



Equalities – Duty to consider award criteria and conditions in relation to Public Procurement

Purpose

1. The purpose of this Scottish Procurement Policy Note (SPPN) is to provide information on the specific duty in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 to consider contract award criteria and conditions in relation to public procurement.

Key points

2. The key points are:
- the specific duty applies to public authorities which are listed in the Schedule to the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 and which meet the definition of a “contracting authority” in the Public Contracts (Scotland) Regulations 2012;
 - it requires such authorities to have due regard to the inclusion of award criteria and contract performance conditions which will help them to better perform the general equality duty;
 - it applies whenever such an authority awards a contract or framework agreement which is covered by the Public Contracts (Scotland) Regulations 2012.

Background

3. Scottish public authorities are subject to the **general duty** in the Equality Act 2010¹ which requires them to have due regard to the need to:

¹ <http://www.legislation.gov.uk/ukpga/2010/15/contents>

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

Private and voluntary sector organisations are also covered by the general equality duty when carrying out a public function i.e. when delivering services and functions which have been contracted out.

4. The effect of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012² is to place **specific duties** on some public authorities to enable the better performance of the general duty. The specific duties are requirements designed to help public authorities develop better policies and practices, improve transparency and accountability, and deliver better outcomes for individuals and communities in Scotland.

5. One such duty is the duty to consider contract award criteria and conditions in relation to public procurement. The duty is two-fold:

- when a public authority awards a contract or framework agreement on the basis of the most economically advantageous offer, it must have due regard to whether the award criteria should include considerations to enable it to better perform the equality duty;
- when a public authority proposes to stipulate performance conditions in a contract or framework agreement, it must have due regard to whether the conditions should include considerations to enable it to better perform the equality duty.

² <http://www.legislation.gov.uk/sdsi/2012/9780111016718/contents>

6. Any award criteria and contract performance conditions must, in accordance with the Public Contracts (Scotland) Regulations 2012, be related to and proportionate to the subject matter of the contract or framework agreement. The inclusion of award criteria and contract performance conditions should be assessed on a case by case basis to ensure that full consideration is given to the needs of, and likely impact on, all those who will be affected by the contract.

7. By way of an example, when procuring care and support services, an authority might consider incorporating award criteria which will allow it to evaluate service providers' understanding of how equalities legislation applies to the delivery of those particular services. Similarly, contracts for the delivery of care and support services should contain appropriate equalities clauses.

8. The 'public procurement' duty applies to public authorities which are listed in the Schedule to the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 and which meet the definition of a "contracting authority" in regulation 3 of the Public Contracts (Scotland) Regulations 2012³. It applies only when a public authority awards a contract or framework agreement which is covered by the Public Contracts (Scotland) Regulations 2012 (it does not, for example, apply to below-threshold procurements).

9. Also relevant is the duty to assess and review policies and practices where this is necessary to fulfil the general equality duty and to publish the results of any assessment. "Policies" in this context should be understood broadly and encompasses all of an authority's activities, including the delivery of services. When planning for the procurement of services and developing its procurement strategy, an authority should therefore consider the need to undertake and publish an equality impact assessment. Guidance on *Assessing impact and the public sector equality duty* has been published by the Equality and Human Rights Commission⁴.

Action required

³ <http://www.legislation.gov.uk/ssi/2012/88/made>

⁴ <http://www.equalityhumanrights.com/scotland/public-sector-equality-duty/non-statutory-guidance-for-scottish-public-authorities/>

10. Public authorities should ensure that they comply with their duties under equalities legislation when planning and undertaking their procurement activity.

Dissemination

11. Please bring this SPPN to the attention of all relevant staff, including those in Agencies, Non-Departmental Public Bodies and other sponsored public bodies within your area of responsibility.

Contact

12. Enquiries about this SPPN should be addressed to Scottish Procurement: spcdcommunications@scotland.gsi.gov.uk.

Scottish Procurement
The Scottish Government
2nd Floor, Europa Building
450 Argyle Street
Glasgow
G2 8LG