

CENTRAL PROCUREMENT DIRECTORATE

PROCUREMENT GUIDANCE NOTE 03/04

SUBJECT: SOCIAL CONSIDERATIONS IN PUBLIC PROCUREMENT

1. Objective

- 1.1 The objective of this Guidance Note is to provide an outline of the range of possibilities for integrating social considerations into public procurement in Northern Ireland under the existing procurement rules.

Note: This guidance will need to be reviewed following the transposition of the consolidated EU procurement directives and the outcome of deliberations between the Equality Commission for Northern Ireland and Central Procurement Directorate on monitoring compliance with anti-discrimination legislation.

Note: In this Guidance Note the term ‘procurement rules’ refers to the legal requirements of the EC Procurement Directives, the EC Treaty and the UK Public Procurement Regulations.

2. Background

- 2.1 The aim of the procurement rules is to guarantee the attainment of the EC internal market policy of the free movement of goods, and the freedom of establishment and freedom to provide services in respect of public procurement contracts. The internal market policy can be pursued while at the same time integrating pursuit of other objectives

such as sustainable development, a concept which combines economic growth, social progress and respect for the environment.

- 2.2 Although the procurement rules do not contain specific provision on the pursuit of social policy goals within the framework of public procurement procedures they do not preclude the pursuit of social objectives. Therefore, there is a range of possibilities which, if properly pursued, make it possible to use public procurement to assist in attaining desired social objectives.
- 2.3 It should be remembered that all Community, international and national regulations, rules and provisions, which are applicable in the social field, apply fully during the performance of a public procurement contract following the award of the contract. Where necessary, these regulations, rules and provisions should be stated in the contract notice or contract documents.
- 2.4 The term 'social considerations' covers a very wide range of issues and fields. It can mean measures to ensure compliance with human rights, with the principle of equality of treatment and non-discrimination, and with national legislation on social affairs such as health and safety at work and employment law.
- 2.5 Social objectives can include, for example:
 - implementation, during the execution of the contract, of measures that are designed to promote equality between men and women, and ethnic, religious or racial diversity. (In the case of service contracts, this might, for example, involve establishing a policy aimed at promoting equality of opportunity in the workplace, through instructions given to the persons in charge of recruitment and promotion, or staff training. It may also involve the appointment by the contractor of a person responsible for implementing such a policy in the workplace);

- recruitment of a number of disabled persons over and above what is laid down by the UK legislation or that of the Member State of the successful bidder;
- compliance with the Disability Discrimination Act 1995 so that, where possible, works contracts take account of the needs of disabled persons by incorporating in the design and structure, appropriate features.

3. Selecting social policies for integration into public procurement

3.1 The question of how best to introduce social policies, and which policies should be selected for integration into the public procurement process, is crucial. Several principles, which contracting authorities can use to guide the selection and introduction, are outlined below:

- ❖ Not every public policy can, or should be, taken into account in every procurement. Procurement resources should be concentrated on delivering the most effective policy goals, which can also achieve best value for money, so as not to overload the system.
- ❖ Transparency of requirements should be ensured. Potential suppliers/service providers should understand clearly what categories of information and service standards would be expected. Contracting authorities must provide adequate, accurate and timely information at all stages of the procurement process. Contracting authorities should also provide a clear written statement on the tenderer/tender evaluation criteria, either in the published notice seeking tender offers, or in the invitation to tender.
- ❖ Not all social policies should be selected for integration into public procurement. Choosing which Government policies should be

integrated will need to be carefully considered and justified, with criteria clearly specified. Policies should be selected to achieve the best results. Sometimes this may simply mean ensuring that procurement decisions do not cut across other policies negatively, or in some cases that public procurement should be harnessed to help achieve other policy objectives.

- ❖ Social policies should be selected which can become operational within the contract and are consistent with other values of the procurement process, in particular the principles of transparency, clarity, integrity, fair-dealing etc.
- ❖ Social policies selected must also be justifiable in terms of any additional expenditure incurred as a result of their inclusion in the contract.

4. Subject Matter/Technical Specifications

- 4.1 The first opportunity for taking social considerations into account is the phase just before the procurement rules become applicable, i.e. when drafting the specification, or subject matter of the contract. At this stage the contracting authority has the broadest scope to influence the pursuit of social objectives. This can be achieved by specifying contract requirements aimed at assisting the achievement of social objectives, or requiring the contractor to comply with clauses relating to the manner in which the contract is to be performed. These are permissible provided that they are consistent with Community law and, in particular, that they do not result in discrimination direct or indirect against tenderers from other member states. To avoid contravening equal opportunities legislation or placing non-local contractors at a disadvantage, contracting authorities are encouraged to define the intended beneficiaries in general terms, for example 'unemployed people', 'trainees' or 'young people'.

- 4.2 The possibilities for taking social considerations into account will vary from one type of contract to another. Public contracts for works and services, for which it is possible to lay down the manner in which the contract is to be performed, provide the best opportunity for a contracting authority to take account of certain social concerns, such as reducing unemployment. These contracts may have several objectives only one of which is social. For example NICS departments are currently piloting a scheme to encourage employers to provide an Unemployment Utilisation Plan to recruit and train unemployed people, who have been unemployed for at least 3 months, as part of the their tender offer. The Utilisation Plan is considered during the assessment of tenders only when two economically advantageous tenders are identified as equivalent. The process integrating this into the procurement process is explained further in 6.7 below.
- 4.3 In the case of supply contracts, apart from the choice of what is to be procured, the possibilities to integrate social considerations into the procurement may be more limited. However, the technical specification for goods may have a social connotation, for example, the purchase of IT equipment or services adapted to the needs of the visually impaired.
- 4.4 It should be noted that service contracts which have the sole purpose of achieving a social objective relate, in most cases, to services listed as Category B in the UK Public Service Contracts Regulations 1993 (Amended SI 2000 No. 2009) and are therefore not subject to the detailed procedural rules on selection and award criteria laid down by the procurement rules. For example, health and social services, educational and vocational training services, or recreational and cultural services are subject only to the provision of the public procurement rules on technical specifications and the publication of contract award notices in the OJEU. However, they remain subject to the provisions of the EC Treaty, which means, among other things, that the procurement process must have a sufficient degree of

transparency, and respect for the principle non-discrimination of tenderers from other member states.

4.5 Similarly public procurement contracts, which have a value below the threshold for regulated competition, can be used to pursue social objectives. For example the 'Special Contract Arrangements' (SCA), a scheme administered by the Department for Employment and Learning, is aimed at assisting employers of several disabled people in the European Economic Area to compete for contracts from UK Government departments and agencies. The SCA requires contracting authorities to give special consideration to buying products and services from suppliers registered with the scheme. The scheme also involves a system known as "offer back" under which a registered supplier whose tender is unacceptable on price alone (ie quality, volume and delivery are acceptable) should be given an opportunity to submit a revised tender for part or all of a contract. If on such "offer back" the registered supplier is able to match the best offer, its revised tender should be accepted.

4.6 A contracting authority, when specifying the goods and services that are to be bought, can choose to buy goods, services or works which correspond to its concerns as regards social policy, provided that such choice does not result in restricted access to the contract in question, to the detriment of tenderers from other member states.

5. Selection of Tenderers (Restricted Procedure)

5.1 The procurement rules essentially contain two sets of rules on selection.

5.2 First, they contain an exhaustive list of cases in which the personal situation of a tenderer may lead to its exclusion from a procurement procedure. These cases concern bankruptcy, conviction of an offence,

grave professional misconduct or non-payment of statutory contributions.

- 5.3 The Fair Employment and Treatment Order 1998 makes it unlawful to discriminate against someone on the grounds of religious or political belief, and requires employers to ensure “fair participation” of both communities in their workforces. Employers who are in default of the legislation through failure to register with the Equality Commission NI or for not submitting monitoring returns face penalties as well economic sanctions such as the loss of Government grants and exclusion from public procurement contracts. Therefore, companies in default of this social legislation can be excluded from the procurement process.
- 5.4 Second, the procurement rules also provide that the suitability of tenderers must be assessed on the basis of their economic, financial or technical capacity. They set out an exhaustive and mandatory list of qualitative selection criteria, which can be used to justify the choice of tenderers.
- 5.5 With regard to economic and financial standing, they set out a number of references, which can be provided to prove the good standing of tenderers in respect of a given contract. This list of references is not exhaustive. However, any other reference required must be necessary from an objective point of view, to prove the economic and financial standing of tenderers and it is therefore, generally not possible for social considerations to be included in such references.
- 5.6 The procurement rules contain an exhaustive list of references or evidence that candidates or tenderers can be required to provide in order to demonstrate their technical capability in view of the nature, quantity and purpose of the contract in question.
- 5.7 Therefore, where social considerations have a direct link to the subject matter of the contract in question (for example, where they have been

included as an element of the specification and as a condition of the contract), a contracting authority can require references concerning the tenderers' experience and know-how in the social field concerned for the purpose of assessing the tenderers' technical capability/capacity to properly perform the contract. Of all the references listed exhaustively in the procurement rules for establishing the technical capability of a tenderer, the following are those which might concern social considerations in certain cases:

- a list of projects completed in the previous five years, accompanied by certificates of due performance for the most important projects, or a list of the major services provided in the previous three years;
- a description of the supplier's technical facilities, and their measures for ensuring quality and study and research facilities; or
- a statement of the technicians or technical bodies which the candidates can call upon for executing the contract, whether or not they belong to the firm, especially those responsible for quality control.

5.8 Tenderers should not be asked about their general social policies. Nor should they be asked to employ a certain percentage of local people.

6. Tender Evaluation/Contract Award

6.1 It should be noted that the selection of tenderers and tender evaluation are two distinct operations that are governed by separate rules. The procurement rules provide two criteria for the award of public contracts. These are either the 'lowest price' or 'the most economically advantageous' tender.

- 6.2 As a general rule, the procurement rules impose two conditions with regard to criteria used for determining the most economically advantageous tender. Firstly, the principle of non-discrimination has to be observed. Secondly, the criteria used should generate an economic advantage for the contracting authority. When a contract is to be awarded to the most economically advantageous tender, the contract documents or notice should set out all the criteria, where possible in descending order of importance, that will be used when evaluating tenders. No other criteria may be used except where two or more tenders have been assessed as equivalent against the criteria for most economically advantageous. In this circumstance an additional criterion relating to a social policy may be used as the determining factor if the contracting authority has declared this in the OJEU notice calling for competition. (See 6.7 below)
- 6.3 The common factor shared by all criteria used for evaluation of offers is that they must concern the nature of the work, which is the subject matter of the contract or the manner in which it is carried out. They must permit the contracting authority to compare tenders in an objective way, in order to determine which tender best meets its needs in respect of a given contract. An award criterion must allow the intrinsic (essential) qualities of a product or service to be assessed.
- 6.4 Social criteria are not included among the various criteria given as examples in the public procurement rules. However, if the term “social criterion” is construed, for example, as a criterion that makes it possible to evaluate, for example, the quality of a service intended for a given category of disadvantaged persons, such a criterion may legitimately be used if it assists in the choice of the most economically advantageous tender within the meaning of the directives. An example would be where a contract to provide computer services to all the employees of a local authority, a criterion relating to the method proposed by the tenderer to ensure, at all times and in a satisfactory

fashion, a quality service which meets the needs of any disabled person, may, in principle, be one of the criteria to be taken into account in determining the most economically advantageous tender. Therefore, criteria involving social considerations may be used to determine the most economically advantageous tender, where they provide an economic advantage for the contracting authority which is linked to the product or service which is the subject-matter of the contract.

- 6.5 The question arises whether the concept of “most economically advantageous tender” implies that each award criterion has to provide an economic advantage which directly benefits the contracting authority, or if it is sufficient, that each criterion has to be measurable in economic terms, without the requirement that it directly provides an economic advantage for the contracting authority in the given contract.
- 6.6 This question was answered by the ECJ in case-513/99 (the Finnish Bus Case). Although this judgment concerned a question relating to the environment, by analogy the same principles apply in respect of the use of social considerations. The case involved the use of ecological criteria, whereby additional points were awarded to tenders, which offered buses with emissions and noise levels below a predetermined ceiling. The Court held that, where a contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender, in accordance with EU procurement law, it may take criteria relating to the preservation of the environment into consideration provided they are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the tender documentation or the tender notice, and comply with all fundamental principles of community law, in particular the principle of non-discrimination.
- 6.7 An important development in the area of award criteria is as the result of a judgment of the ECJ in Case C-255/98, Commission of the European Communities v. French Republic (the Nord-pas-de-calais

case), regarding school buildings. The Court of Justice held that contracting authorities can base the award of a contract on a condition related to the combating of unemployment, provided that this condition was in line with all the fundamental principles of Community law - This condition was regarded by the contracting authority in question as additional, non-determining criteria and was only applied after tenders were compared from a purely economic point of view. The Court - stated that the application of such a criterion must not have any direct or indirect impact on tenderers submitting bids from other Member States of the EC and they must be explicitly mentioned in the contract notice so that potential contractors are able to ascertain that such a condition exists. The European Commission has subsequently interpreted the case as permitting the use of such criteria but only where the bids are equal in other respects. The Unemployed Pilot Scheme highlighted in 4.2 above is using this principle as the basis to operate the scheme. **(For more information refer to Central Procurement Directorate Guidance 01/03.)**

7. Post Contract Award

- 7.1 Contracting authorities can, as previously discussed in section 4 above, impose contractual clauses relating to the manner in which a contract will be executed. The execution phase of public procurement contracts is not currently regulated by the procurement rules.
- 7.2 Procurement staff should ensure that during the execution of the contract that the contractor is fulfilling all contractual obligations. If this is to be the responsibility of the contracting authority rather than a centre of procurement expertise, they should be made fully aware of their responsibilities to ensure the contractor is in full compliance with all the conditions of the contract. Effective systems must be in place to monitor contractual compliance and measure the extent to which social objectives have been delivered.

- 7.3 A positive working relationship, or partnership arrangement, with the contractor may provide an opportunity to encourage the contractor to go beyond the minimum requirements of the contract and to increase the level of success in relation to the social objectives i.e. increase the percentage of unemployed, or disabled persons that are employed. It must be stressed that this cannot be enforced unless it is in the contract and any 'partnership arrangement' must not be anti-competitive or liable to result in preferences for domestic bidders.

8. Section 75 of the Northern Ireland Act 1998

- 8.1 Contracting authorities are reminded of the importance of section 75 of the Northern Ireland Act 1998, which requires public authorities to have due regard to equality of opportunity in carrying out their procurement function.

9. Summary

- 9.1 The procurement rules currently in force contain no specific provision on the pursuit of social policy goals within the frameworks of public procurement procedures. However there is a range of possibilities, which if properly pursued, should make it possible to integrate social consideration into public procurement to attain desired objectives.
- 9.2 The selection and introduction of social policies into public procurement should follow the principles outlined in Section 2, which are aimed at guiding this process. Policies should be selected which are achievable, justifiable, deliver best value for money and are legally compliant with existing Community law.
- 9.3 The best opportunity for integrating social consideration into public procurement is the phase of the procurement process before the procurement regulations become applicable i.e. when drafting the specification, or subject matter of the contract. At this stage the

contracting authority can specify contract requirements aimed at assisting the achievement of social objectives, or requiring the contractor to comply with clauses relating to the manner in which the contract is to be performed.

9.4 When using the restricted process, to select tenderers, social considerations can only be considered where they have a direct link to the subject matter of the contract in question. A tenderer can be required to submit to the contracting authority references concerning their experience and know-how in the social field concerned for the purposes of assessing the tenderers technical capability/capacity to perform the contract.

9.5 There is some limited scope for using social consideration as an award criterion - which is linked to the product, service, or subject matter of the contract provided that they do not provide an unrestricted freedom of choice to the contracting authority.

9.6 Contracting authorities must ensure that the contractor fulfils all contractual obligations and should ensure that appropriate monitoring systems are used to measure the extent to which social objectives have been delivered. A positive working relationship, or partnership arrangement, with the contractor may provide an opportunity to encourage the contractor to go beyond the minimum requirements of the contract in respect of social consideration.

9.7 Any queries relating to this guidance should be directed to:

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