



Brighton & Hove City Council

Procurement Code of Practice:

**Equalities and Diversity Monitoring
in Procurement**

FINAL 16.12.11

Contents

1.	OVERVIEW	2
2.	DEFINITIONS	2
3.	INTRODUCTION	2
4.	THE ROLE OF PROCUREMENT IN PROMOTING EQUALITY	3
5.	DETERMINING WHETHER EQUALITY IS A CORE CONTRACTUAL ELEMENT	4
6.	CONTRACT PROCEDURES	7
7.	CASE LAW	9
8.	THE EQUALITY ACT 2010	10
9.	CONCLUSION	14
	APPENDIX 1 – WORDING TO BE USED IN OJEU NOTICES	15
	APPENDIX 2 – EQUALITIES PQQ QUESTIONS FOR CONTRACTS OVER THE EU THRESHOLD	16
	APPENDIX 3 – SUB-OJEU PQQ QUESTIONS	18
	APPENDIX 4 – RELEVANT EUROPEAN AND UK PROCUREMENT CASE LAW	19

1. OVERVIEW

- 1.1 This Code of Practice (CoP) for officers is for use across the council in dealing with procurement and equality. This CoP gives officers information and advice on how the council will promote equality in the procurement of goods, works and services from all contractors.

2. DEFINITIONS

Equality means treating everyone with fairness and respect and recognising the needs of individuals. It is not treating everyone the same; some people may need to be treated differently to fairly and equally meet their individual needs.

Diversity means recognising and valuing that individuals are unique, each having their own values, beliefs, attitude, culture, ethnic background, sexual orientation, skills and life experience.

3. INTRODUCTION

- 3.1 This Code of Practice (CoP) has been produced to assist compliance with the Equality Act 2010. The Equality Act 2010 supercedes all previous Equalities legislation and provides a new framework to:

- Protect the rights of individuals and advance equality of opportunity for all
- Simplify and strengthen the previous legislation
- Deliver a simple, modern and accessible framework of discrimination law which protects individuals from unfair treatment and promotes a fair and more equal society.

- 3.2 This CoP aims to provide a clear set of guidelines for understanding equalities issues when producing specifications and evaluation criteria for the purchase of works, goods or services. This CoP has been developed to support the Single Equality Scheme Action Plan. For further information on the Action Plan contact Sarah Tighe-Ford, Equalities Co-ordinator, Communities and Equality Team, 01273 292301.

4. THE ROLE OF PROCUREMENT IN PROMOTING EQUALITY

- 4.1 The council provides a wide range of services to the community and businesses in the City. In some cases these are provided directly by the council, in other cases by contractors and partners.
- 4.2 Each year the council enters into contracts worth many millions of pounds for buying works, goods and services on behalf of the community it serves. Therefore, the services provided to the community should be geared towards their diverse needs and requirements.
- 4.3 Spending by the council sustains and maintains a significant number of jobs within the City. The council has a statutory duty to ensure that public money is spent in a way that ensures value for money and does not lead to unfair discrimination and social exclusion.
- 4.4 The promotion of equality in procurement will help the council to:
- Improve the overall value for money for the council in terms of the works, goods and services that are purchased
 - Improve the quality, responsiveness and appropriateness of our services
 - Ensure that public money is not spent on practices which lead to unfair discrimination to any part of the City
 - Create a diverse and integrated workforce
 - Deliver more responsive and flexible services in combating social exclusion and building stronger, cohesive communities
 - Encourage the council's contractors to promote and practice the council's policy on equality
 - Provide services in the City that will have a wider benefit to communities.

5. DETERMINING WHETHER EQUALITY IS A CORE CONTRACTUAL ELEMENT

- 5.1 One of the first tasks that will have to be undertaken when considering procurement is to ensure that equality award criteria is relevant and proportionate to the service being delivered.
- 5.2 To help you determine whether or not equality is a core requirement, you should ask yourself the following questions:
1. What is to be provided under the contract?
 2. Is the purpose of the contract to provide services directly to the public and what equalities impact will it have? (an Equalities Impact Assessment should be completed for large scale, complex/public facing contracts).
 3. Is the provision of works, goods and services in question likely to affect, directly or indirectly, your ability to meet the duty to promote equality?
- 5.3 If you have answered “no” to questions two and three, then equality **will not be** a core requirement of the contract and any equality criteria will need to reflect this.
- 5.4 If you have answered “yes” to questions two and three, equality will be a core requirement of the contract. Once equality has been determined to be a core contractual requirement, you should ensure that the equality criteria are reflected; further guidance should be sought from the Communities & Equality Team and Corporate Procurement.
- 5.5 Promoting equality is important in all contracts; however its ranking will be higher in those contracts that meet the criteria stated in 2 and 3 above. In assessing relevance to equality it is important to look at the totality of what is to be provided, since many technical functions may also involve some interaction with members of the public or council employees, where equality would be relevant.
- 5.6 Below is a list of considerations for assessing whether equality is of high or medium relevance to a contract. The lists are not exhaustive and it will be in part a judgment by the procurement officer to assess the relevance to equality. However, please speak to your Procurement Advisor if you have any particular concerns.

Contracts for Services

5.7 Equality is relevant to a service contract when:

- It involves direct contact with the public, for example, social workers, benefits teams, parking wardens.
- Services involve the repair, maintenance or cleaning of premises, equipment or plant that the council owns or controls, where the service requires awareness of different languages, religious and / or cultural factors, or accessibility of services to disabled people
- Services, such as staff canteen, staff sports facilities and staff training which are provided for the benefit of council employees

Contracts for Goods

5.8 Equality is relevant to a goods contract when:

- Our primary concern is likely to be that the goods are 'fit for purpose' and that they meet relevant quality standards
- In certain contracts, to be 'fit for purpose', it will be relevant to equality when the goods have to be capable of meeting the needs of particular groups. For example, people with a disability or the need to consider different cultural or religious dress codes or food requirements
- Requirements concerning quality and, possibly, arrangements for delivery could also have equality implications

Contracts for Works

5.9 In any contracts for works, your requirements are likely to be the completion of the works within specified timescales, at optimum quality standards. However, you will still need to consider how relevant the contract is to equality.

- In contracts for works, the conduct of the contractor's employees towards council staff and toward members of the public is relevant
- Works must comply with the Equality Act 2010 on ensuring access for disabled people

- 5.10 Once you have determined the relevance of equalities to the contract you will need to make it clear to tenderers what equalities information will be required from them.
- 5.11 However, the most important thing to remember is that **any equality-related award criteria are relevant and proportionate to the contract.**

6. CONTRACT PROCEDURES

Advertising

- 6.1 If the tender is above the EU thresholds, a notice will need to be placed in the Official Journal of the European Union (OJEU). There is some template wording that can be inserted into the 'Additional Information' section of the notice. This wording is intentionally broad – while it is possible to narrow the scope of the contract after a contract notice is published, it is not generally possible to broaden its scope. This wording will allow the council the opportunity to allow for contract award decisions to include consideration of social and economic factors, and the council can then be more specific about its requirements in the Invitation to Tender.
- 6.2 Please see Appendix 1 for the wording to be used. Please ask your Procurement Advisor which example is best suited to your tender.

Pre-Qualification Questionnaires (PQQ)

- 6.3 Pre-qualification allows potential bidders to be assessed on their suitability and general competence. Those that are unsuitable can be rejected and a selection can then be made from the best of those that meet the required standard.
- 6.4 The Corporate Procurement team has a standard PQQ that contains equality criteria. Please see Appendices 2 and 3 for the standard equalities questions for PQQs over and below the EU threshold.

The Specification

- 6.5 If national standards, schemes or brand names are to be used, you should follow it with “or equivalent” so that EU rules are not broken by discriminating against tenderers from Member States.
- 6.6 You should not specify requirements that are unnecessary or commercially unrealistic as this may deter some prospective bidders who may be unable to meet them, for example SMEs and voluntary organisations.
- 6.7 You may also find it useful to carry out a [Pre Tender Risk Appraisal](#). You should contact Corporate Procurement on x1949 if you have any queries about conducting the appraisal.

Tender Evaluation

- 6.8 The approach taken when evaluating equality-related criteria will depend on the service to be provided. However, in all cases the criteria must be clearly stated in the tender document and advice should be sought from the Communities & Equality Team and Corporate Procurement.

Contract Management / Monitoring

- 6.9 The contract forms the framework within which the council and the supplier can work together for continuous improvement and mutual benefit. The process of contract management involves monitoring the contractor's performance against the standards laid down in the contract conditions and the specification.
- 6.10 Monitoring of equalities should be limited to those areas that are relevant to the performance of the contract. The two main areas to monitor are service delivery and the contractor's workforce.
- 6.11 The monitoring should be appropriate to the nature of the contract (i.e length, size and type) and should be consistent regardless of whether the service is provided internally or externally.
- 6.12 Examples of areas that could be monitored are:
- Ethnicity of service users
 - Ethnicity of employees and job applicants
 - Whether there is an Equalities Policy in place
- 6.13 Corporate Procurement and the Equalities team have developed a model to be used when evaluating Equalities Policies. Please contact Lauren Smith, Procurement Advisor, on the Procurement Helpdesk x1949 for a copy of this tool and advice on how to use it.
- 6.14 Contractors used by the council are required to have regard to the council's Equalities Policy as well as current legislation in providing contracted services and in the employment of staff. The Corporate Procurement team regularly undertakes equalities monitoring of contractors / suppliers and requires that they answer questions about the employees working on Brighton & Hove City Council contracts. The results are then analysed and a report drawn up. For more information, please contact Lauren Smith, Procurement Advisor, on the Procurement Helpdesk x1949.

7. CASE LAW

7.1 There have been some important European cases concerning social clauses in public contracts; some examples relevant to the council have been provided in Appendix 4.

7.2 This case law has established some important principles that are important to social matters (eg targeted recruitment and training) in procurement by contracting authorities. Some examples are included below.

- It is possible to include targeted recruitment and training requirements in the procurement process, providing that the drafting and the process does not disadvantage non-local bidders, for example by requiring them to have local labour market knowledge, or a local base, or use local material;
- Environmental and social requirements that address a policy objective of the purchaser are permissible: they do not need to provide an economic benefit to the purchaser.
- All requirements must be capable of measurement and verification.

8. THE EQUALITY ACT 2010

- 8.1 The Equality Bill received Royal Assent on 8th April 2010, with most of the provisions coming into force on 1st October 2010, as the Equality Act 2010 (“The Act”).
- 8.2 The Act largely replaces all existing equality legislation, and covers the following, known as “protected characteristics”:
- Age
 - Disability
 - Race
 - Sex
 - Sexual Orientation
 - Religion / Belief
 - Marriage / Civil Partnership
 - Pregnancy / Maternity
 - Gender Reassignment

Protected Characteristic – Age

- 8.3 The Act protects employees of all ages, but it remains the only protected characteristic that allows employers to justify direct discrimination. For example:

IF AN EMPLOYER CAN DEMONSTRATE THAT TO APPLY DIFFERENT TREATMENT BECAUSE OF SOMEONE’S AGE CONSTITUTES A PROPORTIONATE MEANS OF A MEETING A LEGITIMATE AIM, NO DISCRIMINATION HAS TAKEN PLACE.

- 8.4 Questions you may wish to ask in your Invitation to Tender (ITT) document are:
- Are there any age barriers to employment in place?
 - Are older and younger people consulted about service provision? If so, how?
 - Are older and younger people given the same access to training and development opportunities?
 - What arrangements are in place for monitoring the composition of age in the workforce?

Protected Characteristic – Disability

8.5 The Act applies to a person who has a physical or mental impairment that has a substantial (major) and long-term adverse (negative) effect on their ability to carry out normal day-to-day activities.

8.6 The Act states that it is unfair to treat a disabled person unfavourably because of something to do with a disability. For example:

THE TENDENCY TO MAKE SPELLING MISTAKES DUE TO DYSLEXIA

8.7 Indirect discrimination now covers disabled people, meaning a job applicant could claim a particular rule or requirement disadvantages people with that disability.

8.8 Questions you may wish to ask in your Invitation to Tender (ITT) document are:

- Are disabled people consulted about service provision? If so, how?
- Are physical environments adjusted to facilitate access by disabled people?

Protected Characteristic – Race

8.9 The Act continues to protect people against discrimination on the grounds of their race. This includes colour, nationality, ethnic or national origin.

8.10 Questions you may wish to ask in your Invitation to Tender (ITT) document are:

- Is there a race equality scheme in place?
- Can culturally specific services be provided?
- What arrangements are in place for monitoring the ethnic composition of the workforce?
- What arrangements are in place to ensure that consultation on service design and delivery is non-discriminatory?

Protected Characteristic – Sex

8.11 The Act covers men, women, boys, girls and transgender people and continues to protect all these people against discrimination on the grounds of their sex / transgender status.

8.12 Questions you may wish to ask in your Invitation to Tender (ITT) document are:

- What arrangements are in place for the composition of gender in

the workforce?

- What arrangements are in place to make sure that the service is fully accessible to those people listed in the Act?
- How is equality between men and women promoted in the workforce?
- Has the service provider established a procedure for dealing with complaints of sexual harassment, which covers both employees and customers?

Protected Characteristic – Sexual Orientation

8.13 The Act continues to protect lesbian, gay, bi-sexual and heterosexual people from discrimination on the grounds of their sexual orientation.

8.14 Questions you may wish to ask in your Invitation to Tender (ITT) document are:

- Are people of difference sexual orientations consulted about service provision? If so, how?
- Do harassment policies specifically include and protect lesbian and gay people from homophobic harassment?

Protected Characteristic – Religion / Belief

8.15 The Act continues to protect against discrimination on the grounds of religion / belief, including holding no religion / belief.

8.16 Questions you may wish to ask in your Invitation to Tender (ITT) document are:

- Are people of differing religions and beliefs consulted about service provision? If so, how?
- What arrangements are in place to ensure that service delivery is compatible with religions and beliefs? For example:

TYPES OF FOOD AVAILABLE IN CATERING CONTRACTS

Protected Characteristic – Marriage / Civil Partnership

8.17 The Act continues to protect people who are married or in a civil partnership. However, single people are not protected by the legislation against discrimination.

8.18 Questions you may wish to ask in your Invitation to Tender (ITT) document are:

- What arrangements are in place to ensure that recruitment and selection procedures do not discriminate against applicants who are married / in a civil partnership?

Protected Characteristic – Pregnancy and Maternity

8.19 The Act continues to protect women against discrimination because they are pregnant or have given birth. For example:

IT IS NOW UNLAWFUL TO DISCRIMINATE A WOMAN BECAUSE SHE IS BREASTFEEDING.

8.20 Questions you may wish to ask in your Invitation to Tender (ITT) document are:

- What maternity arrangements are in place and do they improve on statutory rights?
- Is any support given to assist in childcare arrangements?

Protected Characteristic – Gender Reassignment

8.21 The Act will apply to anyone who is proposing to undergo, is undergoing or has undergone a process to change their sex. It is discriminatory to treat people less favourably because they propose to start, or have completed, a process to change their gender. For example:

IT WOULD BE DISCRIMINATORY TO TREAT PEOPLE LESS FAVOURABLY BECAUSE THEY ARE ABSENT FROM WORK WHILE IN A PROCESS TO CHANGE THEIR GENDER.

8.22 Questions you may wish to ask in your Invitation to Tender (ITT) document are:

- What impact does your service have on people who have / are about to undergo a process to change their sex?

9. CONCLUSION

- 9.1 The Act means that the council can play an important role in creating a fair society in the way we provide services, through the jobs and training that we offer and the money that we spend. Encouraging suppliers to promote equality in their own workforces allows public service delivery to benefit from diverse skills and talents.
- 9.2 However, it is important to remember that:

Any equality-related award criteria must be relevant and proportionate to the contract.

APPENDIX 1 – WORDING TO BE USED IN OJEU NOTICES

Example 1

“Under this [procurement / project]* the [contractor / supplier / service provider]* is required to participate actively in the economic and social regeneration of the [locality of and surrounding the place of delivery for the procurement / project]* [community served by the contracting authority]*. Accordingly contract performance conditions may relate in particular to social and environmental considerations.”

Example 2

“Conditions relating to environmental and social requirements of the contracting authority may be included in this contract.”

* delete/add as required

APPENDIX 2 – EQUALITIES PQQ QUESTIONS FOR CONTRACTS OVER THE EU THRESHOLD

14.1. Does your organisation have policies in place to ensure compliance with the Equality Act 2010 and relating to equal opportunities, discrimination and harassment?	YES/NO (delete as appropriate)
14.2. In the last three years, has any adverse finding been made against your organisation by an Employment Tribunal, Employment Appeal Tribunal or any court, (or in comparable proceedings in any other jurisdiction) in relation to any claim made by your employees, former or potential employees?	YES/NO (delete as appropriate)
If the answer to the question above is yes please give details here	
14.3. In the last three years has your organisation been the subject of formal investigation by any statutory body in relation to your employees?	YES/NO (delete as appropriate)
If the answer to the above question is yes please provide details of the relevant statutory body which investigated, including any adverse finding against your organisation (if appropriate) and what steps your organisation has taken as a result of any such investigation and/or finding?	
14.4. Do you have a responsible person nominated for equal opportunities/ discrimination/ harassment control?	YES/NO (delete as appropriate)
14.5. Is your policy relating to equal opportunities and discrimination set out in:	
Instructions to those concerned with recruitment, selection, remuneration, training and promotion?	YES/NO (delete as appropriate)
Documents available to employees, recognised	YES/NO

trade unions or other representative groups of employees?	(delete as appropriate)
Recruitment advertisements or other literature?	YES/NO (delete as appropriate)
14.6. Are your staff with supervisory/managerial responsibilities required to receive training on equal opportunities, discrimination and harassment issues	YES/NO (delete as appropriate)
14.7. Does your organisation carry out equal opportunities monitoring?	YES/NO (delete as appropriate)
If the answer to the above question is yes, which categories does your organisation use for monitoring your workforce and applicants for employment?	

APPENDIX 3 – SUB-OJEU PQQ QUESTIONS

8	EQUAL OPPORTUNITIES	
8.1	Does your organisation have a written equal opportunities policy, to avoid all types of discrimination?	Yes / No

APPENDIX 4 – RELEVANT EUROPEAN AND UK PROCUREMENT CASE LAW

Case Name	Case Reference	Key Points to Remember
EVN	(1) EVN AG (2) Wienstrom GMBH v Republic of Austria (2003) (C-448/01)	The accuracy of the information sought from tenderers in relation to environmental and social requirements must be capable of being verified. Award criteria that are not linked to the subject matter of the contract are not permitted.
Insalud	Contse SA v Insalud (Now Ingesa) (2001) (C-234/03)	A pre-qualification requirement for a contractor to have premises within a particular geographical area was held to be discriminatory and unjustified.
De Pont de Nemours Italiana <i>and</i> Laboratori Bruneau	Du Pont de Nemours SpA v Unita Sanitaria Locale No. 2 Di Carrara [1991] 3 CMLR 25 Laboratori Bruneau Srl v Unita Sanitaria Locale RM/24 De Monterotondo [1991] 1 CMLR 707	It was discriminatory to require bidders to obtain a set portion of their supplies from a specified region.
Letting International	Letting International Limited v Newham London Borough Council [2008] EWHC 1583 (QB)	The duty on a contracting authority to act in a transparent way include the need to sufficiently disclose contract award criteria and weightings in advance, including setting out detailed criteria and sub-criteria where these are used.

