

# Equality and Fairness in Procurement

## Guidance for Contractors

## 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 Preston and its communities. 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, sexual orientation, race (including colour, nationality, national or ethnic origin) religion and belief, disability, gender reassignment pregnancy/maternity and marital/civil partnership status.**

- **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;

- **Age equality**
- **Sex equality**
- **Sexual orientation equality**
- **Race equality**
- **Religion and belief equality**
- **Disability 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 Discrimination Act 1995 (as amended); contraventions of the Sex Discrimination Act 1975 (as amended), Equal pay Act 1970 or the Equality Act 2010 (please see separate note re this section)**

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;

- ❖ Equality Act 2010
- ❖ 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.

## Equality Act 2010

The Equality Act 2010 has important implications. It prohibits unlawful discrimination in all functions of the Council, including procurement.

The Equality Act 2010 gives the Council a clearer, more direct, positive legal duty to eliminate discrimination, advance equality of opportunity and to foster good relations.

Compliance with the Equality Act 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 the Council's behalf, the supplier is responsible for meeting the duty in respect of its public functions only.**

**Contractors must not discriminate unlawfully.**

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

**If you contract with the Council to provide services on the Council's behalf and those services are directly accessed by the public then the Council will**

**continuing accessibility of your services to the public. The Council will enforce this requirement in these circumstances by calling in 1:10 of every such contract in order to monitor compliance.**

## **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.

Please note that section 18 of the Local Government Act 1988 was repealed by the Equality Act 2010.

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

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

## **Equality and Human Rights Commission (EHRC)**

The Equalities Act 2010 is supported by codes of practice produced by the EHRC. Advice and assistance to employers in removing discrimination and providing equal opportunities can be obtained from the EHRC and their website [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## **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 5.6 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.businesslink.gov.uk](http://www.businesslink.gov.uk)

## **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 City 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.

'The Code of Practice on Workforce Matters in Local Authority Service Contracts' which obliges contractors to protect the pension rights of transferring staff was withdrawn by Central Government on 23<sup>rd</sup> March 2011 with immediate effect. The code remains in force for contracts that pre-date the withdrawal



## ***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 (enjoyed 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.'

## **Note on Exclusion from Participation**

Although the RRA, SDA etc have now been subsumed into the Equality act 2010, references to these acts need to remain as examples of where breaches may constitute grounds for exclusion. Employment and other civil cases are still being decided by tribunals and courts on the basis of previous legislation. Assuming we continue to work to the principle of asking about findings of unlawful discrimination in the previous three years, references to these Acts probably need to be retained until 2015 at the earliest.