

A quick guide to equality and procurement for housing









A quick guide to equality and procurement

What's in this guide?

This guide is intended to provide important information about key legal requirements and best practice in relation to the procurement process, how it is used to embed equality and deliver social and community benefits. The guide is split into two parts and is intended for use by local authorities and housing associations, as well as contractors who may be currently working on their behalf, to deliver essential housing services. Part 1 deals with implementing equality and diversity and Part 2 deals with implementing social and community benefits.

Public procurement

Public procurement relates to the purchase of goods, works or services by public sector bodies. The purpose of the EU procurement rules and the implementing UK legislation is to open up public procurement to EU wide competition. The EU procurement rules are designed to ensure that bidders are treated equally and contracts are awarded fairly, transparently and without discrimination on the grounds of nationality. Matters which can be taken into account in choosing a contractor are limited to assessing:

- (i) the technical/professional competence and economic financial standing of the contractor ("selection stage"); and
- (ii) the most economically advantageous tender (i.e. the best value for money or the lowest price) ("award stage").

In selecting the tender which offers the best value for money, provided certain conditions are met, organisations can seek community and other social benefits from their procurement. As detailed in Part 2, there are two different approaches which can be used to implement social and community benefits in procurement, namely the core and non-core approach.

When procuring contracts for goods, works or services it is also important that organisations comply with their obligations under the Equality Act 2010 and the supporting regulations. The obligations will vary according to the nature of the organisation and the roles and functions they carry out. Broadly, the most effective way to address equality issues in the procurement process is to impose contract conditions on the contractor and work with them in order to ensure they meet the required standards.

Part I Equality and Diversity

Summary of Equality Act 2010

The Equality Act 2010 and the supporting regulations consolidate and replace the discrimination legislation that was previously in place. For the first time, the Act brings together all of the legal requirements on equality that the private, public and voluntary sectors need to follow.

The Act protects people from discrimination on the basis of certain protected characteristics for example: age, race, disability, religion or belief etc. All employers and those who provide goods, facilities or services to the public (including the provision of social housing) have responsibilities under the Act.

Further to preventing discrimination, the Act places a duty on certain public bodies (and those who exercise public functions) to actively promote equality across all protected groups. The equality duty applies to local authorities and housing associations that are deemed to perform "public functions". This means that in carrying out their work, they should have due regard to the need to:

- eliminate discrimination, harassment and victimisation and any other conduct prohibited by the Act;
- advance equality of opportunity between people who share a protected characteristic and those who do not; and
- foster good relations between people who share a protected characteristic and those who do not.

When carrying out work on behalf of a body that is subject to the equality duty, such as providing frontline services like repairs and maintenance, the duty becomes shared between that body and the contractor. As a result, housing providers face challenges in making decisions about who to engage to deliver these services, and how to work with contractors to ensure that these obligations are met.

Setting the Standard

It's possible for housing organisations to mainstream equality into the procurement process and to set standards in relation to equality and diversity from the outset. There are several ways in which this can be addressed and should be assessed on a case-by-case basis.

The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 impose specific duties on bodies caught by the equality duty. Where organisations are carrying out a procurement process which is above OJEU threshold and the contract is to be awarded on the basis of the most economically advantageous tender, organisations should consider whether award criteria should include considerations relevant to the

performance of the equality duty. Secondly, if the organisation proposes to stipulate conditions relating to the performance of the contract, it must consider including conditions relating to the performance of the equality duty.

Please note the changes to EU procurement rules on supported businesses. New regulations that will become law in 2014, will see Article 17 change to Article 19, as well as the use of the word 'disabled' changed to 'disadvantaged'.

For information regarding equality & diversity policies and procurement please contact Tai Pawb. For the different stage of procurement, and decision making on inclusion of social clauses please refer to the i2i website <u>www.cih.org/i2i</u>

Actions which can be taken to implement equality requirements as part of the procurement process:

Pre-contract consultation – consult with the market and make it clear what you are trying to achieve and where relevant, publish your organisations aims and policies.

OJEU Notice /Memorandum of Information ("MOI") – state the equality objectives you are trying to achieve at the outset in the OJEU Notice and the MOI.

Specification – ensure that your specification sets out your requirements in respect of equality and how they should be delivered. The specification should be drafted so that it provides equal access for all bidders and should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.

Pre-qualification Questionnaire (PQQ) – the purpose of the PQQ is to assess the bidder's technical/professional competence and financial standing only. If the PQQ goes beyond this, there is a risk that this may breach the principles of the EU procurement rules. Equality questions should only be included at the PQQ stage if they relate to the bidder's technical ability to carry out the contract. For example:

- (i) if the contract relates to tenant advisory services or maintenance in occupied homes, bidders could be asked as part of their technical competence to demonstrate evidence of their ability, or details of any training they have received to deal with people of different backgrounds; or
- (ii) to ascertain whether the bidder has breached the equalities legislation. This is a potential ground for exclusion under the EU procurement rules. There are standard questions in the Supplier Qualification Information Database ("SQUID") which can be used to address this.

If it is deemed appropriate to include equalities questions at PQQ stage they can be included within a distinct section, in which compliance is scored and weighted in the same manner as other considerations. As with other sections, it is important that evidence is requested where possible in order to support the responses to the questionnaire. Careful consideration is required in order to ascertain whether it is appropriate to include equality questions in the PQQ and if so, what questions should be included, to ensure that legal obligations are met.

Award criteria – can be used to evaluate equality requirements, but only if the equality requirements are linked to the subject matter of the contract. This is referred to as the "core" approach. For further details on the core approach, please refer to Part 2.

Assessment – housing providers may wish to consider giving tenants panels a key role in making decisions about who is successful in acquiring contracts. Tenants who are engaged in the assessment stage of the procurement process may be best placed to identify, ask and assess responses to questions relating to diversity issues, which may arise when contractors are delivering services in the homes of people from diverse backgrounds and with diverse needs. Any tenants who are engaged as part of the assessment process should be given clear guidance in respect of how the assessment should be made in accordance with the stipulated criteria. i2i offers training for tenants to enable them to be part of an evaluation panel. It also offers on-going support, training, advice and guidance for any organisation which to use social clauses to create community benefits through their investment.

Tai Pawb is able to offer support in the procurement process by:

- Assisting with the development of equality and diversity questions for PQQs
- Helping to ensuring contracts contain appropriate conditions in relation to on-going equality and diversity requirements
- Facilitating Equality Impact Assessments and developing of Codes of Conduct.
- Working with tenant panels to identify the appropriate assessment of equality and diversity issues

Contract conditions – if it is not possible to link the equality requirements to the subject matter of the contract, the requirements could be introduced as contract conditions using the "non-core" approach detailed in Part 2.

Contract conditions are the one of the most effective ways of including equality requirements. At tender stage, organisations must provide bidders with details of the contract conditions and if relevant, details of the policies they must comply with. It should be made clear that where work is being undertaken on behalf of a social housing provider, legal obligations in relation to equality and diversity which apply to the housing provider are shared with the contractor. As such, it's important that the contract specifies how the contractor will need to work with the housing provider to meet these obligations, for example by attending mandatory equality and diversity training, agreeing to participate in equality audits and taking steps to comply with the organisations Code of Conducts. Bidders who refuse to accept the conditions could be disqualified.

Codes of Conduct – it's important that housing organisations are clear about their expectations of successful bidders prior to the commencement of the contract.

Codes of Conduct should be reviewed by the housing provider on a regular basis, and prior to the commencement of any contract, to ensure that they clearly set out the organisations expectations and that they are up-to-date with all relevant legislation. Reviewing the Code periodically will also ensure that they take account of any changes which may come to light as a result of the organisations on-going commitment to equality and diversity as well as through other service improvement mechanisms. This may be facilitated by the use of an **Equality Impact Assessment**.

Post Award - once contracts are awarded, it important to ensure that steps are taken to work with contractors to clarify and support and agree mechanisms to monitor performance in relation to the equality requirements.

Monitoring and Supporting Performance on Equality and Diversity Post-Award

There are a variety of mechanisms housing providers can use to monitor performance in relation to equality and diversity, where contractors do not have the capacity to undertake this work themselves. Where contractors are already undertaking this work themselves, housing providers should provide guidance on how and when this information should be reported.

Equality Monitoring – housing providers/contractors may wish to consider conducting a tenant satisfaction survey in relation to the services which are being provided by contractors. Responses should be monitored by equality group. When compared with customer profiling data, this information can tell housing providers who is accessing the contracted services and their experiences of using them - providing a breakdown by equality group (i.e. based on the protected characteristics of age, sex, disability etc.) which will highlight any differences in the experiences of people from different groups.

It is also important to consider any measures of dissatisfaction with the service such as complaints, and monitor these by equality group. Any disparity may then be investigated and addressed in partnership with the contractor.

Equality Audits – conducting an equality audit may help to gain insight into the practices of those working on your behalf. This may include asking questions about workforce diversity, internal policy and procedure relating to equality and diversity, any non-compliance and details of staff experience and training. Collating this information may help to identify any potential issues which may arise and allow you to put in place appropriate support where needed, to help mitigate non-compliance and ensure that your own equality objectives are supported.

Developing Equality-related Performance Indicators – organisations will have developed performance indicators in relation to their various activities, including for example their repairs and maintenance service. In relation to repairs and maintenance, some organisations have utilised methods such as mystery shopping, which can be carried out in conjunction with tenant's panels or groups. Mystery shopping can incorporate an equality element to evaluate compliance with the Code of Conduct and measure performance on equality and diversity.

Tai Pawb is able offer support to both housing providers and contractors in:

- Developing customer profiling and equality monitoring mechanisms and provide guidance on how to use this data to improve performance.
- Undertaking an Equality Healthcheck these are mini-equality audits which provide a summary of performance in relation to equality and diversity and make recommendations for improvement.
- Develop key indicators which monitor contractor performance on equality and diversity.

Supporting Your Contractors

Contractor Guidance Manuals – many housing providers have developed handheld guides which contractors can refer to when working in people's homes, which supports the expectations outlined in the Codes of Conduct. These can provide practical information on appropriate conduct and effective communication when working in the homes of people from diverse backgrounds. It is best practice to ensure that this information is also conveyed to contractors during training sessions or toolbox talks, to clarify any questions about the guidance provided.

Training – it's important to ensure that contractors, like other staff receive workappropriate training on equality and diversity. Delivering shorter, practically oriented training sessions to contractors can help support Codes of Conduct, challenge stereotypes and negative attitudes and convey clearly the how equality and diversity fits in with the visions and values of the organisation. It should be used to clarify how discrimination is defined and can occur, which is a specific requirement of the Act.

Toolbox talks – these sessions can be used to provide updates on any changes to legislation and subsequent practice in relation to equality and diversity issues, during the course of the contract. They can also be useful in answering any questions or dealing with any difficulties staff may be facing in meeting the requirements of the Code of Conduct where equality and diversity is concerned. They can be the appropriate place to establish a dialogue and identify any further support which contractors may need.

Tai Pawb is able to offer support through:

- Undertaking project-based work to develop contractor guidance manuals these can be designed to provide guidance which is appropriately tailored, to be practical and useful in the communities which they work.
- Designing and delivering practically oriented contractor training sessions.

Considerations for Contractors

As well as complying with the legal requirements of the Equality Act (2010) as providers of goods and services, contractors will need to consider how well equipped they are to meet the requirements of contracts with those providing services of a public nature. Contractors wishing to examine their own equality practices for these purposes may wish to consider the following key areas:

Company Policy – Is your Equal Opportunities policy up-to-date with current legislation? Does it have a clear line on workplace discrimination and harassment? Is it supported by an action plan or procedure to ensure it becomes a living document? Is it clearly conveyed to all staff and do they understand their legal obligations as well as those of the company?

Training and Awareness Raising – Are staff at all levels given the support they need to deliver an equitable service? Is this training work appropriate and practically oriented?

Workforce Diversity – Does the workforce reflect the diversity of the communities in which contracts are to be undertaken? Does the organisation take real steps to encourage applications from groups who are under-represented among its workforce (such as women or people from minority ethnic backgrounds)? Is this reflected in recruitment policy and practice? Is their scope for positive action initiatives?

To discuss how Tai Pawb can help your organisation please contact info@taipawb.org or call 02920 537630

Part II Community Benefits

Developing Social Clauses and Community Benefits in contracts – Some Practical Considerations

i2i is able to offer hands on practical support on any community benefit initiatives, including but not limited to social clauses in procurement, tenant engagement and involvement, SME friendly practices, bespoke one on one advice and meet the buyer events. Please see the i2i website for further information and contact details <u>www.cih.</u> <u>org/i2i</u>

1. Adopting Clear Policies

When developing social clauses and community benefits it is important to assess contracts on a case-by-case basis to decide your priorities as a purchasing client. Are they:

- Maximising spend from your investment?
- Creating jobs? In particular, for those not in education, employment or training (NEETs)?
- Supporting local businesses or social enterprises?
- Achieving the lowest price?

Engage your staff members, services users, stakeholders and boards to see what they believe is most important for your organisation, and if this is reflected in its visions and values. This will give you a flavour of what you should focus on. Deciding to procure in a way that maximises the opportunities to promote social and other community benefits means that more time has to be spent in the planning stage. However, this is not an excuse not to deliver on this agenda.

Many organisations feel the pressure of tight timetables on procurement, but spending time at the beginning of the process to specify clearly what social benefits are sought from a contract can create a more streamlined and effective approach later on. Please see the Can Do Toolkit resource one for more detailed advice, available on www.cih.org/i2i

2. Developing a business case

Do you want social procurement to be a corporate policy for all your contracts? What is the best way to do this? Do you have the organisational backing?

The following link gives the current European position on social procurement which may be useful in support of a business case: <u>http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1580</u>

The Welsh Government also launched guidance to secure added value and increased benefits in procurement as outlined in its guidance "Delivering Maximum Benefits for the Welsh Pound": <u>http://wales.gov.uk/topics/improvingservices/bettervfm/publications/commbenguide/?lang=en</u>

Community benefits may include targeted recruitment and training opportunities, supply chain initiatives, contributing to local community schemes or working with supported businesses etc.

It is important to think about the split you want between quality and price so that they reflect your original objectives. Consideration should also be given as to whether the social and community benefits should be included using the "core" or a "non-core" approach.

(i) the "Core" approach

If it is possible to link the social/community benefit to the subject matter of the contract, the core approach can be used. For example, if an organisation wanted to achieve training opportunities from a major housing project, the project should be advertised as a project for both housing works and training. The requirements must be stated clearly in the contract notice and the tender documents and can be assessed as part of the award criteria. The award criteria must also be disclosed in the tender documents, comply with the principles of EU law (such as non-discrimination and equal treatment), be capable of being measured objectively and not allow the organisation an unrestricted freedom of choice when selecting the contractor.

In order to be able to use the core approach, organisations must check that they have the power to contract for the community/social element. This can be done by checking the organisation's constitution or charitable objects to ensure that the community/social element benefits the organisation in the performance of its objects.

(ii) the "Non-Core" approach

If it is not possible to link the benefits to the subject matter of the contract the non-core approach can be used. The benefit can be included as a contract condition, but this will not be assessed at either the PQQ (i.e. selection) or award stage. Whilst contract conditions do not need to be linked to the subject matter of the contract, they must be non-discriminatory and proportionate.

The requirements must be referred to in the OJEU notice and set out as contract conditions, but they must not be assessed at either selection stage or award stage. However, acceptance of the contract conditions could be made a Pass/ Fail requirement. The requirement to ensure that organisations have the power to contract for community/social benefits are less stringent than when using the core approach, but organisations will still need to check that the requirements benefit the organisations aims or policies in some way.

3. Preparing the OJEU contract notice and contract documents

If it is intended that community or benefits will form part of the contract, this should be detailed in the OJEU notice, together with details as to whether they will be core or non-core. An example (non-core) clause is shown below:

"Under this [procurement / project] the [contractor / developer] is required to participate actively in the economic and social regeneration of the locality of and surrounding the place of delivery for the [procurement / project]. Accordingly contract performance conditions may relate in particular to social and environmental considerations."

i2i Can Do Toolkit <u>www.cih.org/i2i</u>

As detailed in part 1, it is also vitally important that the Specification and tender documents clearly set out what is required of bidders and they are drafted to provide equal access for all bidders.

4. The Pre-Qualification Questionnaire (PQQ)

As detailed in Part 1 above, the purpose of the PQQ is to assess the bidder's technical/ professional competence and financial standing. If the PQQ goes beyond this, there is a risk that this may breach the EU procurement rules.

The PQQ can be designed to encourage access for SMEs, as seen by the Tai Ceredigion example below. It may be used to discover what experience contractors have in delivering previous contracts, but only where the community benefits relate to the subject matter of the contract e.g. using the example above, where the contract is for a housing project and training posts.

Example - Tai Ceredigion

The Tai Ceredigion PQQ for the WHQS frameworks allowed bidders to apply for one lot only; the lot size that best meets their financial capabilities. By breaking down the requirement into smaller lots this increases the opportunities for SMEs. The key issue is to try and make the requirement accessible for SMEs or other providers in the market without breaching the EU principles of equal treatment of bidders and nondiscrimination based on nationality. Whilst organisations can take measures to make the procurement process more accessible for SMEs and promote benefits in the local area, they cannot expressly state a preference for "local" providers as this would breach the fundamental principle of non-discrimination on the basis of nationality.

LCP	Large Contractor Partner Turnover >£15,000,000.00
	Multi-disciplinary larger General Contractors with experience of large scale (sequential programmed) WHQS works in the social Housing Sector.
МСР	Medium Contractor Partner Turnover >£1,000,000.00 <15,000,000.00
	Organisations with experience of medium scale programmes of work in respect of housing stock.
	The key is that the business should be a general contracting multi-discipline business that would not meet the financial or experience benchmarks for selection in LCP above.
SCP	Smaller Contractor Partner Turnover >£100,000.00 <£1,000,000.00
	Contactors who only deal with one section of the works (e.g. Central Heating Companies). Applications are welcomed from any specialist contractors.

This approach was taken to ensure that the client had a wider range of delivery partners and to mitigate against the risk of reliance on a single contractor. It also meant that LCPs were only competing for work with other LCPs and the same for the MCPs and SCPs.

In addition, the PQQ was split into lots dependent on turnover which reduced the financial thresholds and level of detail that needed to be provided by bidders for the smaller lots, whilst at the same time, ensuring that the larger value lots set a higher financial threshold and level of detail. This is a way of levelling the playing field for smaller organisations that may not have the resources or experience in completing PQQs effectively.

During the submission period for the PQQ, a "Meet the Buyer" day was held by Tai Ceredigion's Asset Director and the procurement consultant, with support from the Supplier Development Service and i2i. Bidders could gain more information about the process, hear what was expected of them in the PQQ, including details of the community benefits clauses. This also provided bidders with the opportunity to raise questions and to seek "how to tender" support from the Supplier Development Service. Meet the Buyer days also offer a suitable forum for bidders to meet and consider forming consortia or other collaborative arrangements to deliver the contract.

5. Developing an award process

With either approach that is used, i2i can give assistance, training and hands-on support to score community benefit method statements using the award criteria. This can include development of clauses, bespoke advice and support from business planning stage, to award and implementation.

If the "non-core" approach is used the contract conditions must be provided as part of the tender process but the bidder's ability to meet the conditions must not be assessed at either selection stage or award stage. However, acceptance of the contract conditions could be made a Pass/Fail requirement.

6. Interviews

Any interviews that are carried out with contractors should be with individuals who will be performing the actual delivery of the contract. Consideration should be given to whether the interviews will be scored or whether they will be used for clarification purposes only.

7. Implementing contract conditions

It is very important to monitor performance once the contract has been awarded. This should not be an add-on to a project manager's job; it should be an integral part of it. Alternatively you can think about using your administrative resources to ensure that key performance indicators ("KPIs") on community benefits are being collated every month. This should also be on the agenda of every meeting between the contractor and client.

In order to manage the contract effectively, we would recommend that a few focused, realistic, easily measurable KPIs are used and monitored carefully. In the event the contractor fails to meet the KPIs this should be addressed in regular meetings and if the contractor fails to respond, this should be escalated to management if necessary. Some organisations have used a 'trainee deposit sum' or retention clause to deal with non-performance of community benefit requirements. This should only be a reasonable sum, related to the value of the contract, that it would cost the client to deliver these requirements in case of non- compliance. Please seek independent legal advice on this.

Tools which can be used to monitor performance include the Value Wales Sustainable Risk Assessment Tool and the Community Benefits Measurement Tool.

Thank you to Tai Ceredigion who piloted this approach. For more information in relation to this example, or in relation to developing social clauses please contact i2i@cih.org

The Rules on Including Supported Businesses and Social Enterprises

Please note that EU procurement law (and relevant directives) on supported businesses are changing as of 2014. Article 19 will become Article 17, and include "disadvantaged" rather than "disabled" when talking of supported businesses and factories. Please contact Value Wales for updated guidance (community.benefits@ wales.gsi.gov.uk) or view <u>Supported Factories and Businesses - Frequently Asked</u> <u>Questions</u>

What is a "supported factory or business"?

The term "sheltered workshops" comes from the European legislation. In the UK, the term used is supported factories and businesses. These terms are defined in the Regulations as follows:

- A supported factory is: 'An establishment where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market.'
- A supported business is: 'A service where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market.'
- A supported employment programme is:
 A scheme under which work is provided for disabled persons and where more than 50% of the workers so supported are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market.'

Under the EU directive, these are known as sheltered employment programmes.

The 50%-plus threshold is the only test which the organisation needs to fulfil. "Supported" is something of a misleading title as it is not necessary that the organisation be in receipt of funding from government or elsewhere. Nor is it necessary that it be a charitable, community or social enterprise (although many such organisations are likely to be).

Any persons who are genuinely engaged in working in the business (but who are not external contractors or self-employed) may be counted towards the threshold of 50%-plus. This could include, for instance, secondees or voluntary workers.

Why support contracts for Supported Factories & Businesses?

It is Welsh Government policy to, as far as possible give people with disabilities the opportunity to enter the labour market. Therefore public expenditure should be used in a way that supports this objective wherever practical. One route is by reserving contracts for supported factories and businesses. This also contributes towards meeting a contracting authority's Corporate Social Responsibility objectives.

There is no restriction on the size and type of contracts that can be reserved under this provision, and the principle can be applied to major contracts as well as contracts for niche products or services. The use of supported factories and businesses can increase supplier diversity in the public sector and help in the delivery of quality public goods and services.

EU procurement rules on supported businesses

Article 19 grants Member States the ability to reserve the right to participate in tender procedures to supported factories and businesses - i.e. no other provider may tender. This is enacted in the UK by Regulation 7 of the Public Contracts Regulations 2006 (SI 2006/5), which uses similar language. In both cases, it is stated that the right to participate in tender procedures may be reserved to supported factories and businesses. This is express language and as such, can be relied on.

Article 19 may be used both for contracts above the relevant OJEU value threshold and those below. Where a contract is below the OJEU threshold, the purchasing authority has two options. It may either:

- (a) voluntarily use the OJEU procedure for a below-threshold contract; or
- (b) state openly in whatever other advertisement or procurement procedure it is using, that the contract is reserved for supported factories and businesses.

In the case of contracts which may be too large or complex for supported factories and businesses to handle alone, public bodies also have the option of encouraging larger contracting entities to include supported factories and businesses within their supply chain as sub-contractors or consortium partners.

It is mandatory to use the OJEU notice procedure for contracts above the tender threshold, organisations may use it voluntarily (and many do) for contracts which are below the threshold value. Using an OJEU notice in this context is a useful way of advertising that the contract is a reserved contract.

Alternatively, there is no reason why you could not state that you are reserving a subthreshold contract, in the advertisement or call for competition which you issue via a portal other than OJEU.

Does Article 19 apply to social firms/social enterprises as well?

Unfortunately not, unless they also meet the threshold of having over 50% disabled workers.

An evolving agenda

The expectations of clients that contacts will deliver added value in terms of community benefits has increased considerably over the past few years and this continues. The welsh housing community has been at the forefront of this development and the good practice resources and materials are constantly being added to.

We hope you find the information in this guide useful.

If you would like any more information on this subject, please contact us at **info@taipawb.org** or call our helpline on **029 2053 7635**.