

Buy and make a difference

How to address Social Issues in Public Procurement



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Foreword by Angela Eagle, Exchequer Secretary to the Treasury

The Government has a responsibility to create a fairer society for everyone, support those with a disadvantage and improve people's well being and we also have a responsibility to use taxpayers' money wisely. These responsibilities aren't mutually exclusive and somewhere they can work in tandem is in public procurement.

Around a third of public spending goes on purchasing goods and services, so it is important that considering social outcomes and achieving value for money fit together. We shouldn't forget that the very principle of buying on a value for money basis isn't about buying the cheapest, it is about taking account of the whole-life cost and wider factors such as social considerations. This practical guide draws on real-life examples to show public procurers how they can help address social concerns both in what we buy and in the way we expect suppliers to cater for our needs.

Introduction

The Government is committed to improving the lives and work prospects of citizens and to taking actions on many fronts to support this commitment. For example, we want to create equality of opportunity for all and to work towards a world-class skills base by 2020.

With an annual expenditure of over £150billion, public procurement has an important part to play in furthering the Government's agenda for tackling social issues. This short guide, with examples, shows how social issues can be legitimately addressed within the policy and legal framework governing public procurement, information on which is at the end of this guide. The guide illustrates the positive steps that procurers can take at the various stages of the process.

For more detailed guidance, please refer to *Social Issues in Purchasing*:
http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf

For an overview of public procurement, see *Introduction to Public Procurement*:
http://www.ogc.gov.uk/documents/Introduction_to_Public_Procurement.pdf

Public procurers must ensure that their procurement activities meet legal obligations under the public sector equality duties (relating to disability, gender and race equality). A separate practical guide on what these duties mean for public procurement will be published in due course.

Central Government has agreed a *Joint Statement on Access to Skills, Trade Unions and Advice in Government Contracting*, with trade unions and private and third sector employer organisations. Specific guidance on the implications of the Joint Statement for public procurers is currently being prepared.

The government is uniquely placed to drive innovation through the use of public procurement. Innovative approaches and solutions through public procurement can also be used to achieve social outcomes and objectives. For more information, please consult the OGC / DIUS publication *Finding and Procuring Innovative Solutions*.



Social issues and what the government buys

Though sometimes overlooked, by far the most important connection between procurement and social issues is to do with what the government buys – hospitals and schools, healthcare, social care, training, prisons, school meals... Most people would probably agree that most of the things the public sector buys are for social purposes. Procuring goods and services that work well and at good value for money is what good procurement is all about.

This guide also covers the situation where social issues are relevant but not to the direct purpose of procurement, for example a contract condition about helping the workforce that would in turn enhance their performance and that of the contract.

Addressing social issues in public procurement

There is more or less scope to address social issues, depending on the stage of the public procurement process:

- Pre-procurement – when identifying the need, approaches and considering the market
- When deciding the requirement – specification stage
- When selecting suppliers to invite to tender – selection stage
- When awarding the contract – award stage
- In the performance of the contract – contract conditions and relationship management.

There is most scope to consider social issues at the earlier stages of the procurement process – when identifying the need, establishing the business case and defining the specification.

When looking at how social issues are relevant it may be helpful to speak to other organisations which specialise in this area or bodies such as Trade Unions and the Equality and Human Rights Commission which have researched case studies and other useful material, which they are happy to share.

Example: Sustainable Procurement Policy

Contracting authority A has introduced a procurement policy which signals its commitment, among other things, to addressing diversity and fair employment practices through procurement, by taking appropriate action at each of the stages. Such policies have to be consistent with the legal framework governing public procurement, including relevance to individual procurements, as covered in detail in *Social Issues in Purchasing*.

The table at the end of this guide, extracted from *Social Issues in Purchasing*, gives an overview of the procurement process and the opportunities for addressing social issues at each stage of the process.

Identifying the need; considering the market and engaging with it

This is the stage at which there is most scope for taking social considerations into account. Social issues can be addressed both through what is bought, for example a service specifically catering for ethnic minorities, and indirectly, for example by making the requirement easily accessible to Small and Medium-Sized Enterprises (SMEs) and Black Asian and Minority Ethnic (BAME) owned businesses.

Example: Promoting contract opportunities across the business community

Contracting authority B engages with all sections of the business community pre-procurement. It advertises its contracting opportunities widely and circulates them to community groups to encourage participation, including from those businesses providing employment to significant numbers of women and BAME groups.

Public procurement is always intended to fulfil a need and achieve defined benefits. In developing the business case, contracting authorities should take account of wider benefits including social ones, in accordance with the Treasury Green Book. A simple guide to the Green Book and whole life costing, taking into account wider social benefits can be found at:

http://www.hm-treasury.gov.uk/economic_data_and_tools/greenbook/data_greenbook_money_sustainability.cfm

Contracting authorities should consult stakeholders including customers and interest groups to help them understand what is needed. Authorities should also engage in a timely and effective way with suppliers to understand what the market can provide. They should consider which social issues or obligations are likely to be relevant to what they need to buy.

Example: Healthier school meals

Authority C wanted to promote healthier eating in schools. In identifying needs, the authority, with the help of the Soil Association and a nutritionist, developed menus that would avoid foods high in fats, sugar or salt and at the same time make the most of local and seasonal produce. To help develop the business case, prior to advertising the procurement the authority held an open meeting where potential suppliers could meet the authority, which helped the authority to assess the market and decide how best to bundle the requirement, for example into different categories of food. An advert was then placed in the Official Journal of the European Union and in the local press, for good quality fresh and/or organic food. The advert also stated that Fair Trade options or equivalent would be welcomed.

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Example: Engaging the community and encouraging participation by the voluntary & community sector

Engaging with the community as customers for the regeneration of a housing estate enabled their needs and experiences to be reflected in the requirement. Early dialogue with a range of suppliers before developing the business case showed that a local voluntary and community sector (VCS) body had previously implemented a similar project on a neighbouring estate, and had succeeded in achieving considerable community buy-in. By engaging with potential suppliers including the VCS at this stage, contracting authority D established a good understanding of the capacity and potential of the market. The authority then took steps to promote the requirement to a range of suppliers including the VCS.

They should also consider whether it would be appropriate on the basis of their user requirement and specification to reserve a contract for organisations providing supported employment opportunities to disabled people. Further details on reserving contracts can be found at:
http://www.ogc.gov.uk/documents/supported_factories_and_businesses.pdf



Specification

Social considerations can be included in specifications where they are directly relevant to the subject matter of the contract.

Core requirements are essential parts of a contract, reflected in both the specifications and in the conditions of the contract. A social issue can be a core requirement and reflected in the specifications provided it is central to the subject of the procurement and consistent with the public procurement Regulations.

Example: Fluency in ethnic minority language

In an ethnically diverse area, contracting authority E wanted to ensure that information about its services was accessible to all racial groups. To address this issue, the authority chose to outsource a help desk to provide assistance to those people with little or no proficiency in English. It therefore included requirements for staff working on the helpdesk to be fluent in languages other than English.

It is also possible to describe specifications in terms of performance/functional requirements and to specify production processes provided, in both cases, that they are relevant; if in doubt, seek legal advice. Any social requirements reflected in the specification should be transparent and should not discriminate against suppliers such as SMEs or those from outside the UK.

Example: Body armour suitable for men and women, including those from ethnic minorities

In a police service procurement for the supply of body armour, the specification requires the contractor to accommodate different requirements of men and women, including different requirements of ethnic minority men and women.

Example: Procuring an employment agency contract that requires measures to attract women

A local fire and emergency service procures an external agency to promote employment with the service and to carry out the initial stages of recruitment. Women are significantly under-represented at every level within the service. The specification requires the contractor to take various steps permitted under the Sex Discrimination Act to increase the proportion of applications from women.

Example: mobile information centre to reach traveller families

A procurement to operate mobile neighbourhood information centres included a requirement to reach traveller families and encourage them to make more use of local services.

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Selection stage

This is the point at which suppliers are selected for the next stage of the procurement process e.g. Invitation to Tender.

The procurement Regulations contain an exhaustive list of references or evidence that potential suppliers can be required to provide in order to demonstrate their technical capability in relation to the nature, quantity and purpose of the contract in question¹.

If a contract requires specific know-how in the “social” field, specific experience may be used as a criterion to prove the suitability of potential suppliers in regard to technical and/or professional ability. Contracting authorities can ask potential suppliers for relevant evidence of technical and/or professional ability, for example, language skills or cultural awareness.

Where relevant, contracting authorities can also consider potential suppliers’ track record for delivering similar contracts. Thus, candidates can be rejected on grounds of grave professional misconduct, which might include, for example, a serious breach of equality legislation.

Example: Workforce skills as a selection criterion ✓

At selection stage, in assessing contractors’ capability to deliver its contracts, public sector transport authority F uses skills criteria relevant to the subject of each contract, case by case. Potential suppliers who can’t demonstrate the adequacy of their recruitment and training, which are relevant to the suppliers’ technical or professional ability to deliver a contract in question, are excluded.

Example: Pre-qualification conditions ✗

In an example of what not to do, a group of contracting authorities, G, has developed a common standard for equalities in public procurement, which is used to decide who to invite to tender or put on their approved lists. Firms are asked to meet various criteria including identifying and addressing imbalances in job applicants and employees according to gender, ethnicity and disability. As the criteria are unlikely to be relevant to every procurement, the standard should not be imposed in blanket fashion, which would run the risk of legal challenge.

¹ Regulation 25 of the Public Contracts Regulations 2006

Award stage

A contract should be awarded to the tenderer offering the best value for money – that is, the optimum combination of whole-life costs and quality to meet the authority's requirements. Value for money in this context equates to 'most economically advantageous' for the contracting authority (not wider), in the parlance of the UK Regulations implementing the EU Procurement Directives.

The Regulations list a number of criteria, by way of example, that contracting authorities can use to identify which tender would be the most economically advantageous. These award criteria include price, delivery or performance dates, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, after-sales service and technical assistance.

Criteria involving social considerations may be used to determine the most economically advantageous tender where they provide an economic advantage for the contracting authority which is linked to the product or service which is the subject matter of the contract.

Where there are two or more bids which are equal on value for money grounds, it is possible to use 'additional social award criteria' to determine between them; legal advice should be sought first, as it is very rare for bids to be equal in this way.

Example: Social award criteria

In a procurement to establish a centre to provide minimum literacy qualifications to adults, contracting authority H included award criteria related to support for those having difficulty keeping up.



Contract Conditions and Social Clauses

The term social clauses refers to special conditions relating to the performance of a contract, which address social issues.

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with European Community law and are indicated in the contract notice or specifications. Contract conditions must relate to the performance of the individual contract in question. They should be relevant and able to be met by whoever wins the tender from the time at which the contract starts.

They should not be disguised technical specifications or selection or award criteria. If, for example, particular skills or qualifications are needed for a contract, these should be considered at the selection stage; additional training, not essential for a contract, by suppliers can be agreed on a voluntary basis once the contract has been awarded.

Contract conditions must not discriminate directly or indirectly against national or non-national tenderers. Contract conditions that require changes to the organisation, structure or policy of a supplier established in another Member State might be considered discriminatory or a barrier to free trade.

Value for money should be maintained; contract conditions should be supported by the benefits they accrue set against the cost of achieving them. Care should be taken to avoid the imposition of blanket clauses on suppliers, which could be regarded as burdensome and might deter suppliers from competing for government work.

Contracting authorities have a wide range of possibilities for determining the contractual clauses on social issues. They may in particular be intended to favour on-site vocational training, the employment of people experiencing difficulty in achieving integration or the fight against unemployment².

Example: targeted recruitment and training

In a works procurement for the construction of a new community centre, authority I included a contract clause that "10% of the person-weeks required to complete all of the works is to be delivered by new entrants that have an apprenticeship, trainee or employment contract with the contractor or a sub-contractor and are engaged in a training programme that is accepted by the employer." In this example, 10% is acceptably proportionate; 50% would not be. Costs and benefits need to be weighed up case by case.

² Recital 33 of the Public Procurement Directive gives examples of specific conditions which a contracting authority may require, while complying with the requirements set out above.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF>

Relationship management with suppliers

There may be opportunities post-award for contracting authorities to work outside the formal procurement process, on a voluntary basis, to promote the importance of social issues such as equality and adult skills to their suppliers and supply chain.

This can be an effective means of influencing suppliers' culture, and helping to ensure that it fits with the contracting authority's own set of values and needs.

Example: Making in-house training available to contractor

Contracting authority J lets its facilities management company's staff attend in-house training, including on the authority's equality policies and procedures.

Example: London Living Wage for existing contracts

Authority K worked with suppliers on a voluntary basis, to bring workers on the authority's existing contracts where appropriate, into line with the London Living Wage. Many of the industries where workers are paid below the Living Wage level employ significant numbers of women and BAME groups.

Further reading

For detailed guidance, see the Office of Government Commerce's (OGC) 'Social issues in purchasing': http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf

The European Commission has also published an Interpretative Communication on social issues in procurement: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0566en01.pdf

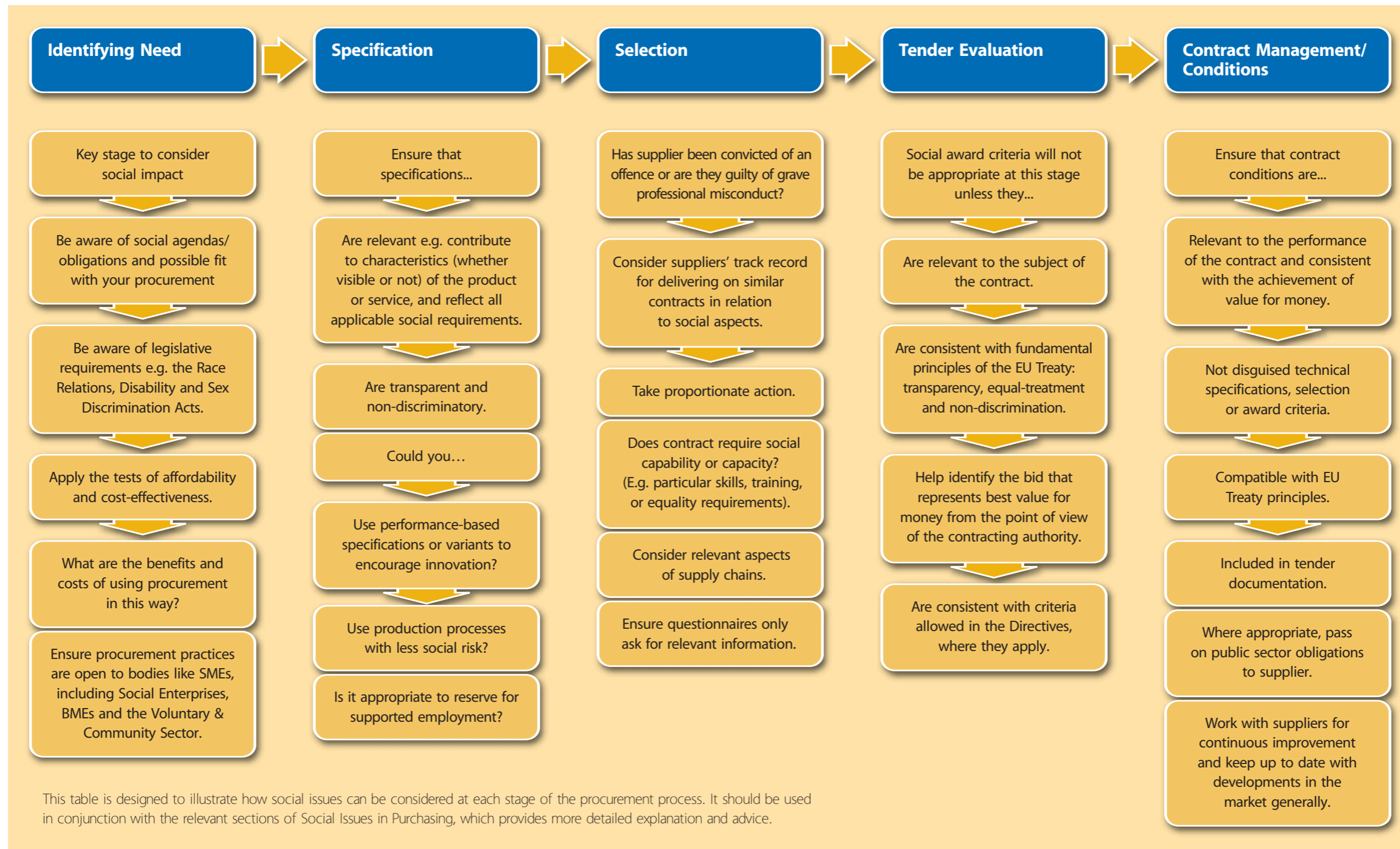
For detailed guidance on innovative procurement [http://www.ogc.gov.uk/documents/Finding_and_Procuring_Innovative_Solutions_\(3\).pdf](http://www.ogc.gov.uk/documents/Finding_and_Procuring_Innovative_Solutions_(3).pdf)

Further enquiries

Questions on this pamphlet should be addressed in the first instance to the OGC Service Desk on 0845 000 4999 or at servicedesk@ogc.gsi.gov.uk



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Policy and legal framework

All public procurement is required to achieve value-for-money and is subject to the principles of the EC Treaty, around a level playing field for suppliers from the UK and other member states, and the UK regulations implementing the EC Public Procurement Directives.

For detailed guidance, see

http://www.ogc.gov.uk/key_cross-cutting_government_policies_the_policy_and_legal_framework.asp

Important do's and don'ts

Do make sure:

- Social issues addressed in procurement are relevant to the subject of the contract.
- Actions to take account of social issues are consistent with the government's value-for-money policy, taking account of whole-life costs.
- Actions to take account of social issues comply with the law, in particular, the principles of the EU Treaty, around a level playing field for suppliers from the UK and other member states, and the UK Regulations implementing the EU Public Procurement Directive(s).
- Any social benefits sought are quantified and weighed against any additional costs and potential burdens on suppliers, which are likely to be passed onto the public sector.
- Not to impose any unnecessary burdens that would seriously deter suppliers, especially small and medium sized enterprises (SMEs), from competing for contracts, which in turn would reduce the choice available and could impact on costs and service standards. The suppliers deterred could include the very ones whose participation would help to further the government's social agenda e.g. those owned by under-represented groups.
- To consider whether any social legislation, such as the public sector equality duties, are relevant to a procurement and take appropriate action to address this.

Do not:

- Act in such a way as to distort competition or discriminate against candidate suppliers from other Member States.
- Add social elements to a contract without careful evaluation and justification of any additional costs.
- Leave consideration of social issues until too late in the process.
- Confuse obtaining value for money, which is required, with awarding contracts on the basis of lowest initial price, which is bad practice.
- Impose contract conditions that are not relevant to the performance of the individual contract.
- As part of the procurement process, ask suppliers about their policies generally on issues which are not related to the specific contract.



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