

**EQUALITY COMMISSION FOR NI /
CENTRAL PROCUREMENT DIRECTORATE**

**Guidance on equality and sustainable development
considerations in public sector procurement
(with particular reference to PPP/PFI)**

CONSULTATION DRAFT

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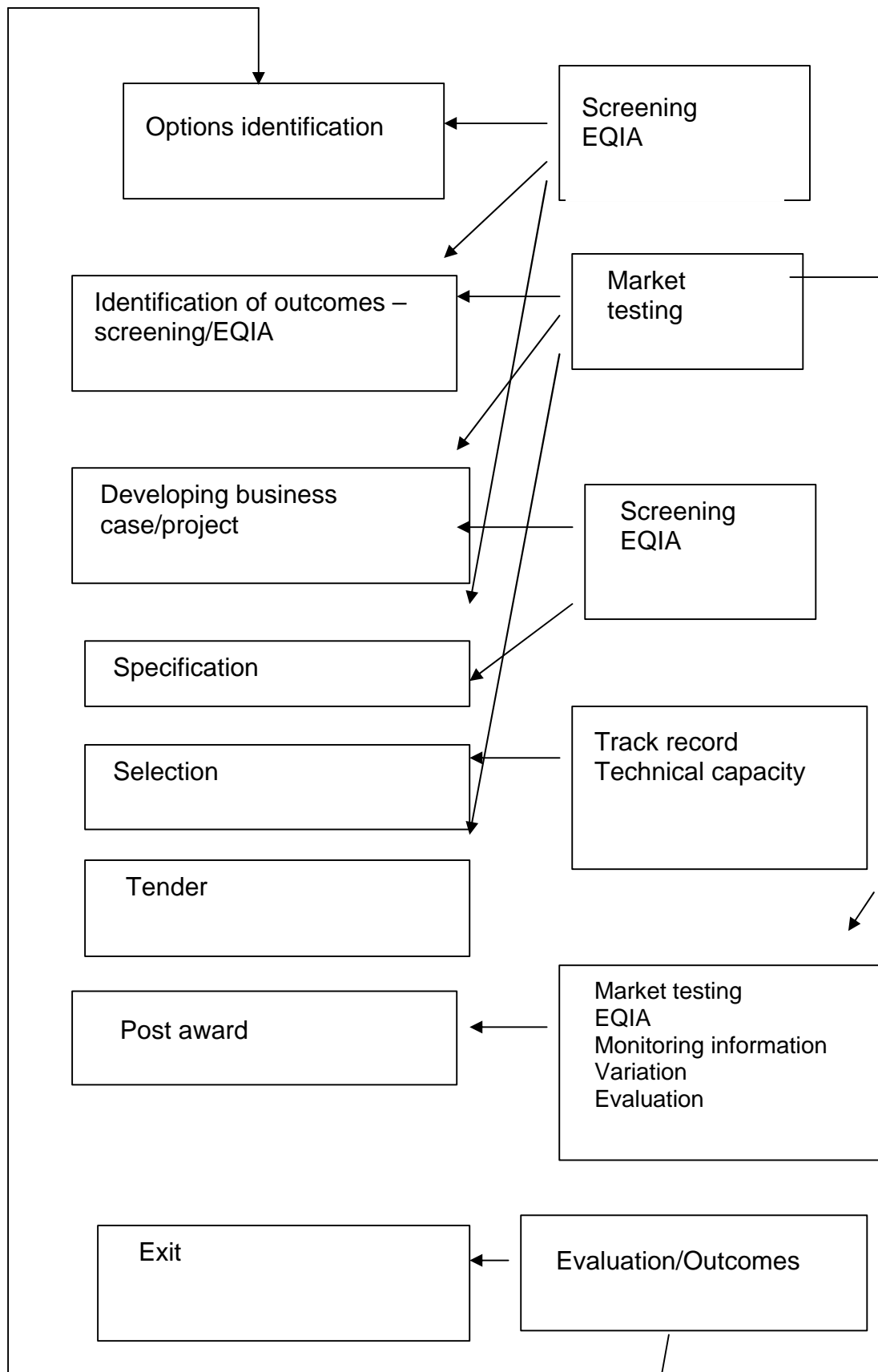
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FOREWORD

EXECUTIVE SUMMARY

Process

Equality Prompts



1 INTRODUCTION

“Equality considerations must be central to public policy processes. The main aim of Section 75 is to ensure that equality of opportunity is ‘mainstreamed’ by public authorities in their policy making, policy implementation and policy review, as they apply to Northern Ireland.”

- 1.1 In these words the **Guide to the Statutory Duties** sets out the aim of Section 75 of the Northern Ireland Act 1998 (s.75)¹. It is not a simple protection against discrimination but a tool for developing public policy and services which contribute to a society which affords equality to all. This guidance has been prepared with procurement practitioners to capture the learning and experience to date and to set down how good practice in procurement can be extended to put equality at the heart of procurement, as intended through s.75.
- 1.2 This guide is intended to cover public sector procurement in general however it is particularly relevant to Public Private Partnerships (PPPs) and Private Finance Initiatives (PFIs). These are a significant means of delivery of Government’s investment in infrastructure and services. Recognising this, the guide gives particular consideration to the opportunities provided in these larger value, multi-faceted projects
- 1.3 This guide applies s.75 to procurement at each stage and identifies who should consider that application.
- 1.4 Beside equality sits sustainable development, that is creating a just, inclusive society for all without limiting the quality of life for the future. The guide addresses how sustainable development considerations, encompassing all three pillars of social, economic and environmental goals, can be incorporated into the procurement process.
- 1.5 The guide will be useful to public authorities, to people making contracts with public authorities and to the users of public services. Certain sections will be of particular relevance depending on the reader’s role but the Equality Commission and the Central Procurement Directorate strongly recommend reading it in its entirety. How a project is developed will have a bearing on its operation well into its life or even its exit plans. Similarly, an understanding of the project development may help make the most of the potential it offers through its life to develop equality of opportunity and sustainability.

1.1

¹ Introduction to the (Revised) Guide to the Statutory Duties, p1, Feb 2005

- 1.6 The guide opens by considering the relevance of procurement to considerations of equality (chapter 2). It then more fully explores the context and the legislative and policy framework (chapter 3).
- 1.7 Then the guide follows the stages in the flowchart on page 3.
- developing the project
 - selecting candidates
 - finalising the contract
 - contract management
- 1.8 Chapter 13 describes how the guide may be of interest to a wider readership of stakeholders. It explains how potential contractors can prepare themselves for and carry out the equality and sustainable development aspects of contracts and how the community and voluntary sector can inform the direction of the contract.
- 1.9 Examples are used to illustrate the points in the text, and there are more detailed examples in annex 3. They are not all from this jurisdiction but have been chosen as transferable practice to illustrate how equality of opportunity can be incorporated into a project.
- 1.10 This guide refers to Public Private Partnerships and Private Finance Initiatives (PPP/PFIs). The abbreviation PPP is used throughout to refer to both financing initiatives (see glossary).
- 1.11 This guidance has been written at a time when the scale of investment in infrastructure in Northern Ireland offers unique opportunities to use the procurement process to promote equality and address sustainable development issues. It is, then, also the opportunity to incorporate the lessons learned in this investment process to the day to day procurement practice and service delivery of public authorities in Northern Ireland.
- 1.12 *The statutory duties on public authorities are a legal requirement which must be complied with.***

2 WHY EQUALITY AND SUSTAINABLE DEVELOPMENT CONSIDERATIONS IN PROCUREMENT?

This chapter considers the causes of inequality and examines the opportunities for change and how sustainable development considerations can be integrated into the procurement of public services. It explains the role of the Equality Commission and that of the Central Procurement Directorate, why this guide was written and how it will be useful.

Inequalities

- 2.1 Inequalities exist in our society for many reasons. As well as discriminatory practices there can be barriers to equality from attitudes, from lack of educational or training opportunities or attainments, from social deprivation or because of personal economic circumstances.
- 2.2 While changes have taken place it is still imperative for us to work to remove these inequalities and change our society to one which treats all its citizens with justice and dignity. While many historical inequalities have been addressed others remain.
- Effective access to the workforce for disabled people is still denied.
 - Women are still over represented in low paid and unskilled work but under represented on public bodies.
 - Most Traveller children leave school with no or few qualifications.
 - Travellers and other ethnic minorities have grave difficulties in securing adequate health care.
 - The number of reported homophobic, racist and sectarian attacks continues to increase.
 - There are continuing differentials in employment and occupational profiles based on community background.
- 2.3 Some improvements have been made, but we must continue to work to eliminate inequalities and make sure no more develop. In addition to these compelling issues of social justice, approaching procurement with an equality perspective ensures good decisions and good service delivery, involving, as it does, people directly affected. It allows us to meet the needs of our diverse communities and, as necessary, make a positive change for the communities in which we live.

Role of the Equality Commission

- 2.4 The Equality Commission for Northern Ireland is an independent public body established under the Northern Ireland Act 1998. The Commission has responsibilities under the legislation on fair

employment and treatment, sex discrimination and equal pay, race relations, sexual orientation disability and age. The remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act (s.75) (see below).

2.5 The Commission's general duties include

- working towards the elimination of discrimination
- promoting equality of opportunity and encouraging good practice
- promoting positive / affirmative action
- promoting good relations between people of different racial groups
- overseeing the implementation and effectiveness of the statutory duties on relevant public authorities
- keeping the legislation under review

2.6 The Commission has specific responsibilities under s.75 which include advice giving, equality scheme approval and a complaints and investigation role. See the *Guide to the Statutory Duties* for more detail.

Public authority statutory duties

2.7 One of the Commission's responsibilities is to oversee the implementation and effectiveness of the statutory duties on public authorities. Public authorities in Northern Ireland which have been designated under Section 75 of the Northern Ireland Act 1998 (s.75) have statutory duties to make equality and good relations considerations central to public policy processes. S.75 requires them to ensure that equality of opportunity is mainstreamed in public policy making, policy implementation and policy review. ***Building equality considerations into public procurement is a responsibility required through public authorities' equality schemes drawn up under s.75.*** The public authority's equality scheme will show how that public authority will promote equality of opportunity in carrying out all its functions, powers and duties relating to Northern Ireland.

2.8 It will also describe the public authority's procedure for identifying those of its policies which will be subject to full equality impact assessment (EQIA) and how these will be prioritised. This is known as screening. Its purpose is to identify those policies which are likely to have a significant impact on equality of opportunity. It requires a systematic review of policies.

- 2.9 The Commission's existing guidance on s.75 clearly identifies procurement as a function of public authorities and sets out the expectation that this function is screened in and an EQIA is carried out (see page 10). Those functions and policies delivered through or as a result of procurement must also be screened and any EQIA carried out.

Equality Impact Assessment

Equality Impact Assessment (EQIA) is a tool for systematic examination of policy to ensure that promotion of equality of opportunity is embraced throughout public policy making.

“The primary function of the EQIA is to determine the extent of differential impact of policy upon the groups and in turn whether that impact is adverse, that is, whether it has a negative impact on one or more of the nine equality categories. If it is decided that the policy has an adverse impact, the public authority must consider measures which might mitigate the adverse impact, and alternative policies which might better achieve the promotion of equality of opportunity.

The seven step process involved in conducting an EQIA is not an end in itself. The aim of the assessment is the better promotion of equality of opportunity. The outcomes from an enhanced policy are of primary concern.

In the Procedure of Conduct of Equality Impact Assessments, outlined in Annex 1 of the Guide to the Statutory Duties, the seven separate elements of an EQIA are as follows:

- 1 Defining the aims of the policy.
- 2 Consideration of available data and research.
- 3 Assessment of impacts.
- 4 Consideration of:
 - Measures which might mitigate any adverse impact; and
 - Alternative policies which might better achieve the promotion of equality of opportunity.
- 5 Consultation.
- 6 Decision by public authority and publication of report on results of EQIA.
- 7 Monitoring for adverse impact in the future and publication of the results

of such monitoring.”

Source: Guidance for Implementing Section 75 of the Northern Ireland Act 1998, ECNI, revised 2005

Procurement

- 2.10 Government, public bodies and others have worked hard to develop and document the principles and practice which guide procurement here. The Department of Finance and Personnel published the Northern Ireland Executive’s Policy on Public Procurement in May 2002 outlining the 12 central principles of procurement. These are considered on page 17.
- 2.11 Equality is integral to and a cross-cutting theme for all of these issues.
- 2.12 As seen in the section above, s.75 is the framework to ensure that in exercising all their functions, powers and duties, public authorities have due regard to the need to promote equality of opportunity. The procurement principles and s.75 complement each other in integrating equality and sustainability into the procurement of public services.
- 2.13 Projects such as those delivered by PPPs are complex in the sense that they involve a wide range of stakeholders or represent significant service delivery and impact in addition to the extent of finance involved. An authority should screen these projects and is likely then to undertake a rigorous process of EQIA to determine the best outcomes of the project deliverable through the procurement process.
- 2.14 The Treasury, which translates Government policy into practice for procurement across the UK, in conjunction with the devolved administrations is keeping the financing models under review. Reports of the implementation of PPP are available along with comprehensive guidance on procurement generally.

Why should equality be considered?

- 2.15 First, it is a statutory requirement, as previously described.
- 2.16 Secondly, it is recognised that there are opportunities for promoting equality of opportunity through procurement and the outcomes will be enhanced if a full consideration of needs and options through s.75 processes has been undertaken.

2.17 Equality of opportunity should be considered as there are likely to be issues and opportunities associated to:

- location
- design and design impact on local areas and individuals
- the context of inequality and multiple deprivation
- current and future service delivery
- employment and workforce issues
- regeneration and local economic impact
- development of infrastructure, skills and employment

2.18 Thirdly, equality should be considered in the decision on the procurement route itself to ensure the best choice.

2.19 The commitment to capturing the possibilities for equality considerations in public procurement begins at the highest level. It is recognised that there are opportunities for promoting equality of opportunity through procurement – indeed public authorities are legally bound to seek them out.

The importance of the duty to promote equality of opportunity and good relations is recognised in South and East Belfast Health and Social Services Trust 2004-2005 annual progress report:

“in terms of procurement, the Trust takes all necessary measures to ensure that the outside organisations used to provide goods or services adhere to the principles enshrined in s.75.”

The importance of health promotion through healthy eating has been clearly recognised as a public policy matter. The procurement of school meals services is a way to further this policy direction. There are clear links to equality as certain groups of school age children and young people are more likely to have a poor diet than others. Planning the delivery of the school meals service by using the s.75 processes will clearly identify the user groups and their needs.

Taking equality into consideration will contribute to the delivery of outcomes. The contracting out of services such as cleaning in hospitals has been an issue of concern. The concern has related to a) the erosion of the terms and conditions of those employed to clean the hospitals, particularly women, and b) reduction in the levels of cleanliness on hospital wards. While one may not necessarily be directly related to the other, ensuring that the services are procured to a specification that sets out requirements on the transfer of any staff, identifying user needs and the quality of the service to be delivered, and that the decision is made on the best overall value, not lowest cost, then the outcomes should be delivered, with no adverse impact to that workforce.

Source: Report on a Formal Investigation into Competitive Tendering in Health and Education services in Northern Ireland, Equal Opportunities Commission NI, 1996.

Why consider sustainability?

- 2.20 The public procurement policy approved in May 2002 applies to procurement carried out by Northern Ireland Departments and their agencies, Northern Ireland public corporations, Northern Ireland non-departmental public bodies and local authorities.
- 2.21 The policy is guided by the concept of “best value for money” which is defined as “the optimum combination of whole life cost and quality (or fitness for purpose) to meet the customer’s requirements”. While achieving best value for money is the primary objective of procurement policy, this definition allows for the integration, as appropriate within the procurement process, of sustainable development goals under the individual or collective pillars of social, economic and environmental objectives.
- 2.22 One of the 12 guiding principles governing the procurement process concerns integration and requires procurement policy to pay due regard to sustainable development policies, rather than cut across them.
- 2.23 The goal of sustainable development is to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life without compromising the quality of life of future generations. In Northern Ireland, that goal will be pursued in an integrated way through a sustainable, innovative and productive economy that delivers high levels of employment; and a just society that promotes social inclusion, sustainable communities and personal wellbeing. This will be done in

ways that protect and enhance the physical and natural environment and through using resources and energy as efficiently as possible.

2.24 The Central Procurement Directorate (CPD) within the Department of Finance and Personnel has, with the approval of the Procurement Board, produced guidance on the integration of sustainable development goals into the procurement process for conventional purchases. Individual guidance notes on each of the three pillars are available on the CPD website www.cpdni.gov.uk. The objective of these guidance notes is to provide an outline of the range of possibilities for integration under the existing procurement rules.

2.25 A list of further resource materials is contained in annex 2.

When the London Borough of Barking and Dagenham let the contract for housing repairs and maintenance the contract set objectives around regeneration of the local economy, promotion of equality of opportunity and celebration of diversity, raising pride in the Borough and making it a cleaner, safer and greener place.

Innovative thinking, ambition for change, flexibility throughout the project and imaginative partnership working are essential to such projects. In this case an effective partnership board has been key to successful outcomes.

Role of this guidance

2.26 This guidance has been written to provide advice on how equality and sustainable development considerations can and should be built into procurement projects. As much of Government's investment will use PPP for delivery, special consideration is given to how equality of opportunity can be promoted in such projects.

2.27 ***It has been written primarily with people involved in the procurement process in mind***, to help ensure compliance with s.75 and the Northern Ireland Sustainable Development Strategy and to help add a new value to procurements, but it will be of use to a wide range of people. For instance contractors will find the guide useful as it sets out the equality conditions which public authorities will be seeking from them.

2.28 Meeting these conditions opens the door to bidding for considerable public contracts.

- 2.29 The community and voluntary sector, along with trade unions, will also find it useful in their role in advising and advocating on behalf of disadvantaged groups.
- 2.30 All public procurement provides opportunities to promote equality and achieve sustainable development objectives. All procurement is also subject to s.75 and, where appropriate, to the Sustainable Development Strategy so the guide should prove useful to all those involved in procurement and contract management.
- 2.31 This guide clearly sets out that it is through good planning and consideration of equality and sustainable development issues at all stages in procurement that the best outcomes can be achieved.
- 2.32 For the purpose of this guidance, it is assumed that a designated public authority under s.75 and a contracting authority in the procurement process are the same.
- 2.33 This guide supplements and complements the existing s.75 guidance and should be read in conjunction with it. This guide advises on compliance with s.75 as it applies to procurement. Public authorities need to consider the risks associated to non-compliance with s.75 when starting to plan any procurement.

Using the guide

- 2.34 ***Public services in Northern Ireland must be of high quality, equitably delivered and take any opportunity offered to promote equality of opportunity.*** It is crucially important then that equality considerations are acted on at all stages in the process of procurement of and the life of the contract. This also applies to the integration, where appropriate, of sustainable objectives to achieve direct and indirect benefit for the Northern Ireland citizen and ultimately have an impact on the global situation. ***This is a step by step guide with examples of how to do it.*** Decisions and actions at any stage and throughout a procurement project have an impact on how fully the opportunities can be embraced during the contract.
- 2.35 ***So it is important to be familiar with the complete guide.*** Actions required may be missed otherwise and the door may not be open to take the chosen route at a later stage. Each player in the development and management of a project must fully understand how his or her role affects stages of the contract: decisions made; outcomes achieved; and therefore equality of opportunity promoted. The right people need to be involved and need to be familiar with the whole process.

- 2.36 The use of equality considerations in EU procurement processes – particularly at the selection and evaluation stages – is complex and subject to the EU rules and complex case law and so whilst this guide provides a general steer, authorities should take legal advice on these issues when applying them to specific projects.
- 2.37 The successful project is the one where the collective understanding of the project and the wide involvement of relevant people works best. The guide shows how procurement can be a means to ensure that equality of opportunity and sustainable development are mainstreamed throughout the functions of public authorities.

3 CONTEXT – PRINCIPLES, POLICY AND LEGAL FRAMEWORK

This chapter describes the context in which public services are being delivered, looking at the established principles of public procurement, the policy environment and the commitment to building better services and the legislative framework.

Procurement policy context

3.1 In 2001 Government undertook a procurement review, and committed to putting its conclusions into practice with regard to integrating sustainable development and equality considerations. There is now a standardised procurement policy in Northern Ireland which recognises equality issues and the integration, where appropriate, of sustainable development objectives. In addition, as part of the work of the review, the Department of Finance and Personnel (DFP) set up a working group on PPP and undertook screening and EQIA of the PPP policy which is the standard policy applied in Northern Ireland.

PPP Definition

The PPP Working Group in its report "Review of Opportunities for Public Private Partnerships in Northern Ireland" (May 2002) provides the following definition

A Public Private Partnership is generally a medium to long-term relationship between the public and private sectors (including the voluntary and community sector), involving the sharing of risks and rewards and the utilisation of multi-sector skills, expertise and finance to deliver desired policy outcomes that are in the public interest.

- 3.2 In approving the public procurement policy for Northern Ireland, the Executive recognised that the primary objective of the policy should be the achievement of "best value for money". When a procurement process results in the 12 principles, set out below, being satisfied to an acceptable extent, then that process can be said to have resulted in best value for money being achieved.
- 3.3 In the context of its overall objectives, a contracting authority should decide what is to be procured and set the specification accordingly, and ensure that its requirement is subject to the normal public expenditure tests of need, affordability and cost-effectiveness. It is at this early specification stage that there is most scope to consider equality of

opportunity and sustainable development issues. It is important to remember that the policy of achieving best value for money in procurement – defined as the optimum combination of whole life cost and quality (fitness for purpose) to meet the user’s requirement – applies to the award stage of the procurement process. (See chapter 11)

3.4 These principles are particularly relevant in procurement through PPP. The length of the contract, range of relationships in consortia and the number of changing stakeholders make PPPs especially challenging procurement initiatives.

3.5 ***Equality is implicit in these principles.***

Twelve principles of public procurement

- *Accountability* – effective mechanisms must be in place in order to enable Departmental Accounting and their equivalents in other public bodies to discharge their personal responsibility on issues of procurement risk and expenditure.
- *Competitive supply* – procurement should be carried out by competition unless there are convincing reasons to the contrary.
- *Consistency* – suppliers should, all other things being equal, be able to expect the same general procurement policy across the public sector.
- *Effectiveness* – public bodies should meet the commercial, regulatory and socio-economic goals of government in a balanced manner appropriate to the procurement requirement.
- *Efficiency* – procurement processes should be carried out as cost effectively as possible.
- *Fair dealing* – suppliers should be treated fairly and without unfair discrimination, including protection of commercial confidentiality where required. Public bodies should not impose unnecessary burdens or constraints on suppliers or potential suppliers.
- *Integration* – in line with the Executive's policy on joined up government, procurement policy should pay due regard to the Executive's other policies, rather than cut across them.
- *Integrity* – there should be no corruption or collusion with suppliers or others.
- *Informed decision making* – public bodies need to base decisions on accurate information and to monitor requirements to ensure that they are being met.
- *Legality* – public bodies must conform to European Union and other legal requirements.
- *Responsiveness* – public bodies should endeavour to meet the aspirations, expectations and needs of the community served by the procurement.
- *Transparency* – public bodies should ensure that there is openness and clarity on procurement policy and its delivery.

Source: *Public Procurement Policy, Department of Finance and Personnel, May 2002*

Policy framework

- 3.6 The equality agenda for Northern Ireland is significant. The grounds covered by the anti-discrimination legislation continue to increase and the equality requirements on public service employers and service providers require them to promote equality of opportunity rather than simply avoid discrimination. The Multi-party Agreement of April 1998 requires equality and good relations to become a central feature of the governance framework, including through public engagement in decision making and accountability.
- 3.7 The Executive, post devolution, identified a massive deficit in investment which the Programme for Government (PfG) aimed to address. Government spends £1.9 billion, or 20% of the Northern Ireland budget, on public procurement annually and plans to spend some £16 billion by 2015 to improve the infrastructure in Northern Ireland. This will be done through the Reinvestment and Reform Initiative (RRI) which also gave new borrowing powers and created a new strategic investment body.
- 3.8 The circumstances of this investment present a key and unique opportunity to build equality into public service provision, remove existing inequalities, bring about a step change in sustainable development and to ensure that this is done well and in a lasting way.

Reinvestment and Reform Initiative

- 3.9 Through the commitments in the RRI, on the Equality Commission, the Departments, leaders in public authorities and other statutory agencies and procurement specialists alike are afforded opportunities to maximise impact on equality and sustainable development issues in Northern Ireland. This investment will reach the heart of our public provision. Likewise its procurement can be the instigator of change.

The investment programme for the schools' estate will prioritise schools for renewal and refurbishment. This programme should also ensure that school buildings are an "asset" for the local community. This objective clearly links to equality, as an equality impact assessment will identify the different user needs of different groups within the community. This will contribute to setting the objectives for any procurement project from the strategy.

- 3.10 The RRI gives immediacy to the need to find means of mainstreaming equality through procurement. This guide is the framework for taking it forward.
- 3.11 The Equality Commission has expressed concerns about the delivery of public services by private bodies. Evidence² has shown that the delivery of public services in this way can save costs but with a detrimental effect on workforce pay and conditions. Equality law has moved on and now public authorities must, not only avoid discrimination, but also take action to seek the opportunities to promote equality of opportunity in all their functions, powers and duties. Procurement guidelines, too, clearly specify that decisions should be made on best value for money, considering more than cost as the final determinant. Therefore, the Commission is keen to ensure that equality is central to the delivery of public functions, whether this is through the public or private sector delivery routes.

Mainstreaming

- 3.12 The guidance looks at mainstreaming equality in policy and strategy development, project development and also in the procurement process. The original s.75 guidance quoted Scottish and European examples. Some elements of these definitions may be helpful.
- 3.13 *Mainstreaming equality is essentially concerned with the integration of equal opportunities principles, strategies and practices into the everyday work of Government and other public bodies from the outset, involving everyday policy actors in addition to equality specialists. In other words, it entails rethinking mainstream provision to accommodate the equal opportunities categories as identified in the Scotland Act.*
- 3.14 *The concept of mainstreaming is based on the philosophy that the achievement of equality should inform all aspects of the work of all the individuals within an organisation as they go about their business. Questions of Equal Opportunities Scrutiny of Policy and Legislation, Scottish Parliament.*
- 3.15 The Council of Europe has defined mainstreaming as *the (re)organisation, improvement, development and evaluation of policy processes, so that a(n)...equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy making.*

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² Report on Formal Investigation into Competitive Tendering in Health and Education Services in Northern Ireland, Equal Opportunities Commission NI, 1996

- 3.16 Aside from the ***statutory requirement to mainstream equality of opportunity***, this approach makes good business sense in that it helps achieve the best outcomes; opens up new markets, contributes to best value and develops a positive organisational culture. Evidence based decision making, involving people who are affected, is the route to mainstreaming equality and good decision making. Projects, contracts and partnerships and other relationships developed and run in this way will deliver the best product, owned by the public authority and changing and growing to best meet the needs of the people served.

Employment/workforce

- 3.17 There are various statutory codes of practice which need to be adhered to including those on employment, such as the statutory codes under the anti-discrimination legislation and the Code of Practice on Workforce Matters (see annex 4).

Legal framework

- 3.18 In Northern Ireland equality considerations must be central to public policy processes. Section 75 of the Northern Ireland Act 1998 requires a designated public authority in carrying out its functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity and good relations between different groups of people. The aim of this is to ensure that equality of opportunity is mainstreamed by public authorities in their policy making, policy implementation and policy review.
- 3.19 Organisations involved in procurement also need to pay attention to the anti-discrimination legislation on the grounds of religious belief and political opinion, sex, race, sexual orientation, disability and age.

Employment

- 3.20 This guidance draws attention to relevant employment law.

European Union Directives and EU Rules

- 3.21 All public procurement procedures must comply with the EU Treaty³. The key policies in the Treaty, from a public procurement point of view, are the free movement of goods, the freedom of establishment and the freedom to provide services. There are also important principles derived from these freedoms which are highly relevant to fair and

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³ Treaty of Rome, 1957, amended

competitive public procurement: equal treatment, of which non-discrimination on the grounds of nationality is a specific expression, transparency, proportionality, mutual recognition and openness to competition.

- 3.22 In addition to the Treaty itself, the EU Procurement Directive⁴ flesh out the principles with detailed procedures and criteria for specifications, selection and award of contracts above certain thresholds. The 2004 Directive reflects previously decided case law and provides the context within which public sector contracting and procurement processes operate. The Directive has been implemented in UK by way of the Public Contracts Regulations 2006 (SI 2006 No.5) (“Regulations”).
- 3.23 This guide has been prepared to take account of EC Treaty⁵ principles, the Directive and Regulations.
- 3.24 The guidance is authoritative but not a definitive guide to procurement and employment law. The law constantly changes and legal advice should always be sought on these matters.
- 3.25 This guide refers to “EU rules” to mean the Treaty, Directive and Regulations.

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⁴ Directive 2004/18/EC

⁵ Treaty of Rome, 1957, amended

4 FROM CONCEPT TO PROJECT – AN OVERVIEW

This chapter maps out the project and the stages which are the best options for promoting equality of opportunity and sustainable development goals in the project. The chapter shows how the policy development stage will establish a clear evidence base for equality considerations and setting objectives.

Which organisations need to consider equality?

- 4.1 Public authorities⁶ in Northern Ireland must ensure that they are meeting their equality duties in taking any decisions.
- 4.2 In many cases a strategy is developed and then the procurement project itself and the contract management are transferred to another authority. ***Equality should be considered within each authority, at scoping and strategic planning stages, at implementation and contract management stages.*** Each authority at each stage needs to satisfy itself that it has met its obligations, and it has acted in a way that does not inhibit the next stage decisions.
- 4.3 The final responsibility lies with the contracting public authority and therefore it needs to be sure that all equality obligations are met and equality considerations ***are*** built into the final contract in a way that is compliant with EU rules.
- 4.4 ***It should be borne in mind that equality of opportunity applies to all aspects of a project –goods, facilities and services issues and workforce matters.***
- 4.5 All organisations are bound by the anti-discrimination legislation, including those wanting to contract with the public sector.

Why should organisations consider sustainability?

- 4.6 One of the guiding principles of sustainable development is to ensure a strong, healthy and just society. Government and the wider public sector need to make more responsible choices if the vision of sustainable development is to be achieved. This is a challenge to us all

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⁶ The term “public authority” is used at all stages to refer to designated public authorities for s.75 purposes, which will have and be implementing an equality scheme. Public authorities will also be “contracting authorities” as the specific term understood in the procurement process. This guide uses these terms interchangeably.

and government has a significant role to play in mainstreaming sustainable development into its work and practices. The Northern Ireland Sustainable Development Strategy sets a number of challenging objectives, one of which requires the Northern Ireland public sector to become a UK regional leader in sustainable procurement.

Organisational arrangements

- 4.7 In consideration of what is best for each situation to take the work forward – planning, implementation and execution – an authority will be looking for ways to bring together the relevant stakeholders. One contribution must be from those with knowledge and experience of equality issues.
- 4.8 Experience has shown that successful projects are the ones which have found the best ways to do this. ***Ownership, a feeling of collective responsibility, understanding of the principles and clarity of role are most important.*** The board or group must be creative in whom it involves, including the officers who will be taking the project forward. The link between development and contract management is a crucial pivot for the project.
- 4.9 In larger and more complex projects, including PPPs, a project board which is representative of all relevant interests for all stages of the project can protect the project from diverging visions and other difficulties. The lead body can use it to enhance accountability and it can support all authorities involved in meeting the responsibilities in their equality scheme in the course of the project.
- 4.10 Many projects will have a Senior Responsible Officer (SRO) appointed to take overall responsibility for the project.

Procurement involving several public authorities

- 4.11 If more than one public authority is involved, consider allocating, from the outset, lead responsibility to one authority. This is likely to be the authority most closely linked to the SRO. This authority will have to ensure that the project is in full compliance with its equality scheme. It may be necessary to have a different lead authority for certain stages. Having a clearly defined lead authority identifies ownership for equality purposes and establishes clear accountability and audit trails should any complaint be received.

Project Board

Composition

At whatever stage the board is established, equality and human resources colleagues **need to** be consulted, to ensure that the equality considerations are part of the ongoing discussions and project development. The board is likely to include them, but they are not the only relevant people. Each project will need to establish and review membership of its project board making any necessary adjustments to meet the changing needs of the project.

Training

A training needs analysis of the entire project board team will assist in ensuring that all players have had appropriate training on equality generally and s.75 specifically as required under the equality scheme. This will ensure that equality considerations are most effectively taken into account by the project board. Advice and training should also be sought for fulfilling equality scheme requirements, such as for screening and EQIA.

Responsibilities

Time should be committed to establishing clear roles for those on the project board. Unambiguous terms of reference which make explicit reference to the need to promote equality of opportunity will be necessary.

The chairperson of the board or Senior Responsible Officer appointed to take overall responsibility for delivering the project should give a signed declaration when the business case or specification is agreed which states that equality has been given full consideration throughout the project. This will contribute to the audit trail in decision making. Consideration needs to be given to providing reports throughout the project.

Setting up of arrangements and gathering information on equality considerations

An initial screening exercise and where required an EQIA will have to be carried out when options are being identified. It is essential that the project board assesses immediately the quality and quantity of information on equality of opportunity which is held, any potential gaps or areas where information has yet to be gathered, and put in place arrangements for ensuring that this is assembled and made available.

This may take the form of authorising a consultation before screening. This will clarify the Board's position on equality for those working on the project at a later stage when options are agreed and the procurement project developed and will assist in the early identification of equality impacts.

Information

The Project Board will consider how to ensure that all those involved in the project are given a clear steer on the equality considerations of the project. This could for example include providing guidance on the equality aspects to be included at each stage.

In preparing for consultations it will be considered how best to impart all of the pertinent information relating to potential policy options to enable meaningful consultation to take place. The Equality Commission guidance will be followed in the consultation.

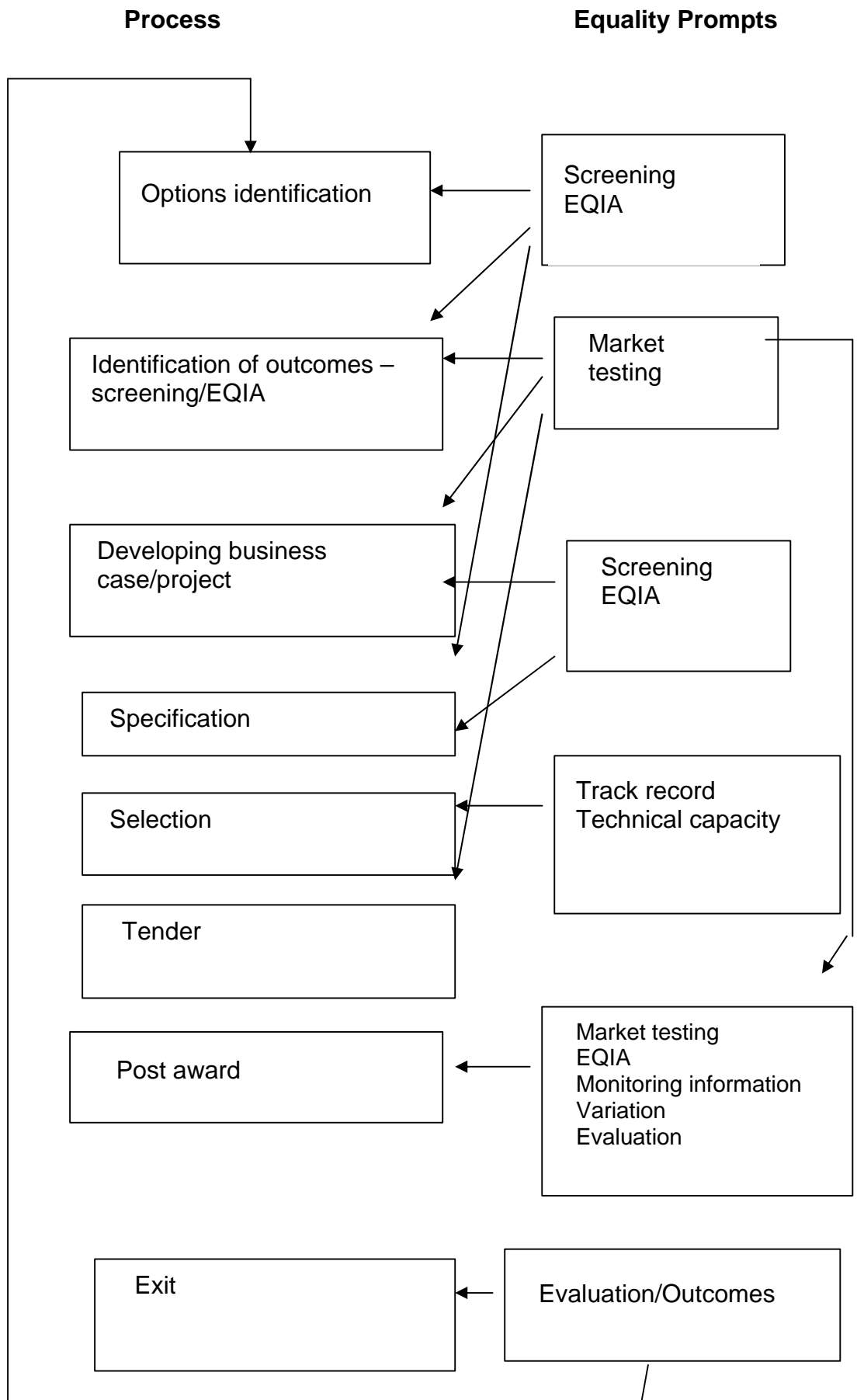
What role do consultants or external advisors play?

- 4.12 If external consultants are involved at any stage in the preparation of strategic options, the development of the procurement programme or for the projects themselves, the responsibility to meet the statutory equality duties is not transferred. In these circumstances the designated authority must be sure that the statutory duties have been met in accordance with its equality scheme.
- 4.13 The public authority should consider how to ensure itself that all people concerned layers are aware of the equality requirements, the commitments in its scheme and advise accordingly.

How to consider equality and sustainable development in the stages of a procurement project – overview⁷

- 4.14 Equality and sustainability need to be considered from the beginning of the procurement process and at all stages thereafter.
- 4.15 ***The process recommended in this guidance is based on the identification of key decision points.*** This has been done to help identify when screening should occur in the early stages and where objectives should be checked later. There are different decisions taken within different authorities at different stages. If a decision is taken that limits future options on equality considerations (ie options to mitigate or use alternative arrangements), then s.75 and equality should have been taken into account for that decision, the evidence base should be available and reasons given⁷
- 4.16 To ensure the appropriate outcomes of the procurement are identified and achieved, and objectives set accordingly, screening and any EQIA should be done at more than one point where details are decided at different points.
- 4.17 Compliance with legal requirements such as non-discrimination will be a requirement of all contracts. The scope for including specific equality or sustainable development outcomes is most effective when identified at the early stages. Opportunities should be considered: before a particular procurement begins; in planning; when deciding the strategic objectives; the specification; when writing the contract documentation; and once the contract is being performed.

1.1 _____
⁷ See page 18 of s.75 guidance



5 PRE-ADVERTISEMENT I – STRATEGIC DEVELOPMENT

This chapter sets out the importance of considering equality and sustainable development issues from the outset and identifies early decision points in the processes where such issues should be addressed.

What is the starting point?

- 5.1 Procurement and the decisions on the best procurement routes are established through various routes, such as the legal, political and economic priorities of any given time.
- 5.2 The starting point for any strategic development may be
 - research recommendations
 - political commitments
 - Ministerial announcement
 - cumulative actions resulting in a specific commitment to take action
 - public pressure.
- 5.3 The assumption here is that there will be a policy development stage, which will involve an assessment of the policy objectives, identification of the options to meet the objectives and which will be a project in procurement terms. There will be a full assessment of these options and how best to achieve the business objectives.
- 5.4 This may, for example take the form of
 - developing a 15 year strategy for roads
 - a report making recommendations on how to prioritise a known budget for improvements to schools buildings
 - a review of acute health services across the region, and recommendations made on the siting of any new units.
- 5.5 At this stage relevant sustainable development objectives and equality obligations under s.75 must be considered to inform the strategy, outcomes and objectives. If the information being used to prepare options and strategy are consistent with s.75 categories and provide details consistent with the duties, or any research undertaken considers equality, then equality will be clear in the outcomes and objectives.
- 5.6 At this stage creation of the evidence base for good decision making begins. For example, if a consultant is to be asked to make recommendations about prioritisation of spending money for capital investment, consideration should be given to how equality is built into

the terms of reference. If research is being commissioned, then equality should be considered as part of the research criteria/terms of reference.

5.7 *Therefore, at this stage the question is whether the public authority has sufficient information on equality to put forward a fully considered set of strategic options.*

Checklist

It is important to look at the opportunities presented to promote equality when defining the strategy and subsequent project. S.75 processes are the framework to do this. Projects may afford wider opportunities to achieve equality objectives and sustainable development.

Check the equality scheme

Every designated public authority has to produce an equality scheme as part of their s.75 duties. The key question which a public authority should be asking is "What are we doing, or what do we plan to do to ensure that policy options comply with our equality commitments and our agreed equality scheme?"

Ask questions of the right people in the authority

In order to ensure that equality considerations are effectively built into the procurement project from the start of the policy development stage, it will be necessary to sound out the possible options with the equality team and also the HR team and others who have a knowledge of equality issues.

Ownership

If more than one public authority is involved, consideration should be given to the lead responsibility to one authority. This authority will have to ensure that the project is in full compliance with its equality scheme. It may be necessary to have a different lead authority for certain stages of the project.

Training

Have the right people been trained on equality issues? There will be a training schedule in the authority arising from the equality scheme and it should be ensured that all actors in the process have participated in training appropriate to their role in the project, both general equality training and training in specific processes.

Setting up of arrangements and gathering information on equality considerations

Researching options for the strategy will require use of various sources of information. The research or other sources should be checked to see if they consider s.75 categories or equality generally. If they do not, consideration should be given to how the information to hand might be supplemented to ensure equality is considered in emerging options.

Early engagement

If it is found that there is little equality information to go on, it may be necessary to consider sounding out others who may be able to identify the main issues from their experience. This can be carried out in the context of the equality scheme.

Statutory duty in relation to sustainability

- 5.8 Because of the importance Government is attaching to the delivery of sustainable development in Northern Ireland it is intended to have in place by 2007 a legal duty requiring relevant public bodies to take account of sustainable development in the exercise of their functions.
- 5.9 An Integrated Impact Assessment Tool (IIAT) which will incorporate sustainability criteria to ensure that all new or revised policies take full account of sustainable development is being developed by OFMDFM. This will provide a more detailed assessment framework which will in turn complement any strategic assessment required under the Strategic Environmental Assessment Directive. It should be noted that the IIAT supplements, and does not replace, the requirement to screen and equality impact assess as necessary.

How to consider equality at a strategic level

- 5.10 The identification of key issues and priorities in a strategy should demonstrate that equality has been taken fully into account. In practice, this will mean screening the strategy (see also the *Guide to the Statutory Duties*).
- 5.11 Policies linked to large procurement projects will be screened at more than one stage. This includes the initial strategy and any project determined by it including the procurement route which is to be used. Any changes to the initial policy option made later in the project which significantly alter the nature of the policy should lead to rescreening.
- 5.12 Screening will identify equality of opportunity implications and may also signpost the public authority to mitigating actions:
- 5.13 “Arrangements must be made to obtain relevant information, whether quantitative or qualitative, so that an authority can clearly demonstrate why a policy is screened in for impact assessment or screened out as not requiring an EQIA.” (*Guide to the Statutory Duties*)
- 5.14 Where there is a potential adverse impact the public authority must always consider the options for mitigation. Further consideration of any alternative policy should be undertaken. All policy options must be considered and the alternatives detailed. It should be ensured that information can be provided on the justification for the action taken and the reason for any constraints.

- 5.15 Screening will assist the public authority in taking steps to ensure that any decision does not limit options for later mitigation of adverse impact.
- 5.16 Consideration should be given to the equality aspects of the service provision associated with capital projects at all stages.
- 5.17 There may not be data available at this stage for screening. So consider asking groups which may be affected (see section 5 of the Guidance on Equality Impact Assessment) to help identify equality issues at the outset. Ensure that any research commissioned accesses information to help fulfil the equality duties.

Costs of equality and sustainable development objectives

- 5.18 Any strategic planning will include a cost evaluation of the options. If equality and sustainable development objectives are considered early enough, it informs the options through identifying outcomes and objectives. The decision needs to be made whether the outcomes should be achieved through the procurement or another policy option.

For example, all Government estate management contracts could include provisions requiring on-site crèche facilities for working parents. This could legitimately be part of the user requirement under EU rules. This would also support the Government's aim to promote family-friendly and flexible working and to assist single parents.

However, this would most certainly also add cost, so it would be important to consider if this additional money would be more effective if spent directly on setting up nursery schemes in the area. This might be more successful in achieving the Government's aim because it would provide permanent places for all children (not just the children of staff) in an environment specifically designed and dedicated to their learning and development.

Source: Social Issues in Purchasing, Office of Government Commerce, 2006, p12

During the strategic decision making for the government's Priorities and Budgets, it is agreed that an objective of procurement in some instances should be to recruit from the long-term unemployed. This is initiated at a time of high levels of unemployment in Northern Ireland.

The advertisement for a road maintenance contract sets out that candidates will be expected to fulfil an employment plan as a contract condition. Candidates who are invited to tender for the maintenance contract are asked to submit a plan of how they would do this, along with their experience and capacity to implement such proposals.

Where else should equality of opportunity and sustainable development be considered in the gathering and preparation of information?

5.19 All of the processes inherent in planning a general procurement or PPP will have structures which lend themselves to consideration of equality objectives such as market testing, economic appraisal or programme level evaluation.

5.20 The processes in this guidance are consistent with other forms of assessments required of government departments in policy development, for example

- environmental impact assessment
- health impact assessment
- regulatory impact assessment and
- integrated impact assessment.

For example, if the user requirement was to build a hospital, a contracting authority's awareness of regional neighbourhood renewal issues might lead it to consider locations in certain deprived areas to facilitate their regeneration.

Source: Social Issues in Purchasing, Office of Government Commerce, 2006, p11

The department, in scoping the objectives and outcomes, decides that it will promote good relations through locating a concert hall in an area that is currently derelict and which acts as an interface between two communities. The decision to do this has been based on cost assessments and alternatives considered.

6 PRE-ADVERTISEMENT II – EMPLOYMENT AND WORKFORCE MATTERS

This chapter identifies the specific framework for procurement where a workforce may transfer to a different employer. It sets out the equality issues that need to be considered and the current policy framework, including protections for workers from adverse impacts on their terms and conditions.

- 6.1 The responsibilities to comply with equality obligations and to meet responsibilities for sustainable development of course extend to workforce matters.
- 6.2 This includes current concerns about workforce issues, the present position in law and the approach to work force matters set out in The Code of Practice on Workforce Matters in Public Sector Service Contracts in Northern Ireland. It also includes understanding of the procurement stages at which workforce issue should be considered.

(Note: the Code of Practice on workforce matters has not yet been promulgated)

A public authority with responsibility for maintenance to public buildings has an ongoing contract with a firm to provide the workforce for such maintenance. The authority operates in an area of high unemployment as much of the traditional manufacturing industries have closed in the past 20 years. When setting up the procurement project for this maintenance, the authority decided to include an additional contract condition that requires the contractor to offer an apprenticeship for every £100,000 spent by the authority.

Does choosing PPP as a procurement route have any impact on workers?

- 6.3 Given historic concerns⁸, there has been anxiety that cost savings in PPP would be at the expense of lower paid workers formerly in the public sector who would transfer to the private sector. Concern has centred on the potential erosion of terms and conditions and the resultant impact on services such as cleaning and catering (see

1.1 _____

⁸ Report on a Formal Investigation into Competitive Tendering in Health and Education Services in Northern Ireland, Equal Opportunities Commission NI, 1996

example page 11). Protections are now in place to meet those anxieties. Public authorities should ensure fair and reasonable treatment in PPP projects through

- being open with staff
- retaining flexibility in public sector delivery
- protecting terms and conditions for both transferred and newly recruited workers
- protecting staff pensions.

Since 1997 extended protections have included

- Fair Deal for Staff Pensions
- Cabinet Office Statement of Practice 2001
- Retention of Employment Model for the NHS 2001
- Best Value Code of Practice

These have supplemented the overarching Transfer of Undertakings and Protection of Employment (TUPE) guarantees and the Code of Practice on Workforce Matters.

What protection does TUPE offer?

- 6.4 It is important to note that the TUPE guarantee only covers the initial transfer of staff to a new employer. Consequently further guidance has been prepared in the form of the Code of Practice on Workforce Matters to ensure that diminution of terms and conditions, resulting in a two tier workforce, does not develop through transfer of employment by acquisition or merger or through any subsequent recruitment.
- 6.5 Given the original concern it is especially important that, not alone should the initial transfer be monitored, but that the impact of any later acquisition, merger or recruitment be kept under scrutiny along with all longer term decisions around any contracting out.
- 6.6 Public authorities should also acquire and adhere to guidance on pensions. The Government Actuary will examine final arrangements but the public authority, in considering the transfer of schemes, should consider what equivalence is when a guaranteed benefit scheme is transferred to a guaranteed contribution scheme.

What role is played in workforce matters?

- 6.7 The duty on public authorities to have due regard to the need to promote equality of opportunity still applies when provision of a public service is out sourced. Importantly good management of workforce issues will form part of the service specification and contract conditions of such contracts.
- 6.8 If the private contractors awarded contracts are not adhering to the spirit of s.75 and appropriate requirements the public authority may be found to be in breach of its equality scheme. Consequently, it is important that the public authorities report on the actions they require contractors to take in order to act in a manner that is consistent with these duties, and on the progress made by contractors in adhering to these actions. This information should be contained in the annual report of progress to the Equality Commission. The actions referred to are outlined in more detail below.

What about responsibility for best value for money?

- 6.9 There is no conflict between good employment practice and value for money. The procurement principles referred to on page 15 facilitate and encourage fairness and equality in employment and the interaction between planning and best value for money at award stage is outlined. It is the responsibility of each contracting public authority to have regard to its employment equality obligations and to ensure that any employees likely to be affected by the project, either staff transferring or newly recruited to the contract, are treated fairly and in accordance with all legal obligations.

The revised procurement policy on its introduction included a focus on the Special Contracts Arrangement Scheme. This scheme is designed to help workshops for disabled people to compete for public contracts. It applies only to contracts below the threshold level for EU rules and is open to workshops throughout the European Union.

The Public Contracts Regulations 2006 widens the scope on supported employment by enabling contracting authorities to reserve specific contracts (including those above the EU thresholds) to contractors that operate supported factories, businesses or employment programmes.

The procurement policy also initiated a pilot scheme for two years aimed at examining the feasibility and effect of facilitating the unemployed into work through public sector contracts. Contractors and candidates wishing to be

considered for a contract within the pilot scheme were required to demonstrate their commitment to the scheme. This required suppliers to develop, submit and implement a plan for utilising the unemployed in work on the contract.

The successful pilot scheme established a model for the integration of unemployment and wider sustainable development considerations into the public procurement process. Details of the pilot scheme including supporting documentation can be found on the Central Procurement Directorate's website: www.cpdni.gov.uk.

The Special Contracts Arrangement Scheme, the provisions on supported employment and the Unemployment Pilot Study clearly demonstrate that affirmative policies to address particular employment difficulties, which comply with EU rules, can be designed and implemented.

What practical steps can a public authority take?

6.10 Public authorities should, in selecting contractors and service providers

- ensure that the contractor complies with all the anti discrimination and equality obligations
- ensure that the arrangements for staff including selection and terms and conditions comply with relevant employment legislation
- consider how, within the particular project, to ensure that the contractor is complying with relevant Codes of Practice and is committed to and has adequate arrangements in place to meet any employment equality specifications and/or contract conditions.

How far does TUPE afford this protection?

6.11 The framework for protection of any workers affected by a PPP project is quite extensive. Central to this is TUPE which provides specific protection for transferred workers. TUPE regulations protect the interests of employees where a business is transferred or an element of an undertaking is transferred. TUPE means that, at the time of transfer, the contractor or service provider continues to employ the existing workforce and the existing wages and other employment conditions continue to apply. If an employee is dismissed, the new employer is responsible for unfair dismissal or redundancy payments.

6.12 Public bodies will be under a statutory requirement, which will oblige them to consult with employees and their representatives, including recognised trade unions, employees' associations and staff throughout the process. They will be required to disclose all information on matters affecting the workforce including the TUPE based transfers.

What are the essential facts on the Code of Practice on Workforce Matters?

- 6.13 OFMDFM has prepared [and consulted on – see 6.2] Code of Practice on Workforce Matters in Public Sector Contracts in Northern Ireland. The code will be mandatory. It is intended that observance of the code will form part of the service specification and conditions for all contracts which involve a transfer of staff from a public sector organisation to a contractor or service provider and staff TUPE transferred under a re-tender of a contract.
- 6.14 The extension of the original code widens its operation into the greater public sector including the civil service, NHS and maintained schools. The aim of the code is to prevent the emergence of a two-tier workforce in cases where public sector employees are contracted out to a service provider, ensuring that new recruits receive comparable treatment to the transferred staff. It stipulates that new employees to service providers, which provide contracted out services, do not receive less favourable terms and conditions than those staff that transferred from the public sector into those companies and who consequently receive the protection of TUPE.
- 6.15 It is important to note that the promotion of equality of opportunity is core to the aims of the code. It is also important to note that in circumstances where TUPE does not strictly apply legally, the code recommends that the core principles of TUPE should be followed and that all of the staff involved should be treated no less favourably than if TUPE had applied. This refers to transferees from the public sector and new appointees to the relevant private sector contractor.

The central elements of the code are

- public sector organisations will only select providers who offer staff a package of terms and conditions which will ensure high quality service delivery
- terms and conditions must prevent the emergence of a two tier workforce dividing transferees and new joiners
- public sector organisations will apply the Cabinet Office Statement of Practice on Staff Transfers including A Fair Deal for Staff Pensions, meaning that staff transferred must continue to have access to the public sector pension scheme or an alternative good quality pension scheme which is broadly comparable to the public sector scheme which they are leaving
- where the service provider recruits new staff alongside staff transferred from the public sector it must offer terms and conditions which are overall no less favourable than those of transferred employees. The package offered to new staff can differ from that of the transferred staff so long as the overall package is no less favourable
- public sector organisations will monitor the operation of the code and the contractor or service provider must provide the public sector organisation with information to allow monitoring of compliance with the code
- the public sector organisation will enforce the obligations under the code including taking non compliance into consideration in relation to future work

At what other stages should workforce matters be considered?

6.16 While the interests of the workforce are in constant consideration there are particular stages of the procurement process where specific action can be taken for equality and sustainability objectives.

Developing the project

6.17 It is important that the potential equality issues in relation to employment are identified at the policy initiation, development, monitoring and evaluative stages. In assessing the policy objectives and the identification of options to meet the objectives the potential

effect on workforce issues must be considered. Where the project is likely to include the provision of services the options in terms of employees, from retention of staff in the public service to secondment through to transfer to the private sector, must be considered.

- 6.18 If it is considered that there is insufficient information on which to make a decision, screening and where required EQIA will be appropriate to gather the necessary information to put forward a fully considered set of options. Contracting authorities are required by the Code Of Practice on Workforce Matters to have effective consultation and communication policies and practices which ensure that consultation is inclusive and meaningful. This in turn requires that consultation is seen to have a direct impact on the decision making process.

A project to replace a number of existing schools with new buildings is being designed. There is uncertainty around building supervision services (eg caretakers). The public authority through EQIA identifies options and seeks to assess the equality implications including by way of consultation as the EQIA requires. Following consultation it may be decided that, given the size composition and locations of caretakers, it would be inappropriate to transfer this workforce to the private sector contractor who will be responsible for the design, build and management of the new schools. In such a case it would be preferable if the staff concerned were to remain public sector employees. On the other hand it may be concluded that, given limited resources within the schools, the external provider could best provide the supervision and support. The terms and conditions of the employees would be protected through TUPE and the Code of Conduct and performance measures would be developed to ensure broader equality considerations, including meeting s.75 requirements, are met.

Selection stage

- 6.19 A public authority which advertises for a contractor or service provider will receive expression of interest from potential candidates and may seek from these candidates further information to assist it to move forward to the selection stage. In relation to the employment matters the public authority can request from the bidders information on employment policies and practices. There are some examples below, but each question in the PQQ must be drawn up with the specific project in mind to ensure that it is relevant to that contract.

- Is it the policy of the bidder to comply with all employment and equality legislation?
- Is it the policy of the bidder to actively promote employment equality?
- Are staff with managerial responsibilities required to have training in equal opportunities?
- Have there been any findings of employment discrimination made against the bidder in a tribunal or court?
- Does the bidder regularly consider the composition of its workforce and where there is under representation and engage in affirmative/positive action to address this?

Workforce issues in contract conditions

6.20 A public authority when awarding a contract should ensure that it provides for adequate performance monitoring bearing in mind requirements in its equality scheme to monitor for adverse impact. Such monitoring will be essential to the authority in assessing the contractor or service provider in relation to employment equality. Accordingly the public authority may wish to require performance monitoring parameters such as those in the box below. (See also chapter 12)

Tools for performance management

- information relating to the implementation of equality of opportunity
- this should be supplied in a timely manner and in an agreed format
- information on the equality monitoring systems to be implemented to measure the extent to which the contractor is providing equality of opportunity and fair participation
- information on the nature of the contractors' arrangements for reporting on its compliance with agreed equality measures, at its most senior operational and strategic levels
- information that staff with managerial responsibilities are receiving equality training
- information on the composition of the contractor's or service provider's workforce
- regular reports of reviews of the approach to equal opportunity in employment
- reports of affirmative/positive action measures, goals and targets set to improve workforce composition, where necessary, and associated activity such as outreach measures to achieve these targets.

6.21 Rigorous contract specification can ensure private sector compliance with good employment practice. Importantly an authority can require information from a contractor or service provider which is not just related to the avoidance of unlawful discrimination but which also enables the authority to report on all its s.75 and sustainable development responsibilities.

7 PRE-ADVERTISEMENT III – PROJECT DEVELOPMENT

This chapter covers progress from the point at which the project is decided upon and specific objectives/outcomes identified. That is, a hospital is needed and PPP will be the procurement route. This may also involve a change of authority in lead role, specifically a transfer from the Department to the implementation/contracting authority.

Does the project need to be screened?

- 7.1 Yes. If an authority is planning and developing a project, it will require decisions to be made. Equality of opportunity needs to be taken into account in these decisions. Through the development stages decisions will be taken which will result in changes to current practice. This is a policy change for the purposes of s.75 and must then be screened. The example in annex 3 on the siting of a new hospital illustrates the need for screening at this stage.
- 7.2 (For more details on screening see chapter 5, page 24 of Guidance for the implementation of Section 75 of the Northern Ireland Act.)
- 7.3 For complex procurements, this is reinforced by the range of decisions still to be taken.
- 7.4 Furthermore, in the government's PPP policy documents, the expectation is clear that the contracting authority will screen, and EQIA as necessary, all PPP projects.

How should screening/EQIA information be used?

- 7.5 The data gathered will inform the outcome of the screening and EQIA where required and ultimately the decisions on objectives and outcomes. Screening/EQIA data will then be useful for decision making to ensure the solutions are correct to meet user need and meet the objectives. Setting out user needs according to the nine section s.75 groups will ensure that solutions are appropriate.
- 7.6 Having identified outcomes or solutions early on, equality issues the specification, contract and performance monitoring will follow.

The public authority has identified from screening that the project does have equality implications, and therefore screened it in and has now undertaken an EQIA. The result of this has shown that there are equality issues associated to the project.

There are two options, as identified in the s.75 guidance.

First, to identify mitigating measures and alternatives to deliver the policy aim, i.e. the project. The public authority makes sure that it can mitigate, ie that the legislative/policy framework allows mitigation in the way identified, or the decisions taken previously on the project do not limit these options. The public authority should proceed with planning and setting out requirements taking this into account.

or

Secondly, the authority has identified a potential adverse impact through the EQIA, but due to legislative/policy constraints, or constraints dictated by previous decisions, the policy (ie the project) cannot be mitigated or amended at this stage.

If this is the case, it should be ensured that the potential adverse impact is recorded, both in the EQIA process, but also as part of the decision making/approval routes through the project board. But in accordance with scheme requirements the resulting actions must be monitored for any actual adverse impact and action taken accordingly.

- 7.7 The authority agrees contract monitoring which will collect evidence to determine whether there is an adverse impact and uses this in reviews of the contract for any variations needed.

The screening/EQIA for the infrastructure needs for an FE college highlights the use of the local FE college currently by a large number of disabled students. In addition to meeting the requirements of the Disability Discrimination Act with standard provision, in discussion with a number of user groups, particularly comprising the disabled students, further user needs are identified for the IT infrastructure and facilities.

The contracting authority consults for current industry standards and best practice to ensure that the specification for the IT facilities, hardware and software will meet the user need, establish a service which maintains accessible IT facilities and will be flexible enough to adapt to opportunities afforded by future technological development.

How should a bundle of projects within one PPP contract be treated for s.75?

- 7.8 Equality should have been considered in the decision to bundle several projects together, so there should be data to inform this stage. For example, the strategic decision to combine the refurbishment of three schools with one new build school. The screening/EQIA may have identified changing community demographics alongside geographic economies which influenced its decision to create the bundle.
- 7.9 The public authority that is the contracting authority will have to screen at project development stage, using the previous information and then ensure that all the relevant equality issues are identified by separating each component of the bundle and consider the equality issues.
- 7.10 Again, the lead body and the project board can ensure focused thinking, a shared vision, maximum accountability and compliance with equality schemes on the part of all public authorities involved.

What about screening/EQIA done by multiple authorities?

- 7.11 Public authorities still have to comply with their duties, therefore they need to decide how best to do this for the project concerned. Authorities need to satisfy themselves that they have met their duty should any questions be raised or complaints made about their compliance with their equality scheme.
- 7.12 The project board overseeing the project and contract should decide who takes the lead to co-ordinate any screening and EQIA at this stage. For example, if three schools and a library are included in a project and they are in two education and library board areas.
- 7.13 Some projects may include bodies which are not designated under s.75. These might be schools in an education project or voluntary organisations which provide health or social services. It is still in their interests to ensure that the screening and EQIA is conducted, as it will contribute to the delivery of the best solution from the contract. However, if this not agreed, care needs to be taken in the use of data to ensure the results are not distorted.
- 7.14 This approach makes good business sense, as it will ensure that there are clear responsibilities and therefore clarity should any complaint be raised.

Do s.75 obligations get transferred to a private contractor?

7.15 No.

7.16 But the authority will still be covered by its equality obligations, whether the function/service is delivered directly or contracted out. Therefore the authority needs to ensure that it can meet its duties through any contract, and may well pass on key processes as part of the contract. This means the authority should consider the contract terms, the overarching aims and objectives of the function/service which is going through procurement and user need, what equality considerations need to be incorporated in the contract, and how performance monitoring will be carried out, with future changes negotiated from the monitoring information.

An authority planning a new school build undertakes screening and if necessary an EQIA as part of its general scoping to determine the specific requirements and user needs for the school. During this process the authority identifies a higher level of those with a particular disability (cystic fibrosis) in the geographic area. Given the government policy of ensuring access for disabled children to mainstream schools, the specification is developed to ensure the school is accessible in accordance with the Disability Discrimination Act requirements but also with specific requirements in the layout and design of the school building that will accommodate the needs of children from this particular group.

The authority takes account of this disability in monitoring and performance management measures in order that the school remains accessible according to student profile and can ensure that any wider community use of the school also takes account of this disability for people of school age and older.

The amalgamation of library services results in the refurbishment of a library building and an assessment of the services provided. The EQIA identifies that there is a significant Indian and Chinese community in the catchment area for the library, some of whose first language is not English. There is also an ageing age profile for the local area, with a greater incidence of disability. This has an influence on how access and signage is planned both for language and also locations. The specification includes a number of requirements to ensure that signage for and within the library is appropriate for these groups. It also allows for review and change along with the local profile and continuous review of how the library services are engaging with and meeting the needs of the local community.

The construction of a new hospital wing is undertaken while the rest of the hospital is open for business as usual. All of the authority's staff and other contracted staff undertake training on equality issues, as part of the implementation of the authority's equality scheme, to ensure that the front line services are delivered in an appropriate way. Given the construction will impact directly on service users, the authority also requires that the construction site staff undertake equality training, which is set this out in the specification, and the training standards requirement is then monitored against.

8 PRE-ADVERTISEMENT IV – SPECIFICATION

This chapter covers getting to the stage where the public authority is clear in what it wants the contractor to do from the objectives which have been set. The better this is planned and the clearer the public authority can be in what it wants the contractor to do, the more likely it is that the final contract terms will deliver what is required, the contractor will meet them and the public authority can monitor this.

- 8.1 The contract specification affords the opportunity and freedom to potential contractors to propose innovative solutions which integrate equality or sustainable development considerations into a new or existing public facility or service. The specification should
- focus on the outputs required rather than the means of delivery and encourage candidates to use their skills and experience to develop innovative technical solutions and provide the capital investment required to maximise the objectives of the procurement policy including addressing equality and sustainable development issues
 - be sufficiently broad to allow value to be added by the contractor but not so broad as to allow candidates to feel exposed to risks that are difficult to quantify and, consequently, inflate their price
 - build in flexibility. It is important that there is flexibility in the design of a PPP facility as usage may change over the 25 to 30 year life of the contract. This is also true of equality or sustainable development issues as goals and objectives are likely to change over the life of the contract. Flexibility in design and service delivery save time, money and resources in the long term
 - take account of current aims, objectives and cross-cutting policies as well as legal obligations and market soundings about what industry can supply.

How should our equality and sustainability requirements be specified?

- 8.2 Since the strategic development stage described in chapter 5 and through the screening process, objectives have been developed which include equality and sustainability considerations. These will now provide indicators as to what the descriptive documents and the technical specifications will require of the contractor to meet in carrying the project through. At the pre-advertisement scoping stage the public authority will consider how the objectives and user needs can be defined in such a way as to incorporate the equality and sustainability

considerations identified so far, which will then define contract conditions and performance management.

8.3 For example

- specifying the location of a new theatre complex which will regenerate a geographic area
- specifying the process of detailed consultation with users to determine service delivery needs over time
- specifying the equality training required for all those who will be engaged in delivering services through the contract.

8.4 Where technical requirements are defined to include obligations to comply with good employment practice or requirements for community use, then an authority can use these factors as criteria for selection and award. These are factors in the specification and subject of the contract.

8.5 A contracting authority will also be able to use these factors, as appropriate, as criteria for selection and evaluation as they can be linked to technical knowledge and ability at the selection stage and the subject matter of the contract at the tender evaluation and negotiation stage.

8.6 It will also allow development of the way in which the public authority expects the project to be delivered with appropriate consultation, training, monitoring and variance mechanisms.

8.7 If the authority wants to consider any objectives through the project which are additions to the subject of the contract as determined in the scoping and planning stages then it should seek further advice to ensure these are not inadvertently used in the selection or award stages.

In the case of Concordia⁹, the decision was made to purchase a bus service (not the purchase of buses). The award criteria and scoring scheme allowed additional points for delivery of the service using buses which had low levels of nitrous oxide emissions and noise below defined levels with the aim of promoting a better environment. These criteria effectively favoured gas powered buses. The ECJ ruled that they were linked to the subject matter of the contract; the delivery of the bus services themselves ties in very closely and has a direct link with the specification of the buses.

An authority decides to re-organise its telephone helpline service, resulting in the decision to contract out this service. The telephone helpline is for fault and complaint reporting by the authority's residents. Under the non-discrimination rules in procurement, the authority cannot specify where the helpline office must be based, but it does specify the training that the helpline operators must have in equality to ensure the service is delivered appropriately to the residents.

The same authority also decides to contract out its cleaning services. Again, it cannot stipulate where the contractor must be based, but it does stipulate that the service must be delivered in its buildings, and therefore in a particular location.

It also has specification requirements about the cleaners wearing their uniform, and protective clothing. The authority has used a uniform that has been developed to ensure it complies with dress requirements for certain religious groups and ensures the same specification requirements are in the contract.

How can soft market testing contribute to specifying equality and sustainable development objectives?

8.8 Public authorities may choose to talk with potential contractors to establish what may or may not be commercially viable in terms of delivery. Equality and sustainable development issues can be written in to the soft market testing programme by, for example, specifying, where appropriate, that criteria include those relating to equality and

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⁹ ECJ case C – 513/99

sustainability. (Some public authorities use benchmarking instead of soft market testing.)

- 8.9 The soft market testing process could include discussions on, for example, the effect of the inclusion of equality and sustainability considerations in the project in terms of cost, complexity and outcomes. Early dialogue, at this stage and indeed before an individual procurement begins, with the supplier community can be useful in finding out what is available, in informing the market of future requirements and in stimulating more innovative responses. While care should be taken not to distort competition – this process should not give advantage to any particular supplier. Market testing is dealt with in full in chapter 12.

Weighting criteria for the specification

- 8.10 The public authority will have to consider the weighting of sustainability and equality considerations against one another and against the other specifications required where they are included in the subject matter of the contract. EQIA will have shown the equality objectives which will have been incorporated into the specification. The weighting arrangements will be proportionate to these, and decided for each procurement project.

Using the equality scheme to help with specifications

- 8.11 As the public authority will have a scheme which states its arrangements for promoting equality of opportunity and good relations in the delivery of all its functions, it makes good sense to use the scheme as a template for requirements in delivery of the project and specify them, and use them in ongoing performance management. The contractor can draw on it to understand how to, for example
- monitor for any adverse impact on the promotion of equality and good relations
 - provide information including the results of monitoring
 - make sure people have access to information about the service provided under the contract and to the service itself.
- 8.12 It also will explain the necessity, particularly in PPPs and other contracts extending over several years, to specify regular planned improvements in equality outcomes with periodic reviews demonstrating improvements.

How to get added value from this process

8.13 Where a contracting authority is using variants, it is possible to take account of tenders submitted which exceed the minimum requirements it has deemed necessary to fulfil a contract. By accepting variants when assessing which bid is best placed to fulfil its needs, contracting authorities would then be able to see if tenders with enhanced equality or sustainability elements would be affordable on the basis on the bids received. Where this is not the case, contracting authorities could still choose from the bids meeting only the minimum requirements without having to re-advertise. This option is available as long as tenders are assessed on a most economically advantageous tender (MEAT) basis and where the minimum technical specifications to be delivered are mentioned in the contract notice. The notice must also indicate if variants will be accepted.

For example, capital contracts will nearly always require timber. The minimum requirement is that the timber be legally obtained but it could be that the contractor would exceed the minimum requirements by undertaking to source only wood from sustainable forests.

9 SELECTION

This chapter considers how the EU rules apply to selecting candidates and how equality and sustainability can feature in the selection process. It suggests what information needs to be exchanged – how the public authority finds out about the company and how the contractor finds out about the project. It also confirms how criteria apply to consortia or partnerships set up to engage in a particular procurement project.

Should equality and sustainable development requirements be included in the advertisement?

- 9.1 Yes. Notices, whether in local and national newspapers, specialist journals or in the *Official Journal of the European Union* (OJEU), must give basic information (that is, only that which can properly be requested) about the nature of the contract and selection criteria. Therefore the equality and sustainability information will be clearly set out in the objectives, outcomes and criteria for selection at this stage, drawn from the specification.
- 9.2 The notice must also include any equality or sustainability objectives that will be a requirement of the contractor as a contract condition. For example, the objectives may be to refurbish a road and to recruit from the long term unemployed. The latter will not form part of the selection process but needs to be included at this stage.

Example

How much detail should be included for selection?

- 9.3 At advertisement and selection stage the authority is bound both by the detailed requirements of the procurement legislation (Directive and Regulations) and the general principles derived from the EC Treaty, including those of equal treatment of all candidates (wherever they are based) and transparency.
- 9.4 Once this is done, it is at this point that little more can be added. That is, if the planning, objective solving, user need identification and decisions on outcomes have not been considered fully and included equality and sustainability; it will be an afterthought at this stage, not mainstreamed, with little scope to achieve effective outcomes.

Shortlisting candidates (see also annex 3)

9.5 After placing the advertisement, the authority will receive a number of expressions of interest from candidates wishing to participate in the tender process. The pre-qualification or selection or shortlisting stage is permitted under three procurement procedures from the EU rules – restricted, competitive dialogue and competitive negotiated. For smaller projects, many authorities may shortlist candidates if there is a lot of interest. It is the means by which the contracting authority can select the best qualified candidates to move forward in the tender process. This stage is referred to in the procurement legislation as the “selection” stage.

Selection of candidates

9.6 The selection stage can be broken down into two distinct phases

- excluding candidates from the process
- selecting the best qualified candidates.

9.7 The EU rules list the grounds upon which candidates must and may be excluded and also sets out an exhaustive list of selection criteria which can be used.

Grounds for exclusion

9.8 The grounds for exclusion are set out in the EU rules. There are firstly grounds on which candidates must be excluded, which do not include sustainability or equal opportunities issues. There are then listed grounds on which candidates may be excluded from participation. These include circumstances where they have

- been convicted of a criminal offence concerning professional conduct
- been found guilty of grave professional misconduct proven by any means that the contracting authority can demonstrate.

9.9 The fair employment legislation provides that a public authority shall not contract with an unqualified person, that is a person or company which has been served by a notice by the Equality Commission for failures in respect of non-registration, failures to submit a monitoring return or to comply with an order of a tribunal or court.

- 9.10 Candidates from other countries can be excluded for relevant convictions under the national laws of the country in which they are based.
- 9.11 It is the responsibility of the contracting authority to decide if they wish to pursue this option and exclude candidates as a result of the information they obtain, from the candidate or otherwise, related to convictions or grave misconduct findings.
- 9.12 However in both of these instances, any decision to exclude candidates on this basis would need to be non-discriminatory under the EU Rules, and the candidate concerned may have improved their practices and procedures since any decision was taken.

Criteria for selection

- 9.13 In terms of selection, the aim of the selection process is to assess the candidates' ability to deliver the contract requirements. Selection criteria are generally backward looking and assess a candidate's track record. Under the EU rules, there is an exhaustive list which sets out the selection criteria. The assessment can only relate to the candidate's ability to delivery the particular contract which is the subject matter of the procurement.
- 9.14 The contracting authority assesses historical information which is aimed at ensuring that candidates who are selected to tender have "economic and financial standing" and "technical or professional ability"¹⁰. The technical ability could include examples of previous experience of similar schemes, workforce expertise, technical expertise or quality systems.

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¹⁰ Articles 47 and 48 of the Directive.

The London Borough of Harrow¹¹ put out to tender three housing management contracts. This was regarded by the authority as the first step in a longer term process which would eventually result in the transfer of housing stock to the private sector. The procurement process was therefore structured so as to assess, amongst other criteria, the ability of providers to purchasing the housing at a later stage. This was despite the fact that the contracts to be awarded were only for housing management services and there was no obligation on either side to go ahead with the privatisation. The court ruled that that the authority could only consider exclusion factors or ability in relation to the performance of the actual contract to be awarded and so, in this case, the ability of the provider to meet the authority's long term aims and take on a transfer of housing stock was not relevant and could not be used as criterion in the selection of candidates.

Use of pre-qualification questionnaires (PQQs)

9.15 There is no set format for the way in which pre-qualification information is requested. It is quite common, for example, to just see a list of the information required set out in the OJEU notice. However, it is standard practice in the UK, particularly for complex projects, to use a pre-qualification questionnaire which sets out questions for candidates to complete.

9.16 The advantage of using a PQQ is that it is clear what information is required and ensures that the information is delivered in a consistent format. This significantly assists in the administration of the selection process and in ensuring equal treatment and transparency.

9.17 However, standard PQQs should be applied with caution, to ensure that

- irrelevant information is not being requested, which then might not be used in the assessment
- crucial questions are not missed
- questions meet the rules and conditions for selection
- questions are relevant and useful for the selection process for the particular project.

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¹¹ R v Secretary of State for the Environment ex p. Harrow BC (1997) 29 HLR1

Broad equality and sustainability issues and PQQ questions – standard questions relating to statutory/policy compliance

- 9.18 Assuming that the stringent conditions are met then the pre-qualification questionnaire can be used to explore equality and sustainability issues. Contractors can be asked if they are complying with their own national legal requirements.
- 9.19 It is therefore very important to consider carefully the types of questions that are asked on the standard forms which are used for a whole host of public procurement contracts. Questions relating to aspects of equality or sustainability policies must be similarly tailored to each specific contract. There are generally agreed and accepted equality questions which, subject to the conditions referred to above, may be included in the conditions referred to above. PQQs need to be considered on a project by project basis.

Equality in the Workplace

The principles contained within this example apply and could be transferred to projects in Northern Ireland.

1. Is it the policy of the Bidder and/or its named supply chain members as employers to comply with the statutory obligations under the Race Relations Act 1976, which apply in United Kingdom, or equivalent legislation that applies in the countries in which the Bidder or its named supply chain members employs staff?
2. Is it the policy of the Bidder and/or its named supply chain members as employers to promote race equality as set down in the Race Relations (Amendment) Act 2000 or equivalent?
3. In the last three years, has any finding of unlawful racial discrimination in the employment field been made against the Bidder and/or its named supply chain members by the employment tribunal, the employment appeal tribunal, or any court, or in comparable proceedings in any other jurisdiction?
4. In the last three years, has the Bidder and/or any of its named supply chain members been the subject of formal investigation by the Commission for Racial Equality (CRE), or a comparable body, on the grounds of alleged unlawful discrimination in the employment field?
5. If the answer to question 3 is yes or, in relation to question 4, the CRE or comparable body made a finding adverse to the Bidder and/or any of the named supply chain members, what steps have been taken as a result of that finding?
6. Is the policy of the Bidder and/or its named supply chain members on race relations set out:
 - in instructions to those concerned with recruitment, selection, remuneration, training, and promotion;
 - in documents available to employees, recognised trade unions, or other representative groups of employees; and
 - in recruitment advertisements or other literature?
7. If the answer to questions 1 or 2 is 'No', please provide other evidence

to show how the Bidder and/or its named supply chain members (as appropriate) promote race equality in employment?

8. Are the staff of the Bidder and/or its named supply chain members (as appropriate) who have managerial responsibilities required to receive training on equal opportunities?
9. Does the Bidder and/or its named supply chain members observe, as far as possible, the CRE's code of practice for employment, as approved by parliament in 1983, or a comparable statutory code? Or guidance issued under equivalent legislation in another member state, which gives practical guidance to employers and others on the elimination of racial discrimination and the promotion of equality of opportunity in employment, including monitoring of workforce matters and steps that can be taken to encourage people from ethnic minorities to apply for jobs or take up training opportunities?
10. Is it the policy of the Bidder and/or its named supply chain members as employers to comply with their statutory obligations under the Sex Discrimination Act 1975, as amended, the Equal Pay Act 1970, and the Disability Discrimination Act 1995 – all of which apply in the United Kingdom – or equivalent legislation in the countries in which the Bidder and/or its named supply chain members employ staff?
11. In the last three years, has any finding of unlawful sex or disability discrimination in the employment field been made against the Bidder and/or its named supply chain members by the employment tribunal, or any court, or in comparable proceedings in any other jurisdiction?
12. If the answer to question 11 is 'yes', what steps have been taken as a result of that finding?
13. If the Bidder and/or its named supply chain members are not currently subject to UK legislation, please supply details of the Bidder's and/or its named supply chain members' experience (as appropriate) in complying with equivalent legislation that is designed to eliminate discrimination (including, but not limited to, racial, sexual and disability discrimination) and to promote equality of opportunity.

Source: example taken from the English Building Schools for the Future standard form PQQ

Broader equality and sustainability issues and non standard PQQ questions

- 9.20 There are non standard questions which explore broader equality and sustainability issues, though always subject to the basic conditions applying to selection criteria. These will relate to the candidate's track record or history of delivering similar projects, and so will be determined on a project by project basis. Some example questions are set out below.
- 9.21 Even if contracting authorities do not intend to take some information into account during a procurement process, the fact that this information has been requested means that the courts may assume it was taken into account when selecting candidates should a complaint arise.

The following points are included as they have been used in specific projects to demonstrate technical ability, where they were linked to the subject matter of the contract.

- Please provide details of how you have successfully built collaborative relationships between schools and wider community groups including groups with differing racial, ethnic, religious backgrounds or with specific needs in terms of access to facilities and services, with reference to specific projects and partnering arrangements.
- Please provide details of partnering arrangements or procurements in which you have been involved which were reliant on building co-operative and collaborative relationships. Please explain how and what relationships you have built.
- Please provide examples of how you have previously managed practical changes in attitude and culture and details of the subsequent results.
- Please provide details of how you have helped to integrate building programmes with wider planning for [education support and school services] How has this had an impact on to other strategic planning with an equality focus
- Please provide details of how you have successfully built collaborative relationships with public sector organisations, with reference to specific projects and partnering arrangements.

- Please provide details of how and where you have developed and/or implemented flexible and fully integrated ICT strategies to complement building programmes. Has this ever specifically related to DDA or other arrangements?
- Please provide details of how you have previously delivered performance management [and monitored trends] with particular reference to equality issues. Please provide practical examples of how you have anticipated potential problems and what steps you have taken to minimise the impact.
- Please describe what method you have previously used to collect performance data and benchmarking information and how this information has been used to improve future productivity of health care related facilities (or other facilities or services if you have no experience of [health care]).
- How have you previously optimised selection and specification of equipment and material and exploited the latest technological developments. How has this been particularly relevant to people who have difficulty accessing the equipment or how have these measures ensured equal access across a diverse community?
- Please demonstrate how your approach to design quality has previously provided direct improvement in the delivery of community based health and/or social care related facilities or services with particular reference to diverse community needs.
- Please describe your experience of public sector projects in which you have previously been involved requiring you to work with
 - multiple occupants (where the provision of a facility was involved) and/or
 - multiple clients with differing social needs
- Please describe how you embed sustainability and renewable energy practices into buildings and services over time and describe how you have transferred skills to the local labour market.

- 9.22 Using this type of approach and questioning candidates has a great deal to offer as it develops the relationship between the public authority and the candidate in meeting the challenges of the project. A voluntary approach allows innovation and develops shared thinking.
- 9.23 Equality and sustainability issues aimed at those additional objectives which may have been identified as discussed on page 42, rather than the contract itself, cannot form requirements in a particular procurement, but contracting authorities can discuss the possibility of working voluntarily with contractors after award to achieve these aims.

For example (Victoria Square)

Scoring and weighting

- 9.24 There is no statutory obligation to score PQQ responses in a particular way, using a specified methodology or to weight criteria or indicate an order of importance¹². Nor is there an obligation to establish how scoring is to be undertaken before PQQ responses are received. However, it would be good procurement practice to do so. This assists in terms of openness and transparency and where a scoring and weighting scheme is produced and disclosed in advanced to all participants this ensures that the whole process is open, with all involved understanding the relative importance of different factors. PQQs form one part of a selection procedure. The EU rules do however require contracting authorities to specify, in the contract notice, the minimum standards and the objective and non-discriminatory criteria to be applied to limit the number of candidates.
- 9.25 When structuring a scoring scheme or methodology it is important to ensure that scores are proportionate and appropriate to the particular project in question. This means that care needs to be taken to ensure that scoring and weighting attributed to equality and sustainability considerations are also proportionate and appropriate.
- 9.26 For example, it may be appropriate, in the context of procurement of a domiciliary care service, to score equality compliance and training highly as this involves very direct, personal contact by individuals with

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¹² The position is different with award criteria used at the next stage of the process where there is an obligation to set out the criteria and either the weightings to be applied or the order of importance of those criteria for contract award.

members of the community. However, for a road building programme, the score and weighting for equality elements may be lower whereas environmental and other sustainability considerations are likely to be significant.

Consortia and partnerships

9.27 For large and complex projects, it is likely that the candidates will include consortia such as

- a special purpose company which is set up for the purposes of tendering for a particular contract
- a special purpose company which is set up for the purposes of bidding for certain types of contract or in a particular market or
- an arrangement where a group of individuals/organisations work together for the purposes of submitting a bid.

9.28 In the case where the consortium is a newly constituted organisation, the selection criteria can apply to those organisations which make up the constituent parts of the consortium, and their track record looked at.

9.29 The contracting authority needs to make sure that it sets out the questions in such a way to get the information it needs from the constituent parts of the consortium.

10 TENDERING I – INVITATION TO TENDER/EVALUATION OF BIDS

This part of the guide outlines the procedures for moving, after shortlisting, to final selection of the contractor. The guidance can be adapted for any of the formal procedures including where your contract is outside the EU directives. All this will allow clear outcomes, outputs and resultant key performance indicators. Contractors will be able to offer from their experience negotiated voluntary additions.

Procedures for tendering

10.1 On completion of the selection process contracting authorities must follow the procurement route chosen, at the advertisement stage, to invite candidates to submit tenders. Competitive dialogue is a new procedure introduced in accordance with the EU Rules for use in the procurement of particularly complex projects. It is therefore sensible to assume that, in the majority of cases for PFI and PPP, where the open or restricted procedures are not appropriate (these procedures must always be considered first) then the competitive dialogue procedure will be the procedure which will be followed.

Competitive dialogue

10.2 In the competitive dialogue process candidates selected following the pre-qualification stage are invited to participate in a dialogue. The competitive dialogue stage enables the contracting authority to have discussions with candidates with the aim of identifying and defining the means best suited to meet the contracting authority's needs. The dialogue may take place in successive stages to reduce the number of solutions discussed and the number of candidates involved. A solution need not be just a technical solution but can also be a solution which covers the entirety of the contracting authority's requirements, including pricing (equivalent to a preliminary bid). Once the required solution or solutions have been identified the contracting authority declares the dialogue to be concluded. It is during this phase that the contracting authority can explore in further detail equality or sustainability issues in terms of delivery of the actual project.

10.3 Those candidates remaining at the conclusion of the dialogue are then invited to submit final tenders based on the solution(s) identified. Final tenders can be 'clarified, specified and fine tuned' provided that this does not involve changes to the basic features of the tender (variations in which are likely to distort competition or have a discriminatory effect).

10.4 At this stage it is unlikely that equality or sustainability can be factors to consider as they should have already been addressed during the competitive dialogue phase.

Evaluation of bids

10.5 The evaluation of bids allows an opportunity to examine how candidates have responded to the requirements within the specification including the equality and sustainability aspects.

10.6 The evaluation methodology for the contract will need to both test the compliance of bids to the specification as well as give proportionate weight to the importance of the various criteria being evaluated. The evaluation process may therefore include a specific consideration of how the bidder is proposing to handle various equality and sustainability issues set out in the specification.

10.7 Project teams should be looking for candidates to demonstrate that they have understood the needs of the contracting authority and that they have the ability to develop appropriate solutions which meet any requirements in relation to equality or sustainability considerations both during construction, in the case of a works contract, and generally during the life time of the project.

10.8 The evaluation methodology should be clear about how the costs and benefits of proposals are to be measured and also about who is to carry out the assessment of the bid proposal. This might be suitable work for legal or technical advisors or for departmental energy and environmental managers.

10.9 The competition may allow for the evaluation of additional equality and sustainable development proposals submitted by candidates, which are not eligible for evaluation under the most economically advantageous tender (MEAT) criteria, to determine between two or more bids considered equal on value for money (MEAT) grounds as defined in the tender documentation.

10.10 As the EU Rules require contracting authorities to provide feedback if requested by unsuccessful candidates there will be an opportunity to comment on the equality and sustainability aspects of their proposals and how these were evaluated. Such feedback should help to transform the market into taking greater account of these considerations.

Award

10.11 The EU rules permit contracts to be awarded on the basis of either *lowest price* or *most economically advantageous tender*. This latter option is equivalent to 'value for money' and, according to Departmental policy, should be chosen by contracting authorities. Acceptable criteria for determining the most economically advantageous tender must meet certain conditions

- be relevant to the subject of the contract
- be from the point of view of the contracting authority
- be consistent with basic EU Treaty principles
- relate to the specification
- be distinct from selection criteria.

10.12 Lowest price is not available as a basis for overall award under the competitive dialogue procedure. The only basis for award under this procedure is most economically advantageous tender. Once a preferred bidder has been identified (i.e. the bidder providing the most economically advantageous tender), there is a further opportunity to 'clarify aspects of the tender or confirm commitments' provided, again, that there are no substantial changes to the tender and that this does not risk distorting competition or causing discrimination. At this stage it is unlikely that equality or sustainability can be a factor to consider as this should have already been addressed during the competitive dialogue phase.

11 TENDERING II – THE CONTRACT

This chapter will reinforce that public authorities be specific about how the commitments will be monitored and measured, making sure they are proportionate with the procurement in question. It reinforces that contract clauses for equality should be included; suggests some clauses and other factors to be considered, depending on the nature of the project, to meet sustainable development objectives, within the EU rules.

Why are contract conditions needed?

- 11.1 Contract conditions relate to the performance of the contract. Providing they are relevant and do not undermine value for money considerations, they can offer significant scope for working with suppliers in a way which maximises the equality or sustainability impact of a particular contract. Working with suppliers after the contract has been awarded also provides an additional opportunity for procurement to contribute to the achievement of the relevant objectives.
- 11.2 Writing the equality and sustainable development considerations into the contract makes the contracting authority's intentions clear. It is easy to get these contractual arrangements right if at the early stages of the process the project team members have been careful in how they have developed the objectives and the specification.
- 11.3 For instance if it has been decided to recruit from the unemployed, the contract should say that. If a hospital meals service is to be delivered to meet specific user needs, the contract will need to say how this will happen.
- 11.4 Equality and sustainability considerations will be very specific, translating into the monitoring arrangements, and appropriate variance clauses to address changes over time.

Standard conditions

- 11.5 Standard in a contract therefore will be
 - the model equality of opportunity condition developed for Northern Ireland (see below)
 - other standard conditions to meet s.75 obligations, such as the consultation with users required, monitoring and reporting arrangements, and any related variance clauses

- conditions specific to individual contracts to ensure that the objectives and outcomes are delivered, including variance clauses.

Key points to remember

- Contract conditions must be compatible with the fundamental Treaty principles, particularly the provision of non-discrimination.
- The need for transparency requires that conditions of contract should be advised in advance to candidates. Details should be included in the tender documentation.
- Evidence of compliance with contract conditions should generally not be requested at selection or award stage. Suppliers must accept the conditions in order to be awarded the contract.

11.6 These conditions and the contract as a whole are only as good as the monitoring against them

Equality of opportunity contract condition

(1) The Contractor shall comply with all applicable fair employment, equality of treatment and anti-discrimination legislation, including, in particular, the Employment (Northern Ireland) Order 2002, the Fair Employment and Treatment (Northern Ireland) Order 1998, the Sex Discrimination (Northern Ireland) Order 1976 and 1988, the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, the Equal Pay Act (Northern Ireland) 1970, the Disability Discrimination Act 1995, the Race Relations (Northern Ireland) Order 1997, the Employment Relations (Northern Ireland) Order 1999 and the Employment Rights (Northern Ireland) Order 1996 and shall use his best endeavours to ensure that in his employment policies and practices and in the delivery of the services required of the Contractor under this agreement he has due regard to the need to promote equality of treatment and opportunity between:

- a. persons of different religious beliefs or political opinions;
- b. men and women or married and unmarried persons;
- c. persons with and without dependants (including women who are pregnant or on maternity leave and men on paternity leave);
- d. persons of different racial groups (within the meaning of the Race Relations (Northern Ireland) Order 1997);

- e. persons with and without a disability (within the meaning of the Disability Discrimination Act 1995);
- f. persons of different ages; and
- g. persons of differing sexual orientation.

(2) The Contractor shall take all reasonable steps to ensure the observance of the provisions of the above clause (1) by all servants, agents, employees, consultants and sub-contractors of the Contractor.

Source: Central Procurement Directorate, Department of Finance and Personnel

S.75 and affirmative action

11.7 S.75 has provided the means of considering promotion of equality of opportunity and it can provide a framework for building affirmative action into contracts using the guidance to ensure that the key concepts are considered and written into the contract such as

- monitoring
- consultation
- complaints
- reporting
- targets
- improvement
- managing performance.

Workforce requirements

11.8 This applies in relation to the workforce requirements in the contract as well as to the service provision. The contract will be written to comply with the law and with the guidance. Also, the commitments made in the dialogue stages around training and support can be recorded.

11.9 There is more on this in chapter 6.

Contract conditions and legal obligations

11.10 As a general rule, laws relating to social, environmental and employment obligations should not be highlighted in the contract conditions. This is because contractors should be abiding by these

laws irrespective of the contract. Highlighting one or two implies some laws are more important than others.

Example contract condition

Statutory and other regulations

The contractor shall be deemed to have acquainted himself with any and all Acts of Parliament, Statutory Regulations, or other such laws, recommendations, guidance or practices as may affect the provision of the service(s) specified under the contract.

The Contractor shall be deemed to have acquainted himself with British/European standards and codes of practice as may be relevant to this contract.

The contractor shall adequately train, instruct and supervise staff to ensure that so far as is reasonably practical the standards and codes of practice are observed.

11.11 When a public body contracts out one of its functions the public body must ensure that its obligations under s.75 continue to be met. Thus in procurement a contracting authority must consider how to ensure its own compliance with the duty. The contractor will have his own obligations in law and it is not the role of contract to monitor these however the public authority will monitor how its equality duties are being fulfilled.

11.12 The public authority will have to ensure it is in compliance with its equality scheme, monitoring against the objectives and purpose of the project. The Equality Commission's general guidance on s.75 (Note: and forthcoming guidance on monitoring are) is useful in establishing mechanisms for monitoring and reporting.

11.13 However there are limitations to the use of standardised clauses as monitoring whether contractors are following the law generally is difficult and potentially costly. It must be assumed that organisations adhere to the law generally and contracting authorities would be no different with regards to their contractors. Therefore, as stated earlier, the better the specification of objectives for the project, the easier it is to create clauses that allow measurement and using equality and sustainability indicators

11.14 Of course action taken by a contracting authority should a conviction occur during the contract will depend on the contract conditions which have been set.

Partnerships and sub-contractors

11.15 The contract conditions should also take into account the range of partnerships, whether between public authorities or consortium members. The competitive dialogue procedure needs to make clear how equality and sustainability issues apply. The competitive dialogue and contract management process should also ensure that the contract requirements are “stepped down” to sub-contractors, who also are part of the performance management and reporting requirements.

Equality and sustainable development considerations and additional contract conditions

11.16 As set out earlier in this guide, there are circumstances where an objective is set to meet an equality or sustainable development policy objective. Certain objectives can be best met as contract conditions, required of whoever is the successful contractor. Where achievement of these objectives does not form part of the selection or award criteria, they must still be notified to candidates from the outset. This may include, for example

- on-site vocational training
- the employment of people experiencing particular difficulty in achieving integration or
- a requirement to address policies to tackle unemployment.

11.17 These types of objectives will have been assessed on a best value for money basis during the development stage, and proposed and must be non-discriminatory and comply with the EU rules.

11.18 There is scope within the legal framework governing public sector procurement to include certain positive actions to achieve equality and sustainable development policy objectives in the terms and conditions of contracts.

11.19 In particular Article 26 of the new Public Procurement Directive states

“Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with

community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.”

11.20 There are conditions separate from selection/award and the objectives of the project set out in the specification.

For example, in a procurement for the construction of a new community centre, a contracting authority might consider whether there would be significant benefits to be gained from including a targeted recruitment and training requirement in the conditions of the contract. It might therefore include the clause:

“10 % of the person-weeks required to complete all of the works is to be delivered by new entrants that have an apprenticeship, trainee or employment contract with the contractor or a sub-contractor and are engaged in a training programme that is accepted by the Employer”.

Source: Social Issues in Purchasing, Office of Government Commerce, 2006, p29

For example: recruitment from the long term unemployed.

12 PERFORMANCE MANAGEMENT

This chapter addresses contract monitoring and compliance with agreed terms. It sets out the parameters for monitoring and links the procurement process to the ongoing contract management requirements and expectations of the contractor. It also considers how a contract might change over its life.

Contract management

12.1 Effective contract management is crucial to the success of procurement and especially PPP. Unlike conventional procurements for assets and services where individual contracts may be for short periods and public assets are solely acquired or renovated, the PPP relationship (covering investment, maintenance and operation) is intended to last 25 to 30 years. It is essential that a real partnering relationship is established between contracting authority and contractor and contract management will require a different approach than shorter contracts. The project group has a crucial role to play here and the advantages of careful consideration of who is in the group will be demonstrated.

Monitoring

12.2 Monitoring is key to making sure that the value of all the careful work done to date is maximised. The success of a project will depend on how the specification was drawn up, how the contractor is chosen and then what mechanisms are put in place to see that it is being run as specified and if, at any time, change is necessary.

12.3 People may now be involved who were not part of the project at earlier stages and it is important that an opportunity quickly be found to review membership of the project board. If there are new people significant to the contract or specifically involved in managing the contract membership of the project board should be considered. In any case it should be ensured that they understand the equality requirements and the sustainable development objectives of the contract and receive any training necessary.

12.4 An effective payment mechanism which takes account of all requirements of the contract will provide the basis for ensuring that the contractor delivers the service to the required standard and will ensure that the contractor is penalised financially should the service fall below an acceptable standard.

12.5 As well as the payment mechanism there are further opportunities for exploring how the equality or sustainability aspects of a PPP contract are being handled.

Gateway 5 of the OGC Gateway Process

Gateway 5 of the OGC Gateway Process, applicable to all PPP projects, focuses on ensuring that a project is delivering the benefits and value for money identified in the business case. This Gateway Review should ideally be held 6 to 12 months after the asset is available for service when evidence of the benefits is available and a post implementation review has been carried out. For long term contracts such as PPPs a Gateway 5 Review should be repeated at appropriate intervals, with consideration for s.75 reporting periods, to ensure benefits delivery and improving value for money. These reviews can be used to monitor progress on the delivery of equality and sustainable development aspects of the PPP and the authority will wish to ensure that the contractor is collecting information needed for it to complete its s.75 report.

See: http://www.cpdni.gov.uk/index/guidance-for-purchasers/gateway_review_process.htm for more details

12.6 There will have been discussions, agreements and appropriate contract clauses and conditions drawn up between the contracting authority and the contractor relating to the responsibilities for promoting equality and advancing sustainable development objectives. The monitoring arrangements present the opportunity to consolidate and build on those and clarify the responsibilities in general. This will involve looking together at the equality and sustainability clauses and commitments in the conditions of contract, how the contractor will evidence compliance with them and circumstances which could lead to defaults or bonuses where featured in the contract. This would include handling complaints. It is necessary that the contractor understands any references to the legislation, notably s.75, or the Equality Commission's codes of practice in employment or service provision.

12.7 The contractor will be expected to provide results of monitoring, other information about the service, or information about the workforce employed on the contract. It will be necessary to explain to the contractor why this information is necessary and how regular monitoring of equality performance can help meet other requirements of the contract. Reporting dates and how the contracting authority responds

will need to be agreed and periodic meetings to discuss the contractor's monitoring reports will have to be planned.

12.8 Actions which will assist include identifying training, information and advice needs with the contractor. The contracting authority can then make clear what it will offer by way of training, advice and information to help the contractor in delivering good quality monitoring.

For example

KPI	Objectives	Key performance indicator	Target
1	To promote a better quality of life through the efficient use of resources in a way that is socially, economically and environmentally sustainable.	Percentage of schools completed which achieve a Very Good BREEAM* rating.	To achieve the requisite performance standard.
2	To increase the popularity of neighbourhood schools and thereby decrease the mean distance travelled by young people to school.	Percentage reduction in the mean distance travelled by young people to school.	To cause a specified improvement in the KPI relative to current trends in the school.
3	To develop ways in which schools can become the focal point for learning within the wider community.	Ratio of hours that a school is used by the local community for learning related activities to the hours that a school is used by its pupils for learning related activities.	To cause a specified improvement and appropriate increase in the KPI relative to current trends in the school

4	To develop ways in which schools can become the focal point for the delivery of all services to children within a community.	Percentage area of a school that is devoted to the delivery of other non education services to children within the local community.	To cause a specified improvement in the KPI relative to current trends in the school.
5	To make a real contribution to the wider social and economic regeneration of the areas in which schools, libraries and youth clubs are located.	Percentage reduction in long term unemployment levels within the local community and percentage improvement in job opportunities and apprenticeships.	To cause a specified improvement in the KPIs relative to current trends.
6	To promote equality of opportunity, social inclusion, and staff retention and development across all areas of activity, employment and processes.	Percentage reduction in levels of staff turnover within schools and the authority. Percentage increase in levels of participation from all sections of the community. Percentage increase in staff morale as measured by staff satisfaction surveys.	To cause a specified improvement in the KPIs relative to current trends.

* Building Research Establishment Environmental Assessment Method

Asking contractors to take on additional commitments

12.9 To meet duties to promote equality, sustainability and other relevant policy commitments, the contracting authority should build on relationships with the contractor to encourage them to take steps, on a voluntary basis, to prevent unlawful discrimination, to promote equality of opportunity and good relations and contribute to achieving sustainable development in Northern Ireland.

12.10 For example, the contractor may agree to

- adopt an equal opportunities policy for their organisation generally
- monitor their UK-based workforce on all grounds
- take positive action, as permitted, in relation to under-representation of particular groups
- incorporate energy efficiency in their work processes.

For example

How should the contractor's performance of the requirements be monitored?

12.11 All public authorities will have set out in their equality scheme how they will monitor for adverse impact and act appropriately. Here, to ensure effective performance of the contract regular and systematic monitoring will need to be carried out. The objective, to secure best possible performance, is far more likely to be achieved if, in line with the partnership approach, monitoring methods and criteria are agreed with the contractor. The process for reviewing the contractor's performance must be transparent, and trusted by both parties. If the outcomes have been clearly identified in the project specification and equality and sustainability conditions included, this will be monitored alongside the rest of the contract.

12.12 The contractor should be providing the information for the contracting authority to meet the requirements of its equality scheme. To get a full picture of changes over time and delivery of the contract objectives, it

may be necessary for the contracting authority to supplement the data from the contractor. This may include

- use of datasets available on local demographic change or other qualitative information used for the scheme
- interviews or surveys of users/unions/NGOs
- general satisfaction surveys to measure how the authority is generally seen to be performing.

12.13 This, together with the monitoring specific to the contract, will give the evidence base for negotiating any change to the contracts over time via the regular reviews and variance clauses written in.

12.14 The monitoring by the contractor may also result in the contractor recommending changes to the contracting authority.

For example

Improving poor equality or sustainability performance

12.15 If monitoring suggests that the contractor is not meeting the equality or sustainable development requirements the following cumulative steps should be taken, but assumes that that the contract provides for resolution of issues in this manner

- the notice procedures set out in the contract should be used. A meeting with the contractor should be sought to review in detail any problem areas, and spell out clearly (again) what is expected from the contractor. The contractor should be helped identify the reasons for poor performance and how to make improvements – for example, through more training or better monitoring systems – and agree the improvements expected by the next monitoring report
- if, despite efforts to help the contractor make needed improvements, there is serious and persistent failure to meet the equality or sustainability requirements of the contract, the default provisions of the contract conditions can be invoked. However any action must be reasonable, appropriate and proportionate. In addition, at any point when there is evidence of poor performance, the contractor can be reminded that it may not be possible to consider them for future

similar contracts if their performance in relation to the equality and sustainability requirements remains unsatisfactory.

A changing environment

12.16 A feature of PPP contracts is the length of time over which they run. It can be in excess of one or two decades. With this type of time frame it is conceivable that economic, social and environmental situations will change, therefore the equality imperatives may change. If the public authority has planned the project and screened and carried out appropriate EQIAs on the proposals, it may have an estimated time frame for certain changes such as anticipated demographic changes within a decade for the delivery of services within a geographical area. If this can be identified then the contract conditions on this aspect of the project may be different from the overall contract.

12.17 There may also be specific objectives in the project that can be delivered within the timescales of the overall contract span. Clear objectives and an evidence base will enable anticipated changes over time and associated deliverables in the project to be specified. However there will be some changes which are not predicted over time. If the monitoring identifies changes which are needed or gaps which need to be addressed, this should then be negotiated with the contractor in the usual way with all necessary changes, using the variance clauses in the contract.

Lessons for future contracts

12.18 From time to time, and especially as the contract nears its end, it is recommended that the project as a whole is reviewed or evaluated for its success, or otherwise, in promoting equality of opportunity or achieving sustainable development objectives. As suggested in chapter 4, this review is a vital element in planning how future projects could be more successful in meeting these aims.

12.19 Reference should be made to the monitoring records and any feedback from users, would-be users, and other stakeholders. Contracting authorities may want to seek the views of the contractor, trade unions and representatives of users on how well the equality and sustainability objectives have been achieved, or why these objectives have not been fully realised.

12.20 Lessons for future projects can then be drawn up and reported and in the case of equality of opportunity against the equality scheme

- Would a wider, or narrower, scope for the project have made a difference to the outcomes?
- How could the specification have been drafted to produce better outcomes?
- Would different conditions of contract have been more effective in securing high standards of equality in employment or in service delivery?
- How could the monitoring and management of the contract have been more successful in achieving higher standards in performance?

Market testing

- 12.21 Market testing during the life of the contract will assist in achieving any change which equality or sustainability considerations demand.
- 12.22 Market testing for facilities management provisions are included in standard form project contracts in respect of ‘soft’ facilities management services, for example cleaning, catering, portering and building supervision. The majority of the cost of providing these “soft FM” services generally lies in the cost of the staff rather than any particular consumables or equipment. This is in contrast to “hard FM” services, such as maintenance of the building and grounds and gardens maintenance, the cost of which is largely determined by cost of replacement parts, plant and equipment.
- 12.23 By market testing these services every five to seven years in accordance with the project agreement, the risk of general increases in wages, pensions and other benefits is limited, as the contractor will get the opportunity to rebase its costs at regular intervals. As such, market testing helps to ensure the public sector receives better value for money by limiting the unknown risk the private sector is required to price for these services.
- 12.24 A successful market testing exercise requires communication between the public sector and the contractor in relation to the timetable, process and scope of the market test. This information is also of use to the contractor, and the public authority for the purposes of reporting progress on its equality scheme.
- 12.25 Some public authorities use other mechanisms such as benchmarking. These too can be considered with regards to how they can assist in achieving change.

12.26 See also annex 3 for further examples.

As part of the market testing procedure, NHS Standard Form requires Project Co and the trust to meet prior to the tender going out to the market not only to review the Service Level Specifications and Method Statements, but also “to agree the basis on which the tenderers shall be selected by Project Co (the contractor).” Part of those selection criteria could be linked to its staff or quality accreditations, and possibly also its equality policies and procedures (although note that these candidates should not be subjected to more onerous criteria than was the case at the original PQQ). In reviewing the Service Level Specifications, the Trust is able to obtain a market price to reflect changes in its requirements, for example a change in demographics may result in a hospital requiring the provision of different catering services.

Parties interested in providing the market tested services would then complete a Pre-Qualification Questionnaire, to ensure candidates who go on to be shortlisted have the appropriate skills, experience, approach to equality in the delivery of services and financial capability to successfully perform the contract. There is nothing to prevent the public sector’s in-house team from submitting a bid, however the public sector will be evaluated in the same way as the other candidates, and must accept the existing contractual arrangements including a performance based payment mechanism. Shortlisted candidates would be invited to submit a tender against the contract specifications (which includes the payment mechanism), and the tender would also request additional information about management of staff transfers and other commercial issues. The evaluation criteria would be established prior to opening submitted bids, and clearly would need to satisfy the usual requirements of objectivity.

After market testing has taken place, Project Co selects the bid which is deemed to provide best value for money. The financial model (and consequentially the unitary charge) is updated to reflect the revised service costs. The public sector takes full risk of costs rising as a result of the market test (and full benefit should the same costs fall). The parties must be clear between themselves with regard to the effective date of any resulting price adjustment, particularly if the start of the process is delayed or it takes longer than anticipated.

13 NOTES FOR OTHER USERS

This chapter shows how, while this guidance has been written primarily for contracting authorities – specifically those which are designated under s.75 of the Northern Ireland Act 1998 – it will be of use to others who wish to understand how equality of opportunity and sustainable development considerations can be pursued in public sector contracts.

13.1 Wider stakeholders in the procurement process include:

- people wishing to enter into contracts with public authorities, whether in the private or non-governmental sectors, or indeed other public authorities
- people wishing to contribute to policy making and good service delivery in non-governmental organisations, trade unions, among other social partners or as individuals.

13.2 General areas of interest to other stakeholders are listed below, as well as some matters particularly of interest to those who wish to enter into contracts with public authorities.

Engaging with Public Procurement

13.3 Although this guidance is aimed at public authorities, others will also find it useful. It is important to understand the relationship between the public sector and private contractors. Responsibilities under s.75 remain with the public authority. Therefore, while any private contractor with whom a public authority contracts will have equality conditions and sustainable development considerations built into the terms and conditions, it is the public authority that has to ensure that s.75 is being complied with. PPPs represent a large investment of public money over time in the private sector, and voluntary and community groups can help to ensure that this money is spent according to the needs of local communities.

13.4 The public authority entering into a contractual arrangement with another organisation is referred to as the 'contracting authority' but throughout this guidance it is assumed the contracting authority will be a designated public authority under s.75 of the Northern Ireland Act 1998.

Transparency and Accountability

13.5 Public procurement is regulated at European and national level. The processes to procure goods, facilities or services are based on various principles, particularly fairness, non-discrimination and transparency. S.75 provides a mechanism through which public authorities are accountable, and procurement projects, as well as the procurement function, should be covered in equality schemes.

Consultation

13.6 This guidance advises public authorities on the best approach in incorporating sustainable development considerations and obligations under s.75 into their PPP procurement process, including when and how to screen and, if necessary, conduct an equality impact assessment (EQIA) on their policies. It is essential that public authorities consult effectively, including with relevant voluntary and community groups on their proposals in relation to PPPs, and that there is meaningful engagement to ensure that the needs of people are reflected in the decision making process.

13.7 This guide recommends that for complex decisions and developments, consultation happens at different stages of decision making, as different levels of detail emerge. This should ensure a number of opportunities for groups and those affected to engage with the process.

Changing conditions during the life of the contract

13.8 Some PPP projects have a long life span, and it is possible that conditions will change in an area which will affect the contract, for example changing areas and communities may require that greater consideration be paid to older people where ten years previously younger people had been those most in need of the services of the PPP contract. The contracting authority should build into its contract arrangements an obligation to consider these changes and use the mechanism to alter the contract accordingly. Those in the voluntary and community sector are ideally placed to keep abreast of these changes and to ensure that the needs of the community and their interest groups are being properly considered and fed back accordingly to the public authorities who operate in their area.

Monitoring

13.9 Public authorities will have contract arrangements in place with contractors to monitor the contractor's compliance with the contract

term, including equality and sustainable development requirements. However, if it becomes apparent that a public authority is not acting in accordance with s.75 in the discharge of its functions because of the actions of a contractor, any complaint would be to the public authority. If the voluntary and community sector is aware of the partnership responsibilities of the contractors and the contracting authorities, the sector could alert the contracting authority to any issues to an early stage for resolution.

Preparation for contracting with government

13.10 While this guidance has been written primarily for contracting authorities it will be useful for potential contractors who want to make themselves eligible for procurement contracts from the public sector. Evidence shows that taking equality and sustainability into consideration enhances business generally, but it is essential for a contractor who wishes to enter into a contract with a public authority. The guidance shows what the contracting authority must consider and allows the potential contractor to prepare to provide that by developing an understanding of the equality and sustainability responsibilities. Then it is possible to consider what a contractor can offer and how they can work more effectively in partnership in complying with the contract's terms and conditions.

What does the duty on public authorities mean for a private sector firm?

13.11 Equality and sustainability should not be seen as an add-on to a contract. An organisation which hopes to be selected to tender, or to be awarded public authority contracts, will be expected to meet the equality and sustainable development requirements for the particular contract.

How will equality and sustainable development be included in public authority contracts?

13.12 The contracting authority will be considering these issues from the outset. The information gained by public authorities to complete screening and EQIAs will be available setting out any impacts identified on equality groups, and their own strategies on equality and sustainable development will be in the public domain.

Will equality and sustainability be a factor in selecting candidates?

13.13 It should be, dependent on the subject matter of the contract, including

- technical ability in the assessment of candidates' own policies and practices and track record
- in the specification of the project and therefore at the dialogue and tender evaluation stages.

How should equality and sustainability be incorporated into a tender submission?

13.14 As much information as possible is needed about the background and context of the proposed contract as well as the contracting authority's equality and sustainable development objectives. Any potential contractor should look for

- the authority's equality scheme
- facts about the population likely to be affected by the contract and any information about user need
- how the goods, works or service are currently provided and the results of any monitoring, consultation or other assessment, including EQIA, of the impact on equality
- where staff will transfer under TUPE, their terms and conditions, including protection against discrimination and rights to equality of opportunity and any policies and codes of practice with regard to protection of terms and conditions
- the contract specification may include requirements to carry out certain measures in relation to equality or sustainability, for example monitoring a service for any negative impacts it may have on these issues or any training placements to be made available the Sustainable Development Strategy for NI and the contracting authority's Action Plan.

Will the contract conditions impose any equality or sustainability obligations?

13.15 They should do

- generally, for requirements in relation to the project
- in specifications for the contract requirements
- and other economical, social or environmental considerations as set out in contract conditions (eg employment for the unemployed).

Where a contractor is successful, what do they need to do to meet the equality and sustainability requirements of the contract?

13.16 The contractor will want to establish a positive working relationship with the appropriate representatives of the contracting authority. The following questions will help identify specific areas to discuss.

- Is the contracting authority able to offer any support such as advice on equality training?
- How will responsibilities for monitoring equality and sustainability performance be divided between the contractor and the authority? What is the authority planning to monitor?
- In what form, and how often, does the contracting authority expect the contractor to report monitoring responses?
- What are the respective roles in dealing with complaints of discrimination from employees, subcontractors, users of the goods, works, or service in question, or others?
- How will conflict be resolved? For example, if there is disagreement about the implications of monitoring data or other measurements of the contractor's performance
- Does it make business sense to introduce further arrangements to promote equality or sustainability on a voluntary basis such as company voluntary agreements?

13.17 This will set the tone for the long term relationship and create the right environment to deliver the long-term outcomes of the procurement contract.

ANNEX 1 GLOSSARY OF TERMS

(Note: To be completed after consultation and to ask consultees for those terms that need to be explained)

Annual report of progress

BREEAM

Contracting authority

Community and voluntary sector

Complex projects

Designated public authority

EQIA

PFI

PPP

Project Board

Scheme

Screening

Section 75 (s.75)

Senior Responsible Officer

Strategic Partnerships

Sustainable development

ANNEX 2 RESOURCES

There is a rapidly developing bank of resources to support public authorities in making and managing PPPs and other procurement projects. Some are listed below and each of these will have links to other sources but this is not an exhaustive list. It is also useful to look at material prepared by other public authorities on their practice, other equality bodies and organisations who work with and for people affected by s.75.

Equality Commission

This guidance has been written to be integrated in and complementary to the earlier guidance on s.75.

Guide to the Statutory Duties – A guide to the implementation of the statutory duties on public authorities arising from s.75 of the Northern Ireland Act 1998 (2005, revised)

Section 75 of the Northern Ireland Act 1998 – Practical guidance on Equality Impact Assessment (2005, revised)

These and other guides and codes of practice can be found on

www.equalityni.org

Central Procurement Directorate

CPD has the complete tool kit for procurement excellence including extensive material on the Gateway Review Process.

www.cpdni.gov.uk

Office of the First Minister and Deputy First Minister

OFMDFM's Economic Policy Unit developed the Code of Practice on Workforce Matters for Northern Ireland use. There is also a link to a sub-website specifically on PPP

www.ofmdfmi.gov.uk and www.ppp-ni.gov.ni

Strategic Investment Board

SIB is responsible for accelerating delivery of infrastructure projects. They publish the Standard Guidance of PFI Contracts, Northern Ireland.

www.sibni.org

Office of Government Commerce

www.ogc.gov.uk

HM Treasury

www.hm-treasury.gov.uk

Unison

Unison has considered, amongst other areas, matters of staff transfer. It has practice examples and, in some instances, shows how things might have been done differently.

www.unison.org.uk/pfi/

Some more codes of practice and guidance

Age Diversity in Employment: A Code of Practice (DEE, 1999, Nottingham)

Age Discrimination in Northern Ireland – The Law and Good Practice for Employers (ECNI, 200X, Belfast)

Code of Practice for the Elimination of Discrimination in the field of employment against disabled persons or persons who have had a disability (DED, 1996, TSO)

Disability Code of Practice – Employment and Occupation, (ECNI, 2005, Belfast)

Guidance on matters to be taken into account in determining questions relating to the definition of disability (DED, 1996, TSO)

Code of Practice – Rights of Access, Goods, Facilities, Services and Premises (ECNI, 2003, Belfast)

Code of Practice for Employers for the Elimination of Race Discrimination and the Promotion of Equality of Opportunity (CRE NI, 1999, Belfast)

Code of Practice on Equal Pay (EOC NI, 1999, Belfast)

Removing Sex Bias from Recruitment and Selection: A Code of Practice (EOC NI, 1995, Belfast)

Fair Employment in Northern Ireland: Code of Practice (FEC, 1999, Belfast)

Sexual Orientation Discrimination in Northern Ireland – The Law and Good Practice (ECNI, 2004, Belfast)

ANNEX 3 EXAMPLES AND CASE STUDIES

The following examples and case studies will be helpful in illustrating how this guidance applies in practice. However the requirements for any project need to be considered on a case by case basis.

Example 1 – Works - design and construction

	New road build.
Concept Stage (define outcomes)	<p>The strategic framework for the roads build programme is established in a 15 year strategy for the roads infrastructure for Northern Ireland. This strategy will have been screened and then subjected to a full Equality Impact Assessment in compliance with the roads authority's equality scheme.</p> <p>At the strategy stage, the decision to upgrade the road between A and B will have been taken. A detailed analysis of possible alternatives will have been assessed against the five criteria of Economy, Environment, Safety, Accessibility and Integration including upgrading existing roads, providing entirely new roads or a combination of these. Public consultation plays a part in this analysis, with consideration being given to how the route would impact on people, including whether the route would benefit certain groups, through improved travel to work times, or their ability to better access public services or facilities such as town centres etc. A preferred route for the road which in this example concluded that construction on a new alignment was required will have been selected. Details of the preferred route are then published as part of the planning process and may be subject to public enquiries etc.</p> <p>If the route of the road is agreed, then the outcomes of the road build need to identify this.</p>
Specification	The outcomes should translate into objectives for the road build. The objectives need to include the routing of the road to provide the benefits identified. In PPP roads projects, the road authority retains the planning risk and defines in detailed terms the corridor through which the road should pass and the end product that is required. An illustrative design is prepared against which the contractor's proposals are measured.
Contractor Selection	
Tender evaluation	
Contract	The objectives need to be expressed in contract terms, which can be managed and monitored

Contract M'gement	
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Example 2 – Works - construction

	Upgrading main road from A to B
Concept Stage (define outcomes)	<p>The strategic framework for the roads build/maintenance programme is established in a 15 year strategy for the roads infrastructure for Northern Ireland. This strategy will have been screened in compliance with the roads authority's equality scheme.</p> <p>The development of the strategy identified the need to upgrade the A to B road, due to increased road use. Screening and EQIA identified that part of the road cuts through a residential area of family housing and also sheltered housing. The facilities for this area are on the other side of the road. The groups affected by any upgrading to the road will be primarily: disabled people, those with dependents, younger and older people.</p> <p>The potential adverse impacts identified were:</p> <ul style="list-style-type: none"> • the increased traffic on this road and health and safety of the residential community also • worsening access from the housing to the shops and health care centre. <p>The constraints on mitigation and alternative solutions include: planning regulations, and a new road as an alternative route is not an option.</p> <p>The outcomes sought through the road upgrade are to ensure the safe and effective flow of traffic from A to B, for an average of X vehicles per day, and to ensure the ongoing, effective access between the residential area and the local facilities.</p>
Specification	<p>To inform the detailed specification, appropriate user groups are consulted.</p> <p>The consultation will need to address equality considerations in the context of practical issues. User groups could include prospective road users and users of the housing, shops and healthcare centre (workers/owners as well as members of the public) and should, themselves, be convened with equality of opportunity in mind.</p> <p>The affected groups identify that the health centre serves a wider area than just one estate. The estate provides the pedestrian route to the health centre, and there are a significant number of disabled people, specifically wheelchair users, who use that route. The solution proposed is for an underpass, to which the local community</p>

	<p>agrees.</p> <p>The contracting authority sets out the requirement of an underpass in the specification.</p> <p>However, on the issue of children playing in the local area, there is no single solution. The specification is clear that the outcome is a safe environment, and the contractor is asked for the solution on road features and landscaping.</p>
Contractor Selection	<p>The candidates are routinely asked for evidence of their workforce practices, policies and procedures on equality using questions appropriate to the project.</p> <p>Technical capacity:</p> <p>The candidates are asked to provide evidence of their experience of creating a safe environment in consultation with a diverse local community.</p>
Tender evaluation	<p>Evaluation by the project team may also refer back (on specific issues) to the relevant user groups who were consulted at the "spec" stage.</p> <p>The tenderers are asked to provide evidence as to how they will meet best practice standards with regards to design and accessibility issues</p>
Contract	<p>The contract stipulates that</p> <ul style="list-style-type: none"> • All the road features, including footbridges and underpasses, are fit for purpose • Access from residential area to health centre area is maintained. • The road is available for use. <p>One of the candidates puts forward a proposal during the competitive dialogue to ensure that the junction by the residential area allows for both entry and exit onto the road, creating a new route for accessing B, decreasing travel to work times for local residents who do not otherwise count in B's Travel to Work Area.</p>
Contract M'gement	<p>The agreed monitoring against the contract includes the following</p> <p>The contractor provides a sign with telephone contact numbers for complaints about the road being available for use. The data is collated annually for the contracting authority</p> <p>The contracting authority surveys road use every 5 years to measure the number of vehicles</p>

The contracting authority has set up a system to contact the health centre, the local authority community planning forum, and the residents' association once every two years to ask whether access is maintained (along with asking for feedback on other services).

As a result of this monitoring, it becomes clear that the perception of the underpass is that it is unsafe. Litter is left in it and the lights are not replaced if broken. The contracting authority discusses this with the contractor as part of monitoring contract performance to improve this.

However, the contracting authority considers how CCTV in use for traffic monitoring could be extended in use to add value to a community safety initiative, as it sees opportunities to promote good relations in doing this in partnership with others.

Example 3 – Construction/design and services

	FE College (including ITC provision)
Concept Stage (define outcomes)	<p>The strategic framework for the development of Further Education Colleges identifies the need to build a new college in the North West.</p> <p>The Screening and EQIA of the strategy identifies an adverse impact on protestant students with the current provision</p> <p>The outcomes sought through the building of a new college include</p> <ul style="list-style-type: none"> • To build a new FE college • To improve access for Protestant students to the college site and educational services.
Specification	<p>User groups made up of relevant parties from the FE body as well as prospective student groups and the wider public who are likely to have access to the facilities will provide their views on the requirements for the new FE College.</p> <p>It is decided that the contractor can influence where the site of the new college will be, as there are a number of options. However as access for Protestant students is one of the clear outcomes, the specification and advertisement (OJEU notice) are clear that the choice of location must facilitate better access for this group while balancing the other factors which have resulted from the user group meetings.</p>
Contractor Selection	<p>The candidates will need to demonstrate, as part of technical competence, that they understand location issues and the equality considerations for the siting of the buildings.</p> <p>The candidates' track record on equality and anti-discrimination will need to be assessed in a Pre- Qualification Questionnaire.</p> <p>The PQQ may also include a question aimed at establishing the candidate's technical ability in terms of their understanding of location issues and equality considerations demonstrated by previous experience in similar or equivalent circumstances (ensuring that experience outside NI will be accepted).</p>
Tender evaluation	<p>Evaluation by the project team may also refer back (on specific issues) to the relevant user groups who were consulted at the specification stage.</p> <p>During the competitive dialogue phase the candidates are asked to demonstrate how their designs meet the requirements in terms of encouraging integration and community involvement</p>

Contract	<p>The contract will stipulate that the location of the building will be agreed according to the outcomes sought.</p> <p>The contract will specify the levels of access that should be achieved in the location, and physical access to the new buildings.</p> <p>The contract will stipulate that the workforce employed subsequently to provide services in the new building will be covered by the code of practice.</p> <p>The contractor could also agree to additional voluntary arrangements that ensure that all their workforce policies are to the same standard as those applying to this contract.</p>
Contract M'gement	<p>The actual usage of the new building is monitored by the public authority in terms of community background of students enrolled on courses.</p> <p>The authority also sets out a monitoring regime to measure student satisfaction levels every 5 years to determine perceptions of access.</p> <p>The contractor provides annual monitoring information on the workforce employed to within the college under the terms of the contract.</p> <p>The Contractor has also agreed a positive action programme to increase representation from x community within the catering services and cleaning services.</p>

Example 4 – (Soft) Services

	<p>Hospital meals service – including delivery and service to the wards and patients</p>
Concept Stage (define outcomes)	<p>Part of an identified procurement project is the provision of the hospital meals service which covers both the provision of the meals and an “at bed” service direct to patients. This includes direct contact with patients to establish what their meal preferences are, take orders, serve the meals and clear away.</p> <p>The screening at project development stage identified that inappropriate catering services could have a potential adverse impact on difference minority ethnic groups, of which there are small but significant Jewish and Indian communities within the hospital catchment area.</p> <p>The hospital also provides pediatric and geriatric in-patient wards, so meals need to be appropriate for children and older people.</p> <p>The desired outcomes for the catering services is that appropriate</p>

	<p>meals are provided, to agreed nutritional standards, and meals that meet treatment needs are provided.</p> <p>Because of the direct personal contact between the contractor's staff and patients/users from diverse backgrounds, equality awareness and training of staff is regarded as a core requirement.</p>
Specification	<p>User groups of staff and a representative group of patients should be consulted as to the desired outcomes from the contract including the availability and quality of meals which are appropriate for a diverse population group.</p> <p>Taking the outcomes, the contracting authority decides to investigate further the patient profile in the hospital to ensure that no other groups need to be accommodated to ensure that appropriate meals are provided.</p> <p>The specification sets out the standards to be met, and gives the patient profile to potential contractors</p>
Contractor Selection	<p>The technical ability of candidates is tested by their ability to supply food appropriate for specific religious and ethnic groups, measured on a pass or fail rating.</p> <p>The candidates are asked pre-qualification questions to determine their track record on equality and anti-discrimination measures including evidence of their ongoing staff training programmes on equality issues.</p> <p>They are also asked about experience of production of meals to meet the needs of specific patient/user groups.</p>
Tender evaluation	<p>Evaluation by the project team may also refer back (on specific issues) to the relevant user groups who were consulted at the specification stage.</p> <p>The candidates are asked for their approach to provide different food appropriate for different groups by provision of sample menus and are measured on the basis of how innovative the menu is.</p>
Contract	<p>The contract stipulates that appropriate meals must be provided, accommodating specific dietary requirements.</p>
Contract M'gement	<p>The contractor has to provide annual monitoring information on the requests for specific meals and complaints received.</p> <p>The contractor conducts an annual patient satisfaction survey (agreed with the contracting authority) which asks questions about the meals. This survey is monitored for age, ethnicity and gender.</p> <p>The public authority also initiates an assessment of the meals service following press research into malnutrition amongst in-patients</p>

	<p>in a geriatric ward. It identifies problems with the way the meals are delivered to the wards, as many are not eaten. Through the variation clauses in the contract, the service to the geriatric ward is amended to address the problems identified.</p>
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Case Study 1 – project development – screening and identifying outcomes/objectives

	<p style="text-align: center;">DEVELOPING BETTER SERVICES</p> <p><i>Source: IMPLICATIONS FOR TRUST STAFF OF THE METHOD OF FINANCING OF THE PROJECT AND THE RELOCATION OF ACUTE SERVICES</i></p> <p><i>SCREENING REPORT</i></p>
<p>Concept stage</p>	<p>1. Introduction</p> <p>In June 2002 the Department of Health, Social Services and Public Safety (DHSSPS) published a consultation document entitled “Developing Better Services – Modernising Hospitals and Reforming Structures”. The report set out the NI Executive’s proposals for modernising the way in which hospital services are delivered throughout Northern Ireland, including the pattern of hospitals, the range of services they provide and accessibility. It was widely circulated for consultation and generated an extensive debate, especially regarding the provision of acute hospital services in the south west.</p> <p>In February 2003, following the suspension of the NI Assembly, Minister Des Browne announced his decision regarding the programme of modernisation of hospital services which included a new acute hospital to the north of Enniskillen and a local hospital at Omagh. Plans for both hospitals are now being developed and the Trust will be submitting an Outline Business Case (OBC) early in 2005. To ensure that the Trust is able to take full account of all equality implications when making any decision, it has agreed to review the whole of the DBS project for which it is responsible and identify all the aspects which have not yet been considered in terms of equality of opportunity.</p> <p>The review has identified two specific aspects of the project which have not previously been assessed in terms of their implications for equality of opportunity. These aspects are :</p> <p style="text-align: center;">(a) PPP initiative</p> <p>There is potential for the hospitals to be developed in partnership with a private sector partner under a PPP (Public Private Partnership) initiative. If this approach were adopted, some services currently</p>

delivered by the Trust might become the responsibility of the private sector partner. There is also potential for some staff to transfer to the employ of the private sector partner, although other options (such as retention of employment arrangements) may be available for consideration.

(b) Relocation of staff

Acute in patient services will be relocated from Tyrone County Hospital at Omagh to the new hospital north of Enniskillen, although a wide range of services will be delivered from the local hospital at Omagh. This could mean that some jobs will relocate to the new acute hospital near Enniskillen which will impact on staff in terms of additional travelling. It may also be necessary for some staff to move house in order to be readily available when on call.

Services will also transfer from the Erne Hospital in Enniskillen to the new acute hospital and some jobs will be relocated. However, the distance from the Erne Hospital to the preferred site for the new acute hospital is less than 2 miles, so the impact on staff is likely to be less significant than that on the staff currently employed at Tyrone County Hospital. Due to the need for staff to keep their skills up to date, there may also be the need for staff to rotate on a short term basis between the acute and local hospitals and experience differing care situations.

In accordance with Equality Commission Guidance and the Trust's Equality Scheme, these aspects of the DBS project have been screened to determine the implications for equality of opportunity. The screening process has concluded that there are potential differential adverse impacts for some Section 75 groups and that a full EQIA should therefore be undertaken.

2. Participation by different groups

The main focus of the screening process is the effect on staff and an analysis of all Trust staff in terms of Section 75 characteristics has therefore been undertaken. Information is available in terms of community background, ethnic origin, age, gender and disability as well as by professional category and location. At this stage of the project it is not possible to identify exactly which posts might relocate to the new acute hospital and so the data analysis includes all Trust staff.

The data analysis shows that :

(a) There is a greater proportion of staff from a Roman Catholic background than a Protestant background in most categories. The highest percentage is in the Nursing and Midwifery category where 64.2% of staff are from a Roman Catholic background.

(b) A large percentage of Trust staff are white and only small

numbers identify themselves as coming from other ethnic groups.

(c) The Trust employs close to the average number of young people (aged 16-24) and there are relatively high proportions in Administrative and Clerical posts (12.9%) and Professional and Technical posts (10.3%).

(d) The Trust employs a higher than average number of older staff (aged 60+) in the Ancillary and General TC category.

(e) 0.4% of the workforce have a disability which they have declared; no details of the exact nature of these disabilities is available.

(f) There is no specific information available on employees with dependants. However, organisations representing carers have stated that 1 in 8 of the working population of the UK are carers so it is likely that a significant proportion of staff have some caring responsibilities

3. Needs of different groups

Evidence of the potential differential impacts on certain groups within the Section 75 categories has been drawn from :

- comments made by certain organisations during the pre-consultation
- the findings of previous EQIA relating to relocation and PPP initiatives

This evidence suggests that the following groups may be differentially affected by the aspects of the DBS project under consideration.

(a) Black and ethnic minority people

NICEM has pointed out that, with the exception of the Indian community, black and minority ethnic people tend to live in areas where they have the support of a larger community around them. They may therefore experience difficulties that white people do not if they are required to move house.

(b) Young people

Young people tend to earn less than people who have been in post longer and therefore the cost of additional travelling could affect them differentially. Also, a significant percentage of young people live with their parents and would suffer a differential adverse impact if they needed to move house as a result of the relocation of their posts. (Both these points were made by consultees during earlier EQIA.) The problem is exacerbated by the fact that young people have less access to private transport than older people. The Travel Survey conducted by the Department for Social Development on a regular basis shows that only 40% of young males are car drivers compared with 61% of all

adult males and only 35% of young females are car drivers compared with 47% of all adult females.

(c) Married people/ those living with partners

There is no evidence at this stage to suggest that PPP initiatives or relocation of jobs have any differential impact on people by reason of their marital status. However, problems faced by individual members of staff who need to move house as a result of the relocation may be exacerbated where their partner is unable to relocate for whatever reason.

(d) Women

There is some evidence that the contracting out of services in the past has had an adverse effect on women, principally because the type of services subjected to the process traditionally employ a large number of women in low paid jobs. However, it should be noted that, according to evidence gathered during the EQIA of the proposed policy for Public Private Partnerships in Northern Ireland ("Working Together in Financing our Future" 2003), experience of PPP projects in Northern Ireland tends to indicate that these differential impacts do not occur.

In relation to access to private transport, the DSD Travel Survey shows that women are less likely to be car drivers than men; only 42% of women are regular car drivers compared with 61% of men. Women are also more likely to work part time than men and so additional travelling time may have more impact on their work life balance. The Census shows that 33% of women in employment work part-time compared with 6% of men.

(e) People with a disability

There is anecdotal evidence, principally from comments made by Disability Action and MENCAP, that there is potential for people with certain kinds of disabilities to be differentially affected by the need to make longer journeys to work. Some people with mobility problems and some people with learning difficulties are less likely to be car drivers. People with certain physical disabilities may experience discomfort because of the actual length of the journey.

(f) People with dependants

There is considerable research (through Household Surveys, staff surveys etc.) to show that people who care for dependants of any age have greater difficulty in combining their work and personal lives than people without dependants. They are therefore likely to have more difficulty spending additional time travelling to and from work than people without dependants.

4. Opportunities to better promote equality of opportunity

The policy decision to locate the new acute hospital on a site to the north of Enniskillen was made at Ministerial level, following extensive consultation and an EQIA which included a detailed examination of the policy options. It would therefore be inappropriate to reconsider policy options in the current context.

However, there is considerable potential to revisit existing policies and/or develop new ones which will mitigate the impact of the potential adverse differential impacts identified. Some of these policies may need to be developed in partnership with other public sector or community bodies, for example, Translink.

5. Consultation

In order to identify the potential problems which might arise for staff affected by the method of financing of the project and/or relocation, pre-consultation was conducted with a range of Section 75 groups.

48 groups including some with Northern Ireland wide coverage and some local groups were sent a letter outlining the issues which form the focus of this EQIA. Follow up telephone calls were made to all the groups. A copy of the letter together with a list of the groups approached is attached at Annex A.

Many groups were either unavailable for comment or preferred to reserve their comments for the formal consultation period. However, the following views were put forward :

MENCAP commented that there would be issues around the ability of carers to respond to additional travelling time and the cost of transport and, possibly, additional family support

MENCAP also expressed general concerns relating to any project involving a PPP initiative on the grounds of loss of equality of access to employment

NICEM also expressed concerns with respect to PPP initiatives and the protection of the rights of staff within any new structure

the Rural Community Network expressed a concern about the possible running down of services in advance of the opening of the new acute hospital which will not take place for several years.

These organisations and all others on the Trust's list of consultees will be consulted again during the formal consultation on the EQIA. Staff most affected by the proposals will be consulted by questionnaire and all other staff will be informed about the consultation and encouraged to comment. The general public will be informed that the EQIA is being undertaken and given an opportunity to comment. The consultation

	<p>period will last for at least 12 weeks.</p> <p>6. Equality Impact Assessment</p> <p>There is potential for the following groups within the Section 75 categories to suffer an adverse differential impact as a result of the method of financing of the project and/or the relocation of jobs from Omagh to Enniskillen :</p> <ul style="list-style-type: none"> • black and minority ethnic people • young people • women • married people/those living with partners • people with a disability • people with dependants. <p>There are several policies and courses of action which could be adopted to mitigate these adverse impacts; some of these are already in place and others could be developed as a direct result of the EQIA.</p> <p>It is recommended that a full EQIA be undertaken for the following reasons :</p> <ul style="list-style-type: none"> • to identify the extent of the potential impact on the groups listed above • to give consultees an opportunity to identify additional potential problems and suggest additional mitigating actions • to engage staff in the consideration of these issues. <p>The method of financing of the project could have an effect on staff employed in Hard FM services (such as estates management) and Soft FM services (such as catering and cleaning). The relocation of jobs from Tyrone County to the new acute hospital could also have a significant impact on staff. We have concluded that the effects on staff relocating from the Erne Hospital are minimal and will not be considered separately in the EQIA; nevertheless any mitigating policies and actions put in place to assist staff relocating from the Tyrone County Hospital will be extended to staff at the Erne Hospital.</p>
specification	

Case Study 2 – Developing sustainable specifications

<p>Contractor selection</p>	<p>An example of the use of sustainable specifications below.</p> <p>For the design of schools and other similar buildings bidders are required to provide a self-evaluation of the BREEAM for Schools, proving that a score of at least “very good” is achievable. [Detail on criteria to insert]</p> <p>Accompanying text and drawings should expand on how the materials and components specification and elemental services specification above meet BREEAM and related objectives (particular mention must be made of the achievements in relation to the low carbon initiative and the ventilation strategy on each site, including confirmation of the monitoring and remedial proposals in relation to the stated targets)</p> <p>Bidders need to describe their approach and strategy towards lifecycle replacements, and how work and any decanting is to be organised and executed to avoid minimum disruption to each of the schemes they are proposing irrespective of its effects on the performance monitoring regime. This should be sufficiently articulated to support their life cycle profile.</p> <p>Health and well-being: including an explanation of the proposals for lighting, ventilation and acoustic insulation (from both airborne and impact sound) to achieve the requirements of relevant standards.</p> <p>Energy: in particular the target energy consumption for fuel and electricity, including details of proposed sources of energy, energy management systems features, how energy usage can be reduced, how renewable energy has been integrated in to the design and how sub-metering can be used for all utilities in each of the buildings they are proposing.</p> <p>Transport: including proposals for cycle storage and how the landscape design minimises risks to pedestrians and cyclists while allowing appropriate ‘drop-off’ facilities.</p> <p>Water: including details of target water consumption and how it can be reduced.</p> <p>Materials: demonstrating how they will responsibly resourced, environmentally sustainable and appropriately recycled.</p> <p>Land use and ecology: identifying how the design team would act on ecological advice such as a biodiversity action plan.</p> <p>Pollution: meeting the local and regional plan targets for</p>
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	<p>renewable energy (Consistent with ODPM Policy Planning Standard PPS22 and guidance “planning for renewable energy).</p> <p>Description of zoning plans for heating and ventilation indicating which rooms require forced ventilation and/or cooling and how this helps achieve environmental and sustainability aims.</p>
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ANNEX 4 CODE OF PRACTICE ON WORKFORCE MATTERS

To be published