

Procurement Policy Note – Public Procurement and the Public Sector Equality Duty

Information Note 01/13 28 January 2013

Issue

1. This Procurement Policy Note (PPN) is to remind departments of their legal obligations under the Public Sector Equality Duty (PSED), when conducting their public procurement activities. Departments should be aware that this is not a comprehensive guide to the PSED, but a summary of how the duty can be taken into account when conducting public procurement.

Dissemination

2. Please circulate this PPN within your organisation, agencies, non-departmental public bodies (NDPBs) and any other bodies for which you are responsible, drawing it to the particular attention of those with a commissioning, procurement or purchasing role.

Contact

3. Enquiries about this PPN should be directed to the Service Desk 0845 000 4999 servicedesk@cabinet-office.gsi.gov.uk.

Background

4. When conducting their procurement activities, central Government departments and their agencies must ensure that they meet their legal obligations under the Equality Act 2010 and its associated Public Sector Equality Duty in a way that is consistent with the Government's value for money policy and relevant public procurement law.

What is the Public Sector Equality Duty?

5. The PSED is contained within section 149 of the Equality Act 2010. It requires those public bodies which are subject to the duty, to have due regard to the three aims of the duty:
 - Eliminate unlawful discrimination, harassment, victimisation and any other conduct

prohibited by the Act;

- Advance equality of opportunity between people who share a protected characteristic and people who do not share it; and
 - Foster good relations between people who share a protected characteristic and people who do not share it.
6. The PSED should help to ensure that public goods and services are accessible to, and meet the diverse needs of all users to ensure that no one group is disadvantaged in accessing public goods and services.

Who does the duty apply to?

7. The PSED applies to the public bodies listed in Schedule 19 to the Equality Act 2010 (when they are exercising their functions, including procurement) and to other organisations when carrying out a public function¹. In terms of public procurement, departments should be aware of the following:
- Contracting out a service to which the PSED applies – if a department is contracting out a service to which the PSED applies, the department will need to consider whether the contractor would need to meet certain requirements of the PSED in carrying out that service so that the department can fulfil its duty.
 - Contracting out a public function – the successful contractor will be required to fulfil the requirements of the PSED in respect of the public function that it is performing but not beyond that function, e.g. in its wider business/functions. Although this is a statutory duty on the contractor, it would usually be set out in the contract conditions. In addition to the statutory duty on the contractor, the department's PSED itself is non-delegable and so, the public body subject to the PSED remains liable for compliance with its duty and not the contractor.

'Due regard' and assessing relevance

8. The public procurement rules allow for equality-related issues to be taken into account in the procurement process where they are relevant to the subject matter, or relate to the performance, of the contract. 'Due regard' in the context of public procurement means consciously considering the relevance of the three aims of the duty to the individual procurement and ensuring that where equality issues are incorporated into the procurement process, it is done in a proportionate way (i.e. the actions taken are proportionate to the degree of relevance of the equality issue to the individual procurement), taking into account value for money. It is important that the issues are looked at substantively and with an open mind, it is not enough to just note that there will be no negative impact, as there are parts of the duty which look at whether positive improvements can be made. It is good practice for those subject to the PSED to keep a record of the process of consideration to help demonstrate they have given real consideration to the three aims (whether or not equality is relevant to what is being procured). Departments should also be aware of their obligations to publish certain information under the Equality Act 2010 (Specific Duties Regulations

¹ A public function is a function of a public nature for the purposes of the Human Rights Act 1998.

2011).

9. The degree of relevance of equality will vary depending on the individual procurement.

For services, the degree of relevance is likely to be greater if:

- The service involves direct contact with the public, for example, social care services
- The service combines technical performance with provision directly to the public, for example, transport services and communication services;
- The service will be performed on the public authority's premises, where the contractor's workforce will be in contact with the public authority's employees, for example, facilities management services.

For goods, the degree of relevance of equality is likely to be greater if:

- The goods need to meet specific technical needs of the user, for example, meeting the needs of disabled people to ensure that the goods are fit for purpose.

For works, the degree of relevance of equality is likely to be greater if:

- The works need to ensure accessibility for disabled people, for example, building accessibility for disabled people;
- The works are being performed on the public authority's premises where the contractor's workforce will be in contact with the public authority's employees or members of the public.

10. The extent to which equality can be reflected in the procurement process varies depending on both the degree of relevance of equality to the individual procurement and on the stage of the procurement process. A case-by-case assessment is needed. If in doubt, departments can seek advice from their legal teams. Annex A shows how equality issues might be incorporated at the different stages of the procurement process.

11. Where it is clear from the start of the procurement, having conducted pre-procurement engagement and in identifying the need, that equality is not relevant to what is being procured, no further consideration or actions are required. The PSED is a continuing duty so if equality is a relevant consideration in what is being procured it should be considered at an early stage and throughout the procurement process (both before hand and at the time a relevant decision is being made). As a matter of good practice, departments may wish to keep some formal record to show that they have considered the duty in conducting a procurement exercise.

Ensuring transparency

12. In keeping with relevant procurement law and the Government's commitment to be more transparent about how public money is spent, where equality requirements are being incorporated into the procurement process, this must be clearly set out in the tender documents and resulting contract documents.

13. Under the Government's transparency policy, all central government tender

documents and contract for procurements over the value of £10,000 must be published on Contracts Finder. Greater transparency of tender documents and contracts will provide some indication as to whether and how equality has been incorporated into a particular procurement. This information will allow potential providers and the public to hold Government to account where they believe that relevant equality considerations are not adequately addressed in a particular procurement or where they believe that such matters have not been incorporated in a proportionate way.

Annex A – Incorporating Equality into the Public Procurement Process

Procurers should note that less regulated procurements (e.g. Part B services and those below the EU threshold) are only subject to EU Treaty Principles and not to the detailed requirements of the Public Contracts Regulations 2006.

