

Social and environmental issues in procurement - top ten tips



Social and environmental issues have come to the forefront of procurement agendas for a variety of reasons. This paper explains some of them.



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Legal Briefing from the Public Sector and Projects Group

Traditionally, economic and qualitative factors are foremost to be taken into account when entering into contracts. Issues that are outside of the commercial arena are however now becoming increasingly important: non-economic factors, for example, where does the wood come from that we make our paper out of; how environmentally friendly are our contractors and suppliers; and are we benefiting our local economy in the wider sense when we procure?

Social and environmental issues have come to the forefront of procurement agendas for a variety of reasons including: economic climate; environmental agendas and government policy, but their inclusion in the procurement process has been an issue many public authorities have avoided due to its chequered history in the courts and uncertain legal footing.

The legal basis for incorporating social and environmental issues into the procurement process became a little clearer with the specific mention of non-economic factors in both Directive 2004/18/EC (on the coordination of procedures for the award of public works supply contracts and service contracts) and the UK implementing legislation the Public Contract Regulations 2006.

Until these pieces of legislation came into force, local authorities tussled with their duty to promote the social, environmental and economic well-being of their area (by way of its [sustainable] community strategy and/or its use of the well-being power) against procurement legislation and the guidance on the extent to which such issues could be incorporated into the procurement process from the European court of Justice. Now we have a firmer legal footing, if such issues are included in the procurement process in an appropriate and considered manner, they can be legally incorporated into contracts and help further an organisation's sustainable procurement policies.

Below are our top ten considerations for incorporating social and environmental considerations into the procurement process.

Top Ten Tips

1. Always ensure that any social and environmental considerations you wish to select or evaluate on in a public procurement process are linked to the subject matter of the contract. If not, such considerations will fall foul of the procurement regulations, for example, it may be appropriate to evaluate the percentage of recycled material in goods to be supplied, but not whether a supplier uses recycled paper in its offices, as this is not linked to the subject matter of the contract.
2. Expressly mention any social and environmental considerations you intend to include in the procurement in the contract notice and tender documents.
3. Think about how to include Small and Medium-sized Enterprises (**SMEs**) and the local supply chain. Consider specifying where contracts are particularly suitable for SMEs, and split larger contracts into lots to provide SMEs with opportunities to bid for bite-size chunks rather than a large unmanageable contract. Where splitting the contract into lots is not possible, or would prove unaffordable or cumbersome, highlight the possibility of SME bids as part of a consortia.

4. Consider local and national policies. The considerations you include in a procurement process should be relevant to your particular needs. Review strategies (for example, sustainable procurement strategy / sustainable community strategy) regularly to ensure they reflect your main priorities and amend if needed. Ensure references to your policies (and compliance with them) are included throughout the procurement process.

5. Be open-minded. Do not be too prescriptive as to how the authority wants a specific outcome to be achieved. By focusing on an outcome or a desired level of functionality, public authorities can give suppliers the opportunity to be innovative and to suggest solutions with added social and environmental impact. Think about allowing variant bids and ask tenderers to think about the inclusion of social and environmental considerations in such variant bids.

6. If you need or want to specify a particular national or international quality standard (for example ISO or DIN) always use the words 'or equivalent'. This allows potential bidders, who have not attained the specified mark, to show they can meet your required standard; it also complies with the Treaty principle of non-discrimination.

7. Award criteria must not confer an unrestricted freedom of choice on the authority. Award criteria must 'restrict freedom of choice' by setting specific, product-related and measurable criteria, or, as the European Court of Justice put it, "adequately specific and objectively quantifiable" criteria.

8. Consider whether you can enter into voluntary commitments and voluntary arrangements with contractors and suppliers (both new and existing) to ensure that they understand other considerations that are important to the authority without these being expressly included in any procurement process. Although not legally binding and therefore unenforceable, contractors are unlikely to act differently once signed up as they will not want to damage their reputation. The difficulty comes when asking contractors to sign up – this cannot be a requirement on which award is based.

9. Partnership. Try to establish a working partnership relationship with the successful bidder and you are more likely to be able to ask the private sector partner to work with you in achieving your social and environmental agendas. Whilst not requirements of the contract, by working together you may be able to encourage the contractor to act in certain ways and get the results you want.

10. As with any procurement process, ensure compliance with the fundamental principles of Community law, in particular the principles of non-discrimination, transparency and proportionality. Know the Public Contracts Regulations 2006 and understand their limitations. Ensure you seek specific legal advice so as to not fall foul of the procurement rules.

Whilst the Procurement regime is often cited as a barrier to taking social and environmental issues into account when procuring, public authorities can incorporate various considerations within the procurement processes in order to ensure that the outcome is aligned with their social and environmental agendas. Although public procurement is a complex area which requires considered advice, there are permissive provisions within the EU procurement regime and other UK legislation which can be utilised to the advantage of public authorities and the public alike.

<http://www.walkermorris.co.uk/including-social-and-environmental-issues-procurement-top-ten-tips>

Environmental criteria:

- compulsory technical specifications
- award criteria
- conditions for the performance of the contract (ie. contract clauses).

They can take many different environmental aspects into account:

- manufacturing methods
- characteristics
- contents
- emissions
- energy consumption
- disassembly
- waste and so on.

The origin or background for the criteria chosen can vary; stakeholder guidelines, recognised international/national standards, eco-labels, research etc. What they all have in common is that they have to fulfil some basic principles:

Proportionality – the criteria have to be in balance with the goal / target

Non-discriminatory – the criteria must not favour or be unfair to suppliers or products from other countries or regions

Equality – all tenderers must be treated equally

Transparency / predictability - All competitors must be treated equally, given the same opportunity, be supplied with the same information, be subjected to the same test and undergo the same evaluation process as all other bidders. The criteria for selection must be established at the outset and remain consistent throughout.

All criteria must be **Linked to the subject matter of the contract** and **consistent with other requirements** and specifications in the tender documents

Award criteria must be **comparable and possible to evaluate**

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Contracting authorities are gearing up for implementation of the Public Services (Social Value) Act 2012. Queenie Que addresses some of the issues raised.

The Public Services (Social Value) Act 2012 received Royal Assent on 8 March 2012 and is due to be implemented in January 2013. This Act is a rare example of a piece of legislation being introduced under the private member's bill procedure and requires public bodies in England and Wales to consider how the procurement of services may improve the economic, social and environmental well-being of the relevant area.

We asked authorities whether their tenders already incorporate questions designed to deal with this positive duty. Interestingly, the responses were almost equally divided between 'Yes' and 'No'.

Who is covered?

“We are not a local authority.”

In addition to local authorities, all relevant procuring entities – including arm’s length organisations and housing associations – will also need to consider the implications of the Act. This is because the Act applies to all public bodies that fall within the definition of a ‘contracting authority’ under the Public Contracts Regulations 2006, as amended.

When to consider the issue

“Our tenders do not contain this question, but these issues are taken into consideration through the preparation of the business case and development of specification.”

The Act will require public bodies to take into account economic, social and environmental well-being considerations in connection with public services contracts as part of their pre-procurement deliberations.

It is therefore appropriate for authorities to implement a procedure which actively considers the issues to be considered under the Act before a tender process is commenced. The authority can then decide on a suitable approach and consider how economic, social and environmental issues may be addressed in procurement. Authorities should keep a good record and a full audit trail demonstrating that the duties under the Act have been properly discharged.

On a case-by-case basis

“This is currently dealt with on a tender-by-tender basis depending on the nature of the contract, so [questions] are sometimes included but not at present as standard inclusions.”

We agree that it will be important to consider the application of the Act on a case-by-case basis. The Act applies when an authority proposes or makes arrangements to procure the provision of services and does not apply to procurement of works or supplies contracts where there are no services provisions involved.

The Act applies to all scales and types of procurement for services, so authorities will need to assess the extent to which it is appropriate to encourage economic, social and environmental well-being considerations. Different considerations will be appropriate for different services. Also, a suitable consideration for an internal procurement process may not be lawful for an OJEU procurement process.

The Act and EU rules

“We are currently considering how requirements such as local labour can be enforceable within the constraints of existing legislation.”

While the Act encourages economic, social and environmental well-being considerations to be taken into account, the emphasis should be that authorities may only do so within the context of existing constraints emanating from the EU rules.

The EU procurement regime already permits social issues to play a part in public procurement, but this is subject to a number of significant controls and limitations. Authorities will therefore still face the same difficulties to implement local labour clauses. The Act should not be misconstrued as permitting authorities a broad scope to include generic economic, social and environmental well-being considerations where these are not relevant to the subject matter of the contract.

Link to the subject matter

“Only where this is relevant to the subject matter of the contract.”

In order to comply with EU rules, it is a requirement that considerations may only be included if they are linked to the subject matter of the contract and that the principles of value for money and equal access for suppliers are observed. The Act should not be misinterpreted to extend the scope to set unrelated specifications or criteria in order to achieve economic, social and environmental policy outcomes.

Restrictions imposed by EU rules are to ensure all economic, social and environmental well-being considerations to be taken into account remain relevant and proportionate to the contract requirements so as not to risk distorting the outcome of the competition by any undue emphasis given to them.

The Act will require procuring entities to actively consider if there are economic, social and environmental well-being issues in connection with the procurement of public services contracts. To be ready and compliant with the Act by its full implementation date of 1 January 2013, relevant public bodies should review their internal procurement policy and adopt a compliant approach to deal with the positive duty imposed.

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http://localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=12476%3Aknow-your-duty&catid=53&Itemid=142

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