

**Manchester City Council
Report for Information**

Report to: Ethical Procurement and Contract Management Sub Group –
13 September 2018

Subject: Social and Environmental Requirements in Procurement
exercises

Report of: The City Treasurer

Summary

To provide a report on the legal position in respect of considering social and environmental requirements in public procurement

Recommendations

Members are asked to note the contents of the report.

Wards Affected:

Not applicable

Alignment to the Our Manchester Strategy Outcomes (if applicable)

Manchester Strategy outcomes	Summary of how this report aligns to the OMS
A thriving and sustainable city: supporting a diverse and distinctive economy that creates jobs and opportunities	
A highly skilled city: world class and home grown talent sustaining the city's economic success	
A progressive and equitable city: making a positive contribution by unlocking the potential of our communities	
A liveable and low carbon city: a destination of choice to live, visit, work	
A connected city: world class infrastructure and connectivity to drive growth	

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Background documents (available for public inspection):

The following documents disclose important facts on which the report is based and have been relied upon in preparing the report. Copies of the background documents are available up to 4 years after the date of the meeting. If you would like a copy please contact one of the contact officers above.

Background

One of the stated objectives of the 2014 EU public procurement Directive (which has been reflected in the Public Contract Regulations 2015) was to "facilitate a qualitative improvement in the use of public procurement" – that is, ensuring greater consideration for social and environmental criteria.

The inclusion of social and environmental aspects in procurement is part of a sustainable procurement process. Sustainable procurement plays a role in ensuring that the products and services that a Contracting Authority (CA) buys have the lowest environmental and most positive social impact.

The Sustainable Procurement Task Force's definition of sustainable procurement is:

"a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits to society and the economy, whilst minimising damage to the environment".

Legal Position

Public procurement is subject to the EU Treaty Principles of:

- non-discrimination;
- free movement of goods;
- freedom to provide services; and
- freedom of establishment.

In addition to these fundamental treaty principles, some general principles of law have emerged from the case law of the European Court of Justice. The most important of these general principles of law for you to be aware of in the procurement context are:

- Equal treatment and non-discrimination: giving everyone the same chance to win the contract irrespective of their nationality or whether they are familiar to the contracting authority or not;
- Transparency: stating requirements and award criteria up front and sticking to them;
- Proportionality: setting requirements with reference to the needs of the contract in question and not being excessive;
- Mutual Recognition: giving equal validity to qualifications and technical standards of other member States, where appropriate

The Social Value Act came into force in January 2013, and imposes on relevant contracting authorities a duty to consider the economic, environmental and social benefits that can be achieved through commissioning. The Act reinforces the importance of contracting authorities providing social value through their procurement process.

The 2014 EU public procurement Directive clarified that there are instances in which it is valid for a CA to consider social and environmental characteristics when deciding whether to award a contract.

The Public Contracts Regulations 2015 (PCR 2015) which implemented the EU directive into UK law gave legal footing to the inclusion of social and environmental matters within the public procurement process in the UK. The PCR 2015 contains flexibility around using public procurement to promote supplier compliance with social, environmental and labour laws as well as wider scope for evaluating social, environmental and labour law issues as part of the award criteria. For example:

- **Reserved contracts provision (regulation 20)**

Allows CA's to reserve the right to participate in procurement procedures to particular bidders (such as sheltered workshops), provided that the key requirement is met.

- **Exclusion (regulation 57)**

Obliges CA's to exclude tenderers where convicted of terrorist, child labour or human traffic related offences or where in breach of one of the mandatory exclusion conditions. This also allows CA's with discretion to exclude tenderers in violation of social, labour or environmental considerations.

- **Labels (regulation 43) (set out in the specification)**

CAs may ask for labels as a means of evidencing that the deliverables meet the specified environmental characteristics

- **Contract award criteria (regulation 67)**

Award criteria may include environmental or social aspects as long as a clear link with the subject-matter can be demonstrated by the contracting authority, Contractors tenders in response to such will be part of the contract and enforceable by a contracting authority.

- **Abnormally low tenders (regulation 69)**

Tenderers which do not comply with international or national environment, social or labour laws as set out in regulation 56(2), may be rejected.

- **Conditions for performance of contracts (regulation 70)**

Allows for including social, employment related and/or environmental contract conditions, provided they are linked to the subject matter of the contract.

Application of the Legislative Framework to targeted recruitment and training

It is therefore permissible under EU and UK law for local authorities to include employment matters and objectives and other social and environmental requirements

in selection and award procedures and contracts provided that such comply with such fundamental principles of EU law and specific public procurement law.

Contract notice published in the official Journal of the European Union (OJEU) should include CPV codes corresponding to the social and environmental objectives required,. The CA must also have the legal powers to pursue the requirements. There is a duty to comply with EU treaty principles and therefore where a CA seeks to promote local labour, neither the procurement documents nor the process should disadvantage non local bidders. Such requirements in contracts should be objective in nature and not favour local suppliers or restrict employment or training to UK nationals. For example, contracting authorities must not express a preference for jobseekers from a particular locality to receive training or employment or require subcontracts to be placed with "local" SMEs. As wide a variety of suppliers as possible should be able to compete for the contract.

In particular, with regard to targeted recruitment and training, it is proposed that wording is adopted in the Council's Ethical (Procurement) Strategy and other policy documents which sets out the Council's intention to use all its powers, wherever it can, to promote or improve the well being of its area, with the aim of securing skills and employability and equal opportunities in employment. Such aims to include,

1. developing a workforce that is highly skilled and motivated with the aim of ensuring it can meet the skill need of the economy;
2. building a place where everyone who wants to can participate in economic success;
3. providing residents with the skills to compete for employment and encouraging local residents to take up sustainable employment opportunities]

OJEU/Contract Notice

The inclusion of social requirements in contract conditions must be mentioned in any OJEU notice by a contracting authority. The following model wording is suggested, under the section in the OJEU Notice typically headed "other information".

"Under this [procurement exercise] the [contractor] will be required to support the Council's economic and social regeneration objectives as set out in the Council's ethical (procurement) strategy. Accordingly, contract performance conditions may relate in particular to social and environmental considerations".

The Council already includes this type of wording in its OJEU notices.

Where recruitment is included as a requirement of the contract, the Common Procurement Vocabulary (CPV) for "labour recruitment and the provision of personnel services", CPV 79610000, should be included in the list of CPV codes specified in the OJEU Notice.

Social and environmental considerations must be linked to the subject matter of the contract, and cannot be a blanket requirement

Selection/Pre-Qualification Questionnaires

Where recruitment and training is included as a requirement of a contract the following questions can be asked in the section of the questionnaire that assesses technical capacity and ability:

"Please give examples of your involvement in each of the following:

- generating employment and training opportunities for long-term unemployed people;
- providing training opportunities;
- the development of trade skills in your existing workforce; and
- equal opportunities recruitment procedures.

What was your exact involvement in each of the above activities? Which of the examples you have cited have been more successful, and which have been less successful, and why?"

Please note: In order to observe the EU treaty principle of proportionality, questions in a questionnaire must be set with reference to the needs of the contract in question

Specification of Requirements

The specification must be considered on a case by case basis. Some key considerations to take into account are as follows:

Requirements Relevant to the Specific Contract

What requirements are relevant to this specific contract, taking account of:

- the nature of the works or services to be delivered;
- the scale and duration of the contracts;
- the policy priorities and the need for the opportunities that could be provided;
- the most appropriate way to describe and measure the requirement;
- specifying a clear minimum requirement in the tender documentation and contract so that tenderers all bid on an equal basis; and
- proportionality, i.e. ensuring the burden placed on the supplier is proportionate to the potential community benefit.

Information For Monitoring Requirements What information is required from the contractor in order to monitor and verify the delivery of the community benefits?

Validating Outcomes

There should be a robust and transparent method of checking outcomes in the contract to ensure that the contractor delivers the agreed community benefits.