to apply to everyone, but in fact discriminate against one sex. (For example, a rule saying that only people more than six feet tall will be hired will exclude far more women than men.)

The Council is committed to ensuring that contractors acting on behalf of the Council don't discriminate on grounds of sex. The Council will build into the procurement process sex equality considerations.

The Equal Pay Act (EPA) 1975 (1984)

The Equal Pay Act (EPA) was introduced in 1975 and was changed in 1984.

The EPA applies to pay and other contractual matters where a woman and a man are doing the same work or work that is of equal value.

The Council is committed to ensuring that those acting on its behalf comply with this legislation and equality considerations will be built into the procurement process.

The Sex Discrimination (Gender Reassignment) Regulations 1999

These regulations make it illegal to discriminate against transsexuals. This includes treating them less favourably than others when they are off work because of sickness or injury. Transsexuals are also protected from victimisation and harassment at work.

The regulation only protects transsexuals against discrimination in paid employment and vocational training.

You can get a guide from the Department for Education and Skills (DfES) to help you follow the regulations. The guide also suggests good practice for employers and employees in the workplace. The DfES website address is: www.dfes.gov.uk.

Again the Council is committed to the promotion of equal opportunity and this equality consideration will be built into the procurement process.

Employment Regulations

The Employment Equality (Religion or belief) Regulations, which came into force from 2 December 2003, made it unlawful to discriminate against workers because of religion or similar belief.

Religion or belief is defined as being any religion, religious belief or similar philosophical belief.

These regulations apply to vocational training and employment - including recruitment, terms and conditions, promotions, transfers, dismissals and training. They make it unlawful on the grounds of religion and belief to:-

- ❖ Treat anyone less favourably because of their religion and belief;
- ❖ Discriminate indirectly against anyone. That is apply provisions or practices which disadvantages people of a particular religion or belief unless it can be objectively justified;
- ❖ Subject someone to harassment;
- ❖ Victimise someone because they have made or intend to make a complain or allegation or have given or intend to give evidence in relation to a complaint of discrimination on the ground of religion and belief;
- ❖ Discriminate or harass someone in certain circumstances after the working relationship has ended.

There may be exceptions in very limited cases if there is a genuine occupational requirement for the worker to be of a particular religion or belief in order to do the job or comply with the religious or belief ethos of the organisation.

The Employment Equality (Sexual Orientation) Regulations, which became law on 1st December 2003, make it unlawful to discriminate in employment or training on grounds of sexual orientation.

The law means that lesbians, gay men and bisexuals are entitled to protection similar to those already provided for women, disabled and black and minority ethnic staff.

The Council is committed to ensuring that those employed by us as a contractor do not discriminate against their employees and thereby break the law outlined above. Further equality considerations will be built into the procurement process.

The Employment Equality (Age) Regulations 2006-08-23

These are new regulations that come into effect in the workplace from 1 October 2006.

The law will give new rights to workers and employers will have to incorporate changes into their HR policy and procedures.

The current upper age limit for unfair dismissal and redundancy rights is being removed. This means that older workers get the same rights to claim unfair dismissal or to receive a redundancy payment as younger workers.

Employees will have a statutory right to request working beyond compulsory retirement, which employers will have a 'duty to consider'. Employers must also give workers at least six months notice of their retirement date.

The Council therefore expects any potential contractor to ensure it acts within these regulations.

Detailed guidance on the laws can be found at www.acas.org.uk.

Working Time Regulations

The Working Time Regulations came in force in October 1998 but were amended in 2003 with effect from 1 August to extend working time measures.

In essence the basic rights and protections that the regulations provide are:-

- ❖ A limit of an average of 48 hours a week which a worker can be required to work (though workers can choose to work more if they want);
- ❖ A limit of an average of 8 hours work in 24 which night workers can be required to work;

- ❖ A right for night workers to receive free health assessments;
- ❖ A right to 11 hours rest a day;
- ❖ A right to a day off each week;
- ❖ A right to a in-work rest break if the working day is longer than 6 hours;
- ❖ A right to 4 weeks paid leave a year.

It should be noted that it is possible to opt out of the weekly working time limits in the UK.

Potential contractors are therefore expected to ensure that they comply with these regulations.

Further assistance on these matters can be obtained from www.dti.gov.uk.

Future Legislation

Contractors are advised that the government has promised to review employment legislation with a view to rationalisation and harmonisation.

Contractors are advised to keep themselves abreast of the law and its changes.

Workforce matters

The Council recognises the connection between quality of the contract, delivery and the handling of workforce matters. Good quality delivery depends on appropriately skilled and motivated workforces. Neglecting relevant workforce matters in order to drive down costs could have adverse effects on the desired quality and value for money.

Workforce matters in this context may includes (but not exclusively) issues around staff training, rates of pay and other terms and conditions on which the contractor employs its workforce and the contractors track record around industrial disputes.

This Council is particularly committed to the principle that employees working for contractors procured by the Council to provide services or works are to be treated 'no less favourably' than comparable Council employees in their terms and conditions. The Council may seek to insert a fair employment clause into the contract similar to that at appendix 1 to give this effect.

The Council does not wish to see procurement or outsourcing of services driving down terms and conditions of service for employees.

The Council will consider all tenders from contractors in so far as they are compatible with the Council's duty to achieve best value.

Externalisation of Services - TUPE

The Council currently provides a number of services via staff directly employed by it, e.g. printing, catering etc. However, the Council may decide not to run those services "in-house" and may decide to externalise them to competition.

In this instance, the Council will therefore have staff employed directly to undertake such services. If that service is externalised, then it may be that those staff transfer to the new contractor organisation who is to carry out the externalised service.

If this is the case, the Council will advise potential contractors as early as possible that staff could transfer and therefore the Transfer of Undertakings (Protection of Employment) Regulations 1981 as amended and 2006 (TUPE) may apply.

The TUPE Regulations are intended to safeguard an employee's rights when the business they are employed in is transferred to another organisation. The regulations protect pay, terms and conditions of staff being transferred and prevent these entitlements being changed without agreement. Further, the regulations provide transferred staff protection against unfair dismissal and stipulate that trade union recognition and collective agreements in force at the time of transfer must be maintained.

Whether TUPE applies is a matter of law to be decided on the facts of each case.

Potential contractors should ensure they understand and can manage their TUPE obligations, with no detriment to the terms and conditions of transferred employees.

Contractors should also be aware that Council complies with the statutory guidance entitled 'The Code of Practice on Workforce Matters in Local Authority Service Contracts' which obliges contractors to protect the pension rights of transferring staff.

Contractors may satisfy this obligation by seeking admission to the Local Authority Pension Scheme. Alternatively, the new contractor must offer membership of an alternative scheme which is certified as being 'broadly comparable' with the public service scheme.

Potential contractors should ensure they understand and can manage their pension obligations with no detriment to the transferring employees.

Appendix 1

Potential fair Employment Clause

- a) 'Each employee of the contractor who is at any time engaged in (the contract of work) shall be employed by the contractor at that time on terms and conditions of service which are when considered as a whole, no less favourable to that employee, than the terms and conditions of service which the Council would at that time afford on employee (engaged in equivalent work, or of equivalent seniority)'
- b) For the purposes of a) the phrase terms and conditions of service shall include but shall not be limited to, all provisions relating to salary, benefits, entitlements, hours of work, holiday rights and pension rights.'