

APPROACHES TO SUPPORT WORKFORCE
SKILLS THROUGH PUBLIC PROCUREMENT –
THE POLICY AND LEGAL FRAMEWORK

Introduction and Background

One element of achieving successful contractual delivery is ensuring suppliers have sufficient, appropriately skilled and motivated workforces to successfully deliver what is required. Purchasers need to have enough information on their suppliers' capabilities, policies and practices to secure delivery assurance. This guidance has been prepared to advise Government Departments on the extent to which workplace skills' issues can be taken into account in the procurement process, within the framework of the Government's procurement policy and the EU rules. This guidance is designed to help public sector procurers secure successful delivery through the consideration of workforce skills, including Skills for Life, Apprenticeships and indeed the whole of the Government's Skills agenda, as part of the contracting and procurement process where such requirements are relevant to the contract. It provides additional guidance on using existing rules and does not add any new obligations or regulations for procurers.

Departments should continue to award contracts on a value for money basis and test procurement proposals for need, cost-effectiveness and affordability. EU procurement rules and the Government's overarching concern for value-for-money procurement policy do provide scope for taking action in this area, where such issues are relevant to the subject of the contract. This includes:

- Promotion to potential suppliers;
- Reflecting workforce skills, where relevant, in the specification and selection stages;
- Requirements for contracted-in staff on premises;
- Possible action at award and in setting contract conditions;
- Voluntary work with suppliers;
- Contract management.

Workforce skills may include basic literacy and numeracy, higher qualifications, generic skills such as management and leadership, communications, project management, risk management and IT as well as requirement-specific skills such as Health and Safety skills for Facilities Management contracts.

A supplier may provide delivery assurance by confirming they have the capacity and capability to deliver the requirement successfully and when evaluated against all the other tenderers are considered the supplier offering best value for money. Where skills' gaps have been identified in a particular market, recognition of this deficit and a plan to address areas of weakness may be useful in ensuring a sufficiently skilled market and adequate workforce capability for future procurements.

Policy and Legal Framework for Public Procurement

The Government's overarching policy is that all public procurement of goods and services is to be based on value for money. This policy has been endorsed by Ministers, including the Prime Minister. Value for money is not necessarily the lowest initial price; it is defined as the optimum combination of whole life costs and quality to meet the user's requirement. This policy is set out in Chapter 22 Government Accounting and is a direct responsibility placed on departmental Accounting Officers. It is also in guidelines circulated to Departments. The PAC and NAO look at procurement decisions in the context of value for money.

In addition to the Government's long-standing policy of value for money in procurement, public bodies also have to apply both the EU Treaty and the EU Procurement Directives (EU rules). The Treaty requires Member States to comply with principles of non-discrimination, equal treatment, free movement of goods and services and transparency. The EU Procurement Directives are based on these Treaty principles. The Directives include specific, detailed requirements for specifications, selection of tenderers and award of contracts. Specifications are very much for the purchaser to determine. All that the Directives require is that specifications are non-discriminatory (i.e. capable of being met by companies across the Community) and that specific rules on the use of EU and other standards are adhered to. In selecting tenderers, the Directives limit the information and criteria that can be taken into account in assessing the qualities of the companies concerned. In awarding contracts, there are two options: lowest price or the most economically advantageous tender. The latter is equivalent to the Government's value for money objective and should be the option chosen.

Scope for Addressing Workforce Skills' Issues through Public Procurement

In the context of the various policy and legal strands set out above, there is scope to include a wider range of social, environmental and economic issues in public procurement, providing that requirements:

- are relevant to the subject matter of the contract;
- do not undermine the need to secure value for money for the contracting authority in awarding the contract;
- are non-discriminatory and transparent;
- where the EU rules apply, are consistent with the criteria allowed under the Directives/UK regulations for each stage of the procurement process.

However, what is not possible is the inclusion of issues, in terms of criteria or conditions, which are not relevant to the subject of the contract (often known as secondary requirements) and which undermine value for money for the taxpayer.

A “secondary” requirement might include a condition that a supplier will follow a code of conduct on workforce training, where it is not relevant to the goods or services being procured. Where, for example, the contract is for the supply of pencils such training would be unlikely to impact on the quality of the goods to be supplied or the successful delivery of the contract. Workforce training would, therefore, be a secondary requirement as it would not be essential to delivery of the contract. The imposition of such a requirement would be likely to undermine value for money, resulting in higher tender prices and/or reduced competition.

Where the Government seeks to address wider policy issues not directly related to the subject of the contract, it should consider a wider range of options, including changing the law or providing grants or training programmes which would reach the whole target community directly rather than only those who happen to be contracting with Government at the specific time.

To secure delivery assurance, the purchaser needs to understand the skills required to successfully deliver the requirement, and address these, where relevant, at each stage of the procurement process. Depending on the complexity of the requirement, this may include early engagement with the market, clear statements in tender documents on what skills are needed, and the inclusion of the right questions at selection to ensure tenderers provide effective evidence of their capabilities. Contracting authorities should also consider using consistent evaluation criteria, addressing any shortcomings in workforce capability, where appropriate, in discussions or through agreeing and monitoring an action plan, and capturing relevant management points in the contract with supporting mechanisms to monitor them.

Promotion to potential suppliers

The procuring organisation can promote the importance of skills to their potential supplier outside of the procurement process to highlight the importance of the skills agenda to Government. It may also be possible to promote workforce skills issues during the procurement process, for example by providing supplementary information with the invitation to tender documents. However, due to EU rules, unless the relevance test is met, it must be clear to the supplier that skills will not be taken into account in the selection process. The Government is simply acting to provide the potential suppliers with general information and is therefore using its contact with suppliers to get the skills message across.

Literature could be sent out with the tender documents or to all current suppliers explaining the benefits to an organisation of increased workforce skills. For example the DfES’s publication Skills for Life: Make it Your Business.

In the draft “Guidance for Procuring School Meals” a section has been included on the DfES policy on Adult Basic Skills in the Workforce and highlights considerations that those procuring school meals could ask to be addressed in proposals. The School Meals Guidance also includes a link to this document. The consultation document can be found at <http://www.teachernet.gov.uk/docbank/index.cfm?id=8768>

Information on an Apprenticeships scheme could be issued with the tender provided it is clear to the potential suppliers that whether or not it adopts the scheme will not be taken into account in the selection process.

Reflecting workplace skills in the selection criteria

The main avenue available to Departments to raise skills issues with the supplier is during the selection process. This can include inserting questions in a pre-qualification questionnaire (PQQ).

Departments have several options for taking action.

Reflecting workplace skills in the selection criteria can only be done where skills or technical capacity or abilities are relevant to the successful performance of the contract. Government Departments must consider each case on its own merits.

For example, skills could be relevant where a proficiency in language and literacy would be crucial to understanding health and safety requirements– e.g. in food production or a service handling hazardous chemicals.

A requirement for basic skills when procuring a product such as envelopes may not be necessary and could probably not be demanded as it would not be directly relevant to the successful delivery of the contract. Where a supplier’s staff are present on government premises, then there may be a need for basic skills to be included in the selection criteria to maintain safety and effective operation of the workplace.

When procuring for the construction and maintenance of a building, the procurer can ask for evidence that the contractor will be able to provide any necessary repairs or after-care services in a timely fashion. Therefore, where the maintenance of the building requires the availability of specific skills and know-how in the workforce, all tenderers will need to demonstrate that they can fulfil this need adequately e.g. they may factor certain training programmes for their staff to ensure maintenance can be delivered and achieved promptly in line with contract requirements.

Requirements for contracted-in staff on premises

Where a supplier's staff are working in a Government building (e.g. as security, cleaning, catering, IT etc), there is scope to require that the supplier's staff meet those requirements – e.g. health and safety, equal opportunities – which the Government staff have to meet in order for operations within the building to be effective. In this way, where certain skills would be necessary to meet the requirements (e.g. levels of literacy or language skills needed to understand health and safety guidance) we can indirectly require that contracted-in staff have, or develop, these basic skills.

In addition, Departments can also take action through two further stages in the contracting process.

The award of contracts

Workforce skills can be addressed through the evaluation of bids and award of contracts, but only if this is in accordance with the value for money/most economically advantageous tender criteria. The definition of the Government's value for money objective is the 'optimum combination of whole life costs and quality to meet the user's requirement'. Criteria for the 'most economically advantageous tender', which is equivalent to value for money, include 'period for completion or delivery, quality, aesthetic and functional characteristics, technical merit, after sales service, technical assistance and price'. In both cases, the criteria must relate to the performance of the contract in question and not to any longer term or wider benefits.

Setting conditions of contracts

The considerations are similar to those relating to the selection of tenderers. The key concept is 'relevance' of the conditions to the subject of the contract. Making skills' training a requirement should only be considered where those skills relate to the delivery of the contract. If this is not the case, the requirement would be a secondary consideration and likely to be inconsistent with value for money policy. In addition, a condition requiring certain skills would need to be non-discriminatory, bearing in mind the different approaches adopted by other Member States.

An interpretative communication from the EU¹ states that ‘Contracting authorities can impose contractual clauses relating to the manner in which a contract will be executed. The execution phase of public procurement contracts is not currently regulated by the public procurement directives.’ (Com/2001/0566 final 1.6)

Successful tenderers can be required to comply with contractual clauses relating to the manner in which the contract is performed, where these are compatible with EU rules and the value for money policy. When considering the inclusion of such clauses in a contract, care must be taken to ensure they are non-discriminatory, and a cost-benefit analysis must be completed to ensure that value for money is maintained. The contract condition should not be connected to the evaluation process of the bidder’s capacity to do the work. However, to provide a compliant proposal tenderers have to accept the contract conditions provided with the tender documents.

Extract from Interpretative Communication of the European Commission on public procurement and social considerations Public Com/2001/0566 1.6

[61] By way of example, a clause stipulating that a successful tenderer must employ a certain number or percentage of long-term unemployed or apprentices, without requiring the unemployed or apprentices to be from a particular region or registered with a national body, for instance for the execution of a works contract, should not, a priori, amount to discrimination against tenderers from other Member States.

Therefore, a contract might include a clause stipulating that a successful tenderer undertake necessary work using apprentices, providing no requirement was included for the apprentices to be from a particular region or registered with a particular national body, and a cost-benefit analysis would need to be carried out to show that value for money was being achieved.

Voluntary work with suppliers

Once a supplier has been awarded the contract the Government is free to work with them in a voluntary way to promote and highlight the importance of the skills agenda and help them address their workforce skills needs.

Departments can promote Government's objectives and then work with contractors on a voluntary basis to achieve desired results. We should not underestimate the potential of Government and the whole public sector to influence good practice by the power of persuasion, and its access, through procurement, to decision makers in a very wide range of supplier companies.

The DTI and OGC seek to encourage small and ethnic minority firms to tender for relevant Government contracts by making them aware of Government procurement opportunities and the policy and legal framework in which it operates. A joint project to launch a national opportunities portal is due to go live by the end of the year where public sector procurers will be able to advertise low value contracts. In addition, small firms are also assisted by the issue of booklets and the organisation of regular seminars and training sessions. DTI ensures that Departments are aware of the vfm benefits of attracting such firms.

In urban regeneration areas, authorities and contractors will often work closely together, once contracts have been awarded, to maximise local training and employment opportunities.

Contract Management

An important aspect of the procurement process is contract management and monitoring. The contract management team should monitor and manage performance against the contract, not only to deliver what is stated in the contract but to ensure that performance continuously improves and takes advantage of efficiencies to be derived from developments in the market place appropriate to the size and complexity of the contract. The contract management team should monitor to ensure that any shortcomings in technical and non-technical workforce skills identified through the bid assessment process are being addressed effectively and any increase in workforce skills capability and capacity relevant to successful delivery have been achieved.

Other actions the contract management team could take are

- Encourage and support voluntary workforce skills development by the supplier.
- Feedback lessons learned into early engagement with the market to develop market skills.

An Approach to Secure Delivery Assurance through Supplier Workforce Skills

An approach to workforce skills, consistent with the legal and policy framework for public procurement, could therefore include:

- Using the procurement process where this is legitimate: e.g. where basic literacy, language and numeracy skills, or higher skills, can legitimately be linked to the successful delivery of specific contracts.
- The provision, to relevant industry sectors of promotional material (aimed at senior managers in the tendering companies) about the national skills strategy, Apprenticeships, and Millennium Volunteers and the part that Government wishes employers to play in it. (This could complement and reinforce efforts to engage Non-Government Organisations.)
- Targeting companies in the relevant sectors with information on initiatives like Skills for Life and **learnirect**, Apprenticeships, Millennium Volunteers to be cascaded to staff, reinforcing the existing routes for marketing these initiatives.
- Supplementary information provided with an Invitation to Tender, including material aimed at senior managers and staff. This must not include a request for views from the potential supplier, as that will suggest the issue is to be taken into account in the procurement process. Rather, it should be factual information for the benefit of the tenderers outside the procurement process itself.
- Explaining to potential tenderers the extent to which suppliers' staff will be able to participate in training for departmental staff or make use of on-site facilities.
- Reflecting relevant workforce skills in specification, selection and evaluation criteria.
- Contract clauses that relate to the manner in which the contract is performed that are compatible with the legal and policy framework governing public sector procurement.
- Working with the supplier in a voluntary way once the contract has been awarded, to address the workforce's skill needs – including participation in the contracting organisation's own training schemes.

Conclusion

This guidance sets out the range of approaches that Government Departments can use in the procurement process to ensure that Government suppliers' and their staff have appropriate opportunities to develop the basic and higher skills of the workforce and in so doing help achieve the successful delivery of contracts and the economic sustainability of communities.

Workforce skills' requirements should form part of the formal procurement process for Government contracts where they are non-discriminatory, relevant to the delivery of the contract in question and fit with the criteria outlined above. As relevance of skills to contractual obligation is key, there cannot be any broad expectation that contracts will normally meet these criteria; it would be for the procuring Department to consider the arguments in each case, bearing in mind the need to secure value for money and abide by the EU rules.

Implementation of this guidance will support both the effective delivery of suppliers' obligations to Government Departments and the public sector contribution to improving work force skills.

This advice has been drawn up jointly by the Skills for Life Strategy Unit and Commercial Policy Team within the DfES, supported by the OGC.

If you have any questions arising from the contents of this guidance you should use the points of contact detailed on the back page.

Case Study 1 – An Innovative Advisory Service For Potential Learners

DfES's considerable experience of contracting for advice services for learners has demonstrated the much greater impact of well-trained staff on, for example, the likelihood that contacts will follow up and act on the information they received. The requirement has become greater as the need to use IT to access information and provide the best advice has increased.

Specification and Other Documentation in the Pre-Selection Stage

The specification and other pre-selection documentation set out a clear statement of the importance of skills and the Department's minimum requirements, with specific relevant questions:

1. **Statement** - The key to the delivery of the service to-date has been the quality of front-line staff. It is their experience, expertise and knowledge, and their relationship with the client group and in working with other specialist agencies and organisations that has made the services a success.
2. **Requirement** - As a minimum, the Department expects staff to:
 - have a relevant level 3 qualification (see also Key Performance Indicator 1);
 - have expertise and experience in working with the client group and/or experience in working within a similar contact centre environment;
 - have specialist knowledge of at least one of the specialist subject areas;
 - be IT literate and in particular used to using a personal computer for word processing and accessing information; and
 - be capable of addressing the needs of a socially and culturally diverse user group.
3. **Questions** - How will you ensure that users will have access to staff with the necessary skills, knowledge and experience? Explain what programme of training is proposed for front-line staff and how the specific requirements for staff to undergo specific courses will be managed.

Contractually

The Contract specified the skills requirement:

The supplier must adhere to the staff training programme agreed with the Department and specified in the contract. In particular all staff must attend 'Understanding the Services' within 3 months of joining the service, and in addition all front-line staff must have achieved the specialist 'Certificate in Professional Practice' within their first year.

Post Contractual Monitoring And Management

Post Contractual Monitoring and management ensures that workforce qualifications are monitored against the contractual KPI and the contractual provision provides the means by which this may be enforced.

Case Study 2 – An Innovative Goods Handling and Fulfilment Service

The importance of reliable customer service skills in contracts for goods is frequently underestimated. The quality of the interface drives the reliability and effectiveness of service, minimises errors and wrong orders and ensures a good understanding of the customer's expectations and requirements. This DfES contractual process therefore addressed skills in the pre-selection documentation, the contract and contract management.

Specification and Other Documentation in the Pre-Selection Stage

- Statement - The supplier/customer interface is important to the successful delivery of the services.
- Requirement - As a minimum, the Department expects this interface to operate effectively.
- Question - How will you ensure that the services will be delivered by staff with the necessary skills, knowledge and experience?
- Question - Explain what programme of training is proposed for front-line staff?

Contractually

The supplier must adhere to the staff training programme agreed with the Department and specified in the contract. In particular all call centre staff must undertake the agreed training programmes (12 weeks induction/initial training, Customer Care NVQ) and the supplier will operate a voice recording system which feeds into their staff appraisal and ongoing training plans.

Post Contractual Monitoring And Management

As well as monitoring against the contractual KPI, the contract manager has had close involvement with the training programmes to ensure they meet the department's needs.

The Skills for Life Strategy Unit co-ordinates activity to implement *Skills for Life*, the Government's national strategy for improving adult literacy and numeracy skills. The strategy aims to help 2.25 million adults improve their skills and gain a first literacy, language or numeracy qualification by 2010, with an interim target of helping 1.5 million adults by 2007. The strategy covers training in literacy, language and numeracy skills for adults aged 16+, from Pre Entry Level, up to and including Level 2 (the skills level needed to pass a GCSE at grades A* to C).

Contacts

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**Skills for Life Strategy Unit, Department for Education and Skills
<http://www.dfes.gov.uk/readwriteplus/> Email basic.skills@dfes.gsi.gov.uk**

**Service Desk of the Office of Government Commerce Direct Line 0845 000 4 999
Email servicedesk@ogc.gsi.gov.uk**

Further Reading

The new Public Procurement Directive, 2004/18/EC (Works/Supplies/Services), can be found at:

http://www.europa.eu.int/eur-lex/en/archive/2004/l_13420040430en.html

Government Accounting website <http://www.government-accounting.gov.uk>

Procurement Section of Sustainable Development in Government site:

<http://www.sustainable-development.gov.uk/delivery/integrating/estate/procurement-intro.htm>

Social Impacts Section of Sustainable Development in Government site:

<http://www.sustainable-development.gov.uk/delivery/integrating/estate/estate.htm>

Interpretative Communication of the European Commission on public procurement and the environment:

http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_333/c_33320011128en00120026.pdf

ⁱ Interpretative Communication of the European Commission on public procurement and social considerations:

http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_333/c_33320011128en00270041.pdf