

Equality and Human Rights Commission response to the Economy, Infrastructure and Skills Committee's consultation on public procurement in the foundational economy

Consultation details

Title of consultation: Public procurement in the foundational economy

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Executive summary

The Commission welcomes the opportunity to respond to the Committee's Inquiry into public procurement in the foundational economy.

The Commission would welcome the Committee's consideration of equality and human rights as part of the Inquiry.

The 'general duty' of the Public Sector Equality Duty aims to ensure that public authorities and those carrying out a public function consider how they can positively contribute to a fairer society through advancing equality and good relations in their day-to-day activities.

Most devolved public authorities in Wales covered by the general duty are also covered by the specific duties. The specific duties set out the steps that listed bodies in Wales must take that will help to demonstrate that they are meeting the general duty. One of the 'specific duties' relates specifically to procurement. When procuring works, goods or services from other organisations on the basis of a relevant agreement, a listed body in Wales must:

- have due regard to whether it would be appropriate for the award criteria for that contract to include considerations to help meet the general duty
- have due regard to whether it would be appropriate to stipulate conditions relating to the performance of the contract to help meet the three aims of the general duty.

Public authorities will need to have 'due regard' at all stages of the procurement process to the need to advance equality. For example:

- advertising and selecting who to invite to tender
- drafting the invitation to tender and evaluation criteria
- contract specifications and conditions
- monitoring, managing and enforcing contracts.

A public authority remains responsible for meeting the general duty even where relevant works or services are contracted out to an external supplier. It is important to build equality considerations into procurement processes.

The Commission would welcome any recommendations of the Committee's regarding public procurement to include improving public authorities' understanding of and ability to comply with the public procurement specific duty, and to use procurement towards the aims of the general duty.

Consultation response

The Commission welcomes the opportunity to respond to the Committee's Inquiry into public procurement in the foundational economy.

Our response draws to the Committee's attention the existing regulations relevant to procurement under the Equality Act 2010, particularly the Public Sector Equality Duty and its specific duty in Wales regarding procurement. The Commission would welcome the Committee's consideration of equality and human rights as part of the Inquiry.

Public Sector Equality Duty

The 'general duty' of the Public Sector Equality Duty aims to ensure that public authorities and those carrying out a public function consider how they can positively contribute to a fairer society through advancing equality and good relations in their day-to-day activities. The duty ensures that equality considerations are built into the design of policies and the delivery of services and that they are kept under review. This will achieve better outcomes for all. Public bodies are required to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct that is prohibited by the Act.
- advance equality of opportunity between people who share a relevant protected characteristic and those who do not.
- foster good relations between people who share a protected characteristic and those who do not. The guidance refers to these three elements as the three 'aims' of the general duty and so when we discuss the general duty we mean all three aims.

The general duty covers the following protected characteristics: Age, Disability, Gender reassignment, Pregnancy and maternity, Race – including ethnic or national origin, colour or nationality, Religion or belief – including lack of belief, Sex and Sexual orientation. It applies to marriage and civil partnership, but only in respect of the requirement to eliminate discrimination in employment.

The [Equality Act 2010 states](#) that

- (1) Where an authority that is a contracting authority proposes to enter into a relevant agreement on the basis of an offer which is the most economically advantageous it must have due regard to whether the award criteria should include considerations relevant to its performance of the general duty.

- (2) Where an authority that is a contracting authority proposes to stipulate conditions relating to the performance of a relevant agreement it must have due regard to whether the conditions should include considerations relevant to its performance of the general duty.

Specific Duties in Wales – what the duty requires on procurement

Most devolved public authorities in Wales covered by the general duty are also covered by the specific duties. The specific duties set out the steps that listed bodies in Wales must take that will help to demonstrate that they are meeting the general duty. One of the [‘specific duties’ relates specifically to procurement](#). The Commission has [detailed guidance on the procurement duty](#). This sets out that:

When procuring works, goods or services from other organisations on the basis of a relevant agreement, a listed body in Wales must:

- have due regard to whether it would be appropriate for the award criteria for that contract to include considerations to help meet the general duty
- have due regard to whether it would be appropriate to stipulate conditions relating to the performance of the contract to help meet the three aims of the general duty.

Relevant agreements

The specific duty on procurement only applies to contractual arrangements that are ‘relevant agreements’, which in this context means either the award of a ‘public contract’ or the conclusion of a ‘framework agreement’, both of which are regulated by the Public Sector Directive (Directive 2004/18/EC).

The Directive regulates arrangements that are on or above specified EU thresholds. The thresholds are revised every two years and different thresholds apply according to the nature of the public contract, particularly whether the contract relates to works or to goods and services. Thresholds for goods or services differ according to the nature of contracting authority.

Public authorities covered by the general duty

In any event, the requirement to meet the general duty applies to all procurement regardless of the value of the contract. Even where, for example, the provision of a service is contracted out by a public authority to another organisation, the public authority remains responsible for meeting the general duty. The organisation actually

carrying out the work or providing the goods or services may be exercising a public function. If so, it will itself be covered by the general duty to that extent.

Overview of procurement requirements

A public authority remains responsible for meeting the general duty even where relevant works or services are contracted out to an external supplier. It is important to build equality considerations into procurement processes. The general duty applies to anyone who is carrying out a public function. Where an external body is being contracted to provide a relevant public service (including, in some cases, providing goods or works) it will be necessary to make them aware of the responsibilities that may arise under the public sector equality duty and to assist them appropriately. This may involve being clear about the need to address a range of needs and to mitigate disadvantage. Public authorities will need to have 'due regard' at all stages of the procurement process to the need to advance equality. For example:

- advertising and selecting who to invite to tender
- drafting the invitation to tender and evaluation criteria
- contract specifications and conditions
- monitoring, managing and enforcing contracts.

An authority will need to assess its procurement policies and strategies to consider whether they adequately meet the aims of the duty. Policies and strategies should cover planning and carrying out procurement and the subsequent management and enforcement of contracts.

The Commission's monitoring of public bodies' performance on procurement

The Commission's recent monitoring of listed public bodies' performance against the public procurement specific duty showed that there is a gap in knowledge and understanding of how and when to effectively build equality into procurement processes.

The Commission would welcome any recommendations of the Committee's regarding public procurement to include improving public authorities' understanding of and ability to comply with the public procurement specific duty, and to use procurement towards the aims of the general duty. The Welsh Government has committed to reviewing and strengthening the Welsh regulations (the specific duties) for the public sector equality duty. This would provide an opportunity to ensure the procurement duty is used most effectively.

Equality and Human Rights Commission

The Equality and Human Rights Commission is Great Britain's national equality body and has been awarded an 'A' status as a National Human Rights Institution (NHRI) by the United Nations.

Our job is to help make Britain fairer. We do this by safeguarding and enforcing the laws that protect people's rights to fairness, dignity and respect.

As a statutory non-departmental public body established by the Equality Act 2006, the Commission operates independently. We aim to be an expert and authoritative organisation that is a centre of excellence for evidence, analysis and equality and human rights law. We also aspire to be an essential point of contact for policy makers, public bodies and business.

We use our unique powers to challenge discrimination, promote equality of opportunity and protect human rights. We work with other organisations and individuals to achieve our aims, but are ready to take tough action against those who abuse the rights of others.