

Introduction

Public authorities spend billions of pounds annually on contracts for the provision of goods, facilities and services. In 2003/4, the sum in the UK was £132 billion. These contracts cover a range of significant public service areas from the management of prisons to care homes and schools, to the provision of social housing.

Equality should be a central part of public procurement. This is essential for 3 main reasons:

- Public money should be spent on contracts that promote equality, not that entrench discrimination;
- Embedding race equality in public procurement ensures high quality services for members of the public, whatever their diverse needs;
- Preventing discrimination in the selection of contractors enables all businesses to compete for business on an equal footing and stimulates competition amongst businesses.

Current Laws

Under the Race Relations Act 1976 (RRA), public bodies are not allowed to discriminate in carrying out any of their functions, including procurement. This means they could not select or reject a would-be contractor on the basis of race, or treat them unfairly during the contract.

Public bodies also have positive obligations, meaning they actively need to take steps to eliminate discrimination, promote equality of opportunity and good race relations in their procurement practices.

Public bodies have discretion about how to do this, but this could include taking steps to:

- (i) take steps to identify and address barriers faced by certain contractors, for example ethnic minority businesses;
- (ii) take practical steps to embed equality in the design and delivery of contracts.

Public bodies are bound to follow by an EC public procurement directive and regulations which sets out what they need to do at each stage of the contract process for contracts over a set threshold. This sets some limits on the extent to which they can promote equality within the procurement process, but has recently been amended, giving greater freedom.

There is no law preventing private sector bodies from discriminating in their choice of contractor. The private sector is largely unregulated in the way it arranges contracts.

Private sector bodies do not have any positive obligations to promote equality, even when they are delivering a major service for the public sector. The public sector contracting body retains responsibility for meeting the duty in all areas, including those that have been contracted out. This means that public bodies need to take steps to ensure their contractors have the capacity to, and do in practice, deliver in the contract in a way that promotes equality.

The Need for Legal Reform

There are some significant gaps in the existing race equality law on procurement. In particular there is no law stopping private or voluntary sector bodies discriminating when carrying out procurement. There is evidence that discrimination in procurement is preventing businesses from competing.

The legislation that does exist is not applied in practice. Few public bodies have built equality into their procurement processes. They have neither promoted supplier diversity, nor tried to embed equality in the way contracts are designed and delivered.

After the race equality duty came into force into 2001, Public bodies told the CRE that they were unclear on what they were permitted to do in relation to procurement under the RRA and the European legislation. In response, CRE produced detailed practical guidance, with tools and examples, in discussion with Government, and after extensive consultation with public and private sector bodies.

Since then a few public bodies have shown strong leadership and embedded equality in procurement, showing that the legislation that exists can be used effectively. Overall, however, little has changed. Many public bodies have been cautious about promoting equality, and many have simply not prioritised this area, seeing race equality as an add-on and not core to quality procurement. It is now clear that this is not just a question of uncertainty, but lack of will to act in this area unless explicitly obliged to do so. Clearer legislation with teeth is needed.

The DLR Green Paper and Procurement

What the DLR says about procurement

The DLR does not think further legislation is needed in the area of public procurement. In essence it thinks that more legislation would add a regulatory burden, and that further practical guidance is sufficient. The CRE disagrees with the proposals.

CRE response

The poor performance of public authorities under existing legislation, combined with the abundance of detailed and specific guidance on the subject point clearly to a need for stronger, clearer and more enforceable legislation. Further guidance is unnecessary – it will delay the process of implementation while failing to address the crux of the issue. Minimum equality standards in procurement are needed, laid down in legislation.

The Proposals, and CRE response

1. Prohibiting discrimination in the private sector

What the DLR says: There is no need for legislation prohibiting discrimination in the private sector. There is no evidence of discrimination and without this evidence, legislation will only add an unnecessary regulatory burden on the private sector.

What the CRE says: An explicit prohibition on discrimination in procurement in all sectors is needed. There is evidence of discrimination in contracting, particularly in the construction sector. CRE has received many complaints from small businesses which feel they have been

discriminated against in the contracting process. If further evidence is needed, Government should conduct research in line with its existing race equality duty.

A total prohibition is needed to:

- Send out a clear message that discrimination is unacceptable and money should not be spent on discriminatory practices;
- Remove current anomalies. For example, a public sector body must not discriminate against contractors or would-be contractors, but once a contract is awarded, there is no legal bar on the successful contractor discriminating in the way they sub-contract. Further, a private body must not discriminate in the way it recruits an employee, but could discriminate in the way it selects a consultant;
- Provide Companies which have been discriminated against in the procurement process with a legal remedy;
- Ensure discrimination in the private sector does not undermine the quality of provision by reducing competition.

Such a prohibition would inevitably increase the regulatory burden on the private sector, since this sector is currently unregulated in procurement. This alone cannot be a reason for allowing discrimination in procurement to continue unchecked. Regulatory requirements should be proportionate to the size of the contract, the size of the company awarding the contract and its resources.

2. Requiring the public sector to promote equality in procurement

What the DLR says: A single public sector equality duty is needed, covering all equality strands (the general duty). This duty, supported by a statement of purpose, would require public authorities to prioritise objectives in each equality area and take proportionate action towards achieving them. This would enable them to target resources rather than, as at present, having to have 'due regard' to promoting equality in all their work.

The general duty should be supported by specific duties to help public authorities achieve these objectives. These would be flexible to the body in question, rather than the procedure-orientated duties under the RRA.

What the CRE says: The race equality duty applies to all areas of public authority work. If a new duty only applied to prioritised areas, this would mean a regression in standards and inconsistencies across areas of work. Race equality must be mainstreamed throughout public authority work.

Under the proposed duty, procurement is likely to be completely overlooked. CRE research shows many public authorities currently fail to recognise that procurement is highly relevant to race equality, and do not mention it in their race equality schemes. This makes it highly unlikely that procurement would be highlighted as a priority objective in public authority work under the proposed duty. This means the only way procurement would be considered would

be if public authorities prioritised areas of work that were out-sourced. This would create inconsistencies in procurement within authorities, since equality would be embedded in the procurement of some services but not others, not necessarily reflecting the relevance of the contract to equality, but simply whether the authority had chosen to focus on that function. In the procurement of major front-line services that were not prioritised for attention, public authorities would not need to promote race equality.

What the DLR says: There should be no specific duty on promoting equality in procurement. This would not fit with the type of specific duties proposed. It would also run contrary to the aim of simplifying the duty, and empowering public authorities to prioritise their own objectives.

What the CRE says: There should be an additional part to the general duty, requiring public authorities, in the procurement of works, goods or services, to take necessary and proportionate steps to eliminate unlawful discrimination and harassment, and to promote equality of opportunity. This would be outcome-focused, not process driven.

Under the duty there should be scope for the Secretary of State to make regulations to assist public bodies comply with this element of the duty. Statutory guidance should also be introduced to strengthen existing guidance. The regulations and guidance should set out what is needed at each step of the procurement process to ensure: equality requirements of a contract are identified clearly, contractors are selected who will not discriminate and who have the capacity to promote equality in the context of a particular contract, the contract is awarded to the best tender overall including in terms of equality and the contract is monitored.

A separate limb to the *general* duty is important and fully justifiable for 3 reasons:

- There has been some doubt over whether procurement is a function in its own right or an enabler. Even if accepted to be a function, experience shows that procurement is likely to be overlooked in the equality agenda unless explicitly highlighted;
- Procurement differs significantly from other functions. It is a function in its own right, but unusual as it is the mechanism by which goods, facilities and services are delivered rather than the outcome itself. A different approach needs to be taken to embedding equality in procurement from other functions;
- Procurement is a complex area because of domestic and European legislation. Additional regulations are needed, obliging public authorities to embed equality in the procurement process at each stage and showing them how. Without this, the majority of public bodies will not embed equality in procurement.

CRE agrees with DLR that it would not fit with the proposed legislation to have a *specific* duty on procurement.

3. Giving the private sector an equality duty in certain contracts

What the DLR says: The general duty should apply either to a specified list of public authorities (as under the RRA at present) or to any bodies carrying out public functions (as under the EOA and the DDA). A single approach is needed to ensure consistency under a single equality duty.

The implications of the two approaches for private sector contractors are as follows:

1. If the duty applies only to listed public authorities, then private sector contractors will never have a positive duty themselves. They will be only be bound by positive obligations to the extent the contracting authority builds equality into the contract.
2. If any body carrying out a public function is given a duty, then contractors delivering a public service through a contracts might have a direct positive duty (though the law is uncertain in this area).

What the CRE says: It is important that contractors delivering public services promote equality. However, there would be confusion over responsibility and liability under the second approach, if both the contracting bodies and the contractor were directly bound by a positive duty. Whichever approach is taken, the law should make explicit that the public authority contracting body retains responsibility for meeting the duty and that private contractors are not directly bound. Imposing strong legal requirements on the public authorities would provide safeguards to ensure that they imposed in-chain obligations on their contractors.

4. Disqualifying contractors who discriminate

What the DLR says: There should not be a blanket requirement to disqualify contractors who discriminate. This would be heavy-handed and would disadvantaging contractors with a one-off finding of discrimination who have taken remedial measures. Public authorities should retain discretion to disqualify depending on the circumstances.

What the CRE says: Disqualifying businesses who discriminate sends out a clear message that equality is not peripheral to core business, and that they will not win lucrative contracts if they discriminate. It also prevents public money being spent on discriminatory practices. Without caveats, a blanket disqualification requirement could be unfair on certain businesses, but this should not render the whole system inoperative. A prima facie obligation of disqualification should remain, with a burden on the business in question to prove to the satisfaction of the contracting authority that it has improved. Statutory guidance should set clear guidelines on this for public authorities. Without legislation, public authorities will not have the confidence to disqualify contractors and many will simply not see the need to do so.

5. Supplier diversity

What the DLR says: The Green Paper says nothing about broadening existing positive action measures to allow contracting bodies to take measures to encourage and capacity build certain businesses to compete for public contracts. target, train and capacity build minority businesses.

What the CRE says: There is evidence that ethnic minority businesses, most of whom are small or very small, are significantly under-represented in certain contracts and face difficulty in competing for public contracts. Often small businesses are not allowed to compete directly for large public contracts, many find the public contracting process overwhelming and some public authorities are reluctant to diversify business. The outcome is many are prevented from competing, reducing competition.

Existing law on positive action is narrowly defined. There is no scope to introduce targeted measures to help ethnically under-represented businesses to compete for contracts. European Legislation now allows for positive action more broadly.

Legislation is needed to allow for contracting bodies to give ethnic businesses targeted training and support on how to compete for contracts, as well as information sharing, where there is evidence of under-representation in that sector. This would apply equally to the under-representation of white British businesses as to ethnic minorities.

What the CRE thinks is needed

In summary, CRE thinks that legislation is needed setting down clear and enforceable standards. As a minimum this should:

- Prohibit discrimination against potential contractors, whatever sector the contracting body is in;
- Require public authorities to disqualify contractors with findings of discrimination from the contracting process;
- Set down minimum standards for the promotion of race equality in public contracts;
- Allow positive action in procurement to promote supplier diversity.