

Incorporating Social Considerations in Public Procurement

Introduction and Background

Recognising that sustainability is an important issue to both central and local government, public procurement must play its part and address social issues where possible. Regulation 30 of the Public Contracts Regulations 2006 (**the Regulations**) specifically mentions "environmental characteristics" as an element which may be relevant to assessing the most economically advantageous tender (**MEAT**). Environmental considerations can be reconciled with the evaluation of whole life cost and quality issues i.e. the basis upon which an award should be made. However, generally there is less scope to incorporate "social" criteria in the public procurement process as they can be more difficult to link to the subject-matter of the contract. Nonetheless, there is scope to do so, depending on the stage of the procurement process, and we have set out the legal position below following European Commission and OGC Guidance.

Executive Summary

There is scope to include social criteria in compliance with the Regulations depending on the stage of the procurement process. Key points are as follows:

- the social issues must be relevant to the subject of the contract;
- it is best to address social issues at the beginning of the procurement process as there is less scope to introduce social criteria at the selection and award stages;
- social issues must be compliant with the principles derived from the EC Treaty, for example, maintaining a level playing field for suppliers in the UK and other member states i.e. the principles of equal treatment and non-discrimination; and
- social issues to be included in procurement must be consistent with government's value-for-money policy and take account of whole-life costs.

The Legal Position

Recital 1 of the European Directive (2004/18/EC) (**the Directive**) states that the Directive is based on European Court of Justice case-law, in particular case-law on award criteria, and that it:

“...clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned...” and comply with the fundamental principles derived from the EC Treaty i.e. equal treatment, non-discrimination, transparency etc.

Further, Recital 46 of the Directive provides that:

“In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled... a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs- defined in the specifications of the contract- of particular disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong”.

Therefore, under the EC Treaty, it would be discriminatory to require “local” labour in the specifications and/or contract conditions. As issues also need to be relevant to the subject matter of the contract, to exclude, at the selection stage, a candidate for not being willing or able to meet the authority’s own race, gender or disability policies (where those policies go beyond what is required to perform the contract) is unlikely to square with the EU rules. As stated above, the key principles are relevance and non-discrimination.

To a certain extent, social issues can be relevant to all stages. However, they should be addressed at the start i.e. in defining the requirement and drafting the specification, so that they become part of the subject of the contract. In addition, terms and conditions is another means by which social factors can be incorporated in contract performance. However, the selection and award stages provide less scope to introduce social issues. We have outlined below the potential for inclusion of social issues at the different stages of the procurement process.

Please note, social issues should not necessarily be included in every contract - procurers must still meet their value for money and EU obligations in awarding contracts.

Stages of the Procurement Process

1. Pre- Procurement

This is the point at which there is most scope to consider social issues- when the procuring entity is identifying the need and developing the business case. For example, an understanding of government social policy requirements is key to

identifying which are relevant to a particular procurement e.g. cultural and equality issues.

When identifying the need, contracting authorities should also consult stakeholders such as customers and interest groups to help them understand what is needed i.e. conduct market sounding. However, this should not be done in a manner which treats certain candidates more favourably than others i.e. the principles of non-discrimination and equal treatment should be borne in mind.

In addition, ensuring that SMEs have equal access to public contracts is another example of how procuring entities can aim to meet the social agenda.

2. Specification Stage

It is possible for social considerations to be included in the specification as long as the requirement is central to the subject of the procurement and consistent with the Regulations and principles derived from the EC Treaty.

For example, in an ethnically diverse area, it is necessary to ensure information about the relevant services is available to all ethnic groups. Therefore it is legally permissible to include requirements for staff working on a helpdesk to be fluent in languages other than English. There is also a provision in the Regulations giving procuring entities the option to reserve contracts for organisations providing supported employment opportunities to disabled people.

Social conditions reflected at this stage should be transparent and non-discriminatory.

3. Selection Stage

This is the point at which candidates are selected, or not, to participate in the next stage of the procurement process i.e. selected to tender.

First, candidates can be *excluded* on certain grounds set out in the Regulations. These grounds include prior convictions for offences concerning professional misconduct, or a finding of grave professional misconduct and such grounds may relate to social matters e.g. breaches of employment legislation.

Second, in terms of *selection*, candidates can only be selected on the basis of economic and financial standing and technical capacity. The Regulations contain an exhaustive list of evidence that candidates can be required to provide in order to demonstrate their technical capability- the objective is to choose candidates most able to carry out the contract and therefore requirements must be directly relevant to the subject matter of the contract. Some of these can be of a social nature. For example, health and safety provision may impact on a contractor's capability to perform a contract.

Provided it is relevant in assessing technical capacity, contracting authorities can also examine candidates' track records for delivering similar contracts- if candidates have failed to fulfil social requirements of a previous contract, this can be taken into account at this stage.

4. Award Stage

The Regulations permit a contract to be awarded to the tenderer offering either the lowest price or the most economically advantageous tender. A number of examples of permissible award criteria are set out in the Regulations, including quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion. These do not explicitly include social criteria, however could have a social dimension. Such social considerations may be included provided the following are met (as per the Directive):

- criteria must be relevant to the subject matter of the contract;
- criteria should be from the point of view of the contracting authority;
- criteria must comply with the principles derived from the EC Treaty; and
- be distinct from the earlier selection criteria.

5. Performance of the Contract

In accordance with Article 26 of the Directive:

“contracting authorities may lay down special conditions relation to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations”.

Recital 33 of the Directive also provides further guidance:

“Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people ex experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements- applicable during performance of the contract- to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.”

For example, in a construction procurement, a contracting authority may consider including a targeted recruitment and training programme in the conditions of contract e.g. apprenticeships.

However, when including such conditions care must be taken to ensure that they do not discriminate either directly or indirectly against national or non-national tenderers and that they maintain value for money.