

The duty to promote race equality

RACE EQUALITY AND PUBLIC PROCUREMENT

A guide for public authorities
and contractors



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Foreword

This guide, and a companion guide for local authorities, has been published in response to the many requests we have had for advice on how the new duty to promote race equality will affect the way public authorities procure goods, works, and services from external suppliers.

In this guide we give public authorities the information they need to be confident of meeting their race equality duty when they carry out procurement, within EC rules, and UK laws and policies. We also offer guidance to private and voluntary sector organisations on the new race equality expectations they will meet when they do business with public authorities.

Our primary aim is that both parts of this guide should be useful, usable, and used. They should make the relevance of race equality to public procurement clear and comprehensible to anyone who is involved or interested. We are grateful for the advice and support we have received in developing this guide from public authorities in England, Scotland, and Wales, private and voluntary sector organisations, trade unions, and others. We are also grateful to the many authorities and other organisations that responded to our consultation on an earlier draft.

This guide is our first detailed example of how the duty to promote race equality should work in practice in a particular area of a public authority's work. A majority of those who responded to the consultation endorsed the guide's step-by-step approach and numerous examples, despite the resulting length. However, like other manuals, the guide is organised so that once you are familiar with its contents, you should be able to go directly to the information you need.

In March 2003, the Cabinet Office Strategy Unit published its final report on *Ethnic Minorities in the Labour Market*, which recognises the potential role of public procurement in improving equality of employment opportunities. The report's recommendation that 'comprehensive and clear guidance on race equality issues in public procurement is now required' is now government policy. We believe that this guide goes some way to fulfilling this important policy objective.

Promoting race equality through contracts matters. It matters to public authorities and it matters to their contractors, including small firms and ethnic minority businesses that could deliver services for public authorities. It also matters to people who pay for, and have a right to benefit from, public services, whatever their ethnic origin. All taxpayers have a right to expect that public money is not spent on supporting discriminatory practices, but on those that promote equality of opportunity.

We commend this guide to all public authorities and contractors.



Trevor Phillips
Chair, CRE

Introduction

Public authorities in Britain spend billions every year on contracts with private and voluntary organisations for goods, works, and services. It is vital, therefore, that they take full account of all the implications – both economic and social – of their investment. They must now also ensure that this investment is consistent with their race equality obligations.

The Race Relations (Amendment) Act 2000, which amended the Race Relations Act 1976, has important implications. The amended Race Relations Act (RRA) now outlaws discrimination in all functions of public authorities, including procurement. It also gives public authorities¹ a positive legal duty ('the duty to promote race equality') to eliminate discrimination and to promote equality of opportunity and good race relations in carrying out all their functions. The duty to promote race equality applies to procurement itself.

Where a public authority's function is carried out by an external supplier on its behalf, the public authority remains responsible for meeting the duty. Contractors themselves must not discriminate, but they do not have the same legal obligation to promote equality of opportunity. This means public authorities have to build relevant race equality considerations into the procurement process, to ensure that all their functions meet the requirements of the RRA, regardless of who is carrying them out.

So, to comply with their duty under the RRA, one aim of public authorities should be to make sure that public money is not spent on practices that lead to unlawful racial discrimination, but is used instead to support and encourage equality of opportunity and good community relations. Contractors, and potential contractors, need to be aware of the legal duty on public authorities, since it has implications for them.

The CRE's *Code of Practice on the Duty to Promote Race Equality* provides practical guidance to help public authorities meet their duty under the RRA. Two paragraphs in this code refer specifically to how authorities can carry out procurement in the context of their duty (see appendix 1). These paragraphs do not in themselves limit what can be done to secure race equality in procurement, within the wider context of EC rules and value for money principles.

This guide expands and develops the guidance in our code of practice, and accompanying guides, in relation to procurement. It sets out in more detail what public authorities can do to meet their responsibilities under the duty.

1. The public authorities to whom the duty applies are listed in Schedule 1A to the RRA, as amended by the Race Relations Act 1976 (General Statutory Duty) Order 2001, and any future orders for this purpose.

What does this guide offer, and who is it for?

Part I is for public authorities in England, Scotland and Wales. For the purposes of this guide, these include all central government departments and their executive agencies and non-departmental public bodies, all NHS institutions, the governing bodies of schools and of further and higher education institutions, the Scottish Executive and the Welsh Assembly Government. Other public authorities should also find it useful.²

The aim of part I is to help public authorities meet their duty under the RRA when procuring goods, works, and services from external suppliers. It explains how public authorities should take account of their duty to promote race equality in their general procurement policies and practice and, for individual contracts, at each stage of the procurement process. It also sets out additional good practice measures. It should be used alongside other guidance on procurement and race equality, especially our statutory codes of practice on the duty to promote race equality, our guides for public authorities, and our guide to ethnic monitoring.³

Part II is for suppliers of goods, works, and services from both the private and voluntary sectors, including small firms interested in tendering for public authority contracts. We hope this guide reaches the full range of businesses owned or run by people from ethnic minorities. The aim of this part is to give external suppliers the information they need on race equality to do business successfully with public authorities.

At the end of each chapter in part I, and as a final chapter in part II, you will find a short summary of the key points. Throughout the guide, you will find examples that show how the recommendations of the guide have been, or could be, implemented in practice. The guide begins with a glossary and the appendices provide additional reference material.

What are the benefits of building race equality into the procurement process?

For public authorities, integrating race equality into the procurement process can improve the quality of their services, making these more appropriate and more responsive to the needs of different communities. It can also improve the overall value for money of the goods, works, or services they purchase. For private and voluntary organisations, good race equality practice makes good business sense. It makes them better employers, and improves their ability to provide goods and services suitable for all their potential 'customers'. It can also give them a competitive edge when they tender for public contracts.

2. A separate guide, *Race Equality and Procurement in Local Government*, has been produced for local authorities, police authorities, fire authorities, and Scottish joint boards.

3. There are separate versions of all these guides for Scotland and for England and Wales.

What types of contract does this guide cover?

The guide applies generally to contracts between a public authority and an external supplier in the private or voluntary sector. It also applies to the following types of contract.

- The policies and practices of formal and informal consortia for public authority procurement.
- Joint commissioning between public authorities such as strategic health authorities or primary care trusts and local authorities. In such cases, all parties are subject to the duty to promote race equality, so any joint procurement must meet the standards set out in this guide.

The principles of the guide are relevant to the following types of contract, which are not specifically covered:

- Contracts where both the 'buyer' and 'seller' are public authorities, for example, a contract between an NHS trust and a college to train health service staff. In such agreements, each party is subject to the duty to promote race equality, and will want to be confident that the other is applying comparable race equality standards.
- Public authority grants to voluntary organisations.

Does this guide cover other equality areas?

Yes. The focus of this guide is on race equality and the statutory duty public authorities now have under the RRA. However, we also recommend that both public authorities and contractors make every effort to ensure equal treatment in other respects as well, such as sex, disability, religion or belief, sexual orientation, and age.

The law is always changing

This guide has been prepared just as Parliament has approved regulations⁴ to amend the RRA, to comply with the EC race directive (see appendix 1). By December 2003, there will be new legislation in force outlawing discrimination in employment on grounds of sexual orientation and religion or belief, to comply with the EC employment framework directive.⁵ Proposals to revise the EC procurement directives are currently proceeding through the EC legislative process, and new directives may be adopted in 2004. The final version of any new directive may be relevant to some parts of this guide. Decisions of the UK courts and the European Court of Justice may also be relevant to matters we deal with in this guide. Although we have made every effort to make this guide as accurate as possible, you will need to make sure there have been no changes in the relevant UK or EC law when you put our recommendations into practice.

This guide is not an authoritative statement of the law, and we recommend that you seek legal advice for each new procurement project.

⁴ The Race Relations Act 1976 (Amendment) Regulations 2003.

⁵ EC Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, Employment Equality (Religion or Belief) Regulations 2003, and Employment Equality (Sexual Orientation) Regulations 2003.

Glossary

In this guide, the words below have the meanings shown beneath them.

approved list

a list of external suppliers that a public authority has accepted as suitable to be invited to tender for particular types of contracts. Also referred to as 'standing list' by some public authorities.

core requirement

in the context of an individual contract, a requirement which the public authority has determined the contractor must meet, to provide effectively and efficiently the goods, works, or services that are the subject of the contract.

EC directives

the EC public procurement directives and the UK procurement regulations giving effect to the directives in the UK.

EC rules

the EC Treaty, EC procurement directives, UK procurement regulations, and relevant decisions of the European Court of Justice.

ethnic minorities

people who have classified themselves as members of ethnic groups other than 'white British'.

ethnic minority business

a business 51% or more of which is owned by members of one or more ethnic minority groups. Or, if there are few owners, where at least 50% of the owners are members of one or more ethnic minority groups.

ethnic monitoring

a process for collecting, storing, and analysing data about people's ethnic (or racial) backgrounds.

firm or business

any private or voluntary organisation, such as a company, partnership, charitable trust, or other type of body, which can enter into a contract to provide goods, works, or services.

framework agreement

an agreement setting out terms and conditions under which specific purchases ('call offs') can be made throughout the period of the agreement. Also known as 'call off contracts'.

functions

the full range of a public authority's duties and powers.

packaging

the formal dimensions of a contract – its length (how many years), its scale and complexity, and its application (to a geographic area or to a particular population).

positive action

- providing facilities to meet special education, welfare, or training needs of people from particular racial groups; and
- targeting training at, or encouraging job applications from, people from racial groups that are under-represented in that area of work. Positive action does not mean selecting an employee or a contractor from a particular racial group because that group is under-represented, and to do so is likely to be unlawful.

procurement

the process by which a public authority enters into a contract with an external supplier to carry out works or provide goods and services. The term encompasses the full range of public authority contracts, including private finance initiative (PFI) projects and public private partnerships (PPP). It does not include the decision to 'buy' from an external supplier.

promote race equality

to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between people from different racial groups.

public authority

all central government departments and their executive agencies and non-departmental public bodies, all NHS institutions, the governing bodies of schools and of further and higher education institutions, the Scottish Executive, and the Welsh Assembly Government.

RRA

the Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000.

RRA duty

the duty under section 71(1) of the RRA (see above) to have due regard to the need to eliminate unlawful racial discrimination, and to promote equality of opportunity and good relations between people from different racial groups (also referred to in this guide as 'the duty to promote race equality').

racial discrimination

- direct discrimination means less favourable treatment on racial grounds.
- indirect discrimination means applying a requirement or condition which a considerably smaller proportion of people from one racial group can meet and which cannot be justified on non-racial grounds. From 19 July 2003, in certain activities, including employment, education, and health services, indirect discrimination will also mean applying a provision, criterion, or practice which disadvantages people of a particular race, or ethnic or national origin, which cannot be justified as a proportionate way of achieving a legitimate aim.

racial grounds

grounds of colour, race, nationality, or ethnic or national origin.

racial group

a group of people defined by colour, race, nationality, or ethnic or national origin.

service user

the individuals, groups, or institutions for whom a particular service is intended. For example, the service users of a college canteen are the students, staff, and visitors of the college.

services

all the activities of a public authority, whether carried out directly or by others on its behalf, excluding activities defined as 'works' (see below). 'Services' includes the exercise of a public authority's powers of regulation, inspection, and law enforcement. It includes activities provided to members of the public or a section of the public, as well as services provided to the authority itself.

social enterprise

a business with primarily social objectives whose surpluses are principally reinvested in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners.

small business / firm

a business that employs up to 50 people.

supplier

a private or voluntary organisation that is interested in providing goods, works, or services to a public authority. Also referred to as a 'provider'.

tenderer

a supplier who has been selected to submit a tender for a contract.

value for money

the optimum combination of whole-life cost and quality to meet the requirements of the public authority.

works

the construction or demolition of buildings, both residential and non-residential, repair to the fabric of these buildings, construction of roads, bridges, tunnels, and the installation of gas, electric, and plumbing services.



What public authorities should do

Part I will be of particular interest to:

- members of the board or authority or governing body;
- chief officers;
- strategic policy officers;
- procurement and purchasing officers;
- officers concerned with service delivery;
- equal opportunities officers;
- legal officers;
- audit and inspection agencies; and
- trade union representatives.

1

Legal framework and basic principles

Legal and policy framework

Race Relations Act 1976

The Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000 (RRA) gives public authorities a statutory duty to promote race equality. The RRA⁶ requires you, in carrying out your various functions, to have due regard to the need to eliminate unlawful racial discrimination, and to promote equality of opportunity and good relations between people from different racial groups (see the glossary).

Complying with your duty under the RRA in carrying out procurement is compatible with your obligations under EC rules, UK, Welsh, and Scottish legislation, government policy, and your general fiduciary duties.

The duty under the RRA is not optional. You must make the promotion of race equality an integral part of your decision-making and actions across all your functions. To do this, you will have to apply the tests of relevance and proportionality, to see where, when, and how promoting race equality needs to be part of what you do. The RRA recognises that promoting race equality will be more relevant to some functions or policies than to others, and your response should reflect this.

EC rules, 'value for money', and the policies of your authority

EC public procurement directives and UK procurement regulations give effect to the principle of free movement of goods and services. The directives and regulations prescribe procedures for most contracts above certain value thresholds. All contracts not subject to the directives are still subject to EC Treaty-based principles of non-discrimination (between suppliers from different EU member states), equal treatment, transparency, and proportionality (see appendix 1).

All procurement by public authorities must be based on value for money: 'the optimum combination of whole-life cost and quality to meet the customer's requirement', where the customer is the public authority. The need to assess 'whole-life cost' enables public authorities to look beyond the contract price, and to consider longer-term costs and

6. Section 71(1).

benefits. 'Quality to meet the customer's requirement' enables an authority to specify its particular requirements, including those that ensure the authority complies with its duty to promote race equality.

All public authorities carry out procurement in the context of other policies and strategies. Some will be your authority's application of national policies or priorities, such as social cohesion, sustainable development, modernising government, and encouraging small businesses. Others will be policies, priorities, and strategies specific to your authority or to authorities within your sector.

Basic principles

The recommendations in this guide are based on the following principles or guidelines.

Relevance

This should be your starting point when considering how the promotion of race equality applies to procurement. Could your procurement policies and practice result in racial discrimination, either generally or in relation to particular contracts for goods, works, or services? Or could there be a difference in impact on different racial groups? Promoting race equality will be more relevant to contracts for some goods, works, or services than others. In assessing relevance you need 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 your employees, when race equality would be relevant.

Proportionality

The more relevant race equality is to a contract, the more you need to consider it at each stage in the procurement process. Proportionality is not about how many people from ethnic minorities are directly served by your authority. It is about the nature and purpose of the contract, and the effect it could have on different racial groups. Proportionality also relates to the size, value, and length of a contract, as it may be appropriate to consider simpler procedures and requirements for some small, low-value, one-off or short-term contracts.

Accountability

Liability for compliance with the RRA lies with the public authority itself. This is true whether a function is carried out by the authority itself or by an external provider. Depending on the legal structure of the authority, the liable 'person' could be the secretary of state, the board or commission or governing body, or other individual or body who is legally responsible generally for the acts of the authority. The authority may then delegate to officers to take necessary action. You should know who will be responsible for securing compliance with the duty at each stage of the procurement process.

Transparency

EC rules and UK law make transparency, or openness, a fundamental principle of public authority procurement. Transparency is also a key element in the duty to promote race equality. Public authorities are expected to publish their proposals for complying with the duty, to consult the people who may be affected by their policies, and to publish the outcomes when they monitor or assess the impact of their policies on race equality.

Mainstreaming

Promoting race equality is not an 'extra' that you can choose to add on to your established procurement practice. The RRA means that, wherever race equality is relevant, you are expected to make it part of all the policies, plans, and processes involved.

Appropriateness

The public authorities subject to the duty under the RRA vary in size and responsibilities. Some functions are common to all, but not all approaches will be equally suitable. You should tailor the recommendations and examples in this guide to suit your circumstances, and to the ways in which you use procurement within your authority.

Complying with the law

The way you meet your duties under the RRA must be consistent with the requirements of EC rules, UK laws, and government policy, including laws and policies of the Scottish Parliament and the National Assembly for Wales.

Risk assessment

Procurement is about the transfer of defined risk from a public authority to an external supplier in exchange for reward (the contract price). In the context of your duty to promote race equality, the risk is proportionate to the relevance, and significance, of the contract to your duty under the RRA. While you remain responsible for meeting your duty under the RRA, operational risks can often be transferred. Achieving the right allocation of such risks should be a key aim in planning a procurement project.

Summary

To comply with their duty under the amended Race Relations Act, all public authorities must take race equality into account when procuring goods, works, or services from external providers.

Compliance with this duty is compatible with your obligations under EC rules, value for money and other national policies and strategies, and those of your authority.

The key principles that apply throughout part I are relevance, proportionality, accountability, transparency, mainstreaming, appropriateness, complying with the law, and risk assessment.

2

Procurement and the duty to promote race equality

This chapter is intended to help you look at how you carry out procurement as one of your functions that is relevant to your duty to promote race equality. In chapters 3 to 11, we discuss when and how you should build race equality into the different stages in your procurement of particular goods, works, or services.

Your duty under the RRA means that you need to be satisfied that your procurement policies and practices do not discriminate unlawfully, and that they promote equality of opportunity and good race relations.

If you have not already assessed your procurement policies and practices for the impact they might have on race equality, we suggest you do so as soon as possible; ideally before considering new major procurement projects.

How can we assess the impact of our procurement function on race equality?

You may find it useful to consider questions along the following lines.

- Within your main procurement objective – to obtain value for money – do your procurement objectives include promoting race equality or, more generally, equality of opportunity? If they do, what effect has this had on current practice?
- Is there evidence that your procurement policies or practice have an adverse impact on some racial groups, as users of the goods, works, or services provided; as employees (your own as well as those working for contractors); or as suppliers of goods, works, and services?
- Are opportunities to promote race equality being missed, within the context of value for money?
- Does your procurement practice generally include consultation with service users or employees from different racial groups, with trade unions, and with different suppliers (so far as is permitted under EC rules)? If not, how do you take into account any relevant needs, skills, or resources of different racial groups?
- To what extent have you built consideration of race equality into each stage of your procurement process?
- Do your procedures for monitoring contracts include monitoring of any race equality requirements in the specification or contract conditions?
- Within the full scope of procurement undertaken by your authority, is there a consistent approach to race equality? If not, what are the reasons? Is it, for example, the scale of different projects, the nature of the goods, works, or services, or because some procurement is carried out centrally, and some is devolved to departments or sections?

What should we do with the answers?

Your answers to these questions may show that, across your authority, you have not yet given sufficient attention to race equality in procurement. Where you can trace the impact of your current approach, your answers should tell you if you need to review your objectives or your policies or practice.

- If you find evidence of particularly good results, make sure the lessons are shared.
- If you find evidence of adverse impact on some racial groups, you will need to consider what changes you should or might make.
- If there is evidence of direct or indirect discrimination, you will need to act to prevent discrimination in future.
- If there is evidence of adverse impact on particular racial groups, or evidence that you are missing opportunities for promoting race equality, then, having regard to your other legal and policy obligations, you should consider what changes you could make to your policies or practice.

Example

Extract from a public authority's race equality scheme

- Highlight information about the Race Relations Act 1976, and the authority's new legal duties to all contractors on the authority's approved list.
- Revise the standard terms and conditions to include Race Relations Act 1976 responsibilities for contractors and subcontractors.
- Brief staff involved in procurement work about the Race Relations Act 1976 and the impact of the new legal duties on their area of work.

Within the context of achieving overall value for money, you could:

- **review your policies on how you plan projects**
 - How can you ensure that, wherever race equality is relevant, it is taken into account in deciding overall objectives, the core requirements, and the scale or packaging of proposed contracts?
 - How can you involve (or increase the involvement of) potential users, employees, and external suppliers (so far as is permitted under EC rules) from different racial groups in early decisions regarding the content and scale or packaging of proposed contracts?
 - In planning major, strategic contracts (for example, PFI schemes) in which the external supplier assumes a greater share of the risks, do you need a different approach to ensure that the services provided meet appropriate race equality standards?
 - In planning small-scale contracts, how do you ensure that race equality matters are considered in an appropriate and proportionate way?

- **review your policies on how you advertise, tender, and award contracts**
 - How can you ensure that, wherever it is relevant, race equality is given appropriate weight at each stage of the procurement process?
 - How can you attract a wider range of suitable providers?
- **review the way you manage contracts**
 - How do you ensure that contractors meet your specifications or contract conditions relating to race equality?

Example

Lambeth, Southwark and Lewisham Health Action Zone (LSL HAZ) reviewed their commissioning model when research found that the traditional competitive tendering process unintentionally reinforced some of the inequalities the HAZ was trying to address. Little specific consideration had been given to minority groups, including disadvantaged ethnic minority voluntary and community groups.

LSL HAZ developed a more strategic and inclusive model, with an emphasis on planning, inclusion, and partnership. Its aim was to involve all local communities in the planning and delivery of services. This involved:

- contacting voluntary sector infrastructure organisations to ask them to identify potential voluntary and community sector suppliers, including ethnic minority organisations;
- consulting fully on priority setting and specification issues, and agreeing the type of service to be commissioned;
- bringing together all appropriate voluntary and statutory agencies to negotiate and draw up the final proposal; enabling explicit targets, including race equality targets, for the service; and performance indicators;
- ensuring that each agency specifies its particular contribution and responsibilities, and agreeing joint responsibilities;
- making clear in notices and advertisements that consortium tendering is welcome;
- including race equality principles in evaluation criteria, with appropriate emphasis;
- encouraging NHS bodies to check that their standing orders and financial instructions comply with RRA requirements; and
- ensuring that performance management is evaluated on an ongoing basis, to ensure that delivery is responsive to user needs.

South East London Strategic Health Authority is now implementing the recommendations, and incorporating them into its performance management framework for all NHS trusts across the south-east sector.

Summary

Procurement is one of your functions that is relevant to the RRA duty.

To ensure compliance, you need to assess the impact of your procurement policies and practice on the promotion of race equality.

An assessment of your procurement function can include looking at your objectives, your general procedures, and the outcomes in terms of involvement and impact on service users, suppliers, and employees from different racial groups.

You may then want to review how you can more effectively build race equality into the planning of procurement projects and in the procedures you follow, as well as your arrangements for monitoring and managing contracts.

3

Planning procurement projects – race equality as a core requirement

Chapters 3 to 11 look at individual procurement projects, from initial planning to award and post-award monitoring and management. The detailed guidance is particularly relevant if you are involved in a major strategic contract or a large scale, long-term project. For some short-term or small-scale contracts – such as the routine purchase of goods or regular repair or maintenance works – you may decide to adjust or simplify some of the procedures. The figure on page 22 shows the stages covered by this guide, and the recommended actions at each stage.

This chapter will help you to determine how relevant race equality is to a particular procurement project; your determination should influence how you carry out the further stages, which we cover in later chapters.

When is race equality a core requirement in a contract?

Race equality is a core requirement (see the glossary) when it is an essential part of the contract. For example, if the purpose of the contract is to provide services directly to the public, a supplier must be able to provide a service that meets everyone's needs.

If race equality is a core requirement, it must be reflected in the specification and conditions of the contract. It must be considered at each stage of the procurement process, and in your arrangements for monitoring and managing the contract.

Five questions

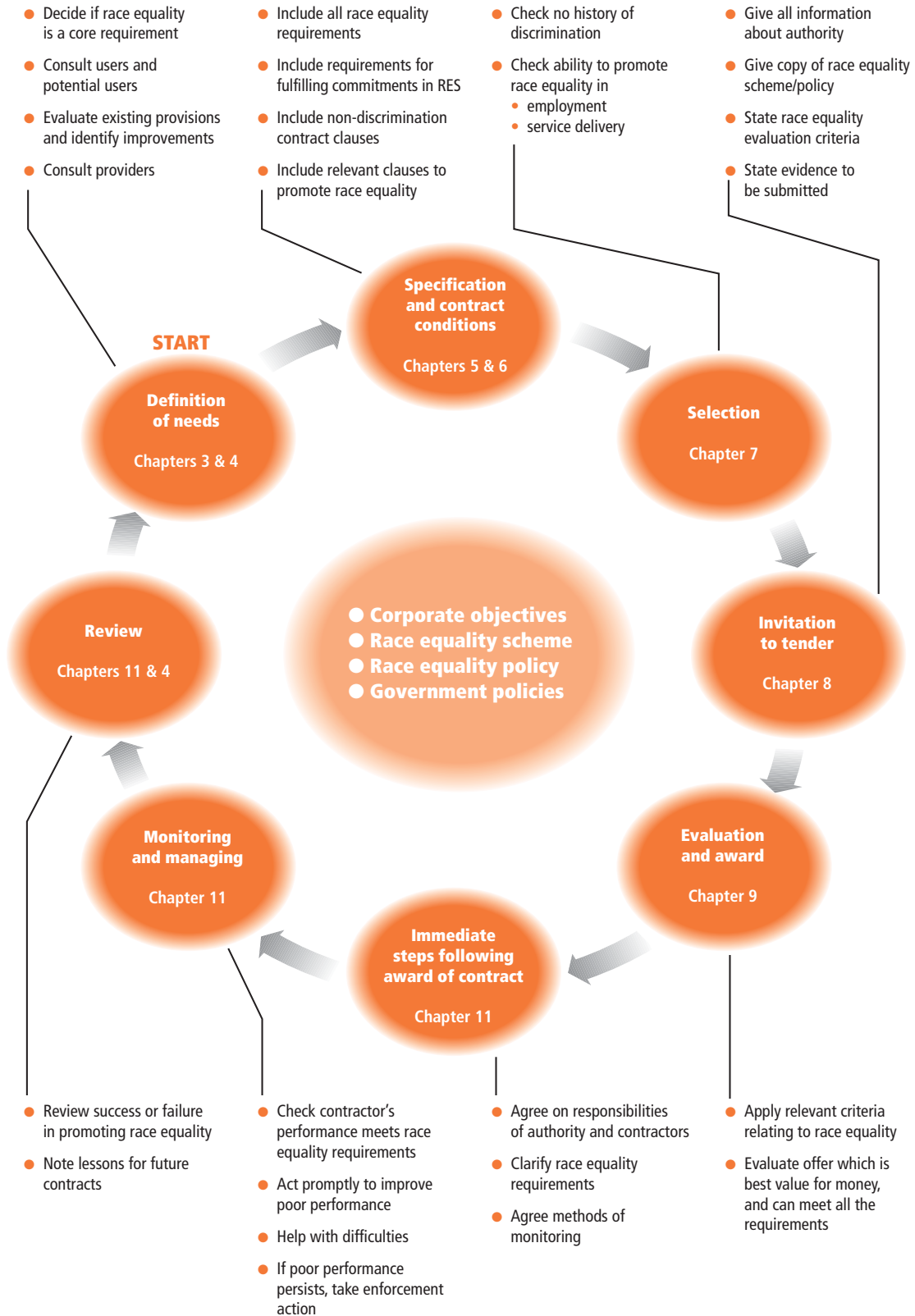
We suggest the following five questions to help you determine whether race equality is a core requirement in any contract for goods, works, or services.⁷

- 1. What is to be provided under the contract?**
- 2. Is the provision of the goods, works, or services in question one of the functions or policies we have assessed as being relevant to meeting the duty to promote race equality?**

7. In answering these questions, you may find it useful to refer to the CRE's *Code of Practice on the Duty to Promote Race Equality*, and accompanying guidance.

Figure 1

Race equality in the procurement cycle



- 3. Is the provision of the goods, works, or services in question likely to affect, directly or indirectly, our ability to meet the duty to promote race equality?**
- 4. If the answer to questions 2 or 3 is yes, is it necessary to include requirements for promoting race equality in the contract, to make sure we meet the duty?**
- 5. If the answer to question 4 is yes, what race equality requirements are appropriate for the contract?**

By applying tests of ‘necessary’ and ‘appropriate’, you should be able to define core race equality requirements that reflect the contract’s relevance to promoting race equality – in proportion to other essential elements of the contract.

While race equality is more likely to be relevant to contracts for services, you cannot assume that it will not be relevant to contracts for goods or works. It is important that you consider all aspects of a contract, to make sure you have not overlooked less obvious race equality implications.

Contracts for services

Under the RRA, you are expected to take all reasonable steps to make sure that an external provider of any service that has been assessed as relevant to your RRA duty meets the same race equality standards you would expect to meet if you were providing the service yourself. Of course, different services will be more, or less, relevant to your duty to promote race equality, and your answers to the five questions above will vary accordingly. We offer a rough guide below.

- Services, including enforcement and regulatory services, which are provided directly to members of the public or to a section of the public are likely to be highly relevant to your RRA duty. In these cases, race equality would be a core requirement. Examples of such services include health services, information or advice services, law enforcement, management of a prison or accommodation for asylum seekers, accommodation or catering for students, and administering driving tests or medical assessments.
- When the main purpose of a service is revenue collection, or the protection of property, but it also involves direct contact with the public, as in investigating benefit fraud, collecting taxes and duties or fines, or security services, race equality is likely to be a core requirement.

Example

A contract for the transport of prisoners to and from court specifically requires the contractor to provide training to all staff who will have contact with prisoners, and to take other reasonable measures to prevent racial discrimination or harassment.

Planning procurement projects

Race equality as a core requirement

- Race equality is also likely to be a core requirement when a service combines technical performance with direct provision to the public, as in transport or communication services.
- Services involving the repair, maintenance, or cleaning of premises, equipment, or plant that you own or control may appear to have little or no relevance to your duty to promote race equality. However, in some cases, there may be aspects of these services where race equality is relevant. For example, when the service requires awareness of different language, religious, or cultural factors. And, more generally, in terms of staff conduct towards staff of the authority and members of the public.

Example

Heriot-Watt University, in a contract for a corporate telephone calling card service, included in the specification a demographic breakdown of home countries of their diverse student population. Suppliers were asked to submit prices against this list. The pricing of calls to students' home countries was a significant factor in the university's decision to award the contract, since otherwise the number of student subscribers might have fallen short of the volume required from the business model on which the project had been based.

- Some services, such as legal services, personnel services, IT consultancies, and financial services, are provided on a corporate basis. How relevant each service is to promoting race equality will vary according to the specific service. For example, within personnel, recruitment services would be highly relevant to the duty, whereas the operation of the payroll system would not.
- Services, such as staff canteens, staff sports facilities, and staff training, which are provided for the benefit of your employees, will also normally be relevant to your duty to promote race equality.

Contracts for goods

To assess whether the promotion of race equality is a core requirement in a contract for goods, start by asking the five questions on pages 21 and 23. Your primary concern is likely to be that the goods are 'fit for purpose', and that they meet your quality standards. In certain contracts, to be fit for purpose, it will be a core requirement that the goods should be capable of meeting the needs of particular racial groups.

Example

A contract for the supply of uniforms for female staff required the contractor to provide versions suitable for women with different cultural dress codes, including hijab to be worn instead of the normal cap.

Example

An NHS Trust contract for the supply of prepared meals includes a requirement to supply meals that are suitable for Caribbean and Chinese diets, as well as meeting certain religious requirements - such as halal, kosher and beef-free meals.

Requirements concerning quality and, possibly, arrangements for delivery could also have implications for race equality.

To be fit for purpose, the goods must be lawful under the RRA, and must be compatible with your duty to eliminate discrimination and promote good race relations.

Example

A contract to produce and publish information leaflets and posters required the contractor to find out, by research, which languages – in addition to English (and, in Wales, Welsh) – the leaflets should be published in, and to consult different communities to avoid content (words or pictures) that could be offensive.

Contracts for works

In any contract for works, your core requirements are likely to be the completion of the works within specified timescales, at optimum quality standards. However, you should also ask yourself the five questions listed on pages 21 to 23, since the works may have implications for the duty to promote race equality.

In contracts for works, the conduct of a contractor's employees towards your staff and towards members of the public will be relevant to the duty.

Example

A further education college in a multiracial community was proposing to award a contract for major works to renew the electricity installations in their main buildings. The college recognised that the contractor's staff would be in direct daily contact with teaching, cleaning, catering, and security staff, and students and visitors, from different racial groups. The college required the contractor to take steps to train, manage, and supervise their staff to ensure they refrained from acts of discrimination to, or harassment of, any members of the college community.

When is race equality a core requirement in workforce matters?

For all contracts: basic technical capacity

You need to be confident that the supplier will provide a workforce that is capable of providing the goods, works, or services to the specified standards, including race equality standards. This means their workforce should have enough people with the necessary skills and abilities, and that they should be highly motivated, suitably trained, supervised, and managed for the purpose of performing the contract. In workforce matters, equality of opportunity, quality, and value for money are inextricably linked. This has nothing

to do with the ethnic profile of a supplier's workforce, but everything to do with the competence of the supplier as an employer, and how they treat their workforce. Trade unions may be able to help you identify equality and quality issues in particular contracts.

The issue of how a supplier treats their workforce arises where staff are transferred to the contractor under TUPE (Transfer of Undertakings (Protection of Employment) Regulations 1981). Transferred staff retain their terms and conditions of employment, including those that guarantee protection against discrimination, and provide for equality of opportunity. So, a core requirement in any contracts where staff will be transferred should be that the supplier offers transferred employees protection in terms of race equality that is at least equivalent to that which they currently have.

In contracts where race equality is a core requirement of the goods, works, and services

In such contracts, you need to ensure that the contractor can meet any particular requirements relating to race equality. Trade unions may assist you in defining the requirements in a workforce context.

For example, there may be a requirement for the provider's staff to know another language, or to be aware of the cultural or religious needs in a particular community, or of the needs of particular groups in relation to the services to be provided.

In contracts that are highly relevant to the duty to promote race equality

Where a contract is highly relevant to your RRA duty, which is likely to include most contracts for 'front line' services, you need to feel confident that the contractor's staff will provide the service in ways that are consistent with your duty. To do so effectively needs a workplace where there is a commitment to race equality. Therefore, you could require the contractor to promote equality of opportunity for their workforce engaged in the performance of the contract. For example, you could require them to follow the CRE's code of practice for employment, to the extent necessary for effective performance of the contract.

You should make sure that any requirements you include are proportionate and relevant to the contract and to your RRA duty.

Particular requirements when the contract is performed on your premises or alongside your staff

If a contract is to be carried out, at least partly, on your premises, or if the contractor's employees will be working alongside your employees there or elsewhere, you could require the contractor to comply with your employment policies and codes of practice, particularly those concerned with race equality and equal opportunities. The contractor could meet this requirement by showing that their policy and codes provide race equality protection equivalent to yours.

When is race equality an additional requirement?

In some cases where it is not a core requirement, you may find that promoting race equality will add value to a contract within the broader context of your policies on equal opportunities, social cohesion, community well-being, or economic development. For example, in a contract to build a new office building, there will be added value if the contractor undertakes to provide training for people from racial groups that are under-represented among people doing particular jobs.⁸

Summary

For each contract, or group of similar contracts, you need to determine the relevance of the contract to your duty to promote race equality.

If race equality is a core requirement of the contract, then at each stage in the procurement process, and in your monitoring arrangements, you must take race equality into account.

We suggest five questions, listed on pages 21 and 23, that should enable you to assess when race equality is a core requirement, and what you should include in the contract to comply with your RRA duty.

Examples of contracts for services, goods, and works illustrate where race equality is likely to be relevant. Certain types of contracts for services, involving direct contact with members of the public, are likely to be highly relevant to your RRA duty.

Race equality may also be a core requirement in relation to a contractor's workforce, especially when the contract involves services that are highly relevant to your RRA duty.

8. In certain contracts, such matters could be addressed as a condition of contract (see chapter 6), as an 'additional criterion' (see chapter 8), or could form the basis of a separate voluntary agreement with the contractor after the contract has been awarded (see chapter 11).

4

Planning procurement projects – a step by step approach

In this chapter, we explain how to take race equality into account in planning large or small procurement projects. We are assuming that you have already made the decision to purchase the goods, works, or services from an external supplier. However, you may find that some of the steps we recommend will also help you to make that decision.

How can we build our strategic objectives into the procurement process?

Your starting point should be to consider whether, and how, your authority's wider strategic objectives, including your race equality objectives, could be translated into the context of a particular contract. You should consider your race equality scheme or race equality policy, which sets out how, in carrying out your functions, you will promote race equality.

What steps should we take?

1. Define your needs

To achieve value for money, you should identify clearly what you want to 'buy'. This includes defining the purchase in terms of your duty to promote race equality. You will need to determine the extent to which race equality is a core requirement, following the guidance in the preceding chapter. You should refer to any parts of your race equality scheme or policy that relate to the subject of the proposed contract.

2. Review your current arrangements

Where the proposed contract will replace or follow existing arrangements for providing the same or similar goods, works, or services (either in-house or under contract), we suggest you review these arrangements for their contribution to race equality. Are there alternative ways to provide the goods, works, or services that could more positively promote race equality, having regard to the needs of service users and employees? You may find it useful to consider some or all of the following steps and questions, depending on the nature of the goods, works, or services.

- Analyse any ethnic monitoring data you have collected, to see if some racial groups are affected disproportionately, or are not being served as well as they should.

- Consult service users. Is the service meeting the needs of those who have used it? Can it be provided better? Where use is voluntary, why have some people chosen not to use the service?
- Consult the current service provider. Did they take any steps to promote race equality? Did they monitor outcomes (in terms of use, participation, or benefits) by racial group? If so, what did the monitoring show? What factors made a difference to the outcomes for each racial group? What problems or obstacles did they encounter?
- Consult the officers responsible for the current arrangements. Did they monitor them for their effects on race equality? What did the monitoring show? Based on their experience, how do they recommend you make sure any future arrangements take full account of race equality?
- Consult trade unions and employees. Do the arrangements raise issues of race equality in employment? How would they suggest dealing with these in the future?

3. Check you have all the necessary information

- Are there changes in the relevant population that need to be taken into account? For example, do the 2001 census data, or your records, show significant changes in the diversity of the population you serve? Are there significant trends for particular racial groups?
- Are there legal or policy changes in the areas of public authority procurement or race equality that need to be taken into account?

4. Consult on possible future arrangements (depending on the nature and scale of the proposed contract)

At this developmental stage, when you are looking for the best solutions, you should make the most of all available sources of information, including the following.

- **People who will ultimately use the service.** Where the proposed contract involves direct provision of services to the public, or a section of the public, consulting representatives of different communities may help you to assess whether your proposed arrangements would have an adverse impact on particular racial groups.
- **External suppliers.** You may find it helpful to explore with external suppliers how your objectives, including your race equality objectives, could be realised.

Drawing on the knowledge and experience of different suppliers may suggest a wider range of options for promoting race equality within the context of the contract, as well as any accompanying risks. Any consultation should be within the context of EC rules, and you must ensure that such discussions do not offer any advantage to any external supplier, and are not seen to do so, for example by basing the specification directly on one supplier's model.

Planning procurement projects

What steps should we take?

Early discussions with suppliers will be particularly useful if:

- you are considering a major, long-term, strategic contract involving a partnership approach; or
- the suppliers have knowledge and experience of the communities you serve, and can help you to develop and plan suitable services.

Example

A government department decided to contract out its information services. The services included leaflets and a telephone information service, and they hoped to establish an interactive website to respond to public inquiries. The department decided that the best way of making sure the contract specifications covered the different needs of all possible users of the service was to discuss its proposal with other agencies providing information services to the public. They consulted a number of voluntary sector organisations, including organisations that provide advice and information to people who have difficulty understanding English.

Example

A fire authority is seeking to contract for the provision of smoke hoods. It is in discussions with several potential suppliers regarding the design of safe and effective smoke hoods that can be worn by male Sikh firefighters, most of whom have beards that make an airtight neck fastening more difficult.

- **Trade unions.** If you are considering a new approach to service provision, the experience of relevant trade unions may help you to identify any workforce implications, as well as any risks or benefits to race equality in different options. Further, you are more likely to retain employees' confidence and morale in situations of potential change, if you tell them what you are proposing and ask for their views. If employees are likely to be transferred to a new employer, you will need to involve them and their trade unions from an early date.

5. Consider various options

Your review of current arrangements, and any internal and external discussions, should generate various options, and a basis for selecting the one most likely to offer best overall value for money while meeting your duty to promote race equality.

- Should the project be packaged differently from existing arrangements? Does the length of the contract matter?
- Should the specification be wider or narrower?
- How should the race equality responsibilities of the contractor be defined? Will it be sufficient to specify race equality outcomes?

- How should the responsibilities for race equality be divided between the authority and the external providers? Which responsibilities should remain with the authority? What sorts of risks are best transferred to the external supplier?
- Will you meet your race equality objectives more effectively by seeking to attract a wider range of suppliers? Does the project involve distinct services for a particular ethnic minority community, which might be more effectively and efficiently provided by organisations already working with that community?

Summary

To meet your race equality duty, you need to clarify how your race equality objectives can be met, and to define what you want to 'buy' in terms of your duty to promote race equality.

You will want to review how well your existing arrangements for providing the goods, works, or services contribute to race equality. This should involve consulting externally and internally.

You should ensure you have relevant information, including the characteristics of your potential service users.

In developing your race equality proposals, you should make use of experience and knowledge within the authority, different local communities, external suppliers, and trade unions.

You will then be prepared to consider options in relation to content, packaging, and tendering that will best meet your race equality requirements.

5

Race equality requirements in contract specifications

Once you have decided if race equality is a core requirement, and determined what form the contract will take, you can use the contract specification to set out explicitly what you require the contractor to do. You could also consider other equality issues at this stage, including those concerning sex, disability, religion or belief, sexual orientation, and age.

The more carefully you formulate equality requirements in the contract specification, the more likely it is that the contractor will meet your expectations. Conversely, if the specification is not clear, the contractor's performance on race equality could be so inadequate that you are not able to comply with your duty under the RRA. You should be able to verify, monitor, and evaluate whatever you specify. This means the requirements on promoting race equality, like the rest of the specification, should be objective, and stated in terms that are clear, explicit, and not easily misinterpreted.

Example

A government department recently awarded a contract to a voluntary organisation to provide English language classes to asylum seekers accommodated in new centres while their applications were being decided. In drafting the contract, the authority considered the different outcomes it might specify and how each might affect how the contractor would provide the service. The outcomes it considered were:

- number of classes provided;
- number of people attending the classes;
- time of day, length, and location of the classes; and
- pass rates of any examination.

How should we specify our race equality requirements?

As far as possible, we recommend that you specify requirements relating to race equality as a set of outcomes or performance targets, preferably expressed in easily measurable terms – that is, numbers or percentages. However, there may be other, qualitative outcomes that you could reasonably expect the contractor to achieve. For example, you could require a service to be tailored to the needs of distinct groups, such as language or cultural needs, or to needs arising as a result of social isolation. You can ask contractors to set out their own ways of meeting the specified outcomes or performance targets.

Example

The Scottish Parliament is developing an 'Equalities in Procurement' checklist to help purchasers build equal opportunities considerations into the specification and procurement schedules for every contract to be let. This checklist asks a series of questions about the nature of the particular contract to be let. The answers to these questions then direct purchasers to a 'cut and paste board', which contains a range of standard sections of text that are to be incorporated into the contract specification, or adapted to suit the individual contract. Potential suppliers must then demonstrate how they will comply with these requirements, and their responses are assessed as an integral part of the evaluation process.

Part of the checklist and 'cut and paste' board is shown below.

For this contract, are the contractors (or potential contractors) likely to be:	If yes, incorporate the following into the SPECIFICATION.
Producing any information in written form (for example, signage, written correspondence, internet pages, etc)	I
Responsible for setting up new 'systems' or 'services' for the Parliament	J
Supplying uniforms for their own staff, or SPCB staff, to wear?	K

I	The Contractor must ensure that all written information produced or used in connection with this Contract is as accessible as possible to people with disabilities and to people whose level of literacy in English is limited.
J	In carrying out work under this Contract, the Contractor should take all opportunities to make recommendations that would enable the SPCB to prevent discrimination more effectively or to promote wider access to the Scottish Parliament's services or premises.
K	All uniforms supplied by the Contractor in connection with this Contract must be culturally sensitive (for example, they must permit the wearing of headscarves, turbans, etc).

Contract specifications

Specifying race equality requirements

Example

A government department monitors enquiries and applications for non-contributory benefits and, referring to the 2001 census, is aware that certain racial groups are significantly under-represented among claimants. A contract for processing benefit claims is now proposed. One provision in the specification requires the contractor to achieve quarterly improvements in applications from the most significantly under-represented racial groups, working to a three-year target that applications for each racial group should be proportional to their representation in the relevant age and occupational groups in the population.

To achieve certain race equality objectives, you may need to specify the processes you consider necessary. These could include:

- consultation with potential service users;
- monitoring the change in use of the service, by the ethnicity of service users; and
- training staff to be aware of the religious or cultural traditions of service users;

You could still express these as 'outputs' – for example, that consultation or training is carried out – but without prescribing the content or process.

Example

A contract to carry out medical assessments for people claiming or receiving certain disability benefits includes a requirement that the contractor will train their staff to be aware of the cultural and religious norms and sensibilities of the people whom they may be asked to assess.

If you specify the achievement of certain performance targets, you may want to make explicit how you expect the contractor to monitor their performance against these targets. So, for example, you may consider specifying:

- ethnic monitoring of people who use the service;
- surveys of potential users who do not use the service;
- consultations with users of the service;
- consultations with the community at large; and
- consultation with the contractor's staff.

The contract could provide for the contractor to make adjustments in the light of the results of monitoring.

You should also specify that the contractor should have procedures for dealing promptly and sensitively with complaints about discrimination, and should adjust the service if complaints highlight significant deficiencies.

Example

The specification for managing a prison requires the contractor to:

- establish systems for receiving, recording, and investigating all complaints of racial discrimination and racial harassment by inmates, staff, and visitors;
- train staff to investigate such complaints;
- monitor the way such complaints are handled; and
- record the actions taken in response to all complaints that are upheld.

Should we include arrangements comparable to those in our race equality scheme or policy?

Many contracts will require the contractor to carry out a function that you have assessed as relevant to meeting your race equality duty. Your race equality scheme should include your arrangements for this function. You could require the contractor to fulfil the relevant commitments in your scheme, for example to:

- monitor all aspects of the contract for any adverse impact on the promotion of race equality;
- publish the results of such monitoring; and
- make sure people have access to information about the service provided under the contract, and to the service itself.

Similarly, if your authority is the governing body of a further or higher education institution or a school, and you have prepared a race equality policy, for contracts where race equality is a core requirement, you could require the contractor to carry out impact assessments and monitoring, as appropriate, to meet your statutory race equality duties.

Can we require the contractor to respond to change?

Yes. If the contract runs for a number of years, as would be the case for services under a PFI scheme, the contract should reflect the need to adjust to change. You could, say, require the contractor to adapt the services to meet demographic or environmental changes that have race equality implications. For example, in an NHS trust PFI project, the contractor should be expected to adjust services to meet the needs of a changing population. So, if asylum seekers are dispersed to the area served by the trust, the contractor could be expected to provide appropriate translation or interpreters' services, and to cater for other special needs, such as religious or dietary needs. Of course, major changes in service provision would need agreement from you.

In the case of PFI and other contracts extending over several years, you may want to consider specifying yearly improvements in race equality outcomes, with periodic reviews.

Can we include a requirement to take positive action?

Yes. If you know that some of the communities you serve are particularly disadvantaged because of their ethnic background, that they have distinct service needs, or that they are under-represented among users of your services, you can write certain positive action steps (see the glossary) into the contract specification. These could include providing services to meet special educational, training, or welfare needs of particular racial groups.

Example

A Scottish health board was proposing to tender for community health services, including ante-natal classes and classes on infant health and nutrition. The board is aware of high rates of infant and child ill health within the local Gypsy / Traveller community, as well as very low levels of participation in community health initiatives, including ante-natal classes. The contract specifies reduced rates of ill health among Gypsy / Traveller children as an outcome. To achieve this, the contract requires the provider to do positive outreach work, and to consult Gypsy / Traveller families, with the expectation that this will indicate how the community health services could do more to meet the health needs of Gypsy / Traveller children and families.

Should we include race equality workforce requirements in the specification?

In a contract for works or services, to secure effective, efficient performance of the contract, the specification should state that the contractor will be expected, throughout the period of the contract, to employ enough highly motivated and suitably qualified and trained staff, and properly supervise and manage them⁹ to meet all the requirements and standards of the contract, including those concerning race equality.

When a contract is relevant to your duty to promote race equality, you may want to specify in greater detail how you expect the contractor to meet the race equality requirements. For example, you could specify:

- racism awareness or race equality training requirements for all managers or staff working at different levels;
- language skills – for example, for contracts involving services to the public in Wales, sufficient staff with relevant fluency / literacy in Welsh; and for contracts involving services to the public, including people who have difficulty understanding English, sufficient staff with relevant fluency / literacy in the relevant languages); or

9. You will need to consider at which stage you will assess suppliers' ability to meet these requirements, since for some contracts you may decide that these would be more usefully considered at the selection stage as matters of 'technical capacity' (see chapter 7).

- recruitment of staff from particular racial groups to perform parts of the service, where belonging to that racial group is likely to be a genuine determining requirement of the job which can be justified under the RRA (for example, counselling for unaccompanied children asylum seekers from Somalia, or advising Afghan women who have been victims of trafficking).

You may also wish to include clauses within the conditions of contract, setting appropriate race equality standards for the contractor's employment practice (see chapter 6).

There may be contracts where it will be appropriate for you to specify measures to meet the special needs of the staff who will transfer to the contractor, to aid their efficiency and improve morale and productivity in carrying out the contract.

Example

The University of Westminster tendered a contract for the cleaning of its halls of residence. Tenderers were informed that the existing cleaning staff, many of whom are Hispanic / Latin American, would transfer under TUPE. Tenderers were expected to set out their training arrangements for staff. One of the factors which the university considered in awarding the contract was the successful tenderer's plans to produce training materials in Spanish as well as English.

Summary

You should define your race equality requirements clearly and objectively.

Wherever possible, the specification should be framed as measurable outcomes, allowing the contractor to develop methods for achieving these.

It may be appropriate to specify 'outputs' (for example, consultation or training) that are consistent with arrangements in your race equality scheme, to ensure the contractor achieves the desired outcomes.

In contracts that last a number of years, you may want to require the contractor to achieve year-on-year improvements in race equality performance.

In relation to certain services, it may be appropriate to include positive action measures to meet special needs of particular racial groups.

Specifications may include requirements to ensure the contractor's workforce is able to carry out the race equality service requirements you are specifying.

6

Contract conditions

This chapter gives examples of model contract clauses relating to a contractor's race equality obligations. Many public authorities have already developed contract clauses along these lines, with some variations, reflecting their policies and experience, and the circumstances of particular contracts.

We suggest that those clauses or sub-clauses marked with a star (★) will be suitable for all contracts. For some small-scale, low-value contracts, for example those for routine purchase of goods or for regular repair and maintenance, it would be reasonable to consider fewer and simpler clauses.

The sub-clauses in Clause 1 marked with a star (★) include those that require contractors to avoid unlawful discrimination, and to impose similar obligations on their subcontractors. This gives added force to the non-discrimination provisions of the RRA by making them an enforceable condition of contract.

We recommend that other sub-clauses of clause 1, which call on the contractor to take measures to ensure the promotion of race equality in its employment practice, should be considered whenever the subject matter of the contract is highly relevant to compliance with your RRA duty (see chapter 3). Under EC rules, which do not regulate how a contract is performed, you are able to include contractual clauses requiring the contractor to implement measures to promote equality of opportunity;¹⁰ therefore, in contracts for services or works, you could include clauses requiring the contractor to implement measures to promote race equality in the employment of staff engaged in the performance of the contract. Contract clauses should not form any part of selection or award decisions.

In all contracts you must ensure that the conditions of contract are non-discriminatory, that is that they are not more difficult for suppliers from different EU countries to meet. For example, any requirement to carry out ethnic monitoring should apply to employees performing the contract in the UK, but not to other employees, as this could conflict with national laws in other member states.

We have not included model contract clauses relating to contract performance or to enforcement mechanisms for poor or inadequate performance or failure to comply with contract conditions, as we would expect such clauses in every contract. However, it will be necessary to make sure that clauses requiring performance of the contract in accordance with specified service levels refer to any race equality performance indicators or outcomes in the contract specification, as appropriate. Any default

10. Section 1.6, *Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement*, COM(2001)566 final, 15.10.2001.

mechanism for failure to achieve service levels should apply to race equality service levels, as should any bonuses that are payable when service levels are exceeded.

The model clauses produced below focus only on race equality and racial discrimination, giving effect to your obligations under the RRA. However, in most contracts it will be appropriate to include clauses that cover other equality issues. For example, clauses similar to 1.1.1 (see below) could be used to prohibit unlawful discrimination on grounds of sex and disability. As legislation prohibiting discrimination in employment on grounds of sexual orientation and religion or belief should be in force before the end of 2003, you may want to consider including contract conditions to prohibit discrimination on those grounds too.

Model contract clauses

1. Racial discrimination and the promotion of race equality¹¹

1.1 The Contractor:

★1.1.1 shall not:

- (a) discriminate directly or indirectly, or by way of victimisation or harassment, against any person on grounds of colour, race, nationality, or ethnic or national origins contrary to Part II (Discrimination in the Field of Employment) of the Race Relations Act 1976, as amended (the Act)¹²; and/or
- (b) discriminate directly or indirectly or by way of victimisation or harassment against any person on grounds of colour, race, nationality, or ethnic or national origins contrary to Part III of the Act (Discrimination in Other Fields); and/or
- (c) contravene Part IV of the Act (Other Unlawful Acts);

where appropriate.¹³

1.1.2 shall, for purposes of ensuring compliance with sub-clauses 1.1.1 (a) and (c) above, in relation to Contractor Staff¹⁴ employed in the

11. The relevance and application of this clause will vary according to the nature of the agreement and the relationship between the parties, and should be amended as appropriate.

12. This includes a requirement to comply with section 7 of the Act where this is relevant to the contractor's dealings with sub-contractors.

13. The contractor has a statutory duty to meet these provisions. Most agreements would also include at the end of the agreement a standard clause requiring all parties to observe all statutes and laws in force.

14. 'Contractor Staff' should be defined as all persons employed by the contractor to perform the agreement.

performance of the Agreement,¹⁵ observe as far as possible the provisions of the Commission for Racial Equality's Code of Practice in Employment, as approved by parliament in 1983, [a copy of which is annexed at Schedule []], including, but not limited to, those provisions recommending the adoption, implementation, and monitoring of an equal opportunities policy.

1.1.3 shall in performing the contract comply with the provisions of section 71(1) of the Act as if the Contractor were a body within the meaning of Schedule 1A to the Act (or any European equivalent which shall be deemed to include without limitation an obligation to have due regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups).¹⁶

★1.2 Where in connection with this Agreement the Contractor, its agents or subcontractors, or the Contractor Staff are required to carry out work on the Authority's premises¹⁷ or alongside the Authority's employees on any other premises, the Contractor shall comply with the Authority's own employment policy and codes of practice relating to racial discrimination and equal opportunities, copies of which are annexed at Schedule [].¹⁸

1.3 The Contractor shall:

1.3.1 monitor the representation among Contractor Staff of persons of different racial groups (which shall mean groups of persons classified as 'ethnic groups' in the most recent official census by the Office of National Statistics or successor body), having regard to the Authority's procedures for monitoring representation among its own employees.

15. As a minimum, it is recommended that this sub-clause should apply to all Contractor Staff. As the CRE's code of practice provides guidance on compliance with the Act in the field of employment, contractors should be encouraged to apply this sub-clause and appropriate race equality policies consistently to the whole of their workforce. It should be recognised, however, that where a contractor employs staff in another member state, compliance with this sub-clause must be in the context of any relevant laws of that state.

16. It is anticipated that this sub-clause will be relevant in an agreement for the provision of services that comprise a function of the authority which the authority has assessed as highly relevant to its compliance with the provisions of section 71(1) of the Act. For example, an agreement to manage a detention centre or a hospital.

17. 'the Authority's premises' should be defined as any premises and land occupied by the Authority for the purposes of carrying out its functions.

18. This clause, which would not normally be suitable in agreements for goods, could be met by the Contractor demonstrating that its employment policy and codes of practice provide race equality protection equivalent to or greater than do those of the Authority. In such circumstances, the Contractor's policies and codes of practice could be annexed to the contract in place of the Authority's.

- 1.3.2 where it appears to the Contractor in relation to particular work of the Contractor Staff, either that the Contractor Staff includes no members of a particular racial group doing that work or that members of that racial group are under-represented among Contractor Staff doing that work compared to their representation in the Contractor Staff as a whole or in the population from which Contractor Staff are normally recruited, undertake the following actions as may be appropriate and reasonably practicable:
- (a) the placing and use of job advertisements to reach members of such racial groups and to encourage their applications;
 - (b) the use of employment agencies and careers offices in areas where members of such racial groups live and work;
 - (c) the promotion of recruitment and training schemes for school-leavers and/or unemployed persons intended to reach members of such racial groups; and
 - (d) the provision of appropriate training and the encouragement of members of Contractor Staff from such racial groups to apply for promotion or transfer to do work in which such racial groups are under-represented.
- 1.4 The Contractor shall [12] months from the date of this Agreement and [annually] thereafter submit a report statement to the Authority demonstrating its compliance with Clauses 1.1, 1.2 and 1.3.
- 1.5 In addition to the report statement referred to in Clause 1.4, the Contractor shall provide such additional information as the Authority may reasonably require for the purpose of assessing the Contractor's compliance with Clauses 1.1, 1.2 and 1.3.
- ★1.6 Where the Contractor commits a breach of Clauses 1.1, 1.2 or 1.3 which amounts to a failure to meet the Service Levels, the provisions of Clause []¹⁹ shall apply.
- ★1.7 The Contractor shall notify the [Authorised Officer] forthwith in writing as soon as it becomes aware of any investigation of or proceedings brought against the Contractor under the Act.
- ★1.8 Where any investigation is undertaken by a person or body empowered to conduct such investigation and/or proceedings are instituted in connection with any matter relating to the Contractor's performance of this Agreement being in contravention of the Act, the Contractor shall, free of charge:
- 1.8.1 provide any information requested in the timescale allotted;

19. This sub-clause, which would not normally apply to contracts for goods, should refer to the relevant clause providing default mechanisms for failure to perform the contract in accordance with specified service levels.

- 1.8.2 attend any meetings as required and permit Contractor Staff to attend;
 - 1.8.3 promptly allow access to and investigation of any documents or data deemed to be relevant;
 - 1.8.4 allow itself and any Contractor Staff to appear as witness in any ensuing proceedings; and
 - 1.8.5 cooperate fully and promptly in every way required by the person or body conducting such investigation during the course of that investigation.
- ★1.9 Where any investigation is conducted or proceedings are brought under the Act which arise directly or indirectly out of any act or omission of the Contractor, its agents or subcontractors, or the Contractor Staff, and where there is a finding against the Contractor in such investigation or proceedings, the Contractor shall indemnify the Authority with respect to all costs, charges and expenses (including legal and administrative expenses) arising out of or in connection with any such investigation or proceedings and such other financial redress to cover any payment the Authority may have been ordered or required to pay to a third party.
- ★1.10 In the event that the Contractor enters into any Subcontract in connection with this Agreement, it shall impose obligations on its Subcontractors in terms substantially similar to those imposed on it pursuant to this Clause 1.

Summary

Standard clauses for all public authority contracts should require the contractor:

- **not to discriminate unlawfully;**
- **to cooperate with any investigation or proceedings concerning alleged contravention of the RRA in performing the contract;**
- **to indemnify the council or authority in the case of any finding under the RRA arising out of the contractor's acts or omissions; and**
- **to impose the same obligations on any subcontractor.**

Where the contractor's staff work on your premises or alongside your employees, they should comply with your employment and race equality policies.

Other contract clauses, requiring further race equality workforce measures, may be appropriate when the content of the contract is highly relevant to your RRA duty.

Clauses should also provide for enforcement measures for failure to meet race equality requirements, and for bonuses where specified outcomes are exceeded.

7

Selecting tenderers

This chapter will be particularly useful to officers involved in selecting external suppliers to tender for contracts. It applies to drawing up both 'select lists' - for major individual contracts, including most that are subject to EC directives - and 'approved lists'²⁰ (see the glossary), and to selecting tenderers for 'framework agreements' (see the glossary). The emphasis in this guidance is on race equality in procurement and you should therefore use it alongside other guidance on compliance with EC rules and other procurement issues.

The guidance in this chapter refers primarily to contracts that are subject to the EC directives. When a contract is not subject to the full regime of the directives, you will have greater flexibility in advertising and in the enquiries you make to select suitable suppliers, although you must still act within basic EC principles, as well as government policies and other legal requirements.

Should we include race equality requirements when we advertise?

Yes. Your notice in the *Official Journal of the European Union* (OJEU), and your notices in local or national newspapers or specialist journals, must give basic information about the nature of the contract. If the contract relates directly to race equality matters, you should say so in the advertisement, and also indicate the kind of evidence you will be looking for.

Example – Extract from OJEU notice

Description / object of the contract

Development, implementation, and evaluation of a national advertising campaign publicising new sanctions that can be imposed on parents who fail to secure their child's attendance at school.

Technical capacity – means of proof required

Experience of providing information effectively in forms and through media that are suitable for a culturally and linguistically diverse population. Please provide copies of audio, visual and/or printed materials used in similar projects, and evidence which demonstrates the effectiveness of your project(s) in reaching culturally or linguistically diverse communities.

20. Where selection is for an approved list, you should treat references to 'the contract' in this chapter as referring to the particular type of contract for which a list of suitable suppliers is being drawn up.

What can we ask suppliers about race equality?

The EC directives specify the matters you can consider at this stage. Suppliers can be disqualified for specified reasons, one of which is grave misconduct in the conduct of their business. Breach of the RRA, or equivalent laws in other EU member states, could amount to such misconduct. Otherwise, you should assess the suitability of suppliers on the basis of their economic and financial standing, and their technical capacity to carry out the contract in question. For this purpose, technical capacity can encompass capacity to meet race relations legislation and any race equality requirements for performance of the contract.

You may already have a standard pre-qualification questionnaire, which was developed before you were subject to the duty to promote race equality. In the light of your race equality obligations, you may want to review the questions you ask. The purpose of your pre-qualification questionnaire is to provide you with all the information you need to select a sufficient number of suppliers who are suitable to tender for your contract. Therefore, like health and safety, you will want to ask some questions about the supplier's track record in relation to race equality.

What can we ask about race equality in the workforce?

There has always been scope for public authorities to consider race equality at this stage, subject to limits imposed by EC rules.

In order to meet your RRA duty requirements, you will want to know that suppliers do not have a history of discrimination. You will also want to know that they have good enough race equality policies and practices for the contract in question.

You should consider what you need to know about potential tenderers for the particular contract. On page 45, we list some model questions, and suggest that, as a minimum, all the questions marked with a star (★) – or similar questions – should be included in every pre-qualification questionnaire. Where race equality is a core requirement, or you consider it appropriate for the contract in question, we recommend that you include all or some of the questions in 4(b), or similar ones. You should ask for the information you require in order properly to assess whether, in terms of race equality in employment, a supplier has the technical capacity you consider necessary to perform the particular contract. In some cases it may be appropriate to develop other questions on race equality in employment.

Before asking these questions, you need to establish what standards you will apply to evaluating answers. The standards must be objective, but you may wish to allow suppliers to demonstrate their capacity in a variety of ways.

Model questionnaire

The ... (*name of authority*) wishes to select firms to tender for a contract for ... (*brief description*). The ... (*name of authority*) is required, under section 71(1) of the Race Relations Act 1976, as amended, to carry out its functions with due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups. In compliance with section 71(1), the ... (*name of authority*) seeks to ensure that external contractors from whom it purchases goods, works or services do not discriminate unlawfully, and can demonstrate that in terms of their employment policies and practice in relation to race equality they have the technical capacity to perform this contract.

The following questions are intended to give the ... (*name of authority*) information to evaluate your firm on its compliance with the non-discrimination provisions of the Race Relations Act, or equivalent legislation in another jurisdiction.

Please make sure you answer every question. Failure to provide the information requested may result in your firm being rejected. Please provide sufficient information to enable the ... (*name of authority*) to make a fair and accurate assessment of how you have dealt with race equality issues in employment.

(Note: Questions 1, 2, and 3 are designed to obtain necessary background information.)

- ★1. What is the size of your firm? Please state total number of:
 - a) partners; and
 - b) employees (including all full-time and part-time employees, apprentices, and other trainees).
- ★2. Of the total number of employees in 1(b), how many are managers?
- ★3. Is your firm part of a commercial group or a consortium? If it is, which of your employment policies are determined by you, and which ones apply to all firms within the group or consortium?
- 4 ★(a) Is it your policy as an employer to comply with your statutory obligations under the Race Relations Act 1976, which applies in Great Britain, or equivalent legislation that applies in the countries in which your firm employs staff? Accordingly, is it your practice not to discriminate directly or indirectly on grounds of colour, race, nationality, or ethnic or national origins in relation to decisions to recruit, select, remunerate, train, transfer, and promote employees?

- (b) Do you:
- i Observe, as far as possible, the CRE's code of practice for employment, as approved by Parliament in 1983, or comparable guidance 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 steps that can be taken to encourage people from ethnic minorities to apply for jobs or take up training opportunities?
 - ii Issue instructions on race equality to those concerned with recruitment, selection, remuneration, training, and promotion?
 - iii Communicate your policy on race equality to employees, recognised trade unions, or other representative groups of employees?
 - iv Advertise your commitment to race equality in recruitment advertisements or other literature?
 - v Train staff with managerial responsibilities on equal opportunities?
 - vi Have procedures in place to protect your employees from racial discrimination (including racial harassment).

Please supply evidence to support your answers to questions 4(a) and (b). Such evidence may be examples or copies of documents, such as your race equality or equal opportunities in employment policy, documents containing instructions to staff, or outlining arrangements for advertisements, recruitment, selection, access to training, opportunities for promotion, copies of recruitment advertisements, extracts from staff handbooks, copies of grievance and disciplinary procedures, or other materials that will enable the ... (*name of authority*) to make a fair and accurate assessment of your firm's capacity to perform the contract.

- ★5. In the last three years, has any finding of unlawful racial discrimination in the employment field been made against your organisation by any court or tribunal, or in comparable proceedings in any other jurisdiction?
- ★6. In the last three years, has your organisation 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?
- ★7. If the answer to question 5 is yes or, in relation to question 6, the CRE or comparable body made a finding adverse to your organisation, what steps have you taken as a result of that finding?

The ... (*name of authority*) is also concerned that external suppliers from whom it purchases goods, works, or services do not discriminate unlawfully on grounds of sex or disability, and therefore requests you to answer the following questions.

- ★8. Is it your policy as an employer to comply with your 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 Great Britain – or equivalent legislation in the countries in which you employ staff?
- ★9. In the last three years, has any finding of unlawful sex or disability discrimination in the employment field been made against your organisation by any court or tribunal, or in comparable proceedings in any other jurisdiction?
- ★10. If the answer to question 9 is yes, what steps have you taken as a result of that finding?
- ★11. If you are not currently subject to UK legislation, please supply details of your experience in complying with equivalent legislation that is designed to eliminate discrimination (especially racial discrimination) and to promote equality of opportunity.

Example

Constructionline, a pre-qualification register for construction-related firms in the UK, has been working with the CRE to include the new guidelines in their processes. It now includes the questions marked ★ in the compulsory section A of its pre-qualification questionnaire. More detailed questions, similar to question 4(b) in this model, are included in section B. Constructionline encourages its registered firms to complete section B questions. The information supplied is then scanned so that public authority clients can view it free of charge.

How should we evaluate the answers to questions on race equality in the workforce?

What you should look for is evidence that suppliers have taken steps to achieve race equality in their employment practice to an acceptable standard for the contract in question.

For this purpose, the bottom line for all contracts must be that a supplier does not discriminate unlawfully. The answers to the questions marked with a star (★) should enable you to determine whether this is the case, or whether they should be disqualified, and you may decide that failure to answer these questions is grounds for rejection.

You should not regard a finding of discrimination as decisive grounds for disqualification, if the supplier provides good evidence that they have taken appropriate steps since then.

Question 7 asks them to provide this evidence. In evaluating responses to question 7, you should look for evidence of improvements that satisfies you that they have remedied their previous discriminatory practice.

You must also ensure that the supplier has the technical capacity, in terms of race equality, in their employment policies and practice which you consider necessary to perform the particular contract. You will need to examine the replies and evidence provided in response to questions 4(a) and (b), to assess whether suppliers have this capacity.

In establishing assessment criteria for particular contracts, one approach is to assess the degree of 'risk' for your authority, that is the relevance of the contract to meeting your duty under the RRA, taking into account the degree to which the contract involves direct provision of services and the degree to which the contractor will have direct contact with members of the public or your staff. The greater the risk, the greater the need for more explicit race equality employment policies, and better evidence of implementation.

In assessing technical capacity, it will also be appropriate to take the size of the private or voluntary organisation into account. It is consistent with the CRE's code of practice for employment to expect larger firms, with greater financial and administrative resources, to have more explicit formal race equality policies and procedures.

What can we ask about race equality in providing services?

If the proposed contract involves provision of a service, and race equality is a core requirement, it is appropriate to use your pre-qualification questionnaire to assess suppliers' capacity to meet relevant race equality service delivery criteria.

At this stage, you are looking for a sufficient number of suppliers with an acceptable race equality 'track record' in service delivery, relevant to the service that will be provided under the proposed contract. Where suppliers have no directly relevant previous experience, which may often be the case, you can look for firms that can provide evidence of their capacity to meet the required race equality standard. You will need to develop some further questions (see model questions below), and an objective framework to assess the replies.

Model pre-qualification questions for contracts for services in which race equality is a core requirement²¹

1. Is it your policy to comply with your statutory obligations under part III of the Race Relations Act 1976 (which applies in Great Britain), or equivalent legislation that applies in any other jurisdiction in which your firm operates. Accordingly, is it your practice not to discriminate directly or indirectly on grounds of colour, race, nationality, or ethnic or national origins in the provision of goods, facilities, or services to the public or carrying out other functions of a public nature²² ('provision of services')?
2. In the last three years, has any finding of unlawful racial discrimination in relation to non-employment matters been made against your organisation by any UK court, or in comparable proceedings in any other jurisdiction?
3. In the last three years, has any contract with your organisation been terminated on grounds of your failure to comply with:
 - a) legislation prohibiting discrimination; or
 - b) contract conditions relating to equal opportunities in the provision of services?
4. If the answer to questions 2 or 3 is yes, what steps have you taken as a result of that finding or termination of contract?
5. Do you have a written policy on equal opportunities or race equality in relation to the provision of services?
- 6a Is the policy referred to in question 5 set out in:
 - a) instructions to managers;
 - b) instructions to staff;
 - c) a staff conduct or disciplinary code; and
 - d) leaflets or other literature available to the public?
- 6b If you do not have a written policy, how otherwise can you demonstrate that you promote race equality in providing services?
7. In any previous or current contracts for ... (*specify general type of goods / services in proposed contract, for example, catering*), or any similar activity, did you:
 - a) take any steps to guarantee equality of opportunity in access to these services by different racial or other groups; or
 - b) provide goods or services appropriate to the special needs of any particular group?

21. In practice, you could combine the employment questions and the service questions in a single questionnaire, provided you make it clear to suppliers that you are looking for evidence in relation to two different aspects of their race equality practice.

22. 'functions of a public nature' in section 19B of the RRA refers to certain functions other than education, housing or provision of goods facilities or services carried out on behalf of a public authority by another body; section 19B makes it unlawful to discriminate in carrying out functions of a public nature.

Selecting tenderers

Assessing suppliers' capacity

As in the case of workforce matters, you should give suppliers an explanation of the information you are asking them to provide, and the criteria against which their replies will be assessed.

Example

The ... (*name of authority*) wishes to select firms to tender for a contract for (*brief description*). The ... (*name of authority*) is required, under section 71(1) of the Race Relations Act 1976, as amended, to carry out its functions with due regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. In compliance with section 71(1), the ... (*name of authority*) seeks to ensure that services which are carried out on its behalf by external contractors are carried out with the same regard for the promotion of race equality.

On the basis of your answers to questions 1 to 4, your firm will be evaluated on its compliance with the non-discrimination provisions of the Race Relations Act or equivalent legislation in another jurisdiction. Please make sure you answer every question. Failure to provide the information requested may result in your firm being rejected. Please provide sufficient information to enable the ... (*name of authority*) to make a fair and accurate assessment of your firm's ability to perform the contract.

Where appropriate, please supply evidence to support your answers. In your answers to questions 5, 6, and 7, the evidence may include examples or copies of documents setting out your race equality or equal opportunities policy as it applies to service delivery, such as instructions to staff, extracts from training manuals or staff handbooks, information provided to service users, or other material that demonstrates your firm's capacity to promote race equality in the provision of this service.

How should we assess suppliers' capacity from the answers to questions on race equality in service provision?

You should look for evidence that a supplier is capable of providing the services in question without discrimination. For contracts where race equality is a core requirement, you will also want to know if suppliers are able to promote equality of opportunity and good race relations. As in evaluating employment practice, the bottom line must be that the supplier does not discriminate unlawfully, either directly or indirectly. A previous finding of discrimination should not automatically disqualify a supplier, provided you are satisfied the firm has since taken effective steps to avoid discrimination and to promote race equality.

You should recognise that for many suppliers these issues may be relatively new. The answers to questions 6 and 7 on page 49 should enable you to assess the supplier's awareness of the issues, and offer some indication of their ability to promote race equality in the services you want them to deliver.

How can we ensure fairness and transparency?

Your own commitment to promoting race equality will be seriously undermined if suppliers do not have confidence in your decisions. It is vital that the questions you ask are relevant, and that your assessments of suppliers' answers to the questionnaire are fair, objective, and consistent. This requires clear, well-defined assessment criteria, which are understood by officers involved in the selection process. We strongly recommend that, if possible, only officers who have been trained on the RRA should be asked to assess suppliers' replies to questions about race equality.

It is good practice, and required for contracts subject to the EC directives, to inform suppliers who are unsuccessful. If a supplier was rejected because you had doubts about their ability to meet race equality requirements, you might use this as an opportunity to increase their awareness of race equality issues. Where appropriate, you could refer applicants to agencies offering advice or training, for example, Equality Direct or the Equality in Employment Advisory Service.

Summary

When race equality is relevant to the contract, and therefore to the selection of suitable tenderers, this should be made clear in the OJEU notice and all other advertisements.

Your pre-qualification questionnaire can ask about race equality workforce matters, with scope for wider enquiries where the subject of the contract is highly relevant to your RRA duty.

If race equality is a core requirement, the questionnaire can ask providers about their track record in service provision.

You should only disqualify suppliers who have had a finding of unlawful discrimination against them if they are unable to offer good evidence of measures they have taken to avoid future discrimination.

You may also set higher race equality standards where the contract in question is highly relevant to your RRA duty.

In selecting suitable suppliers, you may require more evidence to demonstrate race equality employment practices - and more formal policies and procedures - from larger firms with greater resources.

If possible, the evaluation of replies to race equality questions should be done only by officers with appropriate training.



Invitation to tender

The procedures outlined in this guide are based, generally, on the two-stage restricted procedure, as defined in the EC directives. Some contracts will be more suited to either the open or negotiated procedure, and you should have little difficulty in adapting the guidance if you use other formal procedures. You should also be able to adapt the guidance where your contract is outside the EC directives.

What information should we include about our duty to promote race equality in the invitation to tender?

Your invitation to tender should include the information listed below, so that tenderers can submit a tender that encompasses relevant race equality issues. Where possible, you should enclose copies of relevant documents, or indicate where they can be seen.

- Relevant policies, including your race equality scheme or race equality policy, and other equal opportunities policies.
- Facts that are relevant to the contract. For example, information about the population affected (such as students at a university or college, or residents in the catchment area for a primary care trust or a school), by ethnic group, and cross-referred to other factors, such as age, occupational status, language, or religion, where relevant to the contract.
- Details of the current provision of the service in question, including any evidence of the impact on race equality. For example, the results of monitoring, consultation, or other assessment.
- Based on your review of current provision (see chapter 4), what you see as the key challenges to improve race equality performance under the proposed contract.
- If any staff will transfer to the contractor under TUPE, their terms and conditions, including those that guarantee protection against discrimination and provide for equality of opportunity.

What should we say about the evaluation process?

Your invitation to tender must state your basic criterion for awarding the contract, namely the tender that offers 'best overall long-term value for money' or, for contracts subject to the EC directives, the 'most economically advantageous tender'.²³ As well as

23. It is rarely appropriate for public authorities to award contracts on the basis of 'lowest price', as the alternative criterion under EC directives, since this would not enable you to consider factors such as whole-life cost, quality, and service delivery, which are essential elements in value for money, as defined in government policy.

Example

A central government department had been given a new target for recruiting ethnic minorities into its professional grades. The following criteria were stated in the invitation to tender when the department wanted to contract out its non-manual recruitment.

- Ability to meet all the requirements of the contract.
- Price of the contract.
- Quality of the service.
- Ability to put into practice proposals for increasing job applications for posts above grade ... from ethnic minority groups that are currently under-represented.
- Ability to recruit, train, and supervise staff to meet the requirements of the contract.
- Ability to develop new measures that will encourage applications from suitable ethnic minority candidates for professional grade posts.

stating this basic criterion, your invitation to tender must also set out the specific criteria you will use to evaluate tenders, including any relevant race equality criteria. You should list these in order of priority, as shown in the example above.

What information should we ask for in evidence of the tenderer's ability to meet race equality requirements?

You must be careful that you do not, directly or indirectly, re-introduce any of the race equality criteria you used to draw up a select list or approved list. If the contract specification includes promoting race equality to certain standards, you must make clear in your invitation to tender what information you expect tenderers to supply in evidence of their ability to meet those standards, as well as the criteria you will use to evaluate it. You may choose to include separate tender documents to describe in more detail the information on race equality that you require. A standard format will help ensure that comparisons of different tenders are as objective and fair as possible.

Where appropriate, tenderers could be asked to submit a structured, timetabled 'method statement', which would allow scope for each tenderer to develop their own preferred methods of achieving the race equality outcomes in the specification. In cases where the services to be provided could have a significant effect on particular racial groups, you could ask tenderers to include a race equality impact assessment of their proposals.

Your invitation to tender should make clear what information you expect tenderers to provide about the staff who will perform the contract. This could include information about the qualifications of staff, the levels at which they will be employed, the training they will be given (including race equality training), and the arrangements the tenderer intends to make for supervising delivery of the contract. Where race equality training is critical to the effective performance of the contract, you could ask tenderers to submit a training schedule indicating not only pre-commencement training, but also race equality training during the course of the contract, to ensure that new staff, and newly-promoted staff, will, in practice, be able to meet the race equality performance standards.

Where the nature of the service itself has direct implications for the recruitment, training, and supervision of staff – for example, the need for certain language skills, or knowledge of religious or cultural norms – your invitation to tender should state that tenderers must set out in a method statement how they propose to meet these requirements.

What should the invitation to tender say about race equality contract conditions?

Your invitation to tender should refer tenderers to any clauses in the contract conditions relating to race equality in employment. Tenderers should be asked to confirm they will comply with these conditions if the contract is awarded to them.

Are we able to apply additional race equality criteria?

For some contracts, there may be factors relating to the promotion of race equality that are not core requirements, but which you consider to be desirable and that would add value to the authority in its duty to promote race equality and other policy commitments. You might be able, in certain contracts, including those subject to EC directives, to take account of tenderers' ability to meet an additional race equality criterion, if you needed to decide between tenders that otherwise appear to offer equivalent value for money. This means that, in the exceptional case where you had evaluated two or more tenders as being equally economically advantageous for the authority, they could be compared against a further race equality factor. You could only do this if this additional criterion had been stated in your invitation to tender or contract notice, and if it does not breach EC law. You should get legal advice before including an additional criterion.

In the example on page 53, the invitation to tender might include the following as an additional criterion.

The ability to provide anti-racism and race equality training for managers and staff of the department, with a view to preventing discrimination and improving the retention rates of ethnic minority professional staff.

Summary

The invitation to tender and contract documents should provide tenderers with all the information you consider relevant to the race equality requirements of the contract.

In particular, you must state clearly the criteria that will be used to evaluate tenders, and the evidence you will expect tenderers to submit to demonstrate how they will perform the race equality elements of the contract.

Tenderers will be expected to confirm that, if successful, they will comply with the race equality contract conditions.

9

Evaluating tenders

This is a crucial stage in the procurement process, which requires the highest degree of probity, and strict compliance with the standing orders, policy guidelines, and other rules that regulate your contract award decisions. Your task is to evaluate each tender for evidence of the tenderer's ability to meet the requirements of the specification, including those relating to race equality, to the best combination of whole-life cost and quality. You must also be satisfied that the tenderer has accepted and agrees to perform the contract in compliance with the conditions of contract, including clauses relating to race equality.

What preparations should we make for evaluating the race equality aspects?

We suggest that, wherever possible, well in advance of the date for tenders to be submitted, you should resolve the following:

- Who will be responsible for evaluating the aspects of the tenders that relate to race equality?
- What training or guidance do officers need to evaluate proposals for promoting race equality?
- How will tenders be evaluated and compared, particularly in relation to the race equality aspects of the specification and contract conditions?

You should define and agree your (minimum) expectations in writing. We suggest you draw up a template, to make sure that standards are applied consistently and equally in evaluating all the tenders.

What are the basic principles for evaluating tenders for the ability to promote race equality?

The basic principles of evaluation are the same for all aspects of the contract specification. Your object is to find the tender that offers 'best overall whole-life value for money' or, as required in the EC directives, is 'most economically advantageous'²⁴ for you. You must ensure that all the tenders you receive are considered fairly and consistently against relevant, objective criteria.

You must apply the specific award criteria stated in your invitation to tender or contract notice to evaluate the tenders. Tenders can vary widely in quality on different criteria,

24. See footnote 27.

with some excelling on the criteria relating to race equality, but falling short on others. In line with EC rules and your duty to secure value for money, the emphasis you give to promoting race equality must be in proportion to your objectives for the contract as a whole.

Should you seek to apply an additional race equality criterion, which is not a core requirement, you should do so with care, and only after obtaining legal advice.

When you have published the contract award notice, and informed the successful tenderer of your decision, you should (as good practice, where no legal obligation applies) inform all unsuccessful tenderers of the outcome. In the case of tenderers who scored particularly poorly on any race equality aspects of their bid, you could use this as an opportunity to offer advice or to recommend sources of advice and race equality training.

Summary

You should clarify the evaluation process in advance, to ensure that officers involved in evaluating the race equality aspects of tender submissions have appropriate training.

The task is to evaluate tenderers' ability to meet the race equality requirements of the contract, applying the basic criterion of 'best overall whole-life value for money', and the specific criteria stated in the invitation to tender.

The emphasis given to race equality criteria in evaluating tenders must be proportionate to the significance of race equality requirements in the contract as a whole.

You also need to check tenderers' acceptance of race equality contract conditions.

10

Existing contracts

The Race Relations (Amendment) Act 2000, which gave public authorities their new RRA duty to promote race equality, came into force on 2 April 2001. It is likely that you had several contracts up and running on that date, as well as a number of procurement projects in progress. Your duty to promote race equality applies to these contracts in the same way as it does to future contracts and projects. Therefore, we recommend that you look at your current contracts in the light of your RRA duty, if you have not already done so.

The questions below will help you to decide if there are any contracts that you need to try to amend.

- What is the contract for?
- Is the contract relevant to your duty to promote race equality? If there is no, or little, relevance, you should not have to consider any amendment.
- Is the subject of the contract a high priority for you in meeting your RRA duty?
- How long does the contract have to run?
- Does the contract already include race equality requirements in the specification or contract conditions? Are these sufficient to meet your duty?
- Does the contract say who bears the burden in case of changes in the law?
- What does the contract say about variations you may want to make to it?

The next step is to decide whether you need to amend the contract. One question to ask, using a test of proportionality, is: will the benefit outweigh the costs (including time, money, and the effect on your relationship with the contractor). Your bottom line should be to ask whether you could find yourself in (significant) breach of your duty under the RRA if you allowed the contract to continue unchanged.

If you decide to negotiate variations to the contract, depending on the type of contract, you will be looking at making amendments to the contract conditions or the specification. This could involve an increase in the contract price, to reflect any extra burden the new provision places on the contractor, and on any subcontractors.

If you are satisfied that the race equality requirements in an existing contract are sufficient – on paper – to avoid breach of your duty to promote race equality, you should look at how well these requirements are being met in practice by the contractor. It may be that you will need to review how you (and the contractor) monitor and manage the race equality aspects of the contract (see chapter 11).

Example

In January 2001, a government agency awarded a seven-year contract to develop a new staff appraisal system. The contract involved training all staff on the new system, and evaluating its effectiveness across the agency, once it was introduced. The contract began on 1 March 2001.

Although the agency had been aware for some time of complaints that ethnic minority staff received disproportionately low marks in the existing appraisal system, it did not mention this in any of the contract documents. After publishing its race equality scheme in May 2002, in which personnel services generally, and staff development in particular, were assessed as highly relevant to its duty to promote race equality, the agency reviewed this contract and concluded that it needed to secure certain amendments to comply with its RRA duty. The agency met the contractor to explain the changes in the law and to discuss variations in the specification. The contractor agreed to add the following requirements: to consult staff on the proposals for the new appraisal system, to carry out an objective assessment of the new system's impact on race equality, and to give staff race equality training. The contractor also agreed terms for sharing costs.

Summary

Your RRA duty applies to all your relevant functions, including those carried out under a contract that was awarded or developed before 2 April 2001, when the duty to promote race equality came into force.

You are therefore advised to review your existing contracts.

If a contract is highly relevant to your RRA duty, you should consider whether you need to amend the contract to comply with the duty, balancing 'risk' against the costs that may be involved.

If no amendment is needed, you should review how well you are monitoring the race equality requirements, to make sure you are not in breach of the RRA.

Monitoring, managing, and enforcing contracts

However good proposals to promote race equality are on paper, you will only know how effective they are when the contractor begins to put them into practice. The success of a project will often depend on the relationship you establish with the contractor, and on how you manage, monitor, and enforce all parts of the contract.

The person who will be responsible for monitoring and managing the contract may not have been involved during the earlier stages. For example, where a central procurement unit is responsible up to contract award, but monitoring is devolved to the relevant department or section. You should make sure that whoever is responsible for managing the contract understands its race equality objectives and requirements, and receives any race equality training they might need.

Are there any steps we should take before the contract begins?

As soon as possible after award, you should arrange to meet the contractor and, if possible, the person employed by the contractor to be responsible for the race equality aspects of the contract. Your aim should be to develop a positive partnership, founded on a clear, mutual understanding of basic principles. We suggest you start by clarifying the following.

- **The contractor's responsibilities for promoting race equality.** You will want to make sure the contractor fully understands their race equality responsibilities in the contract. It will help if you can give examples of how you expect these elements of the contract to work. You should make clear what you can offer, for example by helping the contractor to identify race equality training needs or sources of equality advice and information. If the specification calls for timetabled improvements in race equality outcomes, you should make sure the contractor understands exactly what this means in practice. For example, you could clarify and agree the baseline and how improvements will be measured.
- **Responsibilities for monitoring.** If the contractor is required to provide you with results of ethnic monitoring, or other information about the service, or about the workforce employed on the contract, you should make sure they understand exactly how to meet this requirement. You may need to explain why you have asked for this information, and how regular monitoring of race equality performance can help meet other requirements of the contract. It may help to give the contractor examples of ethnic monitoring reports. Whether or not the contract stipulates a timetable for reporting, you need to agree reporting dates.

You should tell the contractor how you will monitor the performance of the race equality aspects of the contract, and plan periodic meetings to discuss the contractor's monitoring reports.

- **Contract conditions.** At your initial meeting, you should draw the contractor's attention to the race equality clauses in the conditions of contract, and the circumstances that could lead to defaults or bonuses. You should make sure the contractor understands any references to the RRA, or the CRE's code of practice in employment.

Can we ask contractors to take on additional race equality commitments at this stage?

To meet your duty to promote race equality, and other relevant policy commitments, such as social cohesion, sustainable development, or encouragement of small businesses, you may consider building on your relationships with the contractor to encourage them to take steps, on a voluntary basis, to prevent unlawful discrimination, and to promote equality of opportunity and good community relations.

For example, the contractor may agree to:

- adopt an equal opportunities policy for their organisation generally;
- monitor their UK-based workforce by ethnic background;
- take positive action, as permitted under the RRA, and the Sex Discrimination Act 1975, in relation to under-representation of particular racial groups or of women, and to recruit disabled people (for which there is no restriction under the Disability Discrimination Act 1995); or
- promote subcontracting opportunities for small firms and ethnic minority businesses.

These measures would be wholly voluntary, and distinct from the contract and any of its enforcement provisions.

How should we monitor the contractor's performance of the race equality requirements?

To ensure effective performance of the contract, you will need to carry out regular and systematic monitoring. Your objective, to secure best possible performance, is far more likely to be achieved if, in line with the partnership approach we strongly recommend, you agree monitoring methods and criteria with the contractor. The process for reviewing the contractor's performance must be transparent, and trusted by both parties.

Combining the monitoring of race equality requirements with monitoring the contract generally is less burdensome for you and the contractor, although the officers involved with knowledge of other aspects of the contract may need additional training to bring them up to speed on race equality issues. You may find it easier to maintain consistent standards if you regularly use the same simple format for recording race equality performance data against the requirements of the contract.

Example

RACE EQUALITY MONITORING

Contract

Start date Expiry date / duration

Monitoring visit date

Regular contract liaison / management meetings held? Yes No

Date of last meeting.

Minutes available on file? Yes No

Is race equality a permanent item on the agenda? Yes No

Is race equality monitoring carried out by the client department / authority on a regular basis? Yes No

Date of last monitoring exercise

Is evidence available? Yes No

Items checked: (insert race equality requirements from specification)

.....

.....

.....

Is there evidence that the contractor is complying with their contractual obligations? Yes No

As well as regular meetings with the contractor, and site visits, where appropriate, you may find it useful to develop other sources of information regarding the contractor's performance of the race equality requirements of the contract. This will give credibility and force to any recommendations you might make for improvement. You could approach any of the following, using questionnaires, surveys, or interviews:

- users (and potential users) of the service from different racial groups, and representatives of users;
- trade unions;
- officers within your authority; and
- other public authorities or voluntary organisations.

What can we do to improve poor race equality performance?

If your monitoring suggests that the contractor is not meeting the race equality requirements, you should take the following cumulative steps:

1. Use the notice procedures set out in the contract. You should ask for a meeting with the contractor to review in detail any problem areas, and spell out clearly (again) what you expect from the contractor. You should help the contractor identify the reasons for poor performance, and how to make improvements – for example, through more training or better monitoring systems – and agree the improvements you expect to see by the next monitoring report.
2. If, despite your efforts to help the contractor make needed improvements, there is serious and persistent failure to meet the race equality requirements of the contract, you can invoke the default provisions of the contract conditions.

In addition, at any point when there is evidence of poor performance, you could remind the contractor that you may not be willing to consider them for future contracts if their race equality performance remains unsatisfactory.

Are there lessons for future contracts?

From time to time, and especially as the contract nears its end, we recommend that you review and evaluate the project as a whole for its success, or otherwise, in promoting race equality. As we suggested in chapter 4, this review is a vital element in planning how future projects could be more successful in meeting race equality objectives.

You should refer to your monitoring records and any feedback from users, would-be users, and others. You may want to seek the views of the contractor, trade unions, and representatives of users on how well your race equality objectives have been achieved, or why these objectives have not been fully realised. If your race equality scheme or policy includes an action plan, you could compare what has been achieved through the contract with the targets in that plan.

You could then draw up lessons for future projects:

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

Summary

If race equality contract requirements are to have any real effect, you must have effective procedures for monitoring and managing the contract.

Officers with responsibility for monitoring and managing the contract may need briefing on the race equality requirements, and also training.

You are more likely to achieve your objectives if you can establish and maintain a positive partnership with the contractor.

You should ensure that the contractor understands from the outset their responsibilities for race equality performance, and for monitoring and reporting.

Prompt and effective action should be taken whenever monitoring indicates inadequate performance of race equality obligations.

After award, it may be possible to secure voluntary agreement by the contractor to take further steps to promote race equality, including workforce matters, positive action, and promoting subcontracting opportunities for small firms and ethnic minority businesses.

A review of the success or failure of the contract in meeting race equality objectives will offer lessons for future contracts.

12

Checklist for public authorities

Steps to take in all contracts

- ❑ Determine who will be responsible for evaluating race equality elements at each stage.
- ❑ Provide necessary training on the RRA for all relevant staff.

Additional steps to take when race equality is a core requirement

Planning

- ❑ Determine whether race equality is a core requirement of the proposed contract.
- ❑ Ensure staff responsible for drawing up specifications and contract conditions understand the requirements of the RRA.

- ❑ **Review the race equality impact of your current arrangements.**
- ❑ **Consult internally and externally on how better to meet your duty to promote race equality.**

Drafting specification

- ❑ **Include your race equality requirements in the specification.**

Drafting contract conditions

- ❑ Include non-discrimination contract clauses.

- ❑ **Where relevant, include additional contract clauses on race equality in employment.**

Steps to take in all contracts

Additional steps to take when race equality is a core requirement

Selecting tenderers

- ❑ Ask about findings of discrimination in employment, and any actions taken as a result in the pre-qualification questionnaire.

- ❑ **State your race equality requirements in OJEU, and any other notice.**
- ❑ **Where relevant, ask questions about race equality policy, training, and compliance with the CRE code of practice in employment, or equivalent, in the questionnaire.**
- ❑ **Where relevant, ask questions about race equality in service delivery.**

Invitation to tender

- ❑ **Refer to the RRA duty, and state race equality evaluation criteria in the invitation to tender.**

Evaluating tenders

- ❑ Check tenderers' acceptance of race equality contract conditions.

- ❑ **Evaluate tenderers' proposals for meeting race equality requirements in the specification.**

Steps to take in all contracts

Additional steps to take when race equality is a core requirement

Managing and monitoring the contract

- ❑ Meet the successful contractor, to ensure full understanding of non-discrimination contract conditions, and agree reporting arrangements.
- ❑ Consider a voluntary agreement with the contractor for additional race equality measures.
- ❑ Monitor the contractor's performance of race equality contract conditions.
- ❑ Where race equality performance is inadequate, invoke default provisions and/or warn contractor that they may not be considered for future contracts.

- ❑ **Meet the successful contractor, to ensure full understanding of your RRA duty and race equality requirements in the contract specification, and to agree contract management and monitoring.**
- ❑ **Monitor the contractor's performance of race equality requirements in the specification.**

13

Developing a wider range of suppliers

Having a broad supplier base can lead to a high level of competition, greater choice for you, and improved value for money. This chapter shows the connection between your duty to promote race equality and your supplier base. It highlights some of the advantages of developing a wider range of potential suppliers, including greater involvement of small businesses, ethnic minority businesses, social enterprises, and community organisations, while emphasising that this must be in the context of equal requirements and criteria for all suppliers. It also discusses ways in which public authorities can help to develop the capacity of small firms and ethnic minority businesses to compete successfully for public contracts.

How does our duty to promote race equality relate to selecting suppliers?

In chapter 2 we discussed the need to assess the impact on race equality of your general procurement policies and practice. Do they have an adverse effect on particular racial groups as suppliers, or potential suppliers? If you find that direct or indirect discrimination is occurring, you will need to make appropriate changes to prevent further discrimination. As your duty also involves promoting equality of opportunity and good race relations, then, even if there is no evidence of discrimination, and you find that suppliers from particular racial groups are disadvantaged or are missing opportunities to compete, you should be prepared to review your policies and practice. The review must, of course, be in the context of applying the same criteria to all suppliers.

How should we monitor our suppliers?

The first step is to identify – for example by size, ethnicity of ownership, or other relevant factors – the firms you currently have contracts with, and the firms you have recently invited to tender. This should give you some idea of how your procurement processes affect different types of businesses, including small businesses and ethnic minority businesses (see the glossary).

You should know the size of firms from their replies to your pre-qualification questionnaire (see chapter 7). A number of public authorities have begun to monitor the ethnicity of owners of UK firms that apply to go on their approved lists. As the example on page 69 indicates, you should always make it clear that you will not use this information to select tenderers, or for any purpose other than evaluating and improving your own equal opportunities policy. You may also want to advise suppliers that best practice under data protection legislation would involve their asking the owners of their firms to indicate their ethnicity, before passing this information on to you.

Example

Extract from a form sent to UK firms applying to be included on a public authority's approved list

Your answer to the following question will not affect your chances of being approved; we are asking for this information solely to help us develop our equal opportunities policy. We will use the information in your replies for statistical purposes only, and will not disclose it otherwise without your consent.

The Commission for Racial Equality defines an ethnic minority business as 'a business 51% or more of which is owned by members of one or more ethnic minority groups, or, if there are few owners, where at least 50% of the owners are members of one or more ethnic minority groups'. For this purpose, ethnic minority means ethnic groups other than 'white British'.

A. Is your enterprise an ethnic minority business according to the above definition?

(Please tick the relevant box)

- | | | |
|-------------------------------------|------------------------------|-----------------------------|
| Yes | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| No | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| Not known – publicly quoted company | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| Not prepared to divulge | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

B. Please tick the appropriate boxes to indicate the ethnic group(s) that best describe the owners or managers of your firm.

(Please see appendix 2 for the ethnic monitoring categories that could be used in this type of form)

Is there a link between small firms and ethnic minority businesses?

Yes. The vast majority of ethnic minority businesses are small businesses, employing fewer than 50 people. This means that any steps you take to remove barriers, or increase opportunities, for small businesses is likely, at the same time, to improve opportunities for ethnic minority businesses. Looked at as a group, without considering ownership, small businesses, by their very nature, are highly diverse in what they do and how they do it. This same wide diversity is also a feature of ethnic minority businesses.

Can small firms offer value for money?

Yes. A wider base of potential suppliers (of any size) means greater choice and more competition. Small businesses can enhance value for money in additional ways by offering the following.

Developing a wider range of suppliers

Reaching small firms and ethnic minority businesses

- lower administrative overheads and management costs;
- innovative solutions;
- quick response to changing requirements;
- flexibility and willingness to meet specific customer needs; and
- personal service.

In addition, for some contracts, small firms, ethnic minority businesses, and social enterprises may add value for money, as they can offer:

- knowledge and experience of meeting the needs of particular service users; and
- the ability to supply specialist products or services appropriate to the needs of particular service users.

By 'buying in' the knowledge or skills of specialist suppliers, you effectively expand the capacity of your authority as a service provider.

Many large firms recognise the benefits that small businesses, ethnic minority businesses, social enterprises, and community organisations can offer. It is often the case that large firms awarded public sector contracts subcontract with small businesses, and with ethnic minority businesses, to provide specialist services. You may find it more advantageous to contract directly with such firms.

How can we widen our supplier base to include more small firms and ethnic minority businesses?

For every contract, your starting point must be the goods, works, or services you want to buy. What matters is not who delivers the contract, but whether they offer best overall long-term value for money. However, if your assessment suggests that small firms and ethnic minority businesses are under-represented as contractors, then, by finding ways of improving opportunities for them, you could also achieve better value for money for your authority.

Your objective should be to find ways of enabling under-represented groups or types of suppliers to be able to compete for your contracts on equal terms with more established suppliers, not to apply different standards or to rely on untested assumptions about the capacity of particular firms. You must not favour one supplier over another, at any stage of the process, even if they are from a group that is under-represented among your contractors.

Achieving greater equality of opportunity involves identifying the barriers and finding ways of overcoming them. Barriers could be a consequence of your policies and practices, or could be due to a lack of resources, knowledge, or skills in under-represented firms. Therefore a two-pronged approach is needed: reviewing your practices and making suitable changes, and bolstering the capacity of small firms and ethnic minority businesses.

How can we improve our policies and practices so small firms have a greater opportunity to compete?

In this section we suggest several steps you might take. In reviewing your current policies and procedures, you may wish to consult local business organisations, including those representing small firms and ethnic minority businesses.

Packaging

Small firms are not able to bid for every type of contract. At the planning stage, you could consider different packaging options, to open the bidding to smaller suppliers. However, you must act within EC rules – including the one which prohibits the deliberate splitting of a contract to ensure each part is below the value at which the directives apply. Decisions on packaging, for every contract, must relate to achieving best overall value for money.

As suggested above, there are some situations where contracts with small businesses, which can be more responsive to the needs of service users, may present the best option in terms of value for money. Alternatively, in contracts where the number of people with specific needs is small, the bulk of the contract could go to a large supplier, with a niche supplier providing the specific additional service. Often, voluntary organisations with knowledge of the relevant community may be well placed to bid for such specialised services (see the example below).

You will need to balance any extra up-front costs such arrangements might entail against their ability to meet more effectively the core requirements of the contract, which in the longer term could offer better overall value for money.

Example

A government department that provides front-line services to the public – at offices across the country and by telephone – proposed to engage external consultants to provide training for staff in responding to enquiries from members of the public. The department had had complaints about the way their staff dealt with people who, by their dress or their accent on the phone, were perceived to be other than white British. In planning the contract, the department has decided – in addition to the main training contract – to negotiate with established local community organisations, to provide specialist training for department staff on relevant language and cultural issues for the main ethnic groups in that area.

Advertising

You could review how and where you advertise proposed contracts, and whether your chosen media attract the widest range of suitable suppliers. You may find it helpful to consult relevant trade or business associations, local chambers of commerce, or voluntary sector umbrella organisations. You could consider the following.

Developing a wider range of suppliers

Policies to encourage small firms to compete

- advertising in a wider range of media, including those likely to be used by small businesses and ethnic minority businesses;
- targeting mailshots at small firms, to alert them to forthcoming contract notices;
- developing a 'selling to' website as a 'noticeboard' for your forthcoming contracts; and
- stating your willingness to accept applications from consortia of suppliers.

Procedures and documents

You could review the documentation you use at each stage of your procurement process, to make sure it is clear, jargon-free, and accessible to firms that are not already engaged in public sector contracts. Some authorities have developed separate plain English guides to the way they carry out procurement, which they make available on their website and send to any new supplier who expresses an interest in any of their contracts.

You should make sure that the information you provide states clearly what you are looking for at the selection stage, so that suppliers do not spend time on inappropriate applications. You should also make very clear any different levels of evidence you expect from firms of different sizes.

Approved lists

You could review your approved lists to ensure that they provide sufficient opportunity for small businesses to be considered, based on your assessment of their capacity. This would enable you to include suitable small businesses when you advertise or invite tenders for contracts they might be eligible to compete for. You should be open to considering applications from consortia of small businesses.

It is important to remember that, in selecting firms for approved lists, you must apply the same race equality criteria to small firms and ethnic minority businesses as to any other external provider. However, as we suggest in chapter 7, in assessing the suitability of providers, it is appropriate to take the size of a firm into account in terms of the type of evidence it is reasonable to expect it to supply. You should also bear in mind that there may be newly-established firms that have the capacity to meet your needs, but that may not be able to refer to relevant previous experience.

Following up small firms

You will want to be able to evaluate your efforts to improve opportunities for a more diverse range of suppliers, as well as to use the procurement process to encourage participation by small businesses and ethnic minority businesses.

The Office of Government Commerce (OGC) and the Small Business Service (SBS) have published guidance, *Smaller supplier – better value?*, which describes the benefits offered by small firms. It also explains how authorities can make their contracts more accessible to small businesses.

- You could ask for feedback from firms that did not apply after making inquiries, or failed to submit tenders when you invited them to do so. Their reasons might help you to plan future contracts or review your procurement processes.
- You could offer detailed feedback to unsuccessful businesses at each stage of the process, and advise them on how to improve their bids for future contracts.

What other steps can we take to create a wider range of suppliers?

If you have policies on economic development, or on relieving unemployment or social exclusion, or are part of a partnership concerned with these issues, you may be able – in that context – to encourage and develop the capacity of small firms and ethnic minority businesses to compete for public sector contracts. For example, you could offer training to small firms, including ethnic minority businesses, to improve their technical skills and their understanding of public procurement generally. Such training could include information on the implications of the RRA for public authority procurement. You could provide opportunities for networking between established contractors and small businesses and ethnic minority businesses.

After a large contract has been awarded, you may find there is scope to enter into a voluntary agreement with the successful contractor, to create subcontracting opportunities for small firms and ethnic minority businesses. For example, you could ask your principal contractor to consider inviting small firms from your approved lists to compete for subcontracts.

Example

The NHS Purchasing and Supply Agency (PASA), recognising that many innovative solutions come from small businesses, is involved in a number of initiatives to help new and innovative suppliers enter the NHS market, including:

- producing booklets and information for potential suppliers, which are displayed on their website;
- setting up a web-based supplier information database to avoid the need for suppliers to provide certain information to the NHS more than once;
- supporting government and other projects to encourage innovative suppliers; and
- speaking at supplier events and industry-specific conferences.

Summary

A race equality impact assessment of your procurement policies and practice (chapter 2) may indicate that you need to review your supplier base.

In some cases, small firms and ethnic minority businesses may be better able to meet your race equality and value for money obligations.

You could consider ways of improving opportunities for a wider range of suppliers – improving choice, competition and value for money – including:

- **packaging;**
- **advertising;**
- **using approved lists; and**
- **following up small businesses.**

This is consistent with government policy on encouraging small firms.

Some authorities are taking pro-active steps to improve opportunities for local suppliers, including small firms and ethnic minority businesses.



What suppliers should do

Part II will be of particular interest to managers or employees in private or voluntary organisations responsible for:

- identifying suitable contracts;
- responding to pre-selection questionnaires, or preparing tenders;
- negotiating contracts;
- managing contract performance; or
- managing equal opportunities – in employment and, where applicable, in service delivery.

It will also be useful for trade union and other staff representatives.

14

Introduction

This part of the guide, chapters 14 – 19, provides guidance on race equality for external suppliers who are doing business with public authorities (see the glossary), or wish to do so. It is written for firms²⁵ of all sizes, in the private and voluntary sectors.

If you want to do business with the public sector, you need to know what your customers will be looking for. This part aims to give you the information on race equality you will need to compete for public authority contracts. It should also help you to develop or improve your policies on race equality, or equality of opportunity more generally.

Many firms are now aware of the growing importance of equality. Increasingly, public authorities will want to know that the firms they do business with have good equality policies and practices. But the equality agenda is not just a public sector issue, nor should it be seen as a mere 'add-on' to what private and voluntary sector organisations are already doing. All firms must comply with non-discrimination law, and it is good practice to develop policies and practices that help you to do this. In a wider business context, promoting race equality is a central part of a sound business strategy. It is also central to meeting the objectives of any corporate social responsibility or diversity initiatives.

Chapter 15 explains public authorities' new legal duty to promote race equality, and how this duty affects the way authorities approach the procurement of goods, works, or services from external suppliers. Chapter 16 contains guidance on how you can prepare for, and respond to, race equality matters in individual contracts. Chapter 17 takes a broader view, looking at ways in which you could take positive measures to promote race equality, within the context of public procurement, but also to benefit your firm, irrespective of who your customers might be. Chapter 18 has a checklist, which summarises the steps it will be useful for you to take, both immediately and when you are concerned with a particular public authority contract.

Like part I, this part is not intended as a comprehensive guide to all the issues that might arise for suppliers, and we recommend that it should be used alongside other guidance on public procurement or race equality more generally.

25. A 'firm' is defined as any private or voluntary organisation, such as a company, partnership, charitable trust or other type of body, that is capable of entering into a contract to provide goods, works or services.

Doing business with public authorities – a new agenda for race equality

Why should we want to do business with public authorities?

Doing business with public authorities can be an attractive proposition.

- Public authorities can be good customers. EC rules and government policies require them to have procurement procedures that are open, fair, and non-discriminatory. They have to be honest and professional in the way they choose suppliers, and in any dealings with them.
- Public authority contracts can offer a degree of financial certainty, which could help you to build your reputation and prepare for future contracts.
- Many public authorities now base their contract service specification on outcomes, which allows you to develop methods suitable to your firm and ways of working.
- Public authorities are encouraged to work with contractors on a partnership, rather than adversarial, basis.

What's new in public authority procurement?

The main object of this guide is to bring you up to date with recent developments that will affect the way public authorities do business with external suppliers. The main change is a new legal obligation on public authorities to take race equality into account in carrying out procurement.

The Race Relations Act (RRA):

- makes it unlawful for public authorities to discriminate on racial grounds in carrying out any of their functions, including procurement; and
- gives public authorities²⁶ a positive, enforceable, legal duty to eliminate unlawful racial discrimination, and to promote equality of opportunity and good race relations in carrying out all their functions ('the duty to promote race equality').

26. The public authorities to whom the duty applies are listed in Schedule 1A to the RRA, as amended by the Race Relations Act 1976 (General Statutory Duty) Order 2001. Future orders could add other authorities to the list.

The duty to promote race equality applies to procurement, which means that public authorities must now build relevant race equality considerations into their procurement processes.

The duty applies to the public authority whether a function is carried out by the authority or by an external contractor. In simple terms, to comply with their race equality duty, public authorities will now aim to make sure that public money is not spent on practices that lead to unlawful racial discrimination, but instead on those that support and encourage equality of opportunity and good community relations.

In the next chapter we explain the impact of the duty to promote race equality on each stage of procurement, from the suppliers' viewpoint. For a fuller description from the viewpoint of the public authority, see part I of this guide.

For public authorities, the duty to promote race equality may involve new ways of planning and carrying out procurement to incorporate race equality considerations. This will not alter any of the positive reasons for doing business with public authorities, listed above. In fact, you may conclude that this change adds a further positive reason, namely that it gives you an incentive to check and, where necessary, improve your race equality performance, which has a benefit regardless of any public sector contracts.

How does the Race Relations Act apply to our firm?

Your firm, like all organisations in the public, private, and voluntary sectors, is covered by the RRA in that you must not discriminate on racial grounds in employment, education, and housing, in the provision of goods, facilities, and services, and in carrying out public functions. You can take certain positive action measures (see the glossary), and can be subject to proceedings for alleged breach of the RRA. After 19 July 2003, similar non-discrimination laws should apply to public, private, and voluntary sector organisations in all EU member states.

However, unlike public authorities, you do not have a positive duty to promote race equality. It is for this reason that, to comply with their legal duty, public authorities must now take particular care to introduce race equality into their contractual relationship with external suppliers.

What does the duty on public authorities mean for our firm?

If you are doing business with public authorities, or hoping to do so, you cannot ignore the new context in which they must now operate. If you hope to be selected to tender, or to be awarded public authority contracts, you will be expected to meet the race equality requirements for the particular contract. You should therefore review your own employment and service delivery policies and practices, if you have not already done so. You will then be able to make any necessary changes to your race equality

policies or practice without the pressure of an imminent contract. Your first step should be to make sure you are acting within the law, and that your policies and practice are not discriminatory. Your next step is to consider ways in which you could go further in promoting equality of opportunity.

Some public authorities now want to know more about the firms that apply to them, and those that are successful. Wholly separate from any selection or tendering procedure, you may be asked for information about the ethnic origins of the owners of your firm. If you are a publicly-quoted company, for which such questions are inappropriate, you would not be expected to reply. Otherwise, to ensure the accuracy of such information, and as good practice under data protection legislation, you should, if possible, ask each owner to confirm their ethnicity.

Will the duty on public authorities mean a greater burden on our firm?

In the short term, it may mean additional work and costs, but these should be more than compensated for by the long-term benefits. Public authorities' requirements will vary, depending on the nature of the contract – that is, how relevant it is to the authority's duty to promote race equality. While firms of all sizes must meet the same standards, public authorities may accept less detailed documentary evidence from small firms, which may not have the resources available to large firms to implement formal equality policies.

Many firms – large and small – already have effective race equality policies covering both their employment of staff and services to their customers. Such firms should have little difficulty meeting the race equality expectations of public authorities. Other firms may need to make some adjustments to their policies and practice. The 'cost' of these changes should be outweighed by the improved efficiency and quality that greater equality of opportunity will bring.

If your firm is already involved in corporate social responsibility, or diversity initiatives, equal opportunities will help you deliver these objectives.

What benefit do we gain by promoting race equality – is there a business case?

Surveys of employers have shown that when employment is solidly rooted in equality of opportunity, firms can recruit from a wider pool, staff turnover goes down, fewer days are lost, and staff are more committed to their jobs – all of which increases productivity.

Similarly, when an organisation plans and delivers its services to meet the needs of different service users, the results can be positive for everyone – the organisation uses its resources more efficiently, its staff feel more motivated, and the users receive a better, more appropriate service.

Doing business with public authorities

The duty and opportunities for small firms

Many organisations now realise there is also a strong business case for developing a supply chain that reflects the diversity of the populations they serve. This means trying to attract a wider range of businesses from all communities, as contractors or subcontractors. Greater 'supply-side diversity' makes it easier to meet varied demands and expectations from customers, it increases the skills and knowledge at an organisation's command, and it creates new markets.

There is also a negative business case. The costs of losing a discrimination case in a court or tribunal, or of facing enforcement action by the CRE, can be high, both in financial terms and in damage to reputation.

Will the duty do anything to improve opportunities for small firms and ethnic minority businesses to compete for public authority contracts?

The duty could improve opportunities for more firms to compete, that is, to create a more 'level playing field', but authorities are prohibited from giving preference to any firm, even if they are from a group that is under-represented among current contractors.

To comply with the duty to promote race equality, public authorities should see if their procurement policies and practice are having an adverse impact on suppliers from particular racial groups. If there is evidence of racial discrimination, they would be expected to implement changes to prevent discrimination in future. If it appears that a public authority's procurement processes disadvantage some racial groups as suppliers, the authority would need to consider whether, within the context of value for money, there are ways in which improved opportunities can be provided. The authority's aim would be to remove any barriers that prevent some firms from being able to compete on equal terms. Barriers may either lie within the authority's policies and practice – for example, how they package or advertise their contracts, or provide information to suppliers, or compile approved lists – or they may be due to lack of resources or skills among suppliers.

Example

The Welsh National Procurement website – www.xchangewales.co.uk – due to be launched in autumn 2003, will advertise contracts below and above the OJEU threshold for 96 public sector bodies in Wales. Buyers will post information about tenders, along with a named contact point for suppliers.

Example

Merseyside NHS trusts are seeking to establish a bureau to act as an intermediary for the NHS and local small and medium-sized businesses. The bureau would ensure that all opportunities are made available to potential suppliers, while promoting the benefits to the NHS of dealing with specialist suppliers who offer value for money. Firms will be offered training in the tendering process, and a database of accredited suppliers, whose premises and processes have been vetted 'to gauge calibre and potential', will be available to the NHS and public authorities.

Doing business with public authorities

The duty and opportunities for small firms

Greater opportunities for small firms and ethnic minority businesses to compete could also occur as a result of public authorities now being more aware of the importance of providing services that meet the needs of users, including any particular needs of different racial groups. So, to secure value for money, it may be appropriate for an authority in certain contracts to encourage a more diverse range of suppliers, or, in other cases, to tender separately for one part of a contract that requires suppliers with specialist knowledge or experience.

Larger firms may benefit from this process. If an authority helps to develop greater business skills among 'specialist' firms, these firms could be an asset as subcontractors, assisting a main contractor to meet contract requirements involving services to meet special needs of particular racial groups.

In every instance, suppliers must have the requisite technical capacity, including capacity in terms of race equality in employment and, where relevant, service delivery. And, in every case, decisions must be based on value for money for the authority. As we mentioned above, EC rules and government policy require maximum openness, as well as fairness in public procurement. So, this is not about applying variable requirements, but enabling more suppliers to try to meet the same, consistent requirements. Larger firms that meet an authority's requirements should not be disadvantaged merely by having to compete in a wider field.

Example

An NHS trust serving a multiracial population is proposing to tender for the supply of pre-cooked meals, which will need to include meals appropriate for the diverse cultural and religious dietary requirements of patients and staff. The trust is considering two options:

- to tender a single contract, knowing that the successful supplier will subcontract with small firms with experience in providing specialist meals, for example, halal, kosher, or Chinese meals; or
- to tender a main contract for standard meals, and tender separately among specialist firms for the 'niche' provision of particular types of meals.

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Competing for public authority contracts

This chapter looks at how the duty to promote race equality affects the key stages in the procurement process. It includes guidance on how you can demonstrate your firm's ability to meet the race equality requirements in an individual contract.

How will race equality be included in public authority contracts?

For every contract,²⁷ the public authority needs to determine whether race equality is a core requirement of the contract. This will depend firstly on whether the goods, works, or services are relevant to the authority's duty to promote race equality, and then on how significant race equality is to the contract as a whole. Where race equality is a core requirement, it will be relevant to every stage of the procurement process.

As a rough rule of thumb, race equality will be a core requirement in contracts that wholly or partly involve services to the public, or a section of the public. This would include health services, information services, law enforcement, and the management of a prison or student accommodation. It would also include contracts where a significant element involves direct contact with members of the public; for example, security services, benefit fraud investigation, and transport services, as well as certain services provided to the authority, or for authority staff, including recruitment services, training, and staff catering.

Race equality is unlikely to be a core requirement in contracts that involve no real contact with members of the public or the authority's staff. These might include services of a wholly scientific or technical nature, or the supply of fuel or materials used in technical processes. Contracts for goods could require the needs of particular racial groups to be met; for example in providing uniforms or meals. Contracts for works may require measures to accommodate the needs of different groups; for example, where a contractor's staff come into contact with members of the public or with authority staff.

Can we be involved in planning and developing procurement projects?

Yes, subject to EC rules on equal treatment of suppliers. If you have a current contract with a public authority, the authority may seek your views on different aspects,

27. For recurring routine contracts of a similar nature, and for 'call-off' contracts under a framework agreement, the authority would make this assessment in respect of the type of contracts involved.

including how well the present arrangements promote race equality. When a public authority is considering how best to incorporate race equality into future arrangements for the procurement of goods, works, or services, they may consult external suppliers with relevant experience. This would be an opportunity to suggest options for promoting race equality, taking into account the different degrees of risk for the authority and the supplier in different options. However, such involvement will not give you any guarantees of success when the contract is advertised.

Will race equality be a factor in selecting tenderers?

Yes, all authorities will want to know that you do not have a history of discrimination, and for certain contracts they will want to know you have the technical capacity to meet the race equality standards necessary to perform the contract. The extent to which your past record on race equality in employment or service delivery will be taken into account will, of course, depend on the contract.

The notice in the *Official Journal of the European Union* (OJEU), and advertisements in newspapers or specialist journals, should indicate if a significant element of what is to be provided by the contractor relates to race equality.

In drawing up a select list or an approved list, a public authority will be looking generally for suppliers who can demonstrate that they understand their responsibilities under the RRA and operate within the law. You will be asked if a court or tribunal has recently made a finding of racial discrimination against you, or whether you have been the subject of a CRE formal investigation, and, if so, what steps you have taken to prevent discrimination recurring. You should answer this question, giving dates and other relevant information. You will not be rejected if you can show you have taken appropriate steps since the finding or investigation. You should provide enough detail to give a clear picture of the changes you have made to prevent discrimination recurring. If the court or tribunal, or the CRE, made recommendations, you should state whether you have implemented them.

If race equality is a core requirement of the contract, you may be asked for additional evidence of good race equality practice, including whether you follow the CRE's code of practice in employment. You may also be asked for information about the way you approach race equality in relation to your customers (see chapter 7 for model questions). Again, it is important to provide detailed answers, so that the public authority has sufficient information to make an accurate assessment of your technical capacity for the contract in question, in terms of race equality. You should provide evidence to support your answers. The evidence may include:

- examples or copies of your race equality or equal opportunities policy;
- instructions to staff setting out arrangements for advertisements, recruitment, selection, access to training, and opportunities for promotion;
- copies of recruitment advertisements, and extracts from staff handbooks;
- copies of grievance and disciplinary procedures;

- copies of leaflets for customers; and
- other materials that show your firm's commitment to race equality and equal opportunities.

In assessing your answers and any evidence you submit, the public authority will take account of the scale of the proposed contract and the degree to which it is relevant to the promotion of race equality. It may also take account of the size and experience of your firm.

If you are unsuccessful at selection stage, and one of the reasons is that you did not meet the criteria relating to race equality, we suggest you ask the authority for more detailed feedback. In line with their duty to promote race equality, some public authorities now offer guidance material, or make referrals to specialist agencies, to encourage firms to improve their knowledge of race equality, and their prospects for future contracts.

How should we incorporate race equality into our tender submission?

If you are selected to tender, you will want to have as much information as possible about the background and context of the proposed contract, as well as the public authority's race equality objectives.

You should look for information such as the following in the invitation to tender or other contract documents:

- the authority's race equality scheme or policy;
- facts about the population likely to be affected by the contract, broken down by ethnic group and, where relevant to the contract, by sex, age, or other factors;
- how the goods, works, or service are currently provided, and the results of any monitoring, consultation, or other assessment of the impact on race equality; and
- where staff will transfer under TUPE, their terms and conditions, including protection against discrimination and rights to equality of opportunity.

You will also want to know how tenders will be evaluated. Within the basic criterion of best overall long-term value for money (or, for contracts subject to EC directives, the 'most economically advantageous tender'), the invitation to tender will list the specific evaluation criteria, including those relating to the promotion of race equality.

The contract specification will describe how race equality forms part of the services, goods, or works the contractor is expected to provide. Normally, the authority's concern will be the end product rather than the process, so the specification may state the race equality outcomes the authority is looking for, leaving it to you to indicate how you will achieve them.

Example

A government department is tendering a contract for the design, print, and distribution of a leaflet explaining recent changes in the law. The new law primarily affects families with children. The contract documents include a standard form, which tenderers are asked to use to set out their 'method statement'. This should include their proposals for the following:

- identifying languages (other than English and Welsh) in which the leaflet should be published, to be easily understood by at least 95% of parents of children under 16;
- distributing the leaflet so that the maximum number of families will receive it in an appropriate language; and
- developing proposals for print and broadcast media to publicise the leaflet to the diverse target audience.

If a contract concerns a function that is relevant to the authority's duty to promote race equality, and has a high priority, the specification may include requirements to carry out certain measures within the authority's race equality scheme or policy; for example, to monitor the service for any negative effects it might have on race equality, or to consult people affected by the contract. Your tender should explain how you would do this. You may find it useful to refer to our guide to ethnic monitoring.

If the specification says you are expected to make certain improvements in race equality performance each year (for example, an annual increase in the percentage of people using the service from settled refugee communities), you should say how you expect to meet this requirement.

Where public authority staff will transfer to the contractor under TUPE, your tender should state how you would maintain high standards of employment protection, including protection for race equality.

In completing your tender, you should consider whether the race equality requirements of the contract will have any implications for the staff who will carry out the contract.

For example:

- Will you need people with special knowledge or skills? At what levels? Can you provide this through training, or will you need to recruit specialist staff?
- Will you need to make special arrangements for supervision?
- Will the performance of the contract benefit from employing people from a particular racial group (within the strict limits in the RRA)?

Will the contract conditions impose any race equality obligations?

Yes. Public authorities can also use contract conditions to secure race equality standards. For example, public authority contracts are likely to include a condition that you must not discriminate unlawfully under the RRA, or under all current equality legislation, and that you will make sure your employees, agents, and any subcontractors also do not discriminate on these grounds. Of course, any person who considers they have been subjected to unlawful discrimination will still be able to bring proceedings, as they would regardless of any contract with a public authority. However, by making compliance with the RRA a condition of contract, the public authority gives it added force, since non-compliance can also be enforced by the authority as a breach of contract.

For firms that already have procedures in place to prevent discrimination, compliance with this condition should not be an additional burden. For firms that have not yet adopted anti-discrimination measures, you should find that by doing so you will not only improve your prospects of securing public authority contracts, but you should also avoid the costs of future complaints and litigation.

Other standard race equality clauses could require the contractor:

- in contracts for works or services, to comply with the authority's race equality policies and codes of practice when their staff work on the authority's premises or alongside the authority's staff (this could be met by showing that your policies and codes provide equivalent race equality protection);
- to notify the authority of any investigation or proceedings under the RRA, in connection with the contract, against the contractor and to cooperate with the investigation or proceedings; and
- to indemnify the authority in the event of any investigation or proceedings under the RRA arising from acts or omissions of the contractor, their staff or subcontractors in performing the contract.

If the contract is highly relevant to the public authority's duty to promote race equality, and good race equality employment practice is seen as necessary for effective performance of the contract, you may find additional contract clauses relating to race equality in employment. Such clauses could require that:

- in complying with the non-discrimination conditions, the contractor observes the CRE's code of practice in employment, as far as possible;
- the contractor promotes race equality in performing the contract; and
- the contractor monitors staff engaged in performing the contract and, if there is evidence of under-representation of particular racial groups in certain jobs, adopts measures permitted under the RRA to encourage people from under-represented racial groups to apply for such jobs.

Competing for public authority contracts

Contract conditions and race equality obligations

Contract conditions will not form part of tender evaluation. However, if you fail to confirm that you will comply with the conditions of contract, including those relating to race equality, if you are awarded the contract, your tender as a whole could be rejected.

We advise you to consult all the staff who are likely to be involved in the contract, as well as the relevant trade unions, so that you can be confident that your response on the race equality requirements of the contract is realistic and achievable.

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After the contract has been awarded

If we are unsuccessful, are there any lessons we can learn?

If you are unsuccessful, you will normally be told why. If one reason for rejection was dissatisfaction with your proposals on the race equality requirements, you should ask the public authority for advice on how your response could have been better. You should also check if the authority, or others with whom it is associated, offers training or special guidance on equal opportunities for providers.

If we are successful, what do we need to do to meet the race equality requirements of the contract?

1. You will want to establish a positive working relationship with the appropriate representatives of the public authority. This will be easier if you are very clear as to your role and that of the public authority.
 - Is the public authority able to offer any support, for example advice on race equality training?
 - How will responsibilities for monitoring race equality performance be divided between you and the authority? What is the authority planning to monitor?
 - In what form, and how often, does the public authority expect you to report monitoring results?
 - What are your respective roles in dealing with complaints of discrimination from employees, subcontractors, users of the goods, works, or service in question, or others?
 - How will you resolve conflicts? For example, if you disagree about the implications of ethnic monitoring data or other measurements of your race equality performance.
2. A first priority should be to identify any race equality training needs of staff who will perform the contract (including staff who will be transferred from the authority). You should remember that, for some staff, the race equality responsibilities of the contract may involve new ways of carrying out familiar tasks, and you should make sure they understand this. We suggest you consider giving special equality training to staff with management or supervisory roles, and to those who will be involved in monitoring race equality performance.

3. You should check that all the systems and procedures you described in your tender for meeting the race equality specifications, and any arrangements you will need to make to comply with the contract conditions, are fully in place before the contract start date. In particular, you should check you have made the necessary technical, organisational, and staffing arrangements for any ethnic monitoring specified in the contract.
4. If after the contract is under way, you are unclear about any of the race equality requirements, you should seek clarification as soon as possible. If you fail to demonstrate race equality performance to the specified standard, this could lead to enforcement action by the public authority. In the longer term, it could jeopardise your chances of getting public sector special equality training for staff with management or supervisory roles, and for those who will be involved in monitoring race equality performance.

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Doing more to promote race equality

After award of contract, can we be asked to carry out extra race equality measures?

A public authority may be aware of additional steps the contractor could take to promote race equality. After you have been awarded the contract, the authority may, for example, ask you to agree to:

- adopt an equal opportunities policy for your organisation generally;
- take positive action, as permitted under the RRA, and the Sex Discrimination Act 1975, to offer training or to encourage job applications as a way of overcoming any under-representation of particular racial groups or of women (or men), and to recruit disabled people; or
- promote subcontracting opportunities for small firms and ethnic minority businesses.

You may also be able to suggest other steps to promote race equality, which you could take on a voluntary basis.

Example

The London Borough of Newham awarded a contract for its meals service, valued at £2 million, to an international company. Post-award 'brokerage' by the SRB Provider Development Project negotiated with the company for two sub-contracts for the provision of Asian, and African and African-Caribbean meals with local providers, one from the voluntary sector and one from the private sector. Each subcontract was valued at £350,000 per year and resulted in the employment of four people. The company has since invited the local providers to help it to meet the demand for culturally appropriate meals in other boroughs.

Can we help public authorities to develop the race equality aspects of future procurement projects?

Possibly. As public authorities move towards more complex or innovative procurement projects, they may consult businesses and voluntary organisations at the initial development and planning stage. By drawing on the different perspectives, and wider experience, of the private and voluntary sectors, including in the field of race equality

or equal opportunities generally, some authorities have developed better ways of defining the scope of a strategic contract.

Any contact at the developmental stage cannot offer any advantage in the tendering process, but could help you to understand the legal and policy contexts within which public authorities operate.

Can we contribute to the development of a wider, more diverse, supplier base for public sector contracts?

Yes. Some major companies have already reviewed their own supply chain arrangements, and have introduced new procedures and new contract packaging that enables smaller businesses, and, in some cases, ethnic minority businesses, to compete.

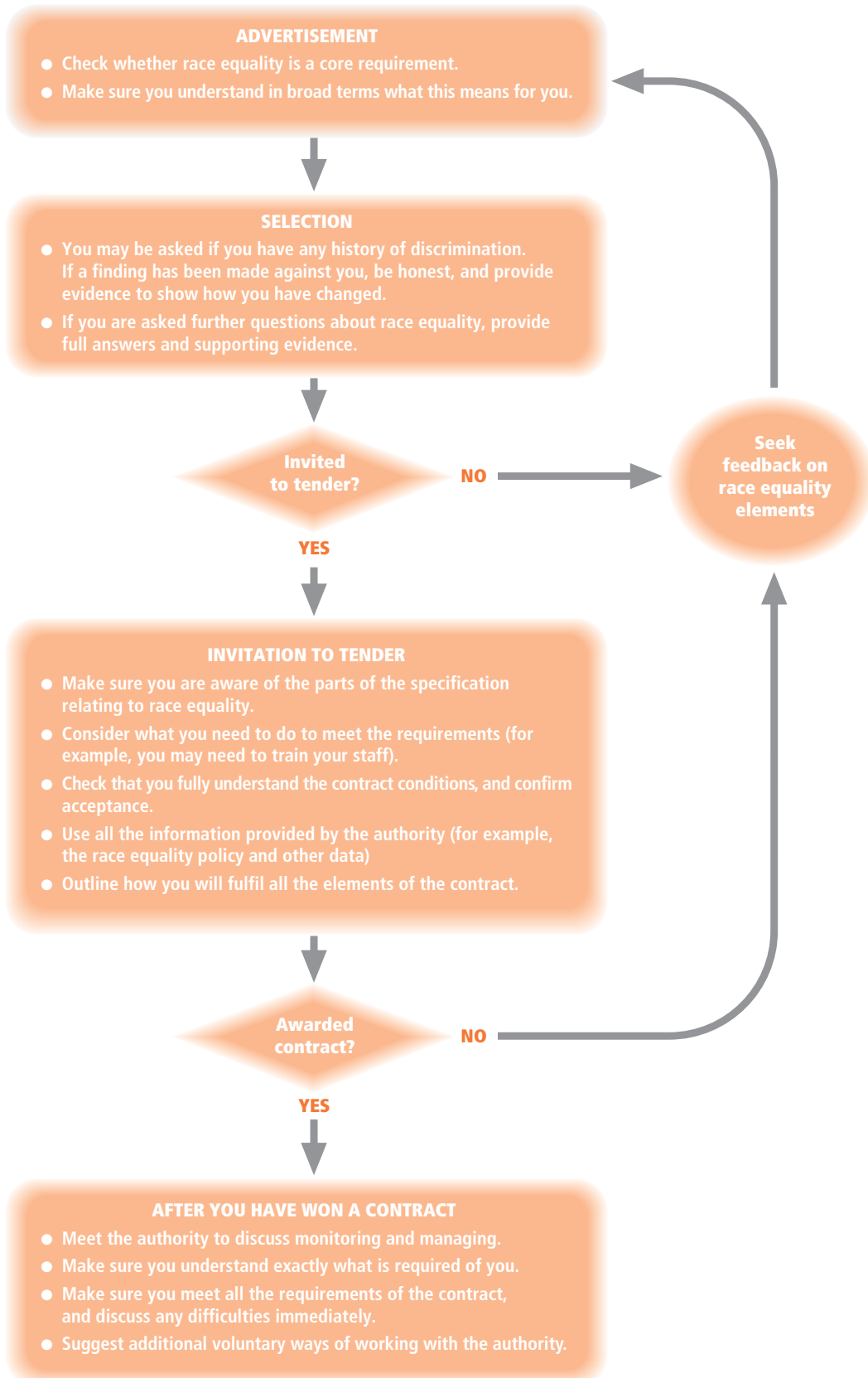
Finding new suppliers that are able to deliver goods, works, or services to your standards, can offer double benefit:

- these new suppliers have an opportunity to improve their skills, establish a reputation, and gain confidence; and
- your firm increases its capacity to meet diverse needs, and to respond flexibly and quickly to changed circumstances or new demands.

The result should be that these small firms and ethnic minority businesses will be better prepared to compete successfully for public authority contracts.

Figure 2

The procurement process – for contractors



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Race equality – a summary for contractors

Some necessary steps

- Check your race equality, and general equality, policies, to make sure you are complying with the law.
- If you do not have a formal policy, how else are you meeting your obligations under the RRA? Plan how you can demonstrate this when you apply for contracts.
- Review whether your policy is reflected in practice, and how this could be improved.
- Consider whether you can show evidence of good race equality practice. Do you have data showing how your policies affect different racial groups, or do you need to conduct ethnic monitoring? Do you communicate your commitment to equal opportunities to your staff and customers? Are you committed to any positive action or supplier diversity initiatives, or do you have any other evidence of good practice?

Applying for a contract

The figure on page 92 shows the procurement process from the contractor's point of view.

Appendix 1

Relevant laws and government policy

Race Relations Act 1976

The Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000 (RRA) makes it unlawful for any public or private sector body to discriminate, directly or indirectly or by victimisation, on racial grounds in employment, disposal of premises, and the provision of education, housing, goods, facilities or services. Racial grounds means grounds of colour, race, nationality, or ethnic or national origins.

The Act outlaws racial discrimination by nearly every public authority in carrying out any of its functions, including procurement, or by any private or voluntary organisation when carrying out 'public functions' on behalf of a public authority. Any person who considers they have been discriminated against, contrary to the RRA, can bring proceedings in the employment tribunal or the county court (or sheriff court in Scotland).

The RRA permits positive action to improve employment opportunities, and to meet any special educational, training, or welfare needs of particular racial groups.

The RRA requires public authorities listed in a schedule to the RRA to have due regard to the need to eliminate unlawful racial discrimination, and to promote equality of opportunity and good race relations in carrying out their various functions. Orders by the Home Secretary and the Scottish Executive impose specific race equality duties on the main public authorities. These orders require public authorities, police and fire authorities, central government departments, NHS institutions, and other bodies to publish a race equality scheme. Governing bodies of schools, and of further and higher educational institutions, are required to prepare a race equality policy.

The RRA established the Commission for Racial Equality (CRE), whose powers include supporting individual complaints of discrimination, enforcing compliance of public authorities' specific duties, issuing codes of practice, and conducting formal investigations.

The Race Relations Act 1976 (Amendment) Regulations 2003 come into force on 19 July 2003. These regulations, which amend the RRA, include a new definition of indirect discrimination, a statutory definition of harassment, provision for a shift in the burden of proof, and removal of some exceptions to the Act. These amendments will apply to grounds of race and ethnic or national origins in many, but not all, activities within the scope of the RRA.

CRE statutory codes of practice

The RRA (sections 47 and 71C) permits the CRE, for specified purposes, to issue codes of practice containing practical guidance on compliance with the RRA. A CRE statutory code of practice does not itself impose any legal obligations, but failure to follow recommendations in a code may result in breach of the RRA. A CRE code is admissible in evidence in legal proceedings, and if any provision of any such code appears to be relevant to a matter to be decided by a court or tribunal, it must be taken into account.

CRE code of practice in employment

This code, which was approved by Parliament in 1983, is a practical guide for employers, trade unions, employment agencies, and employees, to help them understand the provisions of the RRA and their implications. It contains recommendations for practical implementation of policies to eliminate racial discrimination and enhance equality of opportunity in the field of employment.

CRE codes of practice on the duty to promote race equality

These codes of practice (one for England and Wales, and one for Scotland), which were approved by Parliament in 2002, contain practical guidance for public authorities on meeting the duty to promote race equality under section 71(1) of the RRA ('the general duty'), and the specific duties imposed by Order. As part of the guidance on meeting the general duty, the codes include the following paragraphs:

Private or voluntary organisations carrying out a public authority's functions

- 2.9 When a public authority has a contract or other agreement with a private company or voluntary organisation to carry out any of its functions (see the glossary), and the duty to promote race equality applies to those functions, the public authority remains responsible for meeting the general duty and any specific duties that apply to those functions. The authority should therefore consider the arrangements it will need. If the authority's race equality duties are relevant to the functions it is contracting out, it may be appropriate to incorporate those duties among the performance requirements for delivery of the service. For example, a contractor could be required to monitor service users by their racial group, to make sure the authority is meeting its duties. This would not involve requirements concerning the contractor's internal practices. Whatever action the authority takes, it must be consistent with the policy and legal framework for public procurement.
- 2.10 In addition to specifications for the general duty and any specific duties, public authorities may promote race equality by encouraging contractors to draw up policies that will help them (contractors) to avoid unlawful discrimination, and promote equality of opportunity. Such encouragement should only be within a voluntary framework, once contracts have been awarded, rather than by making specific criteria or conditions part of the selection process. Public

authorities should bear in mind that the general duty does not override other laws or regulations on public procurement. In particular, as above, whatever action the authority takes must be consistent with the policy and legal framework for public procurement.

The EC race directive

EC Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

The EC race directive sets minimum standards for protection against racial discrimination. All EU member states are expected to have laws or regulations in place by 19 July 2003, prohibiting racial discrimination in areas such as employment, access to self-employment, vocational training, education, social security, and access to goods and services, including housing. Member states must make arrangements to ensure that victims can seek redress through judicial or other procedures, and that sanctions for discrimination are effective, proportionate, and dissuasive. Member states may permit positive action to prevent, or compensate for, disadvantages based on racial or ethnic origin.

EC procurement rules

The EC public procurement directives give effect to the EC Treaty principles of the free movement of goods and services in the purchasing by public authorities of goods, works, and services. The directives (which have been transposed into UK law as a series of UK procurement regulations) reinforce the need to:

- apply consistent and objective standards;
- avoid discrimination between UK and non-UK providers; and
- ensure clarity, openness, and timeliness at each stage of the procurement process, by conducting procurements in accordance with specified procedures.

The directives apply to all contracts above certain threshold values, and do not permit authorities to artificially split contracts to avoid the rules. Thresholds are normally revised every two years. There are different thresholds for different public authorities. Current thresholds can be seen on www.ogc.gov.uk/index.asp?id=397

The procurement of certain types of service (known as 'Part B services'), including health and social services, education, recreational and cultural services, personnel placement, and security services, is not subject to all of the service directive's requirements. Public authorities must still ensure their procedures for Part B services, and for contracts below the threshold values, meet the treaty (and treaty-based) principles of non-discrimination and equal treatment, transparency, and proportionality.

The European Court of Justice (ECJ) interprets the treaty and the directives when a legal challenge is brought against a public authority in relation to procurement, as do the UK courts.

At the time of writing, amendments to the EC directives have been proposed and may be adopted during 2003 or early 2004. The amendments are expected to simplify and clarify current requirements, and may clarify the extent to which public authorities can take account of environmental matters and social considerations in procurement.

Central government procurement policies and guidance

Central government departments are regulated by government policy on procurement, which is laid down by HM Treasury and stated in *Government Accounting*, chapter 22. All procurement by central government departments, their executive agencies, and non-departmental public bodies (NDPBs) is to be based on value for money, having due regard to propriety and regularity. Value for money in procurement is defined as 'the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the customer's requirement'. The Scottish Administration has signed a concordat with the Office of Government Commerce, agreeing to follow the same value for money principles.

The Office of Government Commerce (OGC) was established to improve the quality of procurement across all government departments. It publishes detailed operational guidance, and is developing processes that will assist procurement staff to achieve best practice in respect of all types of contracts. OGC guidance assists government departments to apply other relevant policy obligations – for example, sustainable development – to their procurement processes. The OGC website, www.ogc.gov.uk, provides model procurement documentation, as well as the full range of OGC guidance, policies, and statements.

UK legislation relevant to public procurement

Law and policy in Scotland

Scotland Act 1998

The Act gives the Scottish Administration and all Scottish public authorities a duty to make arrangements to carry out their functions, including procurement, with due regard to the need to meet the Act's 'equal opportunity requirements'. These are legal requirements relating to the prevention, elimination, or regulation of discrimination on grounds of sex, marital status, race, disability, age, sexual orientation, language, social origin, religion, or other personal attributes.

Law and policy in Wales

Government of Wales Act 1998

The National Assembly for Wales is required to make arrangements to secure that its functions are exercised with due regard to the principle that there should be equality of opportunity for all people.

Following publication of Better Value Wales, which looked at procurement across the public sector, the National Assembly has established a Welsh procurement initiative team to develop best practice across the public sector. It is the Assembly's policy to expect potential contractors to sign up to its core values, including the promotion of equality of opportunity in the way it procures buildings, goods, and services. A website being developed by the Assembly with the Welsh Development Agency will include a facility for public authorities to sign up to these core values.

Welsh Language Act 1993

Under the Welsh Language Act 1993, the Welsh language will be treated as equal to the English language in Wales in all public services.

Policies of public authorities

Social cohesion

Building and maintaining social cohesion in our communities is a priority for the government, and an objective of the EU Treaty. Taking action to remove barriers to full social and economic participation is consistent with a public authority meeting its duty under the RRA.

Sustainable development

Sustainable development seeks to ensure a better quality of life for everyone – both now and in the future – through social progress, the protection of the environment, the prudent use of natural resources, and economic growth.

Small businesses – 'Think Small First'

The aim of Think Small First is to assist small firms in the UK by asking every part of government to think about their role in supporting and promoting small firms and an entrepreneurial society. The Small Business Service is working to simplify access to the government market place by identifying and removing barriers that prevent small businesses from competing for public sector contracts.

Contract standing orders

Public authorities established by statute have contract standing orders, which regulate the decision-making powers of officers and members of the board or authority, and, in some cases, a parent authority. Standing orders lay down procedures for contracts of different values and are intended to ensure value for money, propriety and the proper spending of public money. It will normally be a disciplinary offence for officers to fail to comply with contract standing orders when letting contracts for the authority.

Appendix 2

CRE ethnic monitoring categories

The ethnic monitoring categories set out below are from the CRE's publication, *Ethnic Monitoring – a guide for public authorities*. These categories are based on those used in the 2001 census. By using categories which are the same, or very similar to those by which census data have been collated, you can easily compare the groups you are monitoring with their representation in the population as a whole.

Britain's ethnic minority population is not evenly distributed. If your authority provides services at a local rather than national level, or if your workforce is primarily recruited locally rather than nationally, you will want to make sure that your monitoring properly reflects the relevant population. For example, the relevant local population may include a relatively large number of people from particular ethnic groups which are not included in these categories, but which you consider should be separately monitored to reflect local circumstances. We recommend that, in asking people to identify their ethnic origin, and in collating data, you specify such groups as sub-groups of a relevant category. So, for example, Somalis would be a sub-group of Black African, and Irish Travellers, Roma/Gypsies, or Turks would be a sub-group of 'any other White background'.

ENGLAND & WALES

A White

- British
- Irish
- Any other White background, please write in

B Mixed

- White and Black Caribbean
- White and Black African
- White and Asian
- Any other Mixed background, please write in

C Asian or Asian British

- Indian
- Pakistani
- Bangladeshi
- Any other Asian background, please write in

D Black or Black British

- Caribbean
- African
- Any other Black background, please write in

E Chinese or other ethnic group

- Chinese
- Any other, please write in

SCOTLAND

A White

- Scottish
- Other British
- Irish
- Any other White background, please write in

B Mixed

- Any Mixed background, please write in

C Asian, Asian Scottish, or Asian British

- Indian
- Pakistani
- Bangladeshi
- Chinese
- Any other Asian background, please write in

D Black, Black Scottish, or Black British

- Caribbean
- African
- Any other Black background, please write in

E Other ethnic background

- Any other background, please write in

Appendix 3

Other sources of information and guidance

CRE codes and guides

Statutory Code of Practice on the Duty to Promote Race Equality (CRE, 2002)

Code of Practice for the Elimination of Racial Discrimination and the Promotion of Equality of Opportunity in Employment (1984)

Code of Practice in Rented Housing: For the elimination of racial discrimination and the promotion of equal opportunities (1991)

Code of Practice in Non-Rented (Owner-Occupied) Housing: For the elimination of racial discrimination and the promotion of equal opportunities (1992)

The duty to promote race equality: A guide for public authorities (CRE, 2002), and *The duty to promote race equality: A guide for public authorities in Scotland* (CRE, 2002)

The duty to promote race equality: A guide for further and higher education institutions (CRE, 2002) and *The duty to promote race equality: A guide for further and higher education institutions in Scotland* (CRE, 2002)

The duty to promote race equality: A guide for schools (CRE, 2002) and *The duty to promote race equality: A guide for education authorities and schools in Scotland* (CRE, 2002)

Ethnic monitoring: A guide for public authorities (CRE, 2002) and *Ethnic Monitoring: A guide for public authorities in Scotland* (CRE, 2002)

(All the above publications are available from www.tso.co.uk/bookshop, or phone 0870 240 3697 or email cre@tso.co.uk)

Other guidance

Achieving community benefits through contracts: Law, policy and practice (Richard Macfarlane and Mark Cook, Joseph Rowntree Foundation, 2002)

Clarifies the ways that government departments, local authorities, regeneration agencies and registered social landlords (RSLs) can use their mainstream procurement to increase social inclusion, especially through new jobs. (ISBN 1 86134 424 4, order from The Policy Press)

Interpretative Communication on integrating social considerations into public procurement (European Commission, 2001)

Sets out the extent to which social issues can be considered in public procurement at each stage of the contract process, and in contract conditions. There is a frequently asked questions section at www.europa.eu.int/comm/internal_market/en/publproc/general/01-324.htm which explains issues raised by the interpretative communication.

Smaller Supplier ... Better Value (Small Business Service / Office of Government Commerce)

Recommends ways in which public sector purchasers can engage with small and medium-sized enterprises. For related questions and answers, download www.sbs.gov.uk/content/pdf/OGC_smallersupplier_qa.pdf

Government: Supporter and Customer? (Better Regulation Task Force / Small Business Council, May 2003) Download from the internet: www.brtf.gov.uk/taskforce/reports/entry%20pages/smeprocurement.htm

Examines the barriers that small and medium-sized enterprises (SMEs) face in doing business with the public sector, and the wider benefits to the economy of doing business with SMEs.

Encouraging Responsible Business (SBS, 2002) Download from the internet: www.sbs.gov.uk/content/pdf/sbsbrochure1.pdf

Introductory handbook for small and medium-sized enterprises that promotes the case for corporate social responsibility.

Standards for measuring progress

The Equality Standard for local government (CRE, EOC, DRC, LGA, EO, Dialog, 2002)

Provides a framework for local authorities in England on delivering equality for employment and service delivery, recognising different levels of achievement. (Order from dialog@lg-employers.gov.uk)

The Equality Standard for local government, guidance 1: audit and self-assessment (CRE, EOC, DRC, LGA, EO, Dialog, 2002)

Supports and guides local authorities in implementing the standard. (Order from dialog@lg-employers.gov.uk)

Racial Equality Means Quality: A standard for racial equality for local government (CRE, 1998, www.cre.gov.uk/pdfs/remq_ew.pdf)

Helps local authorities in Wales, including joint boards and joint committees, to meet the requirements of the Race Relations Act.

Research report

Ethnic Minorities and the Labour Market: Final report (Cabinet Office, March 2003) www.strategy.gov.uk/2003/ethnic/report.shtml

Examines the labour market achievements of ethnic minorities, and recommends action to tackle the barriers they face. (Recommendation 26, page 126, sets out actions around public procurement.)

Government strategy

A better quality of life: a strategy for sustainable development in the UK (UK government, www.sustainable-development.gov.uk)

The UK government's strategy for achieving sustainable development – contains an indicator of 'ethnic minority unemployment' in its Building Sustainable Communities section.

General guidance on government procurement policy²⁸

The Office of Government Commerce (www.ogc.gov.uk) works within government to improve procurement, and project and programme management. The OGC also works with suppliers to make the government marketplace more efficient and attractive to business.

Organisations of particular interest to public authorities

Equalities organisations

- The Commission for Racial Equality (www.cre.gov.uk)
The CRE has forthcoming guidance on race equality for small and medium-sized enterprises (SMEs), and on partnerships. For details of new publications, visit the Publications area of the CRE website.
- The Disability Rights Commission (www.drc.gov.uk)
- The Equal Opportunities Commission (www.eoc.org.uk)

Unions

- The Trades Union Congress (www.tuc.org.uk/equality/index.cfm)
- Scottish Trades Union Congress (www.stuc.org.uk)
- Wales Trades Union Congress (www.wtuc.org.uk)

28. Details of sector-specific organisations and their guidance have been deliberately omitted, since this guide is concerned with race equality in procurement, within the overarching principle of value for money.

Organisations of particular interest to contractors

- Equality Direct (www.equalitydirect.org.uk)
Gives business managers advice on a wide range of equality issues.
- The Confederation of British Industry (www.cbi.org.uk/home.html,
www.cbi.org.uk/scotland, and www.cbi.org.uk/wales)
- Small Business Service (www.sbs.gov.uk)
Provides information and advice to help small businesses realise their potential. The OGC and Small Business Service have a new 'supplying government' web portal, www.supplyinggovernment.gov.uk.
- Ethnic Minority Business Forum (www.ethnicbusiness.org)
Works with the Small Business Service and with Business Link franchises to identify the needs of entrepreneurs in ethnic minority communities.
- Business Link (www.businesslink.gov.uk)
National business advice service – provides information to meet business needs, and gives access to a wide network of business support organisations.
- The Federation of Small Businesses (<http://www.fsb.org.uk/>)
Lobbying and benefits group for small businesses.
- DTI social enterprise unit (www.dti.gov.uk/socialenterprise/index.htm)
Promotes and champions social enterprise, takes action to address barriers to growth of social enterprises, and identifies and spreads good practice.



**COMMISSION FOR
RACIAL EQUALITY**

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