

Social Considerations
in Public Procurement



Social



ANNEX III

Six case studies on SRPP Practices in the EU Member States



Directorate General
for Employment,
Social Affairs and
Equal Opportunities



International Training Centre

Decent Work

A case study on West Midlands Common Standards, Wolverhampton City Council, UK

This report is based on library and web-based research, together with information from an extensive interview with Alan Butt, the Senior Contractors Assessment Officer of Wolverhampton City Council, and currently chair of the West Midlands Forum Steering Group.

1. Background

1.1 Origins of the Common Standard

The Local Government Act 1988 substantially restricted the use of public procurement for social policy purposes by local authorities. Section 17 provided that it was the duty of every relevant public authority (in practice local authorities) to exercise its functions in relation to its public supply or works contracts "without reference to matters which are non-commercial matters for the purposes of this section." Among the matters defined as non-commercial were "the terms and conditions of employment by contractors of their workers or the composition of the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces."¹

There was a difficult issue, however, of how to deal with the race relations duty that was imposed on local authorities by section 71 of the Race Relations Act 1976. Eventually it was decided that, rather than repeal section 71, there would be a limited exception made to accommodate it. Section 18(2) provided that "nothing in section 17 shall preclude a local authority from (a) asking approved questions seeking information or undertakings relating to workforce matters and considering the responses to them, or (b) including in a draft contract or draft tender for a contract terms or provisions relating to workforce matters and considering the responses to them, if ... [this] is reasonably necessary to secure compliance with section 71 [of the Race Relations Act 1976, which requires local authorities to promote equality of opportunity for people of different racial groups.]" The Local Government Act 1988 further provided, in section 18(4), that where it is permissible to ask a question under subsection (2), it is also permissible to make an

¹ Section 17(5)(a).

approved request for evidence in support of an answer to the question. Section 18(5) authorized the Secretary of State to specify approved questions for the purposes of section 18(2)(a) and approved descriptions of evidence for the purposes of section 18(4). The Secretary of State subsequently approved several questions which focused on whether employers had adopted an equal opportunities policy relating to race relations and whether the firm was observing the relevant Code of practice issued by the Commission on Racial Equality regarding such policies.² In the view of Charlesworth and Voruz, however, the local authorities' scope for action was "marginal" and did not "allow for much effective implementation of a racial equality policy through a contracts scheme."³

Even this limited approach was the subject of intense debate as to how far a wider or narrow approach was legitimate to their interpretation, and councils were faced with decisions that they had to be told involved some legal risks. Concern came to be focused on the meaning, implications and compatibility with EC law of several of these questions. In any event, the practice of asking approved questions in the form approved was open to the objection that it put contractors from other Member States at a disadvantage. They were less likely than their British competitors to have an established policy on race relations of the kind envisaged, and less likely to be familiar with the CRE Code of Practice. It might be argued that the wording of the questions did not afford to tenderers from other Member States the opportunity of stating that they maintained a policy on race relations which conformed with the law of the State in which they were established (notwithstanding that it was not set out in instructions, documents or advertisements of the kind mentioned in the approved questions) or that they observed an acceptable code of practice designed for another Member State (notwithstanding that it was not precisely the same as the Commission for Racial Equality's Code).

Although, in 1994, the government indicated to the CRE that it saw no need to amend the specification made by the Secretary of State, it went on to emphasize that local authorities should use the questions specified with full knowledge of the requirements of the EC Directives. The CRE issued further guidance to local authorities,⁴ which recommended: "in their evaluation of responses to the approved questions authorities should take account of the obvious differences in the circumstances of companies and other bodies which have no establishment in the UK. Provided that is done, it is our view that the likelihood of a credible legal challenge is very remote. To give effect to this proviso, authorities would be well advised to append a note when they put the approved questions to potential contractors to the effect that companies and other bodies with no UK establishment should frame their response in the context of the anti (race) discrimination law and codification of good practice (if any) in force in the member state from which application is being made."

² Local Government Act 1988 – Public Supply and Works Contracts: Non-Commercial Matters, Joint Circular 8/88 from the Department of the Environment and the Welsh Office, 6 April 1988.

³ Joe Charlesworth and Véronique Voruz, *The Contract Compliance Policy: An Illustration of the Persistence of Racism as the Failure of Modernity*, 7 *Social and Legal Studies* (1998), 193 at 198.

⁴ Letter 25 April 1994, "Promoting Racial Equality through Supply and Works Contracts"

Much time was spent subsequently on attempting to develop schemes that would meet the need to comply with Community law, comply with the terms of the Local Government Act 1988, and achieve some results in terms of contributing to the achievement of racial equality.⁵ An influential amendment of the CRE’s suggested contract terms was adopted by Newcastle upon Tyne City Council during 1993, coming into effect from April 1993.⁶ In 1995, the Local Government Management Board and the Local Authority Associations, in consultation with the CRE and the EOC, produced guidance on how and why equality issues could be considered in the context of procurement, and CCT in particular.⁷ Also in 1995, the Commission for Racial Equality, the Association of Metropolitan Authorities and the Local Government Management Board produced an extensive set of guidance for local authorities in how to incorporate racial equality issues into their contract procedures.⁸ The CRE suggested model criteria for observance of the CRE Code of Practice by contractors.⁹ Based on this, and apparently at the urging of the CRE itself, a consortium of six West Midlands local authorities established a steering group, which met first in October 1997. A Common Standard was agreed and launched in July 1998. The “common standard” at that time set out a standard for racial equality to be adopted by council service providers in procurement, enabling councils to assess whether a firm’s policy on race relations met the legal requirements regarding racial equality.¹⁰ The main driving force behind the development of the Common Standard was the enthusiasm of the officers, rather than political direction from the locally elected members of the Council, and this appears to remain the case today. The elected members are supportive, but the officers appear to be driving the process.

1.2 Development of a revised Common Standard

Before considering the operation of the scheme in more detail, however, there are several subsequent statutory developments that contributed to a revision of the Common Standard in June 2005. The first contributory development was the imposition of several new statutory duties on public bodies in Great Britain, including local authorities. The Race Relations Amendment Act 2000 introduced a duty on public bodies not only not to discriminate on grounds of race, but to engage in more active promotion of racial equality, including in their procurement activities. This duty replaced section 71 of the 1976 Act. Two further equivalent obligations were introduced after the race duty had been operational for some time: the Disability Discrimination Act 2005 included a new public sector duty relating to disability equivalent to that dealing with race.¹¹ Government also indicated that a gender duty would follow. The Equality Act 2006 introduced a new

⁵ See, e.g., the collection of initiatives up to June 1995 in Local Authorities Race Relations Information Exchange, Race Equality and the Contracting Process: Larrie Survey, June 1995)

⁶ See Newcastle City Council, *Can We Do Business? Racial Equality in a Competitive Environment* (1993)

⁷ *Equalities and the Contract Culture* (Local Government Management Board, 1995).

⁸ *Racial Equality and Council Contractors*, CRE, 1995)

⁹ Commission for Racial Equality, *Racial equality means Quality: A Standard for Racial equality for Local Government in England and Wales* (CRE, 1995).

¹⁰ See Michael Orton, and Peter Ratcliffe, *New Labour Ambiguity, or Neo-Consistency? The Debate About Inequality in Employment and Contract Compliance*, *Jnl Soc. Pol.*, 34, 2, 255–272 (2005), pp 262-3 (hereafter Orton and Ratcliffe, 2005), and Michael Orton and Peter Ratcliffe, ‘Race’, *Employment and Contract Compliance: A Way Forward for Local Authorities?*, 19(2) *Local Economy* 150-158 (2004) (hereafter Orton and Ratcliffe, 2004).

¹¹ Disability Discrimination Act 1995 (as amended), section 49A.

statutory duty on public bodies to further gender equality.¹² Under these obligations, councils are required to be able to demonstrate that they have satisfied the general duty to promote equality and prevent unlawful discrimination. One way in which authorities can partially meet this duty is by including equality aspects in their procurement functions. Although the statutory duties fall on the individual public body, contractors and suppliers can be made liable through contracts enforced by the public body.

Second, the new Labour Government reversed part of the policy underpinning the Local Government Act 1988, in particular limiting what had to be regarded as 'non-commercial matters' for the purposes of the Act. Statutory Guidance published in 2003 stated that local authorities 'may take into account of the practices of potential service providers in respect of equal opportunities (e.g. race, gender, disability, religion, age, and sexual orientation) where it is relevant to the delivery of the service under the contract.'¹³ Contracting authorities could, during the pre-qualification stage, seek information 'as to the general competence, track record, details of criminal offences and acts of grave misconduct ... including in relation to legislation on sex, race and disability. Contractors may be excluded from the tendering exercise if they have been convicted of a criminal offence or have committed an act of grave misconduct. Authorities 'will continue to be able to ask the six questions specified in Circular 8/88 although they are no longer restricted to those six questions as the sole means of taking account of racial equality. In addition, and where relevant to the contract, and for the purpose of achieving best value, the authority will be able to ask further questions in relation to racial equality.' The Common Standard was amended to enable this greater flexibility to be taken advantage of.

Third, British anti-discrimination law was significantly expanded since the original Common Standard was adopted, largely due to the adoption of the EU anti-discrimination directives, and now includes new requirements on employers relating to age, sexual orientation, disability, and religion and belief. The revised Common Standard was intended to enable local authorities to assess whether service providers can demonstrate compliance with this new legislation. Questions are now included on sex and disability discrimination, for example.

1.3 Procurement context

It is also important to understand the changing procurement context in which the Common Standard operates. Increasingly councils work in partnership to procure and deliver services. This might be with other partners in the local area - in the public, private and/or voluntary and community sectors - or with other councils and organisations beyond their boundaries through sharing services. Over the last few years an increasing number of local authorities have entered into long-term contracts with private companies to provide a broad range of their services. The scale and size of some of these new partnerships are unprecedented in the local government sector and they have understandably attracted a lot of attention. The largest can be for ten years or more, can be worth between £20m and £30m per year and can involve substantial staff transfers or secondments. Many of these deals have been referred to as "strategic partnerships".

¹² Equalities Act 2006, section 84.

¹³ Statutory Guidance (2003), para 38.

Strategic Service-delivery Partnerships (SSP) are collaborative relationships between local authorities and other organisations in the public, private and/or voluntary sectors, to improve the delivery of services. A three-year SSP research and development programme established the Strategic Partnering Taskforce to help authorities form successful partnerships. The Taskforce put together the Knowledge Programme, which includes a comprehensive A-Z guide to partnerships, and produced a Final Report drawing together its findings and conclusions. The knowledge Programme has been refreshed as part of the Government's commitment to assist local authorities in achieving the greater efficiency and effectiveness in service delivery outlined in the Gershon Review. "Service Transformation Through Partnership" was published by Communities and Local Government in June 2006 to help local authorities and their potential partners best utilise the contents of the Knowledge Programme.

2. Strategy and Actions

2.1 Common Standard: content and mode of operation

The aim of the Common Standard is to raise the performance of those undertaking local government contracts (including contractors, consultants and suppliers) regarding race equality in employment and equal opportunities in general. This is to be achieved by, inter alia, securing contracts, using a common standard, that deliver equalities in public procurement for the residents of those authorities that compose the West Midlands Forum: Birmingham City Council, Coventry City Council, Redditch Borough Council, Sandwell Metropolitan Borough Council, Walsall Metropolitan Borough Council, and Wolverhampton City Council. The Forum is responsible for overseeing the operation of the Common Standard. There is a Steering Group, which meets quarterly, on which each Council is represented.

The Common Standard requires service providers to demonstrate that they comply with equality in employment legislation. The approach adopted distinguished between different contractors based on their size, requiring smaller firms to do less than larger firms.¹⁴ The levels of the standard become more demanding depending on the number of staff employed by the firm.

Firms with fewer than 5 directly employed persons must provide a written assurance that the appropriate level of the Standard will be achieved following any recruitment which increases the size of the firm to 5 or more employees. All firms with between 5 and 49 employees must demonstrate that they comply with four criteria. First, they must provide an equal opportunities policy in respect of race, gender and disability. This policy must cover: recruitment, selection, training, promotion, discipline and dismissal; discrimination, harassment and victimization (making it clear that these are disciplinary offences within the firm); identification of a senior person within the firm with responsibility for the implementation of the policy; and how the policy is communicated to staff in the firm. Second, there must be effective implementation of the policy in the firm's recruitment practices, including the use of open recruitment methods such as the use of job centres, careers service or press advertisements. Third, there must be regular

¹⁴ West Midlands Forum, Racial Equality: Common Standards for Council Contracts (July 1998)

reviews of the policy. Fourth, the firm must conduct regular monitoring of the numbers of job applicants from different gender, disability and ethnic groups.

All firms with 50 or more employees must achieve each of the criteria for firms between 5 and 49, but must also achieve a further six additional criteria. They must provide written instructions to managers and supervisors on equality in recruitment, selection, training, promotion, discipline and dismissal of staff. They must provide equality training for managers and any staff responsible for recruitment and selection. As well as monitoring job *applicants* by gender, disability and ethnicity, firms must also carry out monitoring on the basis of ethnicity, gender and disability for: those in post, those applying for posts, those taking up training and development opportunities, those promoted, those transferred, those disciplined and dismissed, and those leaving employment. If monitoring reveals under-representation of any of these groups, then firms should take steps (including positive action) to address any imbalances. There must be regular reporting and consultation on equality issues within the workforce, and recruitment and publicity literature produced by the firm should mention that equal opportunities practices are in place in the firm.

As mentioned above, the Local Government Act 1988 authorizes local authorities to ask potential service providers six approved questions about racial equality in employment. In light of the changes in the legislation detailed above, the West Midlands Forum revised the Common Standard and widened the scope of the six approved questions to cover sex and disability discrimination issues. The revised questions are as follows:

1. Is it your policy as an employer to comply with your statutory obligations to staff and applicants for employment under equality and non-discrimination laws?
2. In the last three years has any finding of unlawful discrimination or other breach of these laws been made against your organisation by any court or [employment] tribunal?
3. In the last three years has your organisation been the subject of formal investigation by [any of the statutory equality commissions] on grounds of alleged unlawful discrimination?
4. If you answered yes to question 2 or, in relation to question 3 a commission made a finding adverse to your organisation, what steps did you take to address that finding?
5. Is your policy on equal opportunities at work set out: (a) in instructions concerned with recruitment, training and promotion? (b) in documents available to employees, recognised trade unions or other representative group of employees? (c) In recruitment advertisements or other literature?
6. Do you observe as far as possible the equalities and non-discrimination codes of practice [issued by the statutory equality commissions]?

2.2 Pre-qualification process

These six questions are included within pre-qualification questionnaires used by the West Midlands Forum and associated authorities. Orton and Ratcliffe examined the West

Midlands scheme in detail and describe how the West Midlands standard "is based on what is described as the 'pre-qualification' stage."¹⁵

The pre-qualification stage has proven a particularly popular stage for local authorities in England and Wales to filter out unacceptable contractors. Nationally, Constructionline is a register of pre-qualified local and national construction and construction-related contractors and consultants. To register, contractors and consultants fill-in pre-qualification forms once rather than for every tender. It is owned and endorsed by the Department for Business, Enterprise & Regulatory Reform (formerly the DTI). Constructionline gathers and assesses pre-qualification information provided by contractors and consultants on behalf of 1,700+ public and private sector procurers across the UK range and provides them with access to over 14,000 suppliers registered with Constructionline. Over the years local authority health and safety and procurement professionals, have also developed other pre-qualification data-bases. In particular, with the support of the Health and Safety Executive, the Contractor Health and Safety assessment scheme (CHAS) has been established. The scheme is available for use by any public and private sector organizations to use when shortlisting contractors, suppliers and consultants (companies) who apply to work for them. It provides information about the health and safety part of their application. Companies apply to join the scheme so everyone knows they meet acceptable standards of health and safety compliance.

The use of the pre-qualification stage to filter out companies on the basis of failure to comply with equalities requirements was not, therefore, particularly unusual. The Common Standard was originally introduced primarily for building and construction contracts in connection with the councils' approved lists. The standard was originally developed for access to councils standing lists. A standing list is a database of firms which have expressed interest in tendering for work from the council, and have been assessed by the council as being suitable to do so. Typically, a firm that contacts a council will be asked to complete a pre-qualification questionnaire probing such matters as the company's technical competence and financial soundness. Each of the councils involved in the West Midlands initiative has a standing list of several hundred companies."¹⁶ Orton and Ratcliffe observe that "[w]hile the *raison d'etre* for such a list may be the desire to minimise the possibility of contracting unsuitably qualified or financially dubious firms, it also provides the scope for other criteria to be considered, including racial equality."¹⁷ They also identify several other advantages of focusing on the pre-qualification stage. "It means that the councils ensure that all potential contractors, not just those awarded contracts, have an [equal opportunities policy] EOP thereby impacting on a larger number of firms. It also means that having an EOP is not the determining factor at award of contract stage ... thereby addressing concerns ... about affirmative action policies leading to failings in procurement decisions."

Firms expressing interest to any of the six member authorities must satisfy the criteria. Authorities then can use the standard to assess whether or not contractors are meeting their obligations under equality legislation at an early stage when the authority decides who they will invite to tender or put on to their approved lists. Each firm has three

¹⁵ See Michael Orton and Peter Ratcliffe 2005.

¹⁶ Orton and Ratcliffe 2005, p. 261.

¹⁷ Orton and Ratcliffe, p. 261.

attempts to meet the criteria and will be given support at each failed attempt. The results of assessments are recorded on the database shared by the Forum. Firms failing on the third attempt are suspended from being considered for standing lists operated by the forum for a period of two years. Service providers need to demonstrate compliance with the equality legislation through their answers to these questions and by providing supporting evidence. (For those firms not subject to UK legislation, firms are asked to supply details of their experience in complying with equivalent legislation that is designed to eliminate discrimination and promote equality of opportunity, although this has seldom been an issue in practice.) Answers to these questions are checked against the Common Standard levels set out in the previous paragraphs. Details of service providers who have been assessed against the Common Standard are entered on a database. Information from this data-base is shared by participating local authorities via e-mail. Successful service providers who meet the criteria within the Common Standard, do not need to be checked again on equalities in employment within three years.

The benefits to service providers of this Common Standard process are said to be several: that there will be significantly less paperwork to prepare at pre-qualification stage; that once a service provider has been shown to comply by a member authority, the same information will not be required of that provider by any member of the group of local authorities using the Common Standard within a three year period; that advice and support in developing equal opportunities policy and practice is provided to service providers in the context of the Common Standard; and that the process will lead to a greater awareness of equality legislation by service providers and their employees. For local authorities, the benefits are said to be that there is significantly less duplication of paperwork by service providers saving the local authorities valuable time, and it need only take place once every three years; there is a shared data-base available to all member local authorities; and the disparity in race, disability and gender employment rates should be reduced.

What proportion of those applying for acceptance on the standing lists fail because of the Common Standard? Statistics are not available although they will be available in the future. However, the aim is not to disqualify; rather the preferred approach is to work with the applicant to enable them to comply. Extensive documentation is provided to firms to indicate what needs to be in the equal opportunities policy, for example. There has also not been any formal assessment of the costs (financial and otherwise) of implementing the Common Standard. A methodology has now been developed, based on the allocation of staff time, for assessing the cost of running the system, but this has not yet been used to produce figures. The Common Standard is regarded as helping to ensure that local authorities using it do business with organizations that comply with the law, but it is not regarded as doing everything necessary to embed equalities practice, particularly in the context of the provision of services. Additional methods are necessary but the Common Standard is regarded as an effective way of (at least partly) meeting the obligations on local authorities under equality legislation to consider ways of improving standards in the market.

The operation of the Common Standard has not been challenged legally, even by companies that have been removed from standing lists (no more than half a dozen over the whole period of time the Common Standard has applied) for failure to meet the Common Standard. Some companies have appealed (probably no more than about half of those who have been disqualified) through the appeal process that was set up.

The absence of legal challenge seems in part to be the case because firms calculate that they would prefer to comply rather than upset the local authorities, particularly locally-based companies. More generally, legal uncertainty appears to be much less problematic now than in the past, and the importance of the public sector equality duties mentioned above appears to have been important in providing legal support for the Standard.

2.3 Changes over the recent past

The standard was originally introduced primarily for building and construction in connection with the councils' approved lists, which councils constructed themselves. Over time, however, both of these elements in the original scheme have been modified by individual local authorities. Several councils have started using the standard for service contracts, for example.¹⁸ Because of the relative shortage of resources to operate the system, the relatively large number of suppliers that need to be assessed, and the fact that standing lists are somewhat less often used in the case of supply contracts, it is usually the case that a supplier will be assessed for compliance with the Common Standard only when that supplier has successfully been awarded the contract. A shortlisted tenderer will be required to complete the questions and supply the information required under the Common Standard, and the successful tenderer will be expected to meet the Standard. If the successful tenderer is unsuccessful in meeting that Standard, the Council will not necessarily reject the successful tenderer but, instead, will seek to work with the contractor during the life of the contract to ensure that they meet the Standard requirements, with the threat that if the contractor does not meet the Standard, the contractor could be suspended for two years after the contract has ended and not allowed to tender for those two years.

Other councils have significantly changed their approach to approved lists for construction contracts. Whilst some continue to use approved lists for construction, some do not use such lists for suppliers. These changes have led to changes in the way the Common Standard is used, and in particular to changes in the stage of the procurement process at which the Common Standard is used. Coventry Council, for example, has begun, to use Constructionline rather than assessing those who apply for access to their approved list itself. At the moment, however, the information sought from contractors is mostly in the areas of financial and technical information; it does not include the information relating to equality issues that those using the Common Standard wish to have (although Constructionline may be about to modify its approach to equalities and are considering adopting the same questions as those in use by the West Midlands Forum). So the Council that uses Constructionline also uses the Common Standard for subsequently vetting the successful tenderer. Somewhat differently, Reddich Council no longer uses standing lists at all. All its tenders are advertised on the Council website. A PPQ is sent to all who apply and the replies are then assessed. Again, the Common Standard is used to vet the successful tenderer.

2.4 Other approaches to incorporating equality into procurement

The Common Standard relates primarily to the contractor as an employer. Increasingly, however, there has been increased interest in attempting to secure a more diverse supplier

¹⁸ EU Study, p 33-34. REFERENCE

base, focusing particularly on the ownership of the company that is acting as the contractor. This has led some councils that are members of the West Midlands Forum going further in its pre-qualification questionnaire than simply asking companies to supply information about their employment equality practices; some councils (e.g.) Wolverhampton also ask questions relating to the ethnicity of the ownership of the company. This is separate from, and additional to, the Common Standard-related questions. This Case Study concentrates on the approach adopted under the Common Standard and leave aside issues relating to supplier diversity.

There are also other limits to the application of the Common Standard. Subcontractors are not assessed by the Council, due to the lack of resources. The obligation to meet the contract is on the main contractor, and the councils do not monitor their use of subcontractors. So, unless the subcontractor is one which has been nominated by the Council itself, in which case they are likely to have been subject to pre-qualification in the past, then subcontractors may well not have been subject to Common Standard clearance.

The use of the Common Standard is seen as an effective pre-qualification tool. However, the West Midlands Forum "do not advocate that this should reduce the need for other approaches and the six members, like many other authorities, use contract conditions (some of which are now OGC [Office of Government Commerce] standard, and work hard to incorporate equalities into all aspects of procurement (not only at pre-qualification), working corporately to ensure that equalities are considered at an early stage in the tendering process."¹⁹ Thus far, use of technical specifications is not generally used to ensure the promotion of equality requirements. So too, in awarding the tender, the councils seldom consider criteria relating to equalities that are connected to the subject matter of the contract or to the quality parameters of its performance following the MEAT method. Lowest price is used, more often than not. However, Wolverhampton City Council are working with commissioning managers to ensure that the viability of an organization to perform well over the medium to longer term is an important factor for the council to take into account when awarding tenders. Nor, do the councils use the power to reject "abnormally low tenders" as an opportunity to reject bidders on the grounds of failure to satisfy criteria relating to equalities. At the other end of the process, Wolverhampton City Council is now attempting to monitor the equality impact of the service once let.

3. Monitoring and Reporting

3.1 Evaluation of the effects of the Common Standard

A team from Warwick University was commissioned to conduct an evaluation of the Common Standard in 2003, that is before the revision of the Common Standard in 2005. The evaluation was concerned, therefore with how the Common Standard impacted on *racial* equality. Orton and Ratcliffe found that the West Midlands common standard had "a significant impact on encouraging firms to adopt" equal opportunities policies

¹⁹ Interview, Alan Butt.

(EOP).²⁰ "Some companies had never before had an EOP and the introduction of the WMCS meant that for the first time these companies were engaging with equalities' issues and addressing how to ensure their employment practices promoted equality of opportunity. In such cases, the impact of the WMCS was dramatic. Other companies had formerly relied on an equal opportunities statement expressing their commitment to the principle of equality." Of those companies that already had an EOP in place, "WMCS had an impact in that it encouraged firms to review, update and revise policies, for example addressing areas of weakness such as the failure to monitor workforce composition." With regard to policy implementation, "the evaluation also found a broad range of generally positive responses. The research provided examples of companies making great progress on equal opportunities: for example, through the provision of training on equalities' issues, the development of more formalized recruitment practices and even the adoption of positive action strategies." There were, however, "isolated examples of companies which claimed to be taking no steps at all to implement their policy" but "[c]loser examination revealed that this was not quite true: they had, for example, circulated the new policy to staff and stated in job advertisements that the company was an equal opportunities employer. For firms that had not previously engaged with equalities' issues, even such small steps represented clear progress."

There has not been further systematic evaluation of the Common Standard since 2003. There has been no repetition of the Warwick research. A mechanism has been established, however, under which contractors can be asked to complete an "Equalities Post Contract Monitoring [PCM] Questionnaire". This includes detailed questions asking for information, broken down by gender, disability and ethnicity, of the number of employees in the employer's workforce at the date of completing the questionnaire, applications for employment within the last twelve months, the numbers of those recruited within the last twelve months, the numbers of employees on temporary contracts at the date of completing the questionnaire. A target has been set of assessing ten per cent of contractors (selected from those carrying out contracts at the time of the assessment) across the West Midlands each year using this questionnaire. Each authority would choose how best, given its policy interests, to select the range of companies that would be most helpful to assess. The purpose of the questionnaire is to assess what the effect, of any, of the Common Standard has been, rather than to use the information as a basis for any future decisions relating to that particular company. The training to administer the questionnaire has been completed, but the analysis of the information provided so far has been delayed due to the absence of staff resources. The West Midlands Forum's new on-line database (available later this year) will have the facility for recording PCM data and also producing reports on the information recorded, and this is viewed as likely to have a positive impact on staff resources.

Due also the intervening effect of the transformation process in local government contracting discussed above, several authorities are undergoing reviews of their functions and this will imoact on when the PCM programme is undertaken. The "transformation programme" has had significant effects on the use of the Common Standard. In Birmingham, for example, input to the Common Standard work was reduced during the first year of the partnership (following the standing list being suspended during the review) resulting in reduced Common Standard checks at the pre-qualification stage.

²⁰ Ibid. pp 262-3.

However, under the transformation agenda new posts are being created with new responsibilities. Equalities issues are still a key element for procurement and the Common Standard continues to play an important role within the structure.

4. Future developments

There is currently being developed a new version of the database that would be accessible on-line to subscribing local authorities. This will enable the database to be shared with a wider audience of local authorities. It is already the case that several local authorities from the West Midlands, as well as outside the area, have expressed an interest in possibly joining the consortium. The six existing authority members currently fund the development and will continue to provide support in the form of staff time. Funding has been provided from other sources to develop the web-enabled database. The Forum is intending to offer other councils the opportunity to become members of the Forum, and there are plans to roll out the new database within the next few months, although the shortage of resources to support these initiatives is likely to be a constraint in the future. Those close to the process consider that what is needed in order to make the Common Standard even more effective in contributing to greater equalities of opportunity and maximize the efficiency gains of working together, is to put the Common Standard onto a sound business footing with proper costings and resources, and this is what the West Midlands Forum is now trying to achieve.

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Accessibility for All

A case study on design for all in the public procurement process, Catalan Railways, Spain

1. Background

Ferrocarrils de la Generalitat de Catalunya (Catalan Railways) is a public company operating since the beginning of the last century. Nowadays the company has more than 1300 employees managing 103 trains along a network of 79 stations of metropolitan network, regional, mountain train and funiculars.

Since the Catalan Accessibility law was passed in 1991 (followed by the Decree 135/1995) one of the concerns of this company, owned by the Catalan Government, has been the progressive adaptation of infrastructures, rolling stock and services to the needs of all citizens, including those with physical, sensorial or mental limitations due to age, accidents, or permanent disability.

The challenge was to adapt a network designed in the beginning of the XX century to meet the present social demands.

2. Strategy and Actions

The company decided very early to improve the accessibility by including Design for All criteria in the procurement of all new equipments and infrastructures.

There is along list of goods where these criteria were included:

- Ticket machines, like the first with tactile screen accessible for blind people;
- Entrance barriers;
- Public-address system;
- Rolling stock like the first low floor train;
- Information and communication means both for people with acoustic or visual problems;
- Stations removal, including new elevators;

And an endless list of devices, tickets, website, etc. always trying to maximize the use of Design for All criteria.

For all of them the strategy is very similar:

- To collect feed-back from claims, quality interviews, meetings with local associations, etc;
- To define the Design for All criteria to include in the call for tenders alone or with the help of a specialized company;
- To select the best value provider;
- To follow up very carefully the development of prototypes if any;
- In some cases like the train units 213 of the ticket selling machine, a red scale prototype was built in order to check both with the help of external professionals and users the quality of the solutions proposed.
- Especially in the case of station renewal, to check the presence of all elements requested in the call before the final acceptance of the works.

All these activities in the past done by the company on a voluntary basis are, since May 2008, compulsory thanks to the transposition of the 2004/18/EC Directive to the Spanish procurement legislation.

3. Monitoring and Reporting

Ferrocarrils de la Generalitat de Catalunya (FGC) continuously monitors the performance of the service and frequently ask feed-back from the users in order to find new areas for improvement.

Thanks to the continuous scheme the company found up significant elements like:

- The enhancement of the accessibility in one station increased the number of passengers by 16%. Not only people with some difficulty but citizens that found it more comfortable;
- One of the main challenges is to reduce the gap between the wagon and the platform, especially in curved stations designed in the beginning of the last century.

Thanks to many tests with users and the participation of experts, the company is now ready to prepare a call for tenders to purchase mobile platforms to reduce the gap when the train arrives to the station.

4. Barriers and Constraints

If any, the main constrain is the long administrative process that the procurement implies.

That causes that the time between the moment the need for improvement is noticed and the moment the solution is put into practise is perceived by the company as too long.

5. Contact

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Equal Opportunities for All

A case study on Suppliers Diversity Transport for London, UK

This case study discusses the development and operation of aspects of Transport for London's responsible procurement policies, developed as part of the Greater London Authority. It is important to point out that this policy was developed under the previous Mayor of London, Ken Livingstone (Labour). Mr Livingstone was not re-elected as Mayor of London in the election of 2nd May 2008, being replaced by Boris Johnson (Conservative). The case study describes the situation up to this election. At the time of writing (June 2008), it is unclear how far the procurement policies developed by TfL under Mr. Livingstone will or will not be continued under Mr. Johnson.

GLA Group's Responsible Procurement Policy

The approach taken by Transport for London (TfL) needs to be seen in the context of the approach adopted by the Greater London Authority (GLA) group, of which TfL is a part. In June 2006, the GLA Group (consisting of the Greater London Authority, the London Development Agency, Transport for London, the London Fire and Emergency Planning Authority, and the Metropolitan Police Authority)¹ adopted a new Sustainable Procurement Policy to support the Mayor's policies. The term "Sustainable Procurement" was the term used in this policy statement, but in January 2007 the policy was renamed "Responsible Procurement" because "it had become clear [sustainable procurement] is often understood to refer only to environmental issues, and to exclude social ones" and the Mayor "wanted to communicate the importance of both social and environmental objectives."

The current policy statement,² sets the Policy in the context of the Greater London Authority Act 1999, which sets out the principle purposes of the GLA as economic development, wealth creation, and social development, within the Greater London area, and improvement of the environment.³ The Policy states that the GLA has the power to do anything in furtherance of these principle purposes. In exercising these powers, the GLA must do so in ways calculated to promote improvements in the health of Londoners, and in ways calculated to contribute towards the achievement of sustainable development

¹ The policy is also supported by the Metropolitan Police Service.

² Mayor of London, GLA Group Responsible Procurement (March 2006, updated January 2008).

³ Section 30(2).

in the United Kingdom. In performing these functions, the GLA must also have regard to the principle that there should be equality of opportunity for all people. The Mayor considered procurement "as a key opportunity to take forward the delivery of these principal purposes." The Policy set out six social and economic "themes" across which the GLA Group aimed to improve London's sustainability (in addition to the seventh theme of "promoting greater environmental sustainability").

1. Encouraging a diverse base of suppliers, by promoting greater supplier diversity in the private sector. Supplier diversity had already been adopted as a policy in 2005, when a group statement of principles on supplier diversity had been agreed. The purpose is to 'level the playing field', so that "we offer under-represented businesses the same opportunities to compete for GLA group contracts as other qualified suppliers."⁴ Procurement procedures have been developed which include requirements for large organisations to address supplier diversity by providing equality of opportunity to diverse suppliers as subcontractors, and by promoting equality and diversity practices. The GLA Group has agreed a standard format for the collection and reporting of supplier diversity statistics, and information is collected on how much money is spent with diverse suppliers. Each member of the GLA group submits a quarterly return on its expenditure with diverse suppliers to the Responsible Procurement Steering Group. Data is captured with regard to the requirements of the Data Protection Act. Participation from diverse suppliers is encouraged by publishing a forward plan of major procurement activity, identifying large contracts that are due to be tendered over the coming 12 months. "Meet the buyer" events are also hosted in partnership with key suppliers to increase the transparency and accessibility of the procurement process. In addition, the GLA Group, through the LDA, has developed business support programmes to improve the capacity of small and diverse suppliers and to provide guidance on the public sector procurement process.

2. Promoting fair employment practices, seeking "to ensure we move towards a position that, where appropriate, our contractors' staff receive a fair wage reflecting the environment in which they work, and that they enjoy contractual terms which represent reasonable minimum standards and which provide for family friendly, flexible and diverse working environments." The Mayor has established a Living Wage Unit within GLA Economics to set an annual figure for the London Living Wage, taking into account the costs of living in London compared with other parts of the country. The London Living Wage is included in "appropriate" contracts.⁵ The current LLW is £7.20/hour.⁶

3. Promoting workforce welfare, seeking to "ensure that wherever appropriate, our contract terms require our suppliers to make provision for the welfare of their workforce", and seeking "to work with suppliers who do not prevent or discourage

⁴ 2008 "Mayor of London's Responsible Procurement Report", p. 25.

⁵ 2008 "Mayor of London's Responsible Procurement Report", p. 35. For a case study of the introduction living wage provisions into GLA catering and cleaning contracts at City Hall in 2005 and 2006, see <http://www.london.gov.uk/rp/casestudies/casestudy03.jsp>.

⁶ 2008 "Mayor of London's Responsible Procurement Report", p. 35.

employees from joining trade unions or discriminate against employees who hold trade union membership.”

4. Meeting strategic labour needs and enabling training opportunities, seeking “to incorporate provisions into our contracts, where appropriate, to offer training and employment opportunities for London’s communities and to address under-representation of particular groups in particular sectors, and the need for providing skills and opportunities for people experiencing long-term unemployment.” TfL is currently undertaking a pilot project under this policy area – Project Brunel consisting of a training and employment brokerage service, development of an education programme, building on a research study and experiences from TfL’s major projects such as the East London Line.

5. Community benefits, encouraging “a positive contribution from our suppliers to the local communities in which they work on our behalf”.

6. Ethical sourcing practices, seeking to work with suppliers who: do not use forced, bonded or non-voluntary prison labour; establish recognised employment relationships with their employees that are in accordance with their national law and good practice; can demonstrate a commitment to equality of opportunity; impose working hours compliant with national laws or industry standards; work within the laws of their country; ensure the health and safety of the workforces and the wider public; take measures to ensure that child labour is not utilised in their operations, and offer wages and benefits that at least meet relevant industry benchmarks or national legal standards.⁷

According to the 2008 “Mayor of London’s Responsible Procurement Report”, the approach of the GLA Group “has been for each member to be responsible for its own operational implementation of the Responsible Procurement Policy. There is a pan-organisation Steering Group to ensure consistency and drive continuous improvement, supported by a working group to share good practice.” Implementation is being taken on a contract-by-contract approach.

Transport for London and Procurement

Transport for London (TfL) is responsible for operating the capital’s transport network, which includes the Underground, taxis, buses and roads within Greater London, spending £5 billion per annum. TfL’s direct annual procurement spend in 2006/7 was £1.625bn, making it the largest procurer under the responsibility of the Mayor for London. TfL was formed in 2000, combining together the procurement function of the separate businesses

⁷ For a case study of this in operation in the GLA Group, see the case study of the procurement of uniforms by London Underground at <http://www.london.gov.uk/rp/casestudies/casestudy08.jsp>, and “Ethical driving force”, in Company Clothing, April 2007.

within the London transport system. After a programme of greater centralization of the diverse businesses, TfL now has largely common procurement policies across the transport system within its jurisdiction, with greater product standardization, processes and procedures, and is now in a position where it is better able to leverage its spending. The procurement function is in the process of shifting from a largely "transactionally focused" approach to one that is brought in earlier in the process of undertaking large products, and more strategic in its perspective.⁸ The greater use of "responsible procurement" in TfL needs to be seen in this context.

Transport for London and Supplier Diversity

A key step in the development of TfL's supplier diversity programme was to create the definitions of "diverse suppliers".⁹ The definitions were used as the foundation of the programme and also to measure performance. The definition identified four sub-groups: small and medium enterprises; Black, Asian and Minority Ethnic businesses; suppliers from other under-represented or protected groups; and suppliers demonstrating a diverse workforce composition. Each of these four sub-groups is defined in relatively precise terms in a policy paper.¹⁰ TfL's Supplier Diversity Policy Statement states:

"Transport for London (TfL) will proactively encourage Diverse Suppliers to participate in its procurement process for Goods, Works and Services. It will provide a level playing field of opportunities for all organizations including Small and Medium Enterprises (SMEs), Black, Asian and Minority Ethnic (BAME) businesses and other Diverse Suppliers. Within its obligations as a Best Value Authority and in compliance with EU and UK legislation, TfL's procurement process will be transparent, objective and non-discriminatory in the selection of its suppliers. TfL will actively promote Diverse Suppliers throughout its supply chains."¹¹

The most recent TfL Supplier Diversity Policy was adopted in November 2006.¹² This sets out four guiding principles to guide the operation of the policy: (a) engaging diverse suppliers, (b) diversifying the supply chain, involving a commitment to "encourage and support strategic Suppliers to embed Diverse Suppliers into their supply chains as far as practicable, as related to the subject matter of the contract"; (c) delivering benefits within Best Value, ensuring that "[w]here award is based on most economically advantageous tender and where relevant, ensure addressing of diversity requirements and whole life costing is considered as part of evaluation criteria" and (d) monitoring and reporting on diverse suppliers. A Supplier Diversity Toolkit was produced, including four diversity requirements: bidders were expected to provide a comprehensive equality policy regarding their own workforces and those of their subcontractors, a diversity training plan

⁸ Mark Smulian, Closing the Gap, Supply Management, 20 July 2006, 24 at 25.

⁹ Faiza Rasheed, Supplier Diversity fully inclusive, 2007(3) Engage.

¹⁰ Transport for London, TfL Supplier Diversity Definitions, January 2008.

¹¹ Transport for London, Supplier Diversity Policy Statement, Latest Issue: January 2008.

¹² Transport for London, Supplier Diversity Policy, November 2006.

incorporating details of how bidders planned to train their own workforces to deliver equality policy, a supplier diversity plan requiring contractors to set out a plan regarding the participation of diverse suppliers, and a communications plan outlining how the bidder will manage external relations.

A key issue in the operation of such policies elsewhere is how far the procurement authority prefers suppliers because they come from one of the subgroups. The Supplier Diversity Policy aims to navigate this difficulty by distinguishing between "positive action" (which it adopts) and "positive discrimination" (which it rejects). TfL commits itself to "[c]reate and implement a framework of internal controls over Procurement Activities in line with Procurement Principles of non-discrimination, equal treatment, transparency, fairness and proportionality, and hence, without Positive Discrimination, but within the understanding of Positive Action."¹³ Later in the Policy positive discrimination is defined as "a policy or a program (sic) providing advantages for people of a minority group who are seen to have traditionally been discriminated against, with the aim of creating a more egalitarian society. This consists of preferential access to education, employment, health care, or social welfare."¹⁴ Positive action is defined as referring to "promotion of representational, proportionality and equal terms, however no formal definition exists. It must be noted that reward of contracts must be based on equal merit. (...) Supplier Diversity aims to act as an enabler for under-represented groups, equal access to procurements and equally equipped to apply."¹⁵

The Implementation Strategy adopted in September 2006¹⁶ indicated that testing of the policy would take two forms: testing through high value, high status major projects, and testing in smaller, appropriately selected procurements where supplier diversity plays a key theme. Three projects were identified for implementation in the first category: the East London Line Rail Project (ELLP) project, the Highways Maintenance Works Contracts (Streets Management) project, and the ~~Thames Gateway Bridge project~~. The ELLP project will be used to illustrate this approach.

East London Line Extension Project¹⁷

In 2004, TfL put together a 5-year £10 billion investment programme to fund large-scale construction projects including the East London Line extension, the Crossrail project, the Thames Gateway bridge, and other developments linked to the 2012 Olympic and

¹³ Para 5.5.

¹⁴ Para. 12.9

¹⁵ Para. 12.10

¹⁶ Transport for London, Supplier Diversity Implementation Strategy, September 2006.

¹⁷ This discussion of the ELLX case study is based on: EDF Seminar Series: Can Procurement be used to promote equality? Lessons from experiences at home and abroad: Summary note of seminar on Thursday 2nd March 2006, contribution of Valerie Todd from which quotations from a senior public servant are taken; and the following websites: <http://www.london.gov.uk/rp/casestudies/casestudy01.jsp>

Paralympic Games.¹⁸ Equality and inclusion were regarded as being at the heart of that programme and integral to it. The first project was known as the East London line extension and this is an extension to the existing East London line. The ELL contracts were valued at £500 million for the provision of the main works and £350m for the rolling stock and train servicing agreement. In terms of the transport benefits, the aim was to create links between East London and the City of London, taking pressure off London Bridge, to stimulate the East End of London. It also aimed to link the Underground with the orbital railway and was a key component in TfL's overall transport plan for the Olympics. In the summer of 2006, Bombardier was awarded the contract for the rolling stock and train services agreement, and in October 2006 a Balfour Beatty-Carillion Joint Venture was awarded the main works construction contract.

A policy decision was taken to try to bring benefit to the communities that the line extension is going to serve. It is a diverse community, culturally and economically, so the aim was to impact on some of the issues that those communities were facing. Four things were to be required from the contractors: to have an equality policy, to have a training plan, to demonstrate how they were going engage with the communities they were going to be serving, and to have a plan around how they were going to diversify their supply base. These requirements were incorporated in the invitation to tender and contract conditions for two procurements within the project: the provision of main works, and the rolling stock and train servicing agreement.

The first thing required from contractors was a policy addressing equality issues and representation of groups within their own work forces. TfL required that contractors supply an equality policy that accorded with the standards adopted in Codes of Practice by the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission, the three predecessor bodies that were brought together to form the Equality and Human Rights Commission. The policy should also refer to good practice concerning other areas such as sexual orientation and religion and belief. The policy also required contractors to address equality issues within the work forces of their subcontractors.

A senior public servant within TfL, Valerie Todd, has indicated that there were some within TfL who would have preferred that it be made a requirement that contractors had a representative work force that reflected the diversity of London. "Clearly we were advised that that may be seen as restrictive in terms of EU procurement and may preclude some bidders from farther afield, therefore we were not so specific, We did insist that they had a representative work force and looked at the diversity and the gender balance of their work force and how they could attract people from different groups."¹⁹

Contractors were also asked to set out their plan of how they were going to diversify their supply base. TfL did not know at the time when it was tendering what its supply base

¹⁸ GLA Economics, Women in London's Economy 2007, 3.5

¹⁹ Valerie Todd, EDF Seminar Series: Can Procurement be used to promote equality? Lessons from experiences at home and abroad: Summary note of seminar on Thursday 2nd March 2006.

was, so it asked contractors to inform them about the diversity of their suppliers, particularly whether they were working with women-owned business, minority-owned business, disability-owned businesses. That would allow TfL to set a benchmark and measure year-on-year improvements in terms of diversity in that area. TfL's aim was to make sure that it was well informed about where the organisations that it was contracting with were at the time it contracted with them, so that as the years went on – these were very long term contracts – it could see the progress the contractors were making.

Training was a key area. The training plans had two dimensions to them. The first dimension was to make sure the contractor's own work force was fully trained and equipped to deliver the equality agenda. Second, TfL required that the contractor consider initiatives within the wider community where the contractor can offer training – perhaps apprenticeships schemes so that the contractor can support the community within which it is working to address issues of underemployment or unemployment. One of the requirements was that the contractor engage with the communities, and this meant that they had to build relationships with local colleges – in this case predominantly Newham College – and also with local employment agencies and the Learning and Skills Council. Through these arrangements, the aim was to create an environment whereby people were brought together with a common agenda to address some of the social issues that were facing the East End of London.

As regards the issue of costs, the same public servant quoted above has said that "at some point we had a debate about whether that would deter certain bidders or whether it would push up the costs. When we put this to our contractors – those who expressed an interest – they didn't see it as an issue that would raise costs, they didn't see it as an issue that would deter them."²⁰ The GLA's description of the ELLX process also notes that the requirements "received a positive reaction from suppliers".²¹

A key question was the legal form in which these policies should be embedded, in particular how TfL would import these conditions into the contract. "We talked about how we would measure it as a performance requirement. We talked about how it would sit alongside other requirements within the contract. After much debate with our legal team and with our procurement specialists, we decided we would make this a condition of contract and what this meant for us was that before a contractor could get through to the final stage of bidding they would have to demonstrate to us that they could deliver effectively equality in the way that we had asked them to. It meant that equality was put on the same footing as, say, the financial stability of an organisation or their ability to deliver health and safety. So we put it up there with all those other commitments and requirements. Again, we got no push back. And that was important because it seems as though the contractors that we spoke to all wanted to work with us, and didn't see this as an issue, it was more an issue to us in terms of making sure we were doing it in an appropriate way, in a way that was legal, in a way that was sustainable. In the instructions to the bidders we made it clear what evidence we were looking for because clearly we wanted to make sure that what they were putting forward accorded to what we would see

²⁰ Valerie Todd, supra.

²¹ <http://www.london.gov.uk/rp/casestudies/casestudy01.jsp>

as acceptable so we gave them some indication of what we would see as an acceptable plan, what we would see as an acceptable policy, so they weren't simply left to work this all out for themselves, we worked very much in partnership with them."²²

TfL also decided that the ultimate sanction would be that should the contractor not meet these conditions or should the contractor fail in some way, TfL would be able to terminate the contract for failing to deliver the equality dimension. "And that was quite important to us because we wanted everybody to know that we were taking this absolutely seriously." A subsequent study of the project published by GLA Economics stated: "The combination of putting the diversity requirements at the front end of the contractual process, and including a termination clause, was seen as essential to ensuring that the diversity standards were given the same importance as other elements of the contract."²³ It would appear that there were two main challenges in operationalizing this approach. One related to how to ensure the policy complied with EC procurement law, and domestic procurement and employment legislation (on which extensive legal advice was taken). The second related to the reaction of bidders to the termination sanction. According to the study by GLA Economics "Initially there were some concerns about the diversity termination clause, but eventually all the prospective bidders were brought on board. TfL achieved this through holding workshops to help bidders pass through the initial stage of the bidding process."²⁴

TfL was conscious of the need to ensure a relationship that was not "all about enforcement and negativity and requirements on them ..."²⁵ To ensure this, there was close and early engagement with the bidders. "As soon as we had expressions of interest we invited all the potential buyers to a meeting and talked to them about the contract and in that context we talked about supply diversity, and equality. We therefore had a very open discussion and some early engagement. We asked all the contractors to identify their employment needs in advance so we knew what their work force was. We knew what their intentions were around recruitment. We knew the labour market locally so we could start to bring together an understanding of what were going to be the achievements over time. We didn't want to set artificial targets or aspirations that everybody would fail to meet so we made sure we married up some of the requirements at a very early stage."²⁶ There was also considerable engagement with other stakeholders. "We ... thought it would be useful to work with our local authorities because the railway would be going through their areas: we wanted to talk to their schools, we wanted engagement with their local job centres and we want buy-in at a very local level. We took the liberty of talking to the local authorities so we had some engagement there as well. We worked with Newham College. We considered how we could marry Newham College up with work placements, particularly around skills that are relevant in that particular area. So we went to Newham College, we set out what were the skills we were looking for were during the years of the contract and we worked with them positively to look at how they could supply us with people with those skills over time. We also talked to local funding

²² Valerie Todd, supra.

²³ GLA Economics, *Women in London's Economy 2007*, para 3.3

²⁴ Valerie Todd, supra.

²⁵ Valerie Todd, supra.

²⁶ Valerie Todd, supra.

agencies like the local Learning and Skills Council because we thought it was important that they knew that these contractors would be looking for skills and that if they could bring resources into the pot that would help as well. Throughout the whole of this, we had to maintain what we call a flexible disposition – we did not want to be so rigid and inflexible that we lost goodwill and failed to meet the opportunities as and when they arose, so we have made adjustments as new information has come to light. We have tried to work with our contractors to talk through some of the real issues for them.”²⁷

The most difficult area in operating the requirements once the contract became operational was that relating to promoting supplier diversity. “One of the real issues all our contractors face is around supply diversity – in terms of employment, training, in terms of community engagement they have no issue. They will put whatever effort is needed into those areas of delivery but in terms of changing their suppliers, the people they contract with, that is where they have the most difficulty because finding black and minority businesses, finding women-owned businesses, particularly in the transport industry, is very difficult. And finding ways of growing those businesses is equally difficult. That is the area we need to work with them on and also work with organisations like the London Development Agency to bring together thinking, resources, initiative, and to continuously try and grow businesses that can work in the transport environment. That is the most vexed area in terms of our overall plan.”²⁸

²⁷ Valerie Todd, supra

²⁸ Valerie Todd, supra.

Gender equality

A case study on equal treatment of women and gender mainstreaming, Federal Ministry of Social Affairs and Consumer Protection, Austria

This case study is based on web-based research, together with information from an extensive interview with Ernst Muhr, from the Federal Ministry for Social Affairs and Consumer Protection.

1. Background

The Austrian Federal Ministry of Social Affairs and Consumer Protection (German: *Bundesministerium für Soziales and Konsumentenschutz*, abbreviated BMSK) is the Austrian ministry at federal level responsible for the following policy fields:

- Social Policy
- Social Insurance
- Consumer Protection
- Long-term Care
- Disability
- Senior Citizens
- Men

The BMSK generally wishes to promote equal opportunities for men and women in private companies on a voluntary basis as part of a general policy supporting 'Corporate Social Responsibility', abbreviated CSR). Therefore the minister ordered to take measures of CSR into account in the public procurement activities of the ministry as far as this is compatible with European Community law.

2. Strategy and Actions

The equal treatment of men and women is to be taken into account in three stages of the procurement process, namely in the tender documentation, as a contract clause, and as an award criterion.

Tender documentation

First, tenderers have to include a **self-declaration** in the tender documents in which they declare to abide *inter alia* by the equal treatment laws and regulations. This self-declaration is already included in the model tender documentation of the BMSK. A violation of this declaration may lead to litigation and a contract penalty.

Model contract

Second, the contracts of the BMSK have to include a **contract clause** requiring the equal treatment of men and women employees to be taken into account during contract performance and to take measures to achieve equal treatment. This clause is part of the BMSK model contract. A violation of this contract clause may lead to litigation and a contract penalty.

Award criteria

In view of the requirements of European Community law, the BMSK differentiates between three types of contracts when taking equal treatment and gender mainstreaming into account as an **award criterion**.

- For contracts **above the thresholds** of Directive 2004/18/EC the CSR consideration cannot be taken into account on a general basis but only when due to the subject matter of the contract in question they contribute to the determination of the economically most advantageous tender.
- For contracts **below the thresholds of Directive 2004/18/EC but above €40,000.00** CSR consideration can be taken into account, first, when due to the subject matter of the contract in question they contribute to the determination of the economically most advantageous tender or, second, in other cases. In these other cases the weight of the CSR considerations as part of the award criteria should not exceed 2 per cent of the overall assessment. In order to determine the CSR weight in the assessment, companies have to address the following two questions in the tender documentation:

(1) It the equal treatment of men and women implemented in your company?

- (2) Does your company take any other voluntary measures of CSR? If yes, which are these (please only list measures which go beyond the legally requirements or requirement imposed by the administration)?

Tenderers have to back up their answers with credible data, figures, and facts from their company and summarise the answers in an overview. Then, up to nine points can be allocated for the answer to each of these two questions. Finally a price bonus can be allowed using the following percentages:

- 0- 1 point: 0%
- 1- 3 points: 0.25%
- 4- 5 points: 0.5%
- 6-7 points: 0.75%
- 8-9 points: 1.00%

For both questions this would amount to a maximum overall price bonus of 2%.

The allocation of 1 – 9 points should take into account:

- (1) The structure of the personnel of the company: percentages of men and women, age of men and women working for the company, percentage of women in leading positions.
- (2) Policies and instruments in place promoting equal treatment of men and women in the company (gender mainstreaming programme, etc.)
- (3) Company directives to ensure the balanced representation of men and women, especially in professional positions. If yes, what do these directives provide?
- (4) The state of implementation of equal treatment in the company.

Other possible considerations that can be taken into account in this context relevant to the equal treatment of men and women include:

- (1) Possibilities for part time positions of employees with families including opportunities to return to a full time position.

(2) The existence of procedures for dealing with discrimination and sexual harassment.

(3) Measures to promote the combination of professional and private life, including part time positions and flexible working time models, as well as child care facilities or programmes for child care support.

- For contracts below a threshold of €40,000.00 CSR criteria are not to be taken into account at all since there is generally no formalised procurement procedure.

The use of CSR for contracts between € 40,000.00 and the thresholds of Directive 2004/18/EC is outlined and described in an internal letter of the minister (Rundschreiben Nr. 20) which includes two annexes providing detailed criteria.

3. Monitoring and Reporting

The CSR policy described above has only been in force for a short period and therefore there is not data on its impact in practice. However, due to the limitation to contracts below the thresholds above €40,000.00 and since it only affects a maximum of 2% of the award decision its impact is expected to be limited. The main effect is expected to be a change of the mindset of companies dealing with the ministry towards CSR and the equal treatment of women at the workplace.

4. Barriers and Constraints

It appears that a lack of legal certainty on including CSR in public procurement in relation to both Austrian law and European law, especially with respect to the inclusion of CSR as award criteria. The limitation to 2% outlined above is designed to limit the risk of violations of Austrian and European Community procurement law.

5. Contacts

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Health & Safety on the Workplace

A case study on Safety at Work Regional Government of Piedmont, Italy

This case study is based on library research, together with information from an extensive interview with Salvatore La Monica, from the Health Department of the Piedmont Region, Italy.

1. Background

Regione Piemonte is responsible at regional level for the general interests of the Community; under the present constitutional arrangements, its competences are open-ended, and include the following policy fields:

- Regional procurements
- Social Policy and Welfare
- Consumer Protection

The Regional Government has adopted a program aimed at reducing accidents on the workplace: "Progetto sicurezza nei cantieri edili – anno 2005". The program targets risk factors and was based on the cooperation of the many institutions involved, including the Regional environmental agency and the social security bodies. One of the pillars of the program concerns public procurements (4.2.1.3 "Iniziativa nell'ambito degli appalti pubblici").

Contractors are asked to abide to (social and) security rules (see Cons. 34 of directive 2004/18/EC). As elsewhere, in Italy many social considerations have evolved into social rights benefiting from protection Constitutional or legislative level. Security on the workplace legislation is quite complex, but there is feeling – shared by the *Coordinamento delle Regioni*, an informal think-tank of Regional Governments – that a legislative choice favouring the lowest bid in works procurements has put undue pressure on contractors to overlook security issues.

Truth is that this provision was later found to be in breach of EC law by the Court of justice in the *Sintesi* case (Case C-247/02, *Sintesi s.p.a.*, in *Giur. it.*, 2004, e in *Giust. civ.*, 2004, I, 2893, con osservazioni di R. BARATTA, *Sul criterio di aggiudicazione*

dell'appalto di lavoro pubblico di cui all'art. 30, n. 1, della direttiva 93/37/CEE) and repealed. But reliance on the lowest of a major weighting of the price element in the most advantageous economic offer selection mechanism are still quite widespread.

At national level, Art. 8 of L. 3 agosto 2007, n. 123, has amended Art. 86 of the Code, adding new provisions stating that procuring entities, when drafting contract documents and checking abnormally low tenders, must make sure that offers are adequate with reference to pay for the workers and cover security measures. Moreover, security costs are non negotiable and offers cannot lower them.

In this framework of a program aimed at reducing accidents on the workplace: "Progetto sicurezza nei cantieri edili – anno 2005", DGR 36-14907, the Direzione Sanità Pubblica (the branch of the Regional Government responsible for Health services), started an initiative with the Direzioni Patrimonio e Tecnico and Opere Pubbliche, responsible for different procurements, to include safety provisions in different phases of the procurement management cycle, and namely:

- The drafting of participation requirements;
- The choice of award criteria;
- The vigilance of contract implementation, foreseen penalty clauses for breach of security on the workplace provisions.

2. Strategy and Actions

A draft document on work security and works procurement has just been finalised.

The document concerns the first of the three phases mentioned, i.e. qualification requirements, but also involves adjudication. Apart for qualification requirements, the emphasis is put on the measures prospective contractors intend to take with reference to a specific building site.

The central idea is to give incentives – in terms of criteria applied when choosing the most advantageous economic offer – to the bidders who voluntarily submit additional information.

The legislation now in force already foresees the drafting of a Piano sicurezza cantiere – PSC (Building site security plan), but the legislative requirements are met in what is considered a rather perfunctory way.

A major weakness of the current arrangement is that under Art. 131 of d.lgs. 12 aprile 2006, n. 163, *Codice dei contratti pubblici*, the PSC is often drafted *after* the

procurement is awarded by what is already a contractor, who in any case only after the award has to draft its specifications to the PSC which may have been established by the contracting authority.

This inevitably weakens the hand of the contracting authority, who is already bound by a contract and therefore should start a procedure for breach and termination of contract and ultimately a new award procedure since the other bidders are no longer bound by their bids. The feeling is that to avoid going into that much trouble already at the beginning of the implementation phase, procuring entities don't look hard enough in the PSC that are submitted to them. This is at the root of many of the security on the workplace problems that then arise in public procurements.

The main idea behind the draft document is to induce potential bidders to draft and submit the PSC at the time they present their bids. Moreover, the draft document contains a quite articulated grill of information that should be provided along the bid and the PSC which go well beyond what is presently required under the law. These additional information cover all (not necessarily only the one connected to public procurement procedures) the building sites in operation at the time of the submission of the bid, the composition of the workforce, including the workers not benefiting from long term contracts (which, due to many reasons, may pose more risks from the point of security at the workplace), certification programs to which the firm takes part, security audit procedures followed by the firms, names of all people involved in security at the workplace and their training program, and so on.

Since the Regions have not the primary competence to change existing Italian national legislation on public procurements and related social security provisions (Art. 4 of d.lgs. 12 aprile 2006, n. 163, *Codice dei contratti pubblici*, gives only secondary legislative powers concerning security on the work place, and no competence at all on PSC; generally Corte Cost., 23 novembre 2007, n. 407, read restrictively the Regions' competencies), the change in approach cannot be forced upon potential bidders. The only option open is to give incentives to potential bidders who chose to draft their PSC at the same time as they submit their draft.

The draft document considers that potential bidders may be induced produce all the additional documentation foreseen if it may be taken into account as an element in the choice of the winning bid according to the most advantageous economic offer. Quite rightly, the document does not yet go into the details of the weighting that this additional criterion should be given, but suggests that one of the members of the jury/committee charged with the choice of the winning bid should be a specialist in the field to security at the workplace.

3. Monitoring and Reporting

The program being in its final stage of preparation, no monitoring is currently being carried out. One of the shortcomings of the initiative could be that, at this stage, impact assessment mechanisms have not been expressly foreseen.

4. *Barriers and Constraints*

Aside from the question of State/Region competencies, which could still be risen even if the initiative does not translate in formal rulemaking, the big legal issue is whether the voluntary adhesion to additional provisions aimed at enhancing the security on the workplace may be considered linked to the subject-matter of the contract under Art. 53 of Directive 2004/18/EC and the corresponding provisions of d.lgs. 12 aprile 2006, n. 163, *Codice dei contratti pubblici*. The uncertainty as to the proper scope of this aspect of SRPP is in the mind of those charged with drafting the document under discussion.

Since the scheme is based on the voluntary – even if encouraged – adhesion of potential bidders, a further question is how far they will be ready to incur into the additional costs needed to draft bids conforming to the more onerous model foreseen by the draft document.

5. *Contacts*

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Employment Opportunities and Training

A case study on Social Insertion City of Nantes, France

This case study is based on information gathered from the answers to the questionnaire and from documentation provided by and interviews with Rémy RISSER, Chef du bureau des productions et consommations, Délégation au développement durable, Ministère de l'écologie, de l'énergie, du développement durable et de l'aménagement du territoire ; Martine PALIS, Chef du bureau de la commande publique – DGA - Ministère de l'écologie, de l'énergie, du développement durable et de l'aménagement du territoire, and Gérard BRUNAUD Chargé de mission Animation interministérielle de la politique d'achats publics socialement responsables - Mission interministérielle France Achats-Agence Centrale des Achats - Ministère de l'Economie, des Finances et de l'Emploi - Ministère du Budget, des Comptes publics et de la Fonction publique.

1. Background

The municipality of Nantes – Ville de Nantes is responsible at local level for the general interests of the Community; under the present constitutional arrangements, its competences are open-ended, and include the following policy fields:

- Local procurements
- Social policies and Welfare

Since 2004, it has used social insertion clauses in its procurements.

Art. 26 of Directive 2004/18/CE has been implemented by Art. 14 of the Code des marchés publics 2006 («Les conditions d'exécution d'un marché ou d'un accord-cadre peuvent comporter des éléments à caractère social ou environnemental qui prennent en compte les objectifs de développement durable en conciliant développement économique, protection et mise en valeur de l'environnement et progrès social»).

France has been quite attentive to the possible role of public procurement in fostering the social inclusion of disadvantaged workers. A National Strategy for Sustainable Development was already launched in 2003 and has been updated since then (<http://www.ecologie.gouv.fr/-SNDD-actualisee-.html>). A National Action Plan for

Sustainable Procurement was adopted in 2007 (<http://www.ecologie.gouv.fr/pnaapd.html>). Again in 2007, the Observatoire Economique de l'Achat Public, an official institution established in 2005 and working within the Ministry of Economy (http://www.minefi.gouv.fr/directions_services/daj/oeap/index.htm) has published a guide specifically targeted to procuring entities on « Commande publique et accès à l'emploi des personnes qui en sont éloignées ». The guide analyses in the details the new (2006) provisions in the Code des marchés publics which may be used to foster social considerations in procurement processes. The aim is to make it easier for procuring entities, especially local ones, to adopt a socially responsible approach to public procurement. It expressly recognises that it is not a directive, binding for the procuring entities, but rather a tool to attain shared goals (point 6).

At present, the French Government is engaged in a major consultation with the social partners – the so-called Grenelle de l'environnement and Grenelle de l'insertion – involving different actions impacting social integration, including public procurement. The aim is to build around the central idea of the "Etat exemplaire". The State, and more generally all public law entities, are expected to show the way forward to sustainable development (<http://www.grenelle-insertion.fr/>).

Similar developments took place at local level first, by anticipating and setting the example for actions later started at national level. This was the case with the Alliance Ville Emploi which published an articulated guide targeted to local entities in the framework of a project sponsored by the ESF (<http://www.ville-emploi.asso.fr/extranet/actualites/pdf/CSM.pdf>).

The inclusion of social insertion clauses in public procurement contracts is quite widespread at local level, local authorities being competent with reference to social issues. According to the data referred to in the National Action Plan for Sustainable Public Procurement (<http://www.ecologie.gouv.fr/pnaapd.html>) of 2007, the 53 local authorities as a whole were able to set aside more than two millions working hours to the benefit of disadvantaged workers from 2002 to 2006.

The municipality of Nantes – Ville de Nantes, has been at the forefront of the developments of social insertion clauses. Since 2004, it has followed a holistic approach to social policies and public procurements working hand in hand with other public institutions responsible for social inclusion, which allow coordination and synergies in all the activities that come to compose the *Plan pour l'Insertion et l'Emploi – PLIE*

(http://www.nantesmetropole.fr/1199716709133/0/fiche___article/)

2. Strategy and Actions (of the specific procurement to be presented)

Contract 200/2007 concerns cleaning services for the municipal buildings.

Its subject matter, however, is not strictly limited to cleaning and includes professional insertion of disadvantaged persons ("L'insertion professionnelle de personnes en difficultés). A social insertion clause has been drafted in application of Art. 14 of the Code des marchés publics. A minimum number of insertion hours is foreseen for three out of four lots. It lists a) the insertion objectives; b) the disadvantaged categories covered (e.g. handicapped people; unqualified youth; long term unemployed); c) control mechanism as to the respect of the clause, including d) a progress report to be established every year ("bilan de l'action d'insertion").

More into the details, the contracting authority's concern is not limited to the minimum hours. Insertion must bring some value added for the beneficiaries of the program. Disadvantaged employed must benefit not just from training, but also from a gradual improvement of their skills. Cooperation with social institutions is foreseen to make sure that the insertion program does not limit itself to work opportunities but helps solving housing and health problems.

3. Monitoring and Reporting

Concerning specifically the Bilan de l'action d'insertion, at the end of the first year of contract implementation a report will assess not just the number of hours insertion persons have worked, but also the quality of the work assigned and the acquisition of savoir-faire and de savoir-être. To this end, the contracting authority may interview both the workers, the contractor's employees responsible for the implementation of the insertion clause and the officials from the social services. In any case, the contractor must immediately inform the contracting authority of any difficulties arising in the insertion process. If the clauses is not complied with, heavy penalties are foreseen.

The contractor must make sure that sub-contractors comply with the insertion clause.

It is too early to dress a final assessment as to the real effects of the insertion clause with reference to the specific contract discussed here. However, aggregated data for the results of the "Clauses d'Insertion" in the larger Nantes area include:

- 200 contracts were passed with an insertion clause,
- 154 different firms were concerned,
- 382.000 hours of work opportunities were created for disadvantaged persons,
- 515 disadvantaged persons were hired.

Possibly more important, 50% of the persons involved finally got permanent jobs (see <http://www.socialement-responsable.org/actu/3/Nantes-Un-tramway-nomme-insertion>) .

4. Barriers and Constraints

The case law is quite strict on social insertion clauses, striking down any clause which may favour any category of potential bidders. In *Gravelines*, the Commissaire du gouvernement Denis Piveteau cautioned against any use of Art. 14 which could lead to discrimination among potential bidders («Que dit en effet ce nouvel article 14, sinon que l'éventuelle clause sociale doit figurer dans le cahier des charges à titre de condition d'exécution (ce qui permet de penser qu'elle ne peut intervenir que comme une exigence uniforme, imposée à toutes les entreprises concurrentes) et qu'au surplus elle ne peut avoir d'effet discriminatoire à l'égard des candidats, ce qui ramène à la distinction entre la discrimination des offres, qui serait autorisée, et celle des entreprises, qui ne le serait pas» (*L'illegalité du critère du "mieux-disant social" dans les marches publics*, concl. s. CE 25 juillet 2001, *Gravelines*, AJDA, 2002, 47).

Generally speaking, the more relevant factual difficulties met by the Ville de Nantes in managing procurements contracts with insertion clauses are to involve proactively not just the management of the contractor but its ranks and file employees. Tensions may be accrued when the person involved in the insertion program does not have sufficient basic skills to fill his/her place

5. *Contacts*

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