



GREEN PAPER
on the modernisation of EU public
procurement policy
Towards a more efficient European
Procurement Market

Joint contribution of the European Network Against Racism and
Voice4Change England

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The European Network against Racism (ENAR) is a network of some 700 NGOs working to combat racism in all EU Member States. ENAR is determined to fight racism, racial discrimination, xenophobia and related intolerance, to promote equality of treatment between EU citizens and third country nationals, and to link local/regional/national and European initiatives.



Voice4Change England (V4CE) is a national support organisation for the Black and Minority Ethnic voluntary, community and social enterprise sector (BME VCS) in England. We are a leading voice to inform the formulation of public policy and to influence practice that has a direct effect on the development, delivery and impact of BME voluntary and community organisations and social enterprises (VCOs). We support the sector to build its capacity and secure resources so it can increase its ability to meet the needs of disadvantaged communities. We aim to develop a mutual understanding between the BME VCS and government, as well as wider policy makers, to ensure policies are responsive to BME communities' needs and aspirations.

Introduction

ENAR and Voice4Change England welcome this opportunity to contribute to the debate focusing on the modernisation of EU public procurement policy.

The 2004 public procurement directives (2004/17/EC and 2004/18/EC) allow for the use, within certain limits, of government procurement as a strategic policy instrument to combat racism, institutional discrimination and to promote equal opportunities for minorities, men and women and disabled persons. Still only a few member states and local authorities use this instrument by including criteria for positive action and anti-discrimination clauses in their contracts. The modernisation of EU public procurement policy is an opportunity to mainstream anti-discrimination and positive action into the many domains that are affected by public procurement. In this way, the public procurement directives can reinforce the EU racial equality and employment directives 2000/43/EC and 2000/78/EC and the directives with regard to equal opportunities for men and women, 2002/73/EC and 2004/113/EC) and contribute to the Europe 2020 strategy goals of a smart, sustainable and inclusive growth.

Key Commission Consultation Questions

4. Strategic use of public procurement in response to new challenges

4.1. "How to buy" in order to achieve the Europe 2020 objectives

Requiring the most relevant selection criteria

Question:

69. What would you suggest as useful examples of technical competence or other selection criteria aimed at fostering the achievement of objectives such as protection of environment, promotion of social inclusion, improving accessibility for disabled people and enhancing innovation?

1. Criteria and clauses for equal treatment and anti-discrimination

Anti-discrimination criteria and clauses provide the local population with an assurance that their tax funds are not going to companies willing to discriminate against them. These clauses are already used in the United Kingdom, Austria and Sweden. They can be applied on all public contracts both above and below the European thresholds in goods, services and products. According to studies in the UK, Canada and the United States anti-discrimination clauses have led to positive results for minorities and gender equality in companies that have such clauses. At the same time few contracts have been cancelled. The effect is proactive: including such clauses raises the awareness of the companies participating in the contract process. The risk of losing contracts triggers businesses to take proactive non-discriminatory actions.

An example is the **compliance with anti-discrimination laws as an exclusion criterion in the tenderer selection phase**. A tenderer who has been convicted by a judgment that has the force of

res judicata for failure to comply with national antidiscrimination laws may be excluded from a public procurement procedure. The public procurement guidelines and the Commissions Interpretative Communication explicitly allow procurers to use this as an exclusion criterion. It is advisable to provide information on terms for which this exclusion criterion holds, e.g. convictions in the past 3 years.

2. Criteria related to equal job opportunities and positive actions on the labour market

2.1. Set-asides for social economy initiatives as a selection criterion

Public award contract procedures can be set aside to sheltered workshops and sheltered employment programmes. This will benefit the employment of disabled persons. In order to benefit other disadvantaged groups, such as ethnic and cultural minorities, it is advisable that the Directive makes clear to what extent set-asides can be applied to local social economy initiatives.

2.2. Neutrality of testing a technical criterion or as an award subcriterion

Procurers can safeguard the neutrality of services that provide access to the labour market and education. They can stipulate that selection tests and assessment respect the principle of gender and culture neutrality by including such requirements in the subject matter of the contract, in the technical specification and, where relevant, in the award criteria.

3. Accessibility of buildings, services and products

Public buildings, products and services should be designed to serve all citizens, including people with a disability on work. Existing legislation on accessibility of public buildings is often not implemented and is often only limited to new buildings. Accessibility can also be demanded for existing buildings and for buildings where services with a public goal will take place (education, health, ...). The Directive should therefore point out that procurement can be used to reinforce and complement existing laws. Demands on accessibility can be stipulated in the technical specifications and the subject matter of the contract. For a number of services and depending on the subject matter of the contract, it is advisable to refer to possible specifications with regard to gender and culture neutrality.

Using the most appropriate award criteria

Question:

72. Do you think that the possibility of including environmental or social criteria in the award phase is understood and used? Should it in your view be better spelt out in the Directive?

The 2004 public procurement directives (2004/17/EC and 2004/18/EC) allow for the use, within certain limits, of government procurement as a strategic policy instrument to combat racism, institutional discrimination and to promote equal opportunities for minorities, men and women and disabled persons. Still only a few member states and local authorities use this instrument by including criteria for positive action and anti-discrimination clauses in their contracts. It could therefore be useful to better spell them out.

Imposing proper contract performance clauses

Question:

74. Contract performance clauses are the most appropriate stage of the procedure at which to include social considerations relating to the employment and labour conditions of the workers involved in the execution of the contract. Do you agree? If not, please suggest what might be the best alternative solution.

We think that contract performance clauses are an appropriate stage of the procedure at which to include social considerations. However, it is also relevant to include social consideration in the awarding phase.

Question:

75. What kind of contract performance clauses would be particularly appropriate in your view in terms of taking social, environmental and energy efficiency considerations into account?

In our view, the four contract clauses below would be particularly appropriate in terms of taking social and equal opportunities considerations into account:

1. Compliance with anti-discrimination laws as an execution condition

The execution of contracts is not governed by the public procurement directives, but it is only fair that the principle of anti-discrimination is upheld while executing a contract. Moreover, all EU member states are bound by the discrimination directives. The legislation should also make clear that contracts may be rescinded if the contractor is convicted for unlawful discrimination during the execution of the contract or that fines are possible if the contractor discriminates while executing the contract.

2. Mandatory hiring as an execution criterion

A number of Member States use mandatory hiring of specific groups as a contract compliance condition. The legislation should make clear what the legal scope of such policies is for long-term unemployed, migrants, disabled persons, other groups and on gender equality. A descriptive representation is not enough. Quality-criteria from different perspectives are necessary (age, ethnicity, accessibility, gender,).

3. Diversity in HRM policy as an execution criterion

Procurers can stimulate labour market participation of ethnic minorities by demanding a diversity policy or an HRM quality management system as an execution condition for the contract. Depending on the size and nature of the business, goals can be set on hiring, promotion and retention of certain groups.

4. Training and on the job learning as an execution criterion or as an award criterion

Procurers can stimulate labour market participation of ethnic minorities by demanding training and on the job learning as an execution condition for sizeable and long lasting contracts. A percentage of

the estimated working hours can be set aside for training and on the job learning. In this way it can overcome offer side barriers on the part of ethnic minorities. The quality of the training can be a subcriterion for the award of the contract.

Verification of the requirements

Question:
77. Do you think that the current EU public procurement framework should provide for specific solutions to deal with the issue of verification of the requirements throughout the supply chain? If so, which solutions would you propose to tackle this issue?

The EU procurement framework should clearly stipulate that antidiscrimination clauses also apply to subcontractors. Different control mechanisms through which compliance checking can be achieved should be established: questionnaires if needed, online procurement tools if possible.

Link with the subject matter/ with the execution of the contract

Question:
79. Some stakeholders suggest softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract (this could make it possible to require, for instance, that tenderers have a gender-equal employment policy in place or employ a certain quota of specific categories of people, such as jobseekers, persons with disabilities, etc.). Do you agree with this suggestion? In your view, what could be the advantages or disadvantages of loosening or dropping the link with the subject matter?

We agree that it can be useful to soften or even drop the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract if it makes it possible to require that tenderers have for instance an equal opportunity policy. According to studies in the UK, Canada and the United States anti-discrimination clauses have led to positive results for minorities and gender equality in companies that have such clauses. At the same time few contracts have been cancelled. The effect is proactive: including such clauses raises the awareness of the companies participating in the contract process. The risk of losing contracts triggers businesses to take proactive non-discriminatory actions.

Question:
81. Do you believe that SMEs might have problems complying with the various requirements? If so, how should this issue be dealt with in your view?

SMEs and civil society organisations might face the same type of problems. Whilst some ethnic minority civil society organisations have successfully secured contracts, for many the barriers created by commissioning and procurement processes have prevented them from effectively competing. For

instance, research by Shared Intelligence¹ into procurement and commissioning found that ethnic minority civil society and social enterprise organisations shared many challenges with other small organisations. However it also found distinct concerns including: limited understanding of the ethnic minority civil society sector and the communities it works with; institutional racism; perceived lack of trust amongst commissioners of ethnic minority organisations; and lack of engagement with the early stages of the commissioning process. Thus any future programme of training public service commissioners should encompass a robust equality and diversity segment which provides focus on existing inequalities and the role of the ethnic minority civil society and social enterprise, as well as relationship building with diverse groups.

Other key areas identified in Voice 4 Change England *Shared Vision for the Future of the BME VCS* research² include:

Commissioning and Procurement Barriers and challenges

- Funding and capacity: the administrative, financial and reporting requirements of contracts can be too onerous for small organisations. Cash flow problems are created where contracts provide payment in arrears and the move to payment by results is likely to create huge challenges especially when working with vulnerable communities.
- Consortia bidding: Bidding in consortia can be a successful way for ethnic minority civil society organisations to bid for larger contracts. However, many organizations have reported playing a marginal role in consortia arrangements and feel they were included only as an equality tick box, receiving little of the resources that enter the consortia.
- Value for money: Whilst value for money is important it is also important for social return on investment to be considered. The emphasis on value for money could lead to loss of funding for organisations who are unable to achieve economies of scale but who deliver to parts of the community that others cannot reach.
- Prescriptive contracts: some tenders can be too prescriptive preventing organisations responding to user needs.

V4CE and ENAR therefore welcome the European Commission's plans to lift the administrative burdens within procurement processes, particularly for smaller contracting authorities.

V4CE responded to the UK Joint Cabinet Office-BIS Task Force on cutting red tape in September 2010. They were asked to identify five burdens that restrict the operation and running of small organisations. In summary these were:

¹ Shared Intelligence, 2008, [Evaluation of the National Programme for Third Sector Commissioning: Consultation with BME Third Sector Organisations](#).

²V4CE, September 2010, *Shared vision for the future of the BME VCS*.

- (a) Tendering for contracts and fundraising - applications are becoming more and more complex as well as cash flow problems due to lack of reserves;
- (b) Evaluation and monitoring – small ethnic minorities voluntary and community organisations and social enterprises do not have the funds to invest in quality assurance systems to assess performance and income; there is a lack of feedback from commissioners for unsuccessful candidates;
- (c) Barriers to organisational development;
- (d) Funders and policy makers need to support small ethnic minorities voluntary and community organisations and social enterprises to evidence gaps and share this with them so that there is a greater shared responsibility for developing solutions;
- (e) Support in building collaborations and partnerships to deliver contracts.

Question:

82. If you believe that the link with the subject matter should be loosened or eliminated, at which of the successive stages of the procurement process should this occur?

We consider that social and equal opportunities considerations should be allowed at all stages of the process: in defining the technical specifications, the selection criteria, at the awarding stage and for imposing contract execution clauses (for examples and explanations, see answers to questions 69 and 75).

4.4. Social services

Questions:

97. Do you consider that the specific features of social services should be taken more fully into account in EU public procurement legislation? If so, how should this be done?

97.1. Do you believe that certain aspects concerning the procurement of social services should be regulated to a greater extent at EU level with the aim of further enhancing the quality of these services? In particular:

97.1.1. Should the Directives prohibit the criterion of lowest price for the award of contracts / limit the use of the price criterion / limit the weight which contracting authorities can give to the price / introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer?

97.1.2. Should the Directives allow the possibility of reserving contracts involving social services to non-profit organisations / should there be other privileges for such organisations in the context of the award of social services contracts?

97.1.3. Loosening the award criteria or reserving contracts to certain types of organisations could prejudice the ability of procurement procedures to ensure acquisition of such services "at least cost to the community" and thus carry the risk of the resulting contracts involving State aid. Do you share these concerns?

97.2 Do you believe that other aspects of the procurement of social services should be less regulated (for instance through higher thresholds or de minimis type rules for such services)? What would be the justification for such special treatment of social services?

Non-profit organisations have a significant role to play in ensuring that disadvantaged ethnic communities will have access to public services and should therefore benefit from a special treatment. ENAR and V4CE believe it is important for public authorities to recognise the role of and need for ethnic minorities civil society organizations to be commissioned to deliver services for the benefit of disadvantaged communities, as well as the prospect of achieving equality through procurement.

Role of the civil society organisations in public services

Civil society organisations representing minorities and social enterprises play a critical role in ensuring disadvantaged communities can access public services – both through direct service delivery as well as enabling ethnic communities to be involved in the shaping and development of both specific and mainstream services.

Ethnic minority-specific services, such as those delivered by Southall Black Sisters³ and the Asian People’s Disability Alliance⁴, have been designed in response to the failure of larger mainstream service providers in England to meet the needs of ethnic communities. They provide services that are in touch with service users, flexible to changing needs and reach people that others label ‘hard to reach’. Their approach combines creativity, flexibility, commitment to service provision and an understanding of direct experiences of discrimination. V4CE case study report⁵ found that **specialist services: meet local needs; empower users; create bridging social capital; and contribute to social cohesion.**

Civil society organisations representing minorities provide a range of roles and carry out various functions in various public service areas:

- Cultural, social and economic support for younger, older and disabled people;
- Advocacy and advice on legal issues, immigration, race equality, cross equality issues, and equality of opportunity in employment issues;
- Health services including support programmes on mental health issues and to help communities in accessing mainstream health provision;
- Welfare and economic support services;
- Supplementary schools education and training;
- Opportunities to learn and practice ethnic arts and cultural education;
- Day care community centres;
- Language support and adult literacy skills.

Highlighted above is the role of the civil society organisations in delivering specific services to disadvantaged communities. However this does not absolve the need to recognise the vital role which

³ For more information about Southall Black Sisters visit www.southallblacksisters.org.uk.

⁴ For more information about Asian People’s Disability Alliance visit www.apda.org.uk.

⁵ V4CE, 2008, [Discussion Paper 3: Evidencing the value of the BME Third Sector](#).

it plays in the delivery of generic services. Often a false dichotomy is drawn between generic or specialist services. In reality both are needed to meet the needs of disadvantaged communities. **We know that many generic services do not adequately meet the needs of diverse communities. Civil society organisations have a key role to play by advocating for ethnic and religious communities and transferring knowledge and good practice to generic service providers.** This has been evidenced through larger generic providers seeking the help of small organisations in effectively identifying and meeting the needs of local communities.

Despite cuts in funding, civil society organisations have experienced an increase in service demand and a need for new services such as unemployment counseling and job skills training⁶. Public spending cuts are already having a profound effect on deprived ethnic communities that rely on public services. V4CE recently undertook a focus group in the North West region of England in which participants highlighted the importance of specialist services and what the impact of losing those services would be on disadvantaged communities. In particular the **SEVA project**, a project based in Manchester, England, focusing on mental health and ethnic communities, was facing closure due to cuts from the NHS. The loss of such a service would leave a gap in provision for this service which minority service users rely on to meet both cultural and sensitivity needs. One participant stated that they had to signpost individuals to SEVA all the way from Cheshire due to lack of provision in the local area. Thus not only does this example paint a picture as to the impact that loss of services would have on disadvantaged communities, it also serves to demonstrate that **a gap in service provision to disadvantaged communities persists and that policy makers should be using the public service reforms as a platform for filling such gaps.**

The potential of minority civil society organizations and social enterprises to tackle inequalities through procurement

The ability of minority civil society organizations to tackle inequality and be more effective in meeting the needs of the sector as a whole is endorsed by research conducted for the Joseph Rowntree Foundation⁷.

In its Equality Strategy, the UK Government recognises the need to change cultures and attitudes if inequality is to be combated. **V4CE is adamant that commissioning services to the minority civil society organizations and social enterprises can help achieve this as its key role in tackling race inequality and its intimate interactions with service users from minorities and disadvantaged communities places it in a strong position to deliver on this.**

For example the UK Government Equality Strategy talks about its intentions to put in more effective measures to tackle hate crime and violence. **In order to create such measures it must consider underlying causes of hate crime, the effects it has on victims as well as exploring good practice examples existing which show responses to all forms of hate crime.** There are many minority civil society organizations and social enterprises operating at both a national and local level which are

⁶MiNet, 2009, The Economic Downturn and the Black, Asian and Minority Ethnic (BAME) Third Sector.

⁷Mcleod M, Owen D &Khamis C., 2001, Black and Minority Ethnic Voluntary and Community Organisations: their role and future development in England and Wales, Policy Study Institute for Joseph Rowntree Foundation.

experts in these specific areas and which Government should seek to resource in order to achieve its aims. This example can be extended to other areas such as inequalities in education and health.

Thus in order for commissioners to make strategic commissioning decisions based on a full understanding of the social, environmental and economic impact it is vital that they recognise the following:

1. The ability of the minority civil society organizations to deliver specialist services to disadvantaged and 'hard to reach' communities;
2. The ability of minority civil society organizations to complement the services delivered by generic organisations;
3. The value of ethnic and religious minority specific services and the impact of cutting such services;
4. The persistent inequality which continues to exist corroborated by various pieces of recent research;
5. The role of the minority civil society organizations in combating race and cross-cutting inequality in areas such as housing, health, education and employment;
6. Their duties under equalities legislation and the minority civil society organizations willingness to work with them to implement these duties;
7. The role public services delivered by minority civil society organizations can play in tackling race inequality (e.g. reducing hate crime);
8. The cost to the economy which failure to tackle inequality would cause. The National Audit Office estimated that the overall cost to the economy from failure to fully use the talents of people from ethnic minorities could be around £8.6 billion annually;
9. The need to involve service users and civil society organizations in reviewing commissioning processes to ensure such processes are accessible for minority civil society organizations service providers.