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Public Procurement & the Public Sector Equality Duty: Equality Sensitive Tendering in Scotland.

Introduction

Public procurement, the purchase of goods and services by public sector bodies, is an important segment of the economy. In Scotland alone, it accounts for over £10bn per year (Scottish Government, 2016). Beyond its economic impact and the opportunities for businesses, public procurement has been referred to as one of governments' most important functions (Potoski, 2008: 558). Equality sensitive public procurement can reduce discriminatory features of goods, works or services. It can be strategically used to foster equality within the workforce of a specific contract, for instance by including quota for the employment of certain groups in works contracts (Wright, 2014). Furthermore, by strategically using contracting for services, it may be a lever to promote more equal outcomes (Equality and Human Rights Commission, 2013: 19) also in the broader societal context. It has also been considered as having "great

potential to promote gender equality” (European Institute for Gender Equality, 2016).

In Scotland, public authorities are required to take into account equality considerations when purchasing. In this context, two pieces of legislation are of major importance. The Equality Act 2010 generally requires public authorities to take into account equality considerations relating to age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. More specifically, due regard has to be paid to eliminating discrimination, advancing equal opportunities, and fostering good relations between people who share one of the protected characteristics mentioned above and those who do not. In Scotland, the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 reiterate the duty to have due regard to equality considerations with a special emphasis on public purchasing and highlight award criteria and contract conditions.

This Working Paper provides insights into how these duties are implemented at local level in Scotland. It starts out with a brief overview of the strategic use of public purchasing to foster social goals and sets out the relationship between public tendering and equality. It then outlines legal stipulations on equality objectives in public procurement in Scotland. Focusing on progress reports of Scottish local councils in mainstreaming the Equality Duty the paper argues that these suggest most councils focus their efforts on tools for implementation, namely the introduction of equality related award criteria and contractual obligations in tendering, the provision of training and/ or revision of guidance papers. Yet, only a few councils go beyond implementation oriented measures and seek to assess new ways to achieve equality sensitive public procurement by actively engaging with stakeholders and fostering cooperation between equality and procurement staff. The Working Paper concludes with a brief summary and recommendations.

1 Strategic Public Consumption and Equality

Public procurement is an important market. On average, it accounts for about 30% of total government spending and 12% of GDP in OECD countries (OECD, 2015) and nearly 14% of GDP in the EU¹ (Cernat and Kutlina-Dimitrova 2015: 2). In Scotland, over £10bn are spent each year by public sector bodies on construction works, goods, and services (Scottish Government, 2016).

It has been shown that shifting service provision from publicly provided to contracted services can result in a worsening of wages and working conditions and increased job insecurity that affects women disproportionately (Corby 2011: 110; Dube and Kaplan, 2010; Engstrom and Axelsson, 2010; Flecker and Hermann, 2011; Vrangbæk et al., 2015) and that competition-based tendering may contribute to the undervaluation of women’s work and de-skilling (Benjamin, 2015; Bock Mullins and Moreno Saldivar, 2015: 176). Public procurement practices that are aware of these (potential) impacts of contracting (out) and competition-based tendering may seek to mitigate these effects.

Public purchasing interacts closely with equality matters. It can contribute to (re)producing, increasing or diminishing societal inequality. For instance, buildings that are only accessible by stairs may limit access for wheelchair users. They may also have a gendered impact as they limit accessibility for people with prams (mainly women). The use of non-inclusive language may negatively affect the uptake of services by transgender people.

In addition, public procurement can be used more proactively to promote equality within the workforce of the specific contract as well as in the broader societal context. One documented example of the use of public

¹This figure is excluding utilities, including utilities, the spending for public procurement raises to about €2.4 trillion and a share of almost 19% of GDP (Cernat and Kutlina-Dimitrova 2015: 2).

procurement to foster equality has been highlighted by the Equality and Human Rights Commission. Based on lower rates of GP consultation by older (especially single and gay) men a health organization asked bidders in the Invitation for Tenders to include a concept outlining how to achieve a higher uptake of consultations, a strategy that eventually led to “[...] improved attendance at GP surgeries by this group which aided progress towards the equality outcome.” (Equality and Human Rights Commission, 2013: 19)

Hence, through consciously designing the building, good or service, avoiding discriminatory features and taking the divergent needs of different groups into account, more equal outcomes can be fostered.

1.2 Integrating Equality Matters in Tendering

The public purchase of goods and services offers a broad range of potential gateways to foster equality. In order to be fully effective, however, equality objectives need to be an integral part of the whole procurement process (Medina Arnáiz, 2010). Evaluating the good or service and the contract from an equality perspective is an essential (first) step to equality sensitive public procurement. Knowledge about existing inequalities and the way in which specific features of the good or service may interact with societal inequalities is an essential condition for this task.

The result of this analysis should then be incorporated in the design of the good or service to be procured. In addition, stipulations that aim to promote equality can be introduced. Technically, stipulations on equality can be integrated in different ways. They can be part of the selection or award criteria² or included in contractual obligations. These stipulations can adhere to given (quantitative) figures that are to be achieved or upheld (for example by introducing quotas for the employment of women in the workforce carrying out the contract) or they can follow a more open ‘procedural’ approach where bidders are asked to include a concept on how to achieve a certain outcome (Sack, Schulten, Sarter and Böhlke, 2016: 77). As this leaves bidders free to propose novel approaches, it may foster innovation and make efficient use of individual companies’ specific resources to enhance equality.

Against this background, strategic procurement is a very demanding task. It requires high levels of awareness of existing inequalities, a clear conception and knowledge of features that may discriminate or disadvantage persons with certain characteristics and an idea of how equality can be enhanced by designing specific services and contracts. Yet, despite the need for knowledge, little is known about the impact of contract design, technical specifications and public procurement procedures on equality. This holds especially true for those characteristics that remain under-researched and where little quantitative data exists, especially gender reassignment.

² Selection criteria refer to the assessment of the suitability of bidder, while award criteria are used to determine the offer that best meets the needs of the contracting authority (among others Treumer, 2009). This “[...] is a question of separate operations that are governed by different regulations in which, once the suitability of the tenderer to undertake the contract has been decided, the award must be decided [...]” (Medina Arnáiz, 2010: 551).

2 The Legal Framework

Public procurement is embedded in a multi-level regulatory framework that limits local procurers' discretion and impacts on the possibility of including social considerations in general and equality in particular.

Supranational regulations on public procurement that are binding for the UK are currently set for signatory states by the World Trade Organization's (WTO) Government Procurement Agreement (GPA) and for members of the European Union by European law. For the time being,³ the most important legislation impacting on Scotland is European law. It imposes a tight legal framework on public contracting that focuses on non-discrimination against tenderers as well as competition and affects which and how non-economic and most importantly social aspects can be taken into account.⁴ In a nutshell, non-economic criteria, such as the promotion of equality, can be an important part of public tendering as long as they do not interfere with the principles of the single market. While European law negates the possibility of basing the procurement decision on general company policies, it leaves the scope for the strategic use of public procurement to enhance equality rather broad, be it in designing the good or service or in setting requirements regarding the workforce employed in the specific contract (for a more detailed outline of the legal situation at European level see Sarter, 2015).

In the UK, and especially in Scotland, clear provisions exist that require public authorities to consider equality issues when tendering. First, Section 149 of the Equality Act 2010 (the Public Sector Equality Duty) requires that public authorities take into account equality impacts regarding age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation) in all its functions (among which public procurement). The General Duty states that

"A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

In addition, the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 impose further requirements on Scottish public authorities to have "due regard to whether the award criteria should include considerations to enable it to better perform the equality duty." (9(1)) or, respectively, "to whether the conditions should include considerations to enable it to better perform the equality duty." (9(2)).⁵

³Given the outcome of the referendum on remaining in or leaving the EU from June 23rd, 2016 and the resulting current uncertainty as to how the relationship between the UK and the EU will be defined as well as ongoing debates on Scotland maintaining special links to the EU and on a possible referendum on Scottish independence, some uncertainty exists regarding future developments. However, some assumptions may be made about future developments. First, as public procurement is an important market securing non-discriminatory access of UK companies to public contracts in the member states of the EU may be deemed important from a UK perspective. Second, public procurement is a vital part of existing trade agreements of the EU. European public procurement rules apply within the EEA, which means that a 'Brexit' which results in membership of EEA or EFTA would result in an unchanged legal situation regarding the rules governing public procurement. The European Commission has also declared its goal that the Transatlantic Trade and Investment Partnership (TTIP) would "open up public tendering markets on the basis of rules on transparency and non-discrimination similar to those that apply under EU law." (European Commission, 2016: 1). Also, at the time of writing, the available version of the Comprehensive Economic and Trade Agreement (CETA) stipulates the principle of non-discrimination (Article 19.4). This suggests the importance attached to public procurement based on non-discrimination and competition. Against this background, it seems rather likely that stipulations on non-discrimination in public procurement would be part of any trade agreement between the EU and the UK.

⁴In addition to primary law and secondary regulations on public procurement, further secondary regulation might, in some cases, apply to public contracting and limit the possibilities of contracting authorities.

⁵The reach of this broad provision is, however, limited as the Act explicitly clarifies that "[N]othing in this regulation imposes any requirement on a listed authority where in all the circumstances such a requirement would not be related to and proportionate to the subject matter of the proposed agreement." (9(3)) In how far this clarification limits the use of equality considerations in practice remains to be analysed by further research.

Alongside the stipulation to have regard to equality in tendering, the Specific Duties also lay down the requirement to regularly publish on the progress in implementing the duty.

3 Scottish Local Councils' and the Public Sector Equality Duty

Previous research on socially responsible procurement has pointed to the fact that the core concern lies in the implementation and that procuring entities' strategies are of major importance when it comes to the successful use of public procurement as a lever to foster social goals (Sack, Schulten, Sarter and Böhlke, 2016). Against this background, the question arises as to how Scottish local councils implement the requirements set out in the Public Sector Equality Duty and the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.

The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 require local councils to report regularly on their progress on mainstreaming equality and to make these reports publicly accessible. As it can safely be assumed that the councils are likely to highlight areas in which major efforts have been undertaken and that key endeavours will feature prominently, these evaluations provide comparable compiled sources of insights into the individual councils' actions as well as their plans for future progress. In the following part the results of a computer-assisted content analysis of the progress reports of Scottish local councils⁶ issued in 2015 will be presented.

3.1 Development of Equality Sensitive Procurement in Scottish Councils

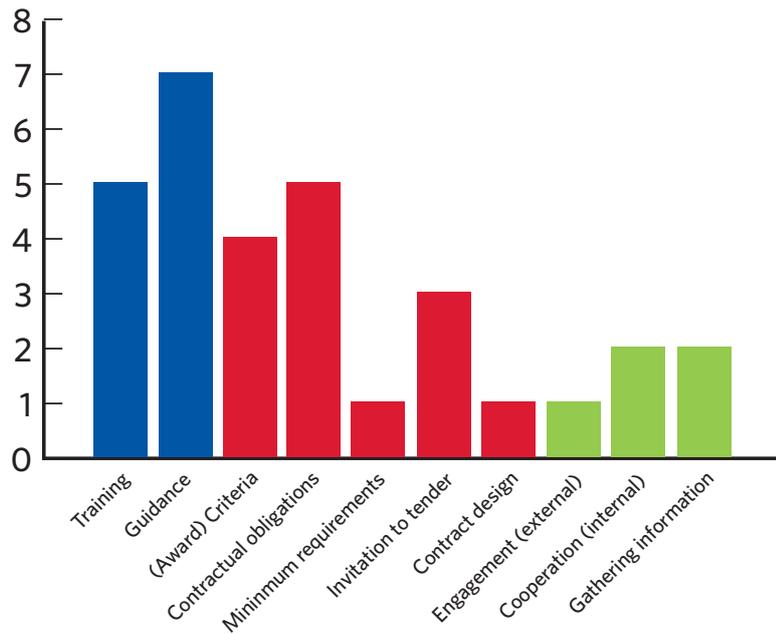
At between five and 133 pages, the progress reports issued by Scottish local councils are varied in length and content. Out of a total of 31 reports examined, only 24 referred to 'procurement'⁷. While the reports vary significantly and the measures reported are rather diverse, three major types of measures can be distinguished: Firstly, activities relating to the provision of guidance and information (issuing of guidance papers and provision of trainings); secondly, the reported use of tools for implementation that relate to equality (e.g. the use of award criteria, minimum requirements or contractual obligations relating to equality); and thirdly, knowledge building activities such as external engagement or internal cooperation between procurement and equality staff.

The first two categories are based on pre-existing knowledge and solely aim at the implementation of existing strategies to include known equality considerations in public procurement. In contrast, knowledge building activities seek to foster the understanding of how public procurement and equality interact and to foster a deeper understanding of how to promote equality – either in general or among procurement staff. These measures have the potential to identify hitherto unaddressed issues in procurement and therefore can contribute to creating innovation in equality sensitive tendering.

⁶The following analysis examined the mainstreaming reports that the councils issued and had to publish online. No report was available for Renfrewshire.

⁷This excludes reports which only make reference to the legal requirements regarding public procurement but do not mention public procurement as an area in which the council specifically implemented these.

Graph 1: Fields of (number of Scottish local councils reporting engagement in fields of activity)



Quantitatively, the three categories were rather unevenly represented (see graph 1).

The most prevalent activities are the provision of training and guidance papers (blue columns in the graph) and the use of stipulations relating to equality in the contract and/ or the invitations to tender (red columns in the graph). Compared to the number of councils engaged in these implementation focused actions, only a small number of councils were involved in knowledge-building activities (green columns in the graph). Only one council, East Ayrshire Council, mentioned engagement with external stakeholders, more specifically with the West of Scotland Regional Equality Council (WSREC), in order to promote participation of small businesses from the voluntary sector and enterprises led by people with protected characteristics in bidding for public tenders (East Ayrshire Council and Education Authority, 2015: 12).⁸ Internal cooperation was explicitly mentioned by two councils. Orkney Islands Council reported that they

had established collaboration between equalities and procurement staff: “Equalities and procurement staff work together, and with other officers, in situations where procurement of goods, services and works has a specific equalities dimension.” (Orkney Islands Council, 2015: 37)⁹ and Aberdeen City Council referenced the creation of a new post “which includes the championing of Equalities in Procurement which will cover addressing legislation and networking with other public bodies’ procurement departments.” (Aberdeen City Council, 2015: 14).

Further activities relating to knowledge building referred to impact assessment and the gathering of information. Edinburgh Council has evaluated the impacts of the council’s investment and reported that it was developing new grant programmes that involved providers as well as service users and saw equality as one of its future core concerns (Edinburgh Council, 2015: 5) and Dundee City Council amended the Annual Citizens Survey when retendering its conduct.

⁸Plans for future engagement activities also included engagement with service users, as East Lothian Council committed to “engaging with service users” (East Lothian Council, 2015: 8) and Stirling Council stated that it intended “to consult widely on the development of the new [Procurement] Strategy with external business and community interests.” (Stirling Council, 2015: 8).

⁹Interestingly, the cooperation between procurement and equality related staff is limited to procurement procedures with an obvious equalities dimension. While this approach may foster innovation in the way, inequalities are addressed and equality fostered, the potential for creating new knowledge and identifying the impact of seemingly ‘equality neutral’ procurement procedures is limited.

The specific extension was the inclusion of questions relating to equality issues which shall serve to inform the Council's policies and practices (Dundee City Council, 2015: 32). This serves as a good example of how the specific design can help promote equality in the future.

4 Conclusion

Public procurement accounts for a significant proportion of government spending and can be used to foster greater equality.

While supranational, and especially European, law establishes a tight legal framework that limits the legal scope for non-economic criteria, it clearly and explicitly gives room to social, and among them equality, considerations. Making use of the scope to use public procurement strategically to address social inequalities, British and Scotland-specific law requires Scottish public authorities to take into account equality considerations relating to age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation when purchasing and reflect on award criteria and contract conditions. Focusing on local councils' reports, this Working Paper analysed actions adopted by Scottish local councils.

It showed that measures that were based on pre-existing knowledge and focused on implementation were quantitatively the most prevalent. Compared to the number of councils engaged in such implementation focused actions, the number of councils involved in knowledge-building activities was rather small. This may be understandable given the emphasis placed on criteria and contract conditions by the Scottish Specific Duties coupled with the higher demands of engagement and knowledge building activities for human and financial resources. Yet, it also limits the potential impact of public procurement for equality. From a policy perspective, special attention should be given to promote measures that aim to foster knowledge building as this may identify hitherto unrecognized impacts of procurement practices and identify and promote new, innovative measures to use public purchasing strategically as a lever to promote a more equal Scotland.

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