

7. Procurement: A guide for listed public authorities in Wales



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1. Context for this guide

Key dates for the public sector equality duty

- 5 April 2011** General duty came into force
- 6 April 2011** Specific duties in Wales came into force
- 2 April 2012** Listed bodies in Wales to publish equality objectives and Strategic Equality Plans
- 2 April 2012** Listed bodies in Wales must have engaged with interested people as part of gathering relevant information to assess its activities against the general duty. Relevant information must be published as appropriate.

1.1 What is a listed public authority in Wales?

For the purpose of this guidance, a listed public authority in Wales (or 'listed body') is one contained in Part 2 of Schedule 19 of the Act as supplemented and amended by the Equality Act 2010 (Specification of Relevant Welsh Authorities) Order 2011. This includes, for example, local authorities, education bodies (including schools), health bodies and the Welsh Government.

1.2 The Equality Act 2010

The Equality Act 2010 (the Act) brings together and replaces the previous anti-discrimination laws with a single Act. It simplifies and strengthens the law, removes inconsistencies and makes it easier for people to understand and comply with it. The majority of the Act came into force on 1 October 2010.

The Act includes a **new public sector equality duty** (the 'general duty'), replacing the separate duties on race, disability and gender equality. This came into force on 5 April 2011.

1.3 What is the general duty?

The aim of the general duty is to ensure that public authorities and those carrying out a public function consider how they can positively contribute to a fairer society through advancing equality and good relations in their day-to-day activities. The duty ensures that equality considerations are built into the design of policies and the delivery of services and that they are kept under review. This will achieve better outcomes for all.

Public bodies are required to have due regard to the need to:

1. eliminate unlawful discrimination, harassment and victimisation and other conduct that is prohibited by the Act
2. advance equality of opportunity between people who share a relevant protected characteristic and those who do not
3. foster good relations between people who share a protected characteristic and those who do not.

The guidance refers to these three elements as the three 'aims' of the general duty and so when we discuss the general duty we mean all three aims.

The Act explains that having due regard for advancing equality involves:

- removing or minimising disadvantages experienced by people due to their protected characteristics
- taking steps to meet the needs of people from protected groups where these are different from the needs of other people
- encouraging people with protected characteristics to participate in public life or in other activities where their participation is disproportionately low.

The Act describes fostering good relations as tackling prejudice and promoting understanding between people who share a protected characteristic and those who do not. Meeting the duty may involve treating some people more favourably than others, as long as this does not contravene other provisions within the Act.

The new general duty covers the following protected characteristics:

- Age
- Gender reassignment
- Sex
- Race – including ethnic or national origin, colour or nationality
- Disability
- Pregnancy and maternity
- Sexual orientation
- Religion or belief – including lack of belief

It applies to marriage and civil partnership, but only in respect of the requirement to have due regard to the need to eliminate discrimination.

This guidance sometimes uses the phrase 'protected group' to refer to people who share a protected characteristic.

2. Specific duties in Wales

The broad purpose of the specific duties in Wales is to help listed bodies in their performance of the general duty and to aid transparency.

2.1 Who is covered by the specific duties?

The specific duties apply to listed bodies in Wales but not to non-devolved public authorities operating in Wales. Most devolved public authorities in Wales covered by the general duty are also covered by the specific duties. The specific duties set out the steps that listed bodies in Wales must take that will help to demonstrate that they are meeting the general duty.

This guide is one of a series of non-statutory guides on the specific duties. The duties inter-relate and more details on each aspect can be found in the following guidance:

1. The essential guide to the public sector equality duty (an overview)
2. Equality objectives and Strategic Equality Plans
3. Engagement
4. Assessment of impact
5. Equality information
6. Employment information, pay differences and staff training
7. Procurement
8. Annual reporting, publishing and Ministerial duties (including review and accessibility)

2.2 Who is the non-statutory guidance aimed at?

The non-statutory guidance has been developed primarily for those responsible for implementing the Wales specific duties, particularly those at senior and operational level who are responsible for policy and decision-making. The guidance will also be useful to anyone who has an interest in the work and activities of public authorities.

It is important that senior decision-makers in public authorities (such as Chief Executives, Chairs and Board members) receive adequate briefing on the general and specific equality duties. This should equip them to ensure that equality is properly considered within the organisation and influences decision-making at all levels.

The text box(es) below outline the requirements of the regulations and these also appear in the *Essential guide*. The additional text in this guidance provides further context on the specific duties.

3. What is procurement?

Many public authorities contract with external organisations in the private and third sectors for the provision of works, goods or services. For the purposes of this guide, 'procurement' is the contractual

process by which a public authority agrees for another to carry out works and/or to provide goods and/or services on its behalf.

4. European context

Public procurement is subject to principles of European law that aim to ensure fairness between suppliers from the UK and other member states. These principles include freedom of movement of workers and goods, transparency, proportionality and equal treatment between tenderers.

These principles apply to contracts of all values. In addition, UK Regulations that implement European Directives on public procurement set out certain limitations that apply in relation to contracts above certain threshold values. Public authorities will need to be aware of this context and will need to consider how to further equality in a way that is consistent with EU procurement rules.

More information on the European context is contained in guidance on public procurement and equality published in 2008 by the Office of Government Commerce called *Make Equality Count*. It is available at: www.ogc.gov.uk and contains numerous examples and a table illustrating how equality issues may be considered and incorporated at different stages of the procurement process.

5. What the duty requires on procurement

When procuring works, goods or services from other organisations on the basis of a **relevant agreement, a listed body in Wales must:**

- have due regard to whether it would be appropriate for the award criteria for that contract to include considerations to help meet the general duty
- have due regard to whether it would be appropriate to stipulate conditions relating to the performance of the contract to help meet the three aims of the general duty.

Relevant agreements:

The specific duty on procurement only applies to contractual arrangements that are ‘relevant agreements’, which in this context means either the award of a ‘public contract’ or the conclusion of a ‘framework agreement’, both of which are regulated by the Public Sector Directive (Directive 2004/18/EC).

The Directive regulates arrangements that are on or above specified EU thresholds. The thresholds are revised every two years and different thresholds apply according to the nature of the public contract, particularly whether the contract relates to works or to goods and services. Thresholds for goods or services differ according to the nature of contracting authority.

Public authorities covered by the general duty:

In any event, the requirement to meet the **general duty** applies to all procurement regardless of the value of the contract.

Even where, for example, the provision of a service is contracted out by a public authority to another organisation, the public authority remains responsible for meeting the general duty. The organisation actually carrying out the work or providing the goods or services may be exercising a public function. If so, it will itself be covered by the general duty to that extent.

6. Proportionality

When spending public money, a body must have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations.

Equality considerations will be more relevant to some services, goods or works than others.

7. Overview of the procurement requirements

A public authority remains responsible for meeting the general duty even where relevant works or services are contracted out to an external supplier. It is important to build equality considerations into procurement processes.

The general duty applies to anyone who is carrying out a public function. Where an external body is being contracted to provide a relevant public service (including, in some cases, providing goods or works) it will be necessary to make them aware of the responsibilities that may arise under the public sector equality duty and to assist them appropriately. This may involve being clear about the need to address a range of needs and to mitigate disadvantage.

Public authorities will need to have ‘due regard’ at all stages of the procurement process to the need to advance equality.

For example:

- advertising and selecting who to invite to tender
- drafting the invitation to tender and evaluation criteria
- drafting contract specifications and conditions
- monitoring, managing and enforcing contracts.

An authority will need to assess its procurement policies and strategies to consider whether they adequately meet the aims of the duty. Policies and strategies should cover planning and carrying out procurement and the subsequent management and enforcement of contracts. A useful tool to assist organisations in developing their procurement policies and strategies is the Sustainable Procurement Assessment Framework (SPAF), which covers equality and includes action plans for improvement.

8. Assessing relevance

Fulfilling other Wales specific duties on impact assessment, collection and analysis of relevant information and engagement will help authorities to identify those contracts most relevant to equality and meeting the general duty.

It is particularly important to determine at the planning stage how promotion of equality may be built into an individual procurement project. This will shape the equality content of the specification and/or contract conditions and will influence the weight given to equality considerations in selecting tenderers and in tender evaluation.

Engaging with potential suppliers can help them to understand equality-related

requirements. Care must be taken not to give any potential supplier an advantage over another. The public sector must have due regard to the need to encourage a diverse supplier base, including third sector organisations and organisations classed as supported businesses. (More information on this and a wide range of procurement matters is available at the National Procurement Website: www.sell2wales.co.uk)

A tool for assessing relevance is the Sustainable Risk Assessment template, which helps organisations consider the social, economic and environmental impacts of specific procurements. This tool covers equality considerations.

9. Transparency in specifications

The specification is a formal description of what the authority is seeking to purchase. Where a public authority has determined that equality considerations are relevant to the works, goods or services, the specification should state as clearly as possible what the authority requires as outcomes or inputs from the successful contractor.

An authority may specify in tender documentation a requirement for contractors to demonstrate how the goods,

service or works will meet the needs of protected groups. Examples may include different language or communication needs or how take-up will be increased for different groups in accessing the service. The contractor could be required to monitor and report on how it is meeting these outcomes.

A tender specification may set out what information an authority will require the contractor to gather on its behalf so that it may meet its obligations on collecting relevant information.

10. Advertising widely

In order to encourage a more inclusive supply base, particularly to include smaller organisations, all major public bodies in Wales have endorsed Opening Doors: the Charter for SME-friendly Procurement. A key commitment in this

charter is that contracts should be advertised as widely as possible and that contracts worth more than £25,000 should be advertised on the Sell2Wales website.

11. Selecting who to invite to tender

Procurement may involve a selection stage during which public authorities assess and select potential suppliers to tender for a particular contract. It is permissible to include relevant equality criteria at this stage as long as this is made clear in the advertisement and the criteria are relevant to the contract.

Where equality is strongly relevant to a contract, it may be proportionate to include a requirement in selection criteria that potential suppliers demonstrate their 'equality track record', in other words their experience of, and capacity to, advance equality within the context of a relevant contract.

An authority may exercise its discretion to exclude a prospective tenderer if they have been found by a court or tribunal to have breached equality law, and if they are unable to provide evidence of how they have taken remedial steps to prevent this from occurring again in the future. However, any such decision to exclude would need to be proportionate and authorities may wish to seek legal advice in these circumstances.

A Supplier Qualification Information Database (SQuID) is being developed in Wales as an online tool. SQuID aims to simplify and standardise the pre-qualification process for companies wishing to bid for public sector contracts. It includes a section on equality, helping public bodies to choose appropriate selection questions.

12. Award criteria

An authority must set out the detailed award criteria it intends to use to assess the value for money of competing bids. These should be stated at an early stage so that potential suppliers know the criteria against which their bids will be assessed. For contracts subject to EU procurement directives, the award criteria must be set out in full in the contract notice.

Value for money is generally accepted to be the optimum combination of whole-life costs and quality to meet the user's requirements. Value for money in this context usually equates to the most economically advantageous tender for the public authority as set out in EU Directives.

Public procurement rules list examples of criteria that may be used to identify which tender would be most economically advantageous. Although not explicitly listed, equality may still be relevant. For

example, equality issues may have an impact on the 'quality' of a service or works, which is a listed criterion.

The weight an authority gives to equality as an evaluation criterion (if any) should be proportionate to the importance of equality issues within the specification as a whole.

The sell2wales website offers further information on promoting equality through procurement. This includes the Welsh Government's Community Benefits Guidance, which has been developed to ensure public procurement in Wales maximises its opportunity to benefit local communities. The guidance considers building in social clauses into large scale service and construction contracts and in particular focuses on creating training and employment for people in disadvantaged or minority groups.

13. Contract conditions

Contract conditions determine how the contract is performed. The Office of Government Commerce has published standard model terms and conditions which include a clause on complying with relevant equality legislation. These are being updated, but can be found on its website.

Conditions relating to equality issues are permissible where relevant and compatible with EC requirements. Authorities should consider including

contract conditions that require the contractor to take all reasonable steps to ensure that staff, suppliers and subcontractors achieve what is required under the Equality Act 2010.

Where equality considerations are highly relevant to procurement, an authority could consider additional conditions. These may include, for example, a requirement to monitor workforce composition or rates of pay.

14. Monitoring contract performance

The ultimate test of the success of a public authority in meeting the general equality duty in any procurement process is the actual performance of the contract and the ways in which the authority manages the contract in conjunction with the contractor. There will be little gain in incorporating equality obligations in the specification and/or contract conditions if an authority fails to adopt effective

mechanisms to ensure these obligations are being met.

A public authority will need to take steps to monitor the actual performance of the contract. An authority retains responsibility for the general duty and will need to act promptly if it becomes aware of poor or non-performance regarding the equality requirements of a contract.

15. Training

Listed public authorities in Wales are required to make appropriate arrangements to promote knowledge and understanding of the general and specific duties amongst their employees and to identify and address staff training needs. This may include targeted training for staff involved in procurement processes.

The Welsh Government's Value Wales offers extensive training opportunities to the public sector on procurement issues, including courses relating to most of the tools and initiatives referenced earlier in this guide.

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