



Crown
Commercial
Service

THE PUBLIC CONTRACTS REGULATIONS 2015

GUIDANCE ON SOCIAL AND ENVIRONMENTAL ASPECTS

Crown Commercial Service, Customer Service Desk: 0345 410 2222 | www.gov.uk/ccs | follow us on [Twitter](#) | connect with us on [LinkedIn](#)

Contents

- **Overview**
- **Key Points**
- **FAQs**
- **Appendix A: Annex X of the Public Contracts Directive**
- **Appendix B: Suggested Contract Clauses**
- **Appendix C: Extract of Equality Act 2010**
- **Appendix D: Extract from Commission Regulation (EU) No 651/2014 of 17 June 2014**

Overview

Background to social and environmental aspects of the Regulations

One of the objectives of the new directives is to allow contracting authorities to make better use of public procurement in support of common societal goals. These goals include the protection of the environment, energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services.

Why is this helpful/necessary?

The Directives provide a clear steer from the European Commission on the application of social and environmental factors in public procurements.

What has changed?

The Directives have clarified that contracting authorities may consider incorporating social, ethical and environmental aspects into specifications, contract conditions and award criteria. In addition specific rules have been included for handling abnormally low tenders, and on the exclusion of suppliers who have violated certain social, labour and environmental laws.

The distinction between Part A and B services has been removed and a light touch regime introduced for certain health, social and cultural services. In addition, the rules allow certain light touch regime contracts to be “reserved” for organisations meeting specific criteria e.g. public service mutuals and social enterprises. Also, a contracting authority may reserve the right to participate in a procurement process to sheltered workshops or suppliers whose main aim is the social and professional integration of disabled or disadvantaged persons, where 30% or more of their employees are disabled or disadvantaged.

Which rules do I need to refer to?

Reserved contracts – Regulation 20

Technical Specifications –Regulation 42

Labels - Regulation 43

General principles in awarding contracts - Regulation 56

Exclusions - Regulation 57

Means of Proof - Regulation 60

Quality Assurance Standards and Environmental Management Standards -
Regulation 62

Contract Award Criteria - Regulation 67

Life-Cycle Costing - Regulation 68

Abnormally Low Tenders – Regulation 69

Conditions for Performance of Contracts - Regulation 70

Reserved Contracts for Certain Services – Regulation 77

Key Points

1. There is considerable flexibility for contracting authorities to include social, labour law and environmental criteria in the stages of the procurement process and during contract performance. For an example in a specific category see the CCS guidance for steel procurement in major projects.¹
2. Government policy is that contracting authorities must ensure that suppliers comply with relevant social, environmental and labour laws in delivering public contracts.
3. There are also new obligations in the Regulations that require procurers to take certain actions to ensure compliance with various international laws. These include national social, environmental and labour laws, EU compliant

¹ For examples see Steel procurement in major projects: Guidance on the application of social issues https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484843/Social_guidance_supporting_PPN1615_.pdf

collective agreements, EU level national and relevant international social, environmental and labour law obligations.

4. It is the law of the country where the work or services are taking place that is relevant. If services are provided at a distance, for example call centres, then it is where the call centre is located and the employees' work that is key rather than the country to which the services are directed. Consequently a tenderer may only be excluded from a tender for non-compliance with labour law if that labour law is the law of the EU Member State in which the employees are working².
5. These new flexibilities and requirements bite at different stages in the procurement process, including specification stage, supplier selection and exclusion, at award stage, and during the life cycle of the contract. They are set out in the next subsections, brigaded according to these main stages of the process.

The Early Stages (inc Exclusion/Selection Stage)³

6. The reserved contracts provision (regulation 20) allows contracting authorities to reserve the right to participate in procurement procedures to particular bidders such as sheltered workshops and sheltered employment programmes. The key requirement to be met before engaging this reserved contracts provision has, however, changed from the requirement under the

² Contracting authorities whose functions are wholly or mainly Welsh devolved functions are reminded they are expected to comply with the Wales Procurement Policy Statement and utilise the Value Wales tools/guidance on ethical procurement matters to ensure they contract with ethical suppliers that operate to professional standards. Further information can be accessed on <http://prp.gov.wales/toolkit/>

³ Contracting authorities are reminded that The Public Services (Social Value) Act 2012 places a requirement on commissioners to consider the economic, environmental and social benefits of their approaches to procurement before the process starts. They also have to consider whether they should consult on these issues. The Act applies to the pre-procurement stage of contracts for services because that is where social value can be considered to greatest effect. See [PPN 10/12](#)

Public Contracts Regulations 2006 (that 50% or more of the supplier's work force are disabled) to a two-stage approach where:

- the purpose and main aim of the supplier is assessed. For example, to be eligible, a supplier's main aim must be the social and professional integration of disabled or disadvantaged persons (see FAQ and Appendix D for more detail on definitions); and
- at least 30% of the employees of the supplier, sheltered workshop or sheltered employment programme must be disabled or disadvantaged workers.

7. In the Open procedure, contracting authorities may decide to verify the absence of grounds for exclusion and the fulfilment of the selection criteria either before examining tenders or after (regulation 56(3)).
8. Tenderers must be excluded if they have been convicted of terrorist, child labour and human traffic related offences (regulation 57(1)) and regulation 57 (1a)). This requirement also applies where the person convicted of such offences is a member of the administrative, management or supervisory body of the tenderer or has powers of representation, decision or control in the tenderer (regulation 57(2)).
9. Tenderers may be excluded if a contracting authority can demonstrate a violation of social, labour or environmental conventions⁴ listed in Annex X of the Public Contracts Directive 2014 (regulation 57(8)(a)) attached at Appendix A).

⁴ Contracting authorities whose functions are wholly or mainly Welsh devolved functions are reminded they are expected to comply with the Wales Procurement Policy Statement and utilise the Value Wales tools/guidance on ethical procurement matters to ensure they contract with ethical suppliers that operate to professional standards. Further information can be accessed on <http://prp.gov.wales/toolkit/>

10. Where the contracting authority verifies that a subcontractor has breached one of the mandatory exclusion conditions such as a breach of labour laws, then the contracting authority must require the main contractor to substitute a new subcontractor (regulation 71(9)(a)).

The Specification

11. Specifications may ask for Labels (regulation 43) as a means of proof that the deliverables meet the specified environmental characteristics. Labels could include, for example, environmental issues (e.g. energy use of appliances) where all of the following conditions are met:-

- the label requirements only concern criteria that are linked to the subject matter of the contract, for example a description of the product and its presentation including packaging;
- the label requirements are based on objective and non-discriminatory criteria;
- labels are established in an open and transparent procedure in which all interested parties can participate;
- labels must be accessible to all interested parties;
- the label requirements are set by an independent party over which the supplier applying for the label cannot exercise a decisive influence;
- if a specific label is requested, equivalents are also to be accepted.

12. Where the deliverable from the procurement is intended to be used by individuals, whether the general public or staff of the contracting authority, the technical specifications must take into account accessibility criteria for persons with disabilities (regulation 42(8)).

The Award Stage

13. When applying award criteria (regulation 67), the Regulations do not contain an exhaustive list of criteria, simply principles that criteria must adhere to,

including best price-quality ratio and being related to the subject matter of the contract, and conforming to the principles of procurement; proportionality, non-discrimination and transparency. Best price-quality criteria may include environmental and / or social aspects as long as they relate to the works, supplies or services to be provided under the contract (regulation 67(2)).

14. For example the award criteria for a printer may include the following costs; acquisition price, cost of consumables (ink), electricity consumption, cost connected to dismantling and recycling, **plus** factors for user-friendliness, level of noise emission, use of recyclable materials for the production of the printers, involvement of persons from a disadvantaged group in the production process, length of warranty, and aftersales service.
15. Fair trade requirements related to the contract subject matter may be included as a contract award criterion, including the requirement to pay a minimum price and price premium to producers, provided they meet the principles set out above.
16. The Directive confirms (recital 97) that contracting authorities are not permitted to require tenderers to have certain corporate social or environmental responsibility policies in place generally.
17. Life cycle costings (regulation 68) may include environmental factors such as CO₂ emissions and carbon footprint of the manufacturing stage of a product, however, the method used must be:
 - based on objectively verifiable and non-discriminatory criteria,
 - accessible to all interested parties,
 - based on data that can be provided with reasonable effort by normally diligent economic operators including those from countries party to the GPA or international agreements binding the EU.

18. Award criteria may include environmental and / or social aspects that relate to any respect and any stage of a life-cycle of the requirements as long as they relate to the subject matter of the contract, namely the works, supplies or services provided under the contract. For example, requesting confirmation that the production of an item did not include toxic materials, or services were and are performed using energy efficient machines, resource efficiency and waste minimization.

19. An abnormally low tender must be rejected when the contracting authority has established that the cost is abnormally low because it does not comply with international or national environmental, social or labour laws (regulation 69(5)).

Post-Award: The life cycle of the contract

20. It is now possible to include social, employment-related and / or environmental contract performance conditions where appropriate, providing they are linked to the subject-matter of the contract and had been previously indicated in the call for competition or the procurement documents (see regulation 70).

21. These could, for example, include Fair Trade requirements as contract performance conditions where they are linked to the subject matter of the contract. (See paragraph 15, for more details on how fair trade, can be taken into account at an earlier stages). Recital 97 of the Directive explains that 'Contract performance conditions pertaining to environmental considerations might include, for example, the delivery, package and disposal of products, and in respect of works and services contracts, waste minimisation or resource efficiency'.

22. Contracting authorities' contract management procedures should also include an on-going verification that contractors are complying with the relevant laws,

in order to comply with the requirement in the Directive that Member States take appropriate measures to do this. The UK decided following consultation to implement this obligation through administrative (i.e policy) measures, rather than regulation.

FAQs

How far down the supply chain do I need to check compliance with my environmental and social requirements?

It is best practice to have a good understanding of your supply chain and to analyse and then manage key members of that chain. Consequently, how far down the supply chain compliance checks are required, needs to be assessed on a case-by-case basis and be proportional. The Steel procurement in major projects: Guidance on the application of social issues includes examples⁵.

Where the contracting authority verifies that the compulsory grounds for exclusion (regulation 57) have been breached by a subcontractor, the contracting authority must require the main contractor to replace the subcontractor.

Suggested contract clauses are provided at Appendix B.

Why is it mandatory to reject an abnormally low tender when it has been proved that costs are low because the tenderer has not complied with environmental, social or labour laws (regulation 69(5)), but only optional to decide not to award a contract when it is proved that the tender does not comply with environmental, social and labour laws (regulation 56(2))?

These two are similar in that they both breach the requirement to comply with the applicable environmental, social and labour laws, however, the difference lies in the effects of this non-observance: normal pricing in one case and abnormally low in the other. Tenders that are abnormally low because they are not observing environmental, social and labour laws can lead to 'social dumping'⁶ and therefore

⁵https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484843/Social_guidance_supporting_PPN1615_.pdf

⁶ On 14 August 2015, Marianne Thyssen, European Commissioner for Employment, Social Affairs, Skills and Labour Mobility, gave a written answer to a European Parliament question on definitions, in which she stated: 'There is no definition of the concept of "social dumping" in EC law. The term is generally used to

they must be rejected. Where the pricing is normal, the risk of ‘social dumping’ is reduced and the contracting authority has the option to award the contract if it considers the non-compliance is tolerable, or if it works with the supplier to ensure compliance going forward.

The UK Government’s policy is that contracting authorities must take appropriate measures to ensure compliance throughout the procurement process.

Contracting authorities have flexibility to determine those measures on a case-by-case basis.

CCS strongly recommends that when contracting authorities are exercising their option whether or not to award a contract to a tenderer that does not comply with environmental, social and labour laws, that the contracting authority takes note of overarching procurement policy and statutory requirements⁷ and carefully considers the potential damage to the environment and society before accepting such a contract⁸.

What measures do we have to take to ensure our suppliers comply with environmental, social or labour laws?

The UK Government’s policy is that contracting authorities must take appropriate measures to ensure compliance throughout the procurement process.

Contracting authorities have flexibility to determine those measures on a case-by-case basis, as set out below. However, to ensure compliance during delivery of public contracts, contracting authorities must use contract clauses to ensure suppliers comply with these obligations. A suggested contract clause for this purpose is at Appendix B.

point to unfair competition due to the application of different wages and social protection rules to different categories of workers’ (*Parliamentary questions*, 27 May 2015, E-008441-15).

⁷ For example the Well-being of Future Generations (Wales) Act, The Public Services (Social Value) Act 2012

⁸ Contracting authorities whose functions are wholly or mainly Welsh devolved functions are reminded they are expected to comply with the Wales Procurement Policy Statement and utilise the Value Wales tools/guidance on ethical procurement matters to ensure they contract with ethical suppliers that operate to professional standards. Further information can be accessed on <http://prp.gov.wales/toolkit/>

The following represents CCS's guidance on measures a contracting authority may find appropriate to take, depending on the circumstances.

CCS suggests that contracting authorities request sufficient information from the successful tenderer(s) to allow for all the exclusion criteria to be verified before award of contract. There are a number of grounds for the exclusion of suppliers based on evidence of unsuitability, including the violation by the bidder of social, labour and environmental laws.

The standard Selection Questionnaire provides a mechanism at selection stage for the contracting authority to obtain the self declaration of the potential supplier, and any organisation they may rely on (including key sub contractors) to deliver the contracting authority's requirement, that they have not breached any of the exclusion grounds. An update of Parts 1 and Part 2 of the standard Selection Questionnaire can be requested at any point in the procurement and contract delivery.

Rather than impose a blanket requirement in applying the Directive's policy towards sub-contractors' compliance with environmental, social or labour law, the Regulations allow authorities discretion to decide the action to be taken in the circumstances of each procurement.

The contracting authority should consider the potential social risks (including to the labour force), and environmental risks that could be involved in the delivery of their requirement and where in the supply chain those risks may occur, and undertake checks to the necessary level. For example in a contract to provide cleaning services, a number of environmental and social rules may be breached by the main contractor through the use of cheaper non-environmentally friendly products, unchecked electrical equipment, incorrect disposal of waste and use of

illegal immigrants or slave labour. In other contracts, breaches of social, environmental and labour laws might occur at a much deeper level in the supply chain. For instance, in a contract for IT hardware, the main assembler may not have breached any such rules, but might be sourcing some of its components from subcontractors that, for example, employ slave labour, so checking further down the supply chain would be the only way to reveal such malpractice.

In the Open procedure, contracting authorities may decide to verify the absence of grounds for exclusion and the fulfilment of the selection criteria either before examining tenders or after.

If the tenderer offers an abnormally low tender then sufficient information has to be sought to establish that the cost is not low because international or national environmental, social or labour laws have been or will be breached. If it is low for this reason, then the tender must be rejected.

Contract management procedures should also include an on going verification that contractors are complying with the relevant laws. Authorities are free to choose how they do this, but examples could include through the monitoring of contractual key performance indicators on social and environmental factors, via site visits, regular contract management due diligence checks on the contractor and sub contractors and through the standard contract management processes.

What do I do if my preferred bidder has not complied with the Modern Slavery Act 2015?

The action you need to take depends on which sections of the Modern Slavery Act (MSA) have not been complied with.

If the bidder has been found guilty of an offense under the MSA then they must be excluded from any further participation in the procurement. This is because an

offense under the MSA is listed in the mandatory exclusion regulations of the PCR15⁹.

However if the supplier has not prepared their slavery and human trafficking statement, and they have a turnover of £36m and above then you have to decide whether they should be excluded from the procurement or not.

To do this you need to ask the supplier for the reasons they have not complied with the requirement. You then need to consider carefully those reasons, taking into account the gravity and particular circumstances of the non-compliance. If the evidence provided is not considered to be adequate and shows that the supplier is not taking the MSA requirements seriously, then that supplier must be excluded from the procurement process and provided with a statement of the reasons for that decision. On the other hand if the supplier has valid reasons for not producing the statement, and has taken steps to rectify the situation then you have the choice to exclude them from taking any further part in the procurement, or to include them.

What definitions should we use when considering the requirements of a disabled person and a disadvantaged worker?

Regulation 2 states “disabled”, in relation to a person, means a disabled person within the meaning of the Equality Act 2010⁽¹⁰⁾ and, in relation to a worker, means a disabled person who is a worker (see Appendix C for relevant section of the Equality Act 2010).

CCS suggests that contracting authorities should draw on recital 36 of the Public Contracts Directive 2014 (which describes disadvantaged persons as “such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups”). Contracting authorities may also find it helpful to consider

⁹ See SI 2015 No. 102 Public Contracts Regulations 2015 r57 as amended by SI 2016 No. 275

¹⁰ Equality Act 2010 c.15.

the definition of a 'disadvantaged worker' given in the EU Commission Regulation (EU) No 651/2014 of 17 June 2014¹¹. The definition is provided at Appendix D.

Can a procurement process be reserved to suppliers if only the 30% threshold is met?

No, the reserved contracts provision in regulation 20 also focuses on the purpose and aims of potential contractors. For example, for a supplier to be eligible, its main aim must be the social and professional integration of disabled or disadvantaged persons. There is then a requirement that these suppliers, sheltered workshops or sheltered employment programmes, have at least 30% of their workforce comprising disabled or disadvantaged persons. The contract procurement process may be reserved to suppliers, sheltered workshops or sheltered employment programmes in these circumstances.

What does “sheltered workshop” mean?

The Regulations do not define sheltered workshops, but in practice, sheltered workshops are generally understood to be a workplace that provides a supported environment for specific types of worker.

What does “sheltered employment programme” mean?

The Regulations do not define sheltered employment programme, but CCS suggests this should be interpreted to mean a scheme that specifically provides work opportunities for disabled or disadvantaged persons.

¹¹ [COMMISSION REGULATION \(EU\) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty](#)

Extract from Public Procurement Directive 2014/24/EU

ANNEX X

**LIST OF INTERNATIONAL SOCIAL AND ENVIRONMENTAL CONVENTIONS
REFERRED TO IN ARTICLE 18(2)**

- ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise;
- ILO Convention 98 on the Right to Organise and Collective Bargaining;
- ILO Convention 29 on Forced Labour;
- ILO Convention 105 on the Abolition of Forced Labour;
- ILO Convention 138 on Minimum Age;
- ILO Convention 111 on Discrimination (Employment and Occupation);
- ILO Convention 100 on Equal Remuneration;
- ILO Convention 182 on Worst Forms of Child Labour;
- Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);
- Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention);
- Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols

Suggested Contract Clauses For Social And Environmental Issues

Article 18 (2) of the new public sector procurement directive (2014/24/EU) requires Member States to take appropriate measures to ensure that in the performance of public contracts, economic operators comply with various obligations in (national and international) environmental, social and labour laws.

The UK Government therefore recommends the use of the following clause in public contracts. It is not mandatory. It refers to the contracting authority as the Authority, and to the contractor as the Contractor/Supplier. These terms should be amended to reflect the defined terms used in the relevant agreement

Clause giving the Authority the right to terminate if the Contractor fails to comply with social, environmental or labour law obligations.

Option 1 (free-standing)

The Authority may terminate this Agreement [with x months' notice] if the Contractor fails to comply in the performance of the Services with legal obligations in the fields of environmental, social or labour law.

Option 2 (where there is a defined Supplier Termination Event giving the Authority the right to terminate)

Add to definition of Supplier Termination Event -

(..) a failure by the Supplier to comply in the performance of the Services with legal obligations in the fields of environmental, social or labour law.

NOTE: in either case the consequences of termination must be considered in the light of the other provisions in the contract.

Clause giving the Contractor (and Sub-contractors) the right to terminate a Sub-contract for the same reasons.

The Contractor shall include in every Sub-contract -

- a. a right for the Contractor to terminate that Sub-contract if the relevant Sub-contractor fails to comply in the performance of its contract with legal obligations in the fields of environmental, social or labour law; and*
- b. a requirement that the Sub-contractor includes a provision having the same effect as (a) above in any Sub-contract which it awards.*

In this clause, 'Sub-contract' means a contract between two or more suppliers, at any stage of remoteness from the Authority in a sub-contracting chain, made wholly or substantially for the purpose of performing (or contributing to the performance of) the whole or any part of this Agreement.

Extract from Equality Act 2010 Section 6

6 Disability

- (1) A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
 - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
- (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
- (6) Schedule 1 (disability: supplementary provision) has effect.

**Extract from COMMISSION REGULATION (EU) No 651/2014 of 17 June 2014
declaring certain categories of aid compatible with the internal market in
application of Articles 107 and 108 of the Treaty**

Article 2 Definitions

(4) 'disadvantaged worker' means any person who:

(a) has not been in regular paid employment for the previous 6 months; or

(b) is between 15 and 24 years of age; or

(c) has not attained an upper secondary educational or vocational qualification (International Standard Classification of Education 3) or is within two years after completing full-time education and who has not previously obtained his or her first regular paid employment; or

(d) is over the age of 50 years; or

(e) lives as a single adult with one or more dependents; or

(f) works in a sector or profession in a Member State where the gender imbalance is at least 25 % higher than the average gender imbalance across all economic sectors in that Member State, and belongs to that underrepresented gender group; or

(g) is a member of an ethnic minority within a Member State and who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment.