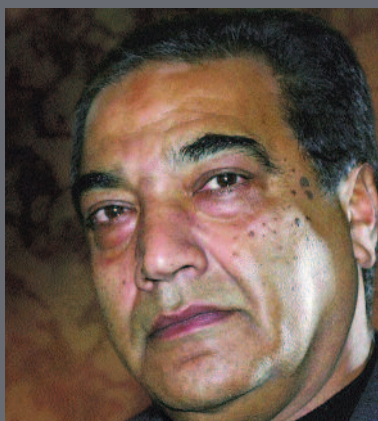


Centre for Research in Equality and Diversity

School of Business and Management
Promoting employment equality
through public procurement





Promoting employment equality through public procurement: Report of a workshop held by the Centre for Research in Equality and Diversity

**Report prepared by Tessa Wright
January 2013**

The Centre for Equality and Diversity (CRED) at Queen Mary, University of London, was established in 2005 and is a prominent international research centre at the leading edge of equality and diversity research. CRED is committed to critical scholarship in researching equality and diversity and seeks to be guided by principles of social justice and inclusivity.

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Background

This is a report of a workshop hosted by the Centre for Research in Equality and Diversity (CRED) at Queen Mary, University of London on Wednesday 31 October 2012. The workshop, entitled *Promoting employment equality through public procurement*, was organised to consider employment equality and diversity within public sector procurement processes by bringing together academics, practitioners and policymakers with an interest in the issue. The specific objectives were to:

- clarify the current legal and policy context for including equality objectives in procurement processes in the light of the Equality Act 2010 and EU legislation;
- provide case examples of where equality aims have been built into procurement; and
- discuss the establishment of a research network linking academics and practitioners interested in equality and procurement links.

This report summarises presentations made at the workshop and key points made by workshop participants in discussions. It is not a verbatim report, but aims to record the points made by speakers as well as the gist of discussions from the floor. Speaker presentations are also available on the Centre for Research in Equality and Diversity website: hosted.busman.qmul.ac.uk/cred/

Around 40 people attended the workshop representing equality and procurement practitioners, academics and those with a policy interest from employer, trade union, voluntary and statutory bodies.

Participants were welcomed by Professor Geraldine Healy, Director of CRED, who highlighted the growing significance of procurement as an avenue for pursuing equality and diversity objectives. Dr Tessa Wright, from CRED, then explained how the idea for the workshop came out of research she had conducted on women's experience of working in traditionally male occupations within the construction and transport sectors, which included interviews with participants about the work of the Olympic Delivery Authority and Transport for London in building equality requirements into contracts with private sector providers. This highlighted the potential power of procurement processes to advance equality objectives, for example in improving women's participation in traditionally male occupations, where the political will existed to do so (Wright, 2011). Although there are some evaluations of existing attempts to link equality objectives to procurement, the academic literature in this area is relatively sparse.

History and overview of using procurement to promote equality: Professor Anthony Heath, Oxford University

Professor Heath drew on examples of affirmative action from the United States and Northern Ireland to see what lessons could be learnt for the UK.

The US Federal Contractor Programme requires companies with more than 50 workers that do business with the federal government worth more than \$50,000 to submit annual affirmative action plans detailing numbers of employed men and women in different racial and ethnic groups. Contractors are potentially subject to compliance reviews by the department of labour and failure to comply can lead to debarment from future federal contracts. Research (Kalev and Dobbin, 2006) found that simply imposing a mandate was not effective, but writing action plans and experiencing compliance reviews were both effective in improving entry of women and blacks into good jobs. Features affecting the success of such strategies included: full-time diversity staff; diversity committees; mentoring; targeted recruitment programmes; employer-provided training; and building diverse top management teams. However diversity training on its own was not found to be effective. Therefore lessons for the UK suggest that simply having an equal opportunities policy is not enough, these may be mere 'empty shells'. Action plans are also needed and monitoring of progress is essential. Similarly, oversight and compliance reviews were essential. A purely voluntary system was felt to be unlikely to work, with evidence showing that the US program was much less effective under Reagan.

The Northern Ireland affirmative action programme drew on lessons from the US experience. The NI programme, however extends to both the public and private sector, not just contractors, so is not specifically a procurement programme. Monitoring returns are a key ingredient, and the NI equivalent of compliance reviews are voluntary and legally-enforceable agreements. Factors contributing to the programme's success included: the professionalization of HR functions in firms; commitment from the top of the organization; and outreach/advertising to under-represented groups. It is also important to go beyond a 'tick box' approach and to monitor outcomes and penalize non-compliance.

Professor Heath then examined attempts to use procurement in England under the Labour governments (1997 to 2010). The National Employment Panel recommended the use of public procurement as a lever for promoting race equality in the workplace in its report *Enterprising People, Enterprising Places* (June 2005). The Department for Work and Pensions (DWP), Department for Children, Schools and Families (DCSF) and Identity and Passport Service (IPS) undertook race equality procurement pilots starting in 2006. An evaluation found these caused contractors little burden or difficulty (since larger firms were often meeting the requirements anyway). The main focus was on helping potential contractors to achieve equality requirements in order to become an accredited contractor. However there

was little monitoring of equality requirements once the contract was in place, due to resource constraints and other priorities. The overall impact, even in DWP, was probably small, although it did stimulate contractors to think about equality issues.

Under the Coalition government there has been a new approach emphasizing improving transparency by requiring public bodies to publish data on equality outcomes; devolving power by liberating public bodies from top-down targets; focussing on measurable results (outcomes) rather than on processes; and enabling the public to hold public bodies to account by comparing their performance, rather than government doing so. However the Coalition is firmly of the view “that it is not necessary to impose requirements on public authorities prescribing what procurement processes they should follow” (12 January 2011) and has therefore not implemented specific duties on procurement in England and Wales. This leaves the question - if contractors are not monitored, how can we hold public bodies to account?

Further unresolved questions are:

- Could use of procurement in the British context succeed with monitoring but without vigorous compliance programme, particularly in the context of budget cuts at the EHRC?
- With a shift towards fewer but larger contractors and therefore longer supply chain, how can this be monitored? Supply chain monitoring was never really thought through under the previous government.
- Might alternative ways of targeting contractors – eg through voluntary agreements or NGO activity (cf NGO activity in US and in Northern Ireland MacBride principles) – be more effective? For example, naming and shaming tactics as used by environmental movements.

Discussion

What about the importance of publicising outcomes of monitoring? Anthony agreed it was important - in NI there was a contentious issue around whether reports should be published, but this is an important way of the public holding companies to account, so more vigorous public dissemination of monitoring of activities of public bodies is needed.

The law: Professor Chris McCrudden, Queen’s University, Belfast

Professor Christopher McCrudden began by asking the question ‘should we be using procurement to deliver equality?’, recognising that in the past trade unions did not support using procurement because of the adverse equality effects of contracting out of public services. Leaving that aside, he moved onto the main focus of the workshop about how employment equality standards relating to employment can be included in contracts.

The answer to the key question about whether employment equality can be built into procurement legally is yes under both British and European Community law, and in some circumstances, since the Equality Act 2010, it is also required.

To be effective in linking equality to procurement, a good understanding of the procurement process is needed, which many people do not have. This is needed in order to make such linkages effective.

Where can equality be built into the procurement process?

- when determining the appropriate definition of the subject matter of each of its contracts, so can we buy equality in the contract – this is the most effective way to do it.
- when determining the technical specifications of each of its contracts. For example, when buying computers, you can specify that they are suitable for people with disabilities, i.e. large screens or braille keyboards
- when establishing selection criteria for each of its contracts
- at the stage of deciding what exclusion criteria to adopt, limiting which tenderers may bid for the contract so excluding those with bad reputations
- when establishing criteria for the award of each of its contracts, and determining the weighting to be given to these criteria, when the contract is awarded to the most economically advantageous tender. Preference can be given to tenders with an employment plan, where all other aspects are equal.
- when considering whether a bid is abnormally low, where any of its contracts is subject to competitive bidding, so if this is achieved by paying women less, this could be taken into account
- when considering the inclusion of contract performance clauses in each of its contracts – European Commission is pushing this one.

British law closely follows European Community law in this area, so this will need to be followed. Article 26 of Directive 2004/18/EC (the “Public Sector Directive”)

“Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.”

But this must be compatible with Community Law, and Recital 33 says that conditions must not be directly or indirectly discriminatory with regard to nationality, so a clause cannot be

imposed that would have an adverse effect on an out-of-state contractor. This is to prevent use by politicians for protectionist reasons, giving contracts to home contractors.

One limitation is that requirements can only apply to that contract, not what the company is doing in relation to other contracts. It also requires a very effective monitoring system that is often not present.

British provision implementing the European directive is in the *Public Contracts Regulations 2006*, Section 29: “A contracting authority **may** stipulate conditions relating to the performance of a public contract...”, ie it is entirely discretionary under these regulations.

But there is a limitation with regard to the Posted Workers Directive. Equality conditions should apply to all workers, including those brought in from abroad, as for example happened with a lot of contracts let for the Olympic construction, otherwise it provides an incentive for contractors to cut costs by bringing in workers not covered by the requirements. But the Posted Workers Directive places some constraints, which however, can be overcome.

However, a more general problem arises from the Treaties themselves, again about the question of whether equality requirements have an adverse effect on the chance of out-of-state contractors getting the contract. Therefore the question becomes, do the equality measures impose “an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State?” (para 57 of *Rüffert*).

If you have an employment condition that is more difficult for an employee in Poland to satisfy, then you will be called upon to justify this. In the *Ruffert* case, the German Land put forward a justification on the basis that it was for the protection of workers, but the challenger said if it is a good idea, then why not do it through legislation rather than procurement? The reason procurement is used is often for political reasons, because it is possible. So justification will be needed as to why the action needs to be taken through procurement rather than another measure – this is the key question. So far judges in cases have been sceptical, so a purely political response will not be enough.

One justification can be that it is required under domestic law, so can be linked to requirements of the Equality Act 2010. Section 149 says:

“A public authority must, in the exercise of its functions, have due regard to the need to ... advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it”.

So is procurement a function of a public authority? The answer is yes, and courts have found this. In the context of procurement decisions then it is clear that public authorities must have due regard to the need to advance equality of opportunity. Two legal cases have confirmed this: *Public Interest Lawyers v Legal Services Commission* [2010] EWHC 3277 and

Hereward & Foster Ltd v Legal Services Commission [2010] EWHC 3370. In the first case, no monitoring of the contract requirements was in place, other than contractors saying that they had done it. Secondly, the condition in the contract had not been subject to an equality impact assessment, which was a breach of the Equality Act (EqA). This is important to be aware of because of the costs involved if the introduction of requirements is found to be against the law. In the second case, the court confirmed that equality obligations are not just to avoid discrimination, but to further equality of opportunity.

We are seeing increasing disparity in equality law between different regions of the UK, which matters when contracts cross borders. The UK government has not enacted any specific duties with regard to procurement under the PSED, but Wales has activated this provision in the EqA. Scotland initially did not do so, but activated a specific duty after Wales did. The *Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012*, Regulation 9 includes an additional requirement:

- *(1) Where a listed authority is a contracting authority and proposes to enter into a relevant agreement on the basis of an offer which is the most economically advantageous, it must have due regard to whether the award criteria should include considerations to enable it to better perform the equality duty.*
- *(2) Where a listed authority is a contracting authority and proposes to stipulate conditions relating to the performance of a relevant agreement, it must have due regard to whether the conditions should include considerations to enable it to better perform the equality duty.*
- *(3) Nothing 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.*

Therefore the equality requirements are tailored to the award criteria as well as to the conditions post-award, which includes the supply chain. In addition, there is now consultation on a Scottish Procurement Reform Bill, which includes:

- *To ensure that public procurement spending supports the creation of new training and employment opportunities, we propose to make it a requirement that those awarding major contracts must consider including community benefits clauses and publish, with the contract notice, a statement of their approach to delivering these benefits through the contract **or** the reason why the contract is not considered suitable for inclusion of community benefit clauses.*

This links not only equality but whole question of social justice into the procurement process. This changes perception of what procurement is for from simply buying goods or service to providing community benefit.

Finally, McCrudden noted the words of Ed Milliband at the Labour Party Conference in October 2012:

“And when the public sector offers contracts to the private sector the next Labour government will ensure that every private sector contract will only be awarded to a large company that trains the next generation with apprenticeships. Because when the public sector is having a contract with a private sector company, it is not just buying goods and services, it must be about building One Nation together. Public and private sectors joining together to do it.”

Discussion

It was pointed out that pre-qualification questionnaires (PQQs) can be used to filter out some contractors who don't fulfil basic requirements such as having equality policies etc. But McCrudden didn't think this was the most effective way to deliver equality, other than to eliminate 'stupid' contractors as it doesn't require them to go beyond non-discrimination. But a question was raised about how to try and improve the practice of contractors, which is better than simply excluding them from the process.

Policy

Review of the Public Sector Equality Duty: Alison Pritchard, Head of the Delivery Unit, Government Equalities Office

Alison Pritchard explained the context for the review of the PSED. The Coalition Government's Red tape challenge has looked at only a few pieces of primary legislation, one of which was the EqA. Some 7,000 responses were received, much of it saying that the Act should not be touched. But the review of the PSED was 'of' but not 'in' the Red Tape challenge, and was not intended as a deregulatory measure, but to test whether it is operating as intended. The review was not operating with predetermined outcomes. A review was planned for 2015, so it has been brought forward and will be completed in March 2013.

The review takes a cost-benefit/burden approach to understanding the Duty – what benefits is it delivering and what is the cost of compliance? It is looking at general and specific duties, but doesn't have powers to review Scottish and Welsh specific Duties. But as changes to the general duty would impact on them, the GEO is in discussions with the devolved administrations. There may be lessons to be learnt from how Scottish and Welsh specific duties actually work.

The review is considering international comparators from within the EU – the UK has a stronger legislative framework, whereas other countries use policy approaches to equality.

It will look at advice and guidance and how this used, is it creating a risk-adverse environment or undue burden, ie for schools as small organisations? It is also looking at case

law and legal advice given, which might show that a tick-box approach is not sufficient, so it is considering how risk is managed. It will also look at what would improve the operation of the Duty.

The broad parameters for the review cover Great Britain in terms of the General Duty, but will take account of the different specific duties and circumstances for the Devolved Administrations. It will consider the breadth of protected characteristics within the context of the PSED – people have commented that this is early to be reviewing the EqA, but it will also look at the operation of the three previous Duties. It will take account of the budgetary position facing public bodies, such as the impact of operating with a smaller HR function. It also needs to look at enforcement and take account of the duties and powers conferred on the EHRC by the Equality Act 2006.

The review is in three stages: refining the Terms of Reference, Evidence Gathering and Conclusions. Now in the Evidence-gathering phase, mostly desk-based research so far, but it is now launching wider evidence-gathering through round tables and questionnaires in order to be sure they get evidence rather than just opinion.

Four main methods of evidence gathering:

- Thematic desk-based research (including analysis of case law, international comparisons, assessment of existing research)
- A selection of roundtables with experts and civic society representatives, to include deliverers of services. (qualitative)
- Questionnaires of frontline practitioners (quantitative), to include how EIAs have been functioning – burdens and benefits? Also do people understand legislative requirements
- Case studies (site visits) of public bodies to test emerging findings, health, local government, policing and Whitehall.

Additionally it will use digital opportunities (e.g. online fora, virtual roundtables etc.) to test data and encourage wider engagement.

Discussion

Concern was raised about accountability of the review – how communities are involved is crucial. What is the structure of review team? Pritchard said that accountability for the review is now with Minister Maria Miller. The review team is made up of Pritchard, plus officials, but the overall governance model in terms of the external component is still being determined, and subject to much political discussion as Conservative and Liberal Democrats have particular views, and further discussions have taken place since the reshuffle. But

Pritchard believes there will be sufficient external review, although she's not currently sure if there will be an external head of the review.

Is housing within the scope of the review? This would allow scrutiny of the construction sector, which needs this in terms of equality. Pritchard said that local government is included and housing would be a logical area to include.

A question was raised about how the review would cover the specific duties in Wales and Scotland that did not apply to England. Pritchard has found that greater focus on General rather than specific duties has helped in avoiding a tick-box approach and therefore moving away from attention to process to outcomes. She believes that the general duty to have due regard should include what is specified under the specific duty on procurement in Scotland anyway. The intention was to make the specific duties as non-specific as possible, but this does not mean that effort should not go into procurement. But some participants pointed out that equality officers find it frustrating to have vaguer, less prescriptive rules, making it harder to put things into place. Also a question was raised about whether it is the time to be considering removing or weakening the duty when there is still significant evidence of institutional discrimination?

Pritchard replied that a counter argument is that as the duties have existed, but institutional discrimination still occurs, are they working? Have we developed so that the public can hold government to account in other ways? She believes that building the general requirement into thinking at the start is better than consideration of a specific list later.

The point was raised that the terms of reference of the review are still not defined, nor are governance arrangements in place, but they have moved onto evidence gathering. Therefore will organisations have time to collect evidence, knowing what the terms of reference are, and have confidence that this evidence will be listened to?

Pritchard said that phases of the review were overlapping in order to ensure that there was sufficient time for evidence gathering, so the literature review was needed at the start and they are hoping to get into the rest of the evidence-gathering phase as soon as possible.

As Pritchard believed that the Scottish specific duty does not go beyond the general duty requirements, clarification was sought that the general duty requires all public authorities to have due regard to equality at the award stage and in contract conditions – she replied that she believed it did.

Trade union view: Sally Brett, Senior Equality Policy Officer, TUC

Sally Brett gave a trade union perspective in place of Heather Wakefield, National Secretary for Local Government, UNISON, who was unable to attend the workshop at the last minute.

Sally highlighted that research still shows that contracting out of public services leads to poorer terms and conditions of women, so unions are still opposed to outsourcing. She gave

an example in Northern Ireland where they were able to get some services brought back in house because of evidence of the negative impact that it would have on women employees. However, with the increasing push to outsource public services, unions are keen to ensure that public authorities do not avoid their responsibilities under equality law by outsourcing. Unions have for some time argued that procurement is a public function, and have used the detailed guidance from the former Commissions to argue this, but have found it hard to make progress in many areas. This is why they argued for a specific duty on procurement in the EqA, because they were coming up against procurement professionals who were saying equality was one consideration that *could* be built into the contract *if* they chose to and it was proportionate and relevant. But the TUC was arguing that they *should* be doing it. They welcome that the Office of Government Commerce (OGC) put out guidance, which procurement professionals are more likely to use than EHRC guidance, but it is still in rather caged terms, and only voluntary.

The TUC argued for social value considerations in the Localism Bill, and Sally noted that a private members Bill has recently passed - the Public Services (Social Value) Act. This provides that public authorities **must** consider how what is proposed to be procured might improve the economic, social and environmental wellbeing of the relevant area and how in conducting the process of procurement it might act with a view to securing that improvement. The TUC is pleased to have that in place, and also the PSED, and hopes that nothing will be lost in the current PSED review.

But in the current climate the TUC is finding it even harder to get equality and social considerations included in outsourcing, with massive cuts to local authority budgets, it is very difficult. She agreed with the view that a lot of attention has gone into the awarding of contracts, but very little attention to monitoring contracts, and this will get harder with current cuts.

Discussion

Research on domiciliary care for the Low Pay Commission has found that implementation of equal pay among the directly-employed workforce has led to pressure to outsource to save costs – most of social care is now outsourced. It has found that many local authorities (LAs) have no interest in building requirements into contracts because of pressures to keep costs down, so they are not interested, for example, in building in a Living Wage requirement. Some of the most reputable providers are desperate to protect wages to provide decent standards of social care. Is it then discriminatory for an LA to put different requirements into different contracts, i.e. one for refuse affecting mostly male workers, and another for care affecting female workers?

McCrudden felt that that this would be covered under the EqA. But Brett noted that it was difficult for unions to find the resources to tackle so many issues with massive cuts to LAs.

TfL had let a cleaning contract for a bus garage and received two bids, one of which paid the London Living Wage, which was a bit more expensive. But this one was chosen, and good staff went to this company and they therefore had a much lower staff turnover and fewer recruitment problems. When they compared the level of cleaning with other garages, this was far superior, so although they paid a little more, they got value for money and good staff.

Pritchard said that government was generally poor at seeing how costs here might have benefits elsewhere. A while ago there was some interest in the idea of social return on investment, seeing that public money spent in one way would generate a better outcome, but Treasury spending mechanisms are a very bilateral process, they do not take a cross-cutting view of issues.

Equality and Human Rights Commission guidance: Mark Wright, North East Regional Manager

The EHRC is currently developing practical guidance for procurement aimed at procurement officers, equalities and service managers. They are working closely with Mandy Wright and Peter Howarth, Society for Purchasing Officers (present at workshop).

It covers three areas: legislation, preparation and understanding procurement process. They have been testing the guidance with public authorities. It's clear that the PSED applies to procurement policies and exercises. The Duty can't be delegated to contractors, but they will be subject to it. The specific duty to publish information means that contractors have a key role in providing information on the effectiveness of services.

The central section of the guidance contains examples to help mainstream equality thinking into procurement activities across the organisation, to share and learn from good practice.

A good corporate approach to equality and procurement will:

- Be genuinely corporate and strategic - relates to how individual decisions relate to corporate objectives and looks across the authority for wider (community benefits) and has visible commitment
- bring together equalities, procurement and service managers - joint working across the organisation
- mainstream equality considerations into procurement process - as either single authority or part of buying consortium, which is getting more common.

Public authorities can seek to gain added value from the contract, or contribute to wider objectives in three ways:

- make social considerations core to the specification

- through the use of community benefits clauses in contracts, where equality considerations may not be central to the subject of the contract
- through voluntary measures.

In terms of suppliers, there is a need to try and understand the barriers they face in submitting tenders.

It is also important to use equality information to look at gaps and outcomes for particular groups from different services. When people are required to publish equality information under the duty, in some cases this has revealed information that other parts of the organisation was not aware of – so joining up the information is important to support decision-making. This will be needed when the provisions of the Social Value Act come into force in January – but the matters that the authority considers need to be proportionate and relevant, but the focus on social value should enable managers and decision-makers to better deliver the general equality duty. It may also enable suppliers to think about how to better demonstrate respect for the UN human rights guiding principles and engagement with a range of stakeholders.

Procurement needs to consider:

- relevance to the service being delivered
- value for money considerations and the likely resource implications for the provider
- alignment with corporate objectives
- avoiding perception of favouring local suppliers
- compliance with relevant procurement law and European treaty principles

In relation to the workforce, where there is high relevance, authorities should consider carefully what equality considerations need to be part of the technical specification; E&D policies or equivalent and method statements on how these are applied.

On the point that home care staff make up 10% of all staff on the National Minimum Wage (NMW), the EHRC homecare enquiry found very few authorities with specifications that referred to terms and conditions, and only one looked at the issue of NMW and travelling time, which can depress wages below the NMW. It was interesting that authorities often identified in their evidence that poor rates of pay were a barrier to protecting and promoting human rights, along with poor training for staff, so there is a link between improving services and pay – he gave e.g. of older LGB people who had to hide gay identity from poorly paid, poorly qualified and poorly trained care staff. An important point is that cost considerations by LAs can affect their ability to provide non-discriminatory services to underserved groups.

Discussion

The CRE issued great guidance in 2002, but most people never saw it. What ideas are there for ensuring people see the EHRC guidance?

One way is the development of workshop materials, to be available on the EHRC website, which are being road-tested now with procurement professionals. A recommendation from the homecare enquiry was some targeted guidance for purchasers of social care – this is being developed. Also being developed is guidance for voluntary and community sectors on holding authorities to account.

The question of whether we really need more guidance was asked. There is already plenty of guidance available from the UN, EC, OGC etc, but does it get to the key point that procurement officers are very risk adverse? Guidance says what they may do, but then it suggests taking legal advice, so officers will only act where they are told to do something by legislation. What about the role of the EHRC in enforcing the law as a regulatory authority?

A further question was asked about the existence of work on the costs of *not* considering equality? Mark Wright was aware of some research on looking at the value of social return on investment in one authority, but identifying what would have happened without the duty is very difficult, as Pritchard said in relation to the PSED review. Wright noted that guidance was useful in providing examples of where procurement has introduced equality requirements.

Practice

Olympic Delivery Authority: Kevin Bowsher, Equality Nexus, formerly Equality and Inclusion Manager, London Olympics 2012 with Armar Johnston, Balfour Beatty

The ODA as a public authority needed to meet the PSED, it also had a need to demonstrate to the public that that public money being spent on the Games was contributing benefits during the construction phase. Now the Olympic Park has been handed over to the London Legacy Development Corporation (LLDC), also a public body covered by the PSED, and responsible for the Park for a 20-year project. Balfour Beatty is now the contractor for the LLDC to transform the Aquatics Centre, which was built under the Balfour Beatty contract, the subject of this presentation.

Why was Equality & Inclusion (E & I) a priority theme for the ODA?

- Host Boroughs - regeneration and legacy. Tower Hamlets is the poorest borough in UK. IOC have regeneration and community benefit stipulations in the bid process.
- Business Benefits for contractors – around morale, performance, absenteeism etc
- ODA committed to create employment opportunities, in addition to PSED, set out to encourage local employment and those underrepresented in construction.
- Local business opportunities – supplier diversity

- Corporate Social Responsibility – increasingly large contractors have these policies, and can then cite this in their bids, good marketing for them to show community impact in bidding for public sector work
- ODA’s requirements as a public body – appointed a Delivery Partner as it did not have the expertise to manage a site of that size. This was a private sector consortium of three large contractors and in the contract it was stated that the PSED would be met by the Delivery Partner.

What did tier 1 contractors do?

- Met contractual requirements – around employment targets – but this also included sub-contractors, so it was stipulated that any companies they contracted with also had the duty, at any tier. A Business Assurance programme (Kevin and his team) was set up to ensure that all contractors engaged with this. There was also a contractual requirement for an Apprenticeship Programme and provision of places.
- Rolled out diversity training – no good on its own but as part of a programme, for example, it was included in health and safety training that PPE must be suitable for women too.
- Identified employment opportunities, used job brokerage for local people
- Opened up business for SMEs – while the ODA wanted local benefits, the Olympics was sold as having a UK-wide benefit, so something of a dilemma here.
- Engaged with local communities (CSR) – i.e repaired community centre roofs etc., also education on careers in construction with local schools
- Helped change the construction sector environment (e.g. Women into Construction project, which increased the role of women working on site)
- Engaged with their supply chains to drive activity across the project.

An ODA Contractor’s View: Armar Johnston, Balfour Beatty

Balfour Beatty (BB) has worked on Heathrow’s Terminal 5 (T5) and is now involved in the extension of Terminal 2 (T2) – an example of the ripple or legacy effect of one project to the next.

BB employ knowledge workers and then use specialist package contractors who do the manual work, so they worked with the supply chain to achieve joint objectives. BB bought into the ODA E&I objectives.

Selection & mobilization:

- Open availability, used web-based package to advertise tenders, Procure 4

- Diversity questions in pre-qualification process, the industrial relations (IR) policy was also important in terms of decent employment. Audit was key here to ensuring that information provided by companies was accurate.
- Baseline assessment: Big focus on anti-harassment and bullying, they wanted to make the Olympic site a comfortable place to work – this has been a problem in the construction industry.
- Review of policies and processes throughout the supply chain, on EO and IR. Many contractors are SMEs, with less HR infrastructure, so BB recognized they needed to help them. They insisted they adopted BB policies if they didn't have any of their own in place.

BB committed to certain numbers of trainees, including from the local area. The project started in spring 2008 at boom time, but by September/October the bank crash came. Companies therefore had spare staff from other jobs, who they didn't want to make redundant, so there was some negotiation on how to achieve objectives – which they did in the end, but it was not easy.

Engagement with the supply chain took place through:

- Supplier conferences, fairly new to BB (had been done on East London Line (ELL)) – development of actions taken on ELL through Olympics and now T2. Leadership from the top is crucial, i.e. this increased the turnout at supplier conference when BB CEO was attending.
- Leadership Groups – the opportunities leadership group aimed to provide opportunities for employment through brokerage and apprenticeships, which was relatively successful in buying people into aims.
- Open Training Events – they ran specific workshop on Respect for People – it was mandatory for supply chain supervisors to take part. 'Toolbox talks' for all operatives on site took place to fulfill the commitment that people would be comfortable coming to work. A number of supply chain companies have taken the slides for the workshop and developed and used it themselves within their businesses.
- Experience for future projects - Respect for People workshop also rolled out to CrossRail project and at T2 with BAA – this is the ripple effect of the Olympics. Clients are always interested in how things were done at the Olympics.
- Improved policies and processes – currently trying to develop a training hub, on Olympics model, in the West London area – in partnership with 5 host boroughs around Heathrow. There is a Heathrow Construction Academy.

Kevin Bowsher:

The ODA used experience brought from other projects, including TfL and ELL working with BB.

Support from the ODA to contractors included:

- Free advice / guidance – phonenumber, regular meetings with contractors
- Structured site supervisor training, including E&I
- Managed CSR Group / activity – BB and BAM Nutall staff worked together
- Paid membership of Disability Standard, Stonewall, Employers Forum on Age etc
- Partnership with JobCentrePlus, Construction Skills & National Apprenticeship Service that could support contractors
- Partnership with Prince's Trust, with Remploy, with Stephen Lawrence Trust – provided bursaries
- National Skills Academy for Construction Status on Park with training opportunities
- Diversity Week / Excellence Awards – rewarding contractors
- Site-wide bullying helpline
- Industrial Relations Code of Practice
- CompeteFor / Meet Buyer Events – increasing supplier diversity
- Constructionarium – activity to bring in graduates and trainees into real context
- Construction Crew – schools engagement project, bringing schools onto Park
- Workforce Profile Benchmarks – ODA collected workforce stats which could be shared with contractors
- Site-wide diversity training products
- Equality@2012 network – guest speakers to talk about equality issues
- Learning Legacy: www.learninglegacy.london2012.com/

The ODA monitored performance through:

- PQQ / ITT evaluations
- Contractual requirements
- Health Check self-assessment each quarter
- Equality & Inclusion audits - audited by Kevin as part of a comprehensive & integrated audit programme, including H&S
- Corrective Action Notices - some corrective action notices served when contractors didn't meet requirements
- Individual Contractor Performance Reports submitted to the ODA hierarchy
- E&I ODA Board chaired by CE of ODA, contractors invited to talk about what they were doing.

What was achieved?

At July 2011 when project was drawing to a close:

- Workforce (Park & Village approx 11,000)
- 25% from host Boroughs (62% London residents)
- 21% Black, Asian or Minority Ethnic origin
- 1,580 people into work through Job Brokerage
- 457 Apprentices (target 350)
- Women filled 6% of roles, higher than average for manual trades
- Over £270k raised by contractors for disabled children's sports holiday project 'Time to Shine'
- ODA awards from CBI, WISE, Employers Forum on Disability & the National Mentoring Scheme
- Spreading the word (e.g. Crossrail)

BB went above and beyond what was required – not all contractors bought into it to this degree, although all contributed and were brought before the ODA board when not performing adequately. BB was recognised in the Contractor Diversity Awards 2010, but BB also gave an award to their contractors who had done the most. Kevin also got recognition in the ODA Contractor Diversity Awards 2011.

Transport for London and EnterpriseMouchel: Clive Saunders (formerly TfL, now Equality Associates) and John Lulham (formerly TfL)

Clive Saunders

The legal equality imperative in London originally came from the Greater London Authority (GLA) Act, which was then incorporated into the Race Relations Act 2000.

Leadership and ownership from the top is essential. Had there not been Ken Livingstone at the time, we may not be talking about TfL in the way that we have been. When talking to legal and procurement people, Ken didn't want to know what they couldn't do, but instead wanted to know how they're going to do it and to get on with doing it. So action, not just talking the talk, is important. With the Mayor and top management at TfL in the 2000s there was that drive and commitment to action not words.

The TfL approach had partnership working as a core principle, as Equality and Diversity staff have no powers as their role is to advise and support, so it is critical to have internal partnerships, for example with the head of procurement. The core contract managers were committed to making a difference.

They saw relationships with suppliers as a partnership too, in order to deliver TfL statutory duty. They didn't want to exclude suppliers, as this was seen as part of having due regard to promoting equality among suppliers.

The framework included a focus on actions through:

- Strategic Plan, including actions and monitoring
- Training Plan, part of framework of activities, including for supply chain
- Communications Plan, impact will only be felt if people know what you are doing
- Supplier Diversity plan, how to ensure supplier supports TfL policy and principles in their work

In all his work in E&D he has never been as convinced of effectiveness as in this targeted approach taken by TfL. Resources are critical to sustaining these efforts; neither he nor John are at TfL now, but he hopes they are sustaining it.

John Lulham:

John Lulham explained that he was a procurement specialist rather than an equalities expert and this had enabled him to embrace supplier diversity within the procurement process.

TfL is one of the functional bodies of the Greater London Authority (GLA) and was established about twelve years ago. In the early years of linking equalities to procurement, TfL adopted a voluntary approach with selected contractors and John worked with Peek Traffic and Serco Traffic Systems on Traffic Control Maintenance Contracts and Faber Maunsell (now part of AECOM) on Engineering Consultancy Contracts. These contractors agreed to include equality and diversity (E&D) clauses within their existing contracts and senior management from both sides met to monitor and learn from the experience so that a programme of best practice could be developed.

The first contract using the new equality and diversity approach was the East London Line Phase 1, a joint venture between Balfour Beatty and Carillion. E&D was then rolled out in the TfL Highways Maintenance Contracts (Amey, Ringway Jacobs and Enterprise Mouchel) and the TfL Traffic Control Maintenance Contracts (Peek Traffic, Serco Traffic Systems and Siemens Mobility). The aim of TfL was to ensure a cultural change in the contractors' approach to this agenda by incorporating equality and diversity requirements into the procurement process. TfL demonstrated the power of procurement in providing the appropriate leverage to motivate contractors to eliminate discrimination and promote equalities in their supply chain.

Some contractors were a little reticent in the early days but John has been aware of the increasing level of commitment to this agenda over the last ten years and many contractors now view it as "business as usual" as they saw that it made common sense. John was

delighted when the Olympic Delivery Authority included E&D requirements in their contracts, as has been explained by another speaker.

For the process to be a success, it is essential that there is full commitment and involvement by the contractors' senior management together with the need for a partnering approach between TfL and the contractor. For some of John's larger contracts, following the PQQ process, a shortlist of contractors was invited to attend an Equality and Diversity seminar to which the contractors' senior management team were invited. At this seminar, TfL would set out its E&D requirements and aspirations for the contract. Three envelopes were used for the tendering process (one for E&D, one for the financial submission and one for the technical/quality aspects) so that the contractors could submit a draft E&D plan to TfL for comment. Suggestions for improvement would be made by the TfL team in one-to-one sessions enabling an improved final plan to be submitted by the contractors. (See the presentation by Clive Saunders for the content of the plan.)

Monitoring is essential for positive outcomes and regular meetings were held with all the contractors and where the contractors did not have the necessary skills and expertise, TfL worked with them to develop their skills and help them to improve. An annual progress report then goes from the contracting company to TfL. The contracts contain clauses that allow TfL to audit anything they wish, e.g. if there is a requirement to pay the London Living Wage (LLW) then a random audit can be undertaken to ensure that this is being followed. It is also important to support the sub-contractors of main contractors, and John would sometimes visit them not only to make TfL requirements clear to them but also to offer help and advice.

One of TfL's core contractors is EnterpriseMouchel and the workshop heard about their experiences with the E&D process.

EnterpriseMouchel's Experience (apologies from Katherine Day, EnterpriseMouchel)

TfL South Highway Maintenance & Works Contract (HMWC), let in 2007 for 6 years. It will be retendered next year.

Staff on this contract: approx. 119 operatives and 93 staff of whom:

- 56% Blue Collar workers
- Large majority are male, only 10% women
- Age profile is higher than most industries: average age = 37 years old
- Low turnover <1.4%

It is difficult to set targets in terms of the female workforce unless the contracts are long-term, because existing staff are transferred under TUPE. TfL wants to ensure equal opportunities in their recruitment processes so that outcomes change gradually. One of the

consequences of providing good training etc is that there is low staff turnover, so there are fewer opportunities to recruit more women.

Approximately 56 Quality Promises were made on “Ending Inequality & Social Exclusion”, 49 have been completed. Examples include: a commitment to use Small & Medium sized enterprises, providing Equality Impact Assessment training, language services, E&D awareness training. Contractors tend to be willing to share information on equalities - sharing of best practice between companies takes place - unlike other commercially confidential contract information. Some will offer other companies spare places on training programmes where available.

Clive Saunders:

The outcomes and conclusions drawn from using this approach include:

- E&D addressed in management systems – policies, procedures, communications, recruitment
- Know, recognise and address shortfalls
- Develop relationships with schools and communities
- Offer positions, work placements / work experience opportunities to a broader audience, apprenticeships developed
- Investment in training
- Share best practice with “competitors”, Enterprise Mouchel (EM) is one of the leaders within the consortium running maintenance contract
- Supply chain involvement critical
- TfL contract a beacon for other EM contracts – they have Investors In Diversity status

Lessons learnt included:

- Importance of how you sell E&D - this is broader than workforce demographics, there is a need to include everyone, not just about numbers
- Changing the perception of the industry – difficulty in recruiting women, EM have done quite well in having 10% female staff, this compares favourably within the industry; PR in schools is important to long-term change.

EM have found a continuing impact on their future work, through London Highways Consortium (LoHAC) & others there is a requirement for Strategic Labour Needs & Training. Using SMEs and supporting local economies is important. Particularly in London, they need to reflect and represent the Local Community.

Olympic Women in Construction project: Kath Moore

The Women in Construction project is continuing as part of the legacy of the Olympics. Responsible procurement is key to its effectiveness – the number of women on the Olympics Park was more than double the usual numbers of women, and the culture was very different from other construction sites. The project was funded by ConstructionSkills (the Sector Skills Council) and when the Olympic build was over they wanted the project to demonstrate that what they did on the Olympics could be repeated across London. Now the continuing project is in its 2nd year and the only reason they can be effective is because of responsible procurement. They can be particularly effective on large public projects that have targets, not just around gender, but also on employing local people, on disability and BAME groups. They can give support to contractors in achieving their targets. Kath found it great to hear the TfL presentation, whose work shaped the Olympics project. Support from the very top in what they were trying to do on the Olympics was essential, and it's great to feel that there is that support in other areas of London as well. Procurement commitments have helped the project to be more effective and actually to show that there are plenty of women wanting opportunities in construction –the project can facilitate them into the jobs.

John Lulham added that getting contractors to go into schools is very important in trying to get more women into construction and change the image of the job, to show it is not only muddy boots, but on the highways contracts there is a wide range of jobs, i.e. as surveyors and professional staff, as well as site staff. There are plenty of opportunities for women to get into construction; TfL run a graduate scheme and some of the women graduates who were put into EM for 6 months impressed the contractor, showing that employer attitudes to women can change through such experiences.

Discussion

The great progress since the introduction of the race duty in the RRA was commented on, along with the fact that the term 'red tape' was not used once – the contractors presenting seemed to have embraced this work and see its value.

Saunders noted that at the start many suppliers simply did what they had to, now many are asking why they weren't doing it all along because they see the business benefits. However, it is still early days, and work needs to be sustained, delivery is not yet there.

Johnston said that supply chain companies that worked on the Olympics have brought this awareness with them into the T2 project.

On the question of the nature of employment relationships, does the extent of self-employment in construction hinder or promote equality? To what extent do contracting

models, i.e. of BB as the organiser of construction rather than as builder, promote or hinder equality?

Johnston said that there was no self-employment in the Olympics project or Heathrow as part of the IR policy. However self-employment isn't always as a result of the employer driving people into self-employment, i.e. during the fit-out phase of a build, many tradespeople come in for a few weeks, so some prefer to be self-employed so as not to keep changing employer. BB couldn't maintain workers in all specialisms as there is no work for them until particular stages of the build.

It was noted that the ODA workforce was only 21% ethnic minority, which didn't look too good compared to the ethnic diversity of the host boroughs. Has anybody, ie. EHRC, looked at this to see whether 21% is a good or bad figure? Benchmarking is needed as the reason for smaller numbers of BME in some trades may be to do with discrimination.

Saunders replied that for TfL, the representative ethnic minority proportion should have been 33%, but the relevant population with the necessary skills may be different. So they often didn't achieve this proportion because historically BAME employees are under-represented in construction, so the task is to build it up, i.e. working with schools etc.

Lulham said that a contractor will usually come with their own sub-contractors, but TfL get them to try and look for new contractors, particularly from the local community – i.e. through the Meet the Buyer events. It is a gradual process, so this is the reason for letting long-term contracts – they can see a difference from the beginning to the end of a 6-year contract.

It was noted that the politics of making equality and procurement links is interesting. London Mayors, to some extent, realise that there are votes in this. The emphasis in presentations on local employment and suppliers can explain political support. But there is a tension with European Community requirement that is against 'buy local' – it is clear that this can't be done. Therefore there is a tension between regulatory and political systems in play, which makes a balance difficult to achieve. Lawyers would be worried about the local emphasis.

TfL lawyers advise and they are careful not to use words that exclude contractors. They have framed it in terms of positive action for local communities that anyone can engage in. Suppliers have asked whether they will be excluded for not being local or female? TfL say no, but seek to ensure that the best company can equally be BME or female-owned, and do not continue to keep out those who haven't had opportunities in the past.

There was a comment from the Society of Purchasing Officers (SPO) that typically procurement officers are risk-adverse, but the SPO is trying to convince buyers that this approach adds value to meet the objectives of the public authority, and it can create value

for money, so there is a commercial case. There is a need to persuade people of the value, rather than just seeing it as a duty, which what the SPO is trying to do.

Pritchard noted that the business case for equality is hard to demonstrate. However for businesses it is clear that reputational impact is very important, so she's done some work on getting companies to be transparent about what they're doing for women in the workplace, so raising the profile of what they are doing can be important in signing up to such actions. There is a need to develop a social norm that businesses will be doing such things and there is reputational damage if they don't, and those that do well will have a reputational benefit.

The SPO also pointed out that reputational benefit is one of the things that it tries to sell when persuading procurement officers to think about equality. The opportunities are there, procurement is an open door!

Future directions

In response to interest from participants in continuing discussion on this topic, Tessa Wright will establish an informal email network of all people who attended the workshop for sharing research and information. This may be used for establishing links and setting agendas for developing research in this area, as there was a feeling that there was more work to be done promoting the value of incorporating equality objectives into procurement processes, particularly among procurement practitioners. The workshop also highlighted the continuing relevance of the topic with continued privatisation of public services, expected changes to the Public Sector Equality Duty and the forthcoming Public Services (Social Value) Act.

Tessa thanked the presenters and all the participants who attended and raised interesting questions, making it a very valuable workshop.

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**For further information contact:
School of Business and Management
Queen Mary, University of London
Mile End Road
London
E1 4NS**