

RACE EQUALITY AND PROCUREMENT IN LOCAL GOVERNMENT

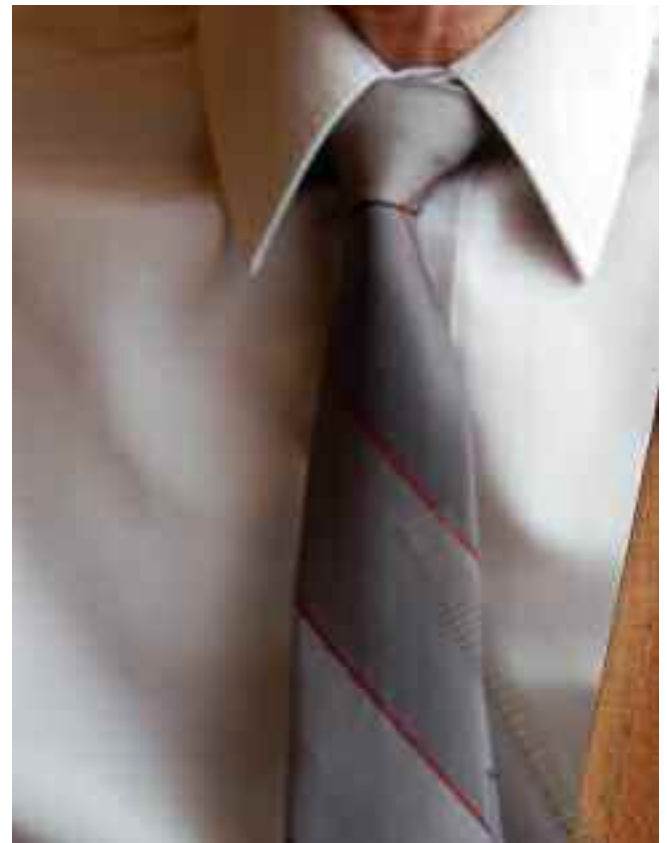
A GUIDE FOR AUTHORITIES AND CONTRACTORS

Local authorities in Britain spend billions every year on contracts with private and voluntary organisations for goods, works, and services. It is vital, therefore, that they take full account of all the implications - both economic and social - of their investment. They must now also ensure that this investment is consistent with their race equality obligations.

The Race Relations (Amendment) Act 2000, which amended the Race Relations Act 1976, has important implications. The amended Race Relations Act (RRA) outlaws discrimination in all functions of local authorities, including procurement. The new section 71(1) of the RRA gives all local authorities a clearer, more direct, positive legal duty to eliminate discrimination and to promote equality of opportunity and good race relations in carrying out all their functions.

The duty to promote race equality applies to procurement itself. Where a local authority's function is carried out by an external supplier on its behalf, the local authority remains responsible for meeting the duty. Contractors themselves must not discriminate, but they do not have the same legal obligation to promote equality of opportunity. So, local authorities must now build relevant race equality considerations into the procurement process, to ensure that all their functions meet the requirements of the RRA, regardless of who is carrying them out. To comply with their duty under the RRA, local authorities should make sure that public money is not spent on practices that lead to unlawful racial discrimination, but is used instead to support and encourage equality of opportunity and good community relations. Contractors, and potential contractors, need to be aware of the legal duty on local authorities, since it has implications for them.

The Commission for Racial Equality (CRE)'s Code of Practice on the Duty to Promote Race Equality provides practical guidance to help local authorities meet their duty under the RRA. This guide expands and develops the guidance in the code of practice and accompanying guides, in relation to procurement. It sets out in more detail what local authorities can do to meet their responsibilities under the duty.



What types of contract does this guide cover?

The guide applies generally to contracts between a local authority and an external supplier in the private or voluntary sector.

It also applies to the following types of contract:

- The policies and practices of formal and informal consortia for local authority procurement.
- Joint commissioning between local authorities and other public authorities, such as strategic health authorities or primary care trusts. In such cases, all parties are subject to the duty to promote race equality, so any joint procurement must meet the standards set out in this guide.

The principles of the guide are relevant to the following types of contract, which are not specifically covered:

- Contracts where both the 'buyer' and 'seller' are local authorities. In such agreements, each party is subject to the duty to promote race equality and will want to be confident that the other is applying comparable race equality standards.
- Local authority grants to voluntary organisations.

This guide is not an authoritative statement of the law and it is recommended that you seek legal advice for each new procurement project.

LEGAL AND POLICY FRAMEWORK

Race Relations Act 1976

The Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000 (RRA) gives all local authorities a statutory duty in carrying out their various functions, to have due regard to the need to eliminate unlawful racial discrimination, and to promote equality of opportunity and good relations between people from different racial groups.

Complying with your duty under the RRA in carrying out procurement is compatible with your obligations under EC rules, UK, Welsh, and Scottish legislation, including best value, and your general fiduciary duties. The duty under the RRA is not optional. You must make the promotion of race equality an integral part of your decision-making and actions across all your functions. To do this, you will have to apply the tests of relevance and proportionality, to see where, when, and how promoting race equality needs to be part of what you do. The RRA recognises that promoting race equality will be more relevant to some functions or policies than to others, and your response should reflect this.



Best value

Best value applies to all local authorities. It requires them to secure continuous improvements in the way in which they exercise their functions, having regard to efficiency, economy, and effectiveness. In seeking to achieve continuous improvement, authorities are expected to review the services they provide, both directly and through external suppliers, and to do so in consultation with users and potential users, including those who have traditionally been under-represented. The '4 Cs' methodology - challenge, compare, consult, and compete - should form the basis of best value service reviews.

DOING BUSINESS WITH LOCAL AUTHORITIES — A NEW AGENDA FOR RACE EQUALITY

Why should we want to do business with local authorities?

Doing business with local authorities can be an attractive proposition:

- Local authorities can be good customers. EC rules, local government legislation, and their own standing orders require them to have procurement procedures that are open, fair, and non-discriminatory. They have to be honest and professional in the way they choose suppliers, and in any dealings with them.
- Local authority contracts can offer a degree of financial certainty. This could help you to build your reputation and prepare for future contracts.
- To meet their 'best value' duty, local authorities will want to work with you to improve the services you provide on their behalf.
- Many local authorities now base their contract service specification on outcomes, which allows you to develop methods suitable to your firm and ways of working.
- Local authorities are encouraged to work with contractors on a partnership, rather than adversarial, basis.

What's new in local authority procurement?

The main change is a new, clearer, and more explicit legal obligation on local authorities to take race equality into account in carrying out procurement. The Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000 (RRA) gives the public sector greater responsibilities to promote race equality in Britain.

The RRA:

- makes it unlawful for local authorities to discriminate on racial grounds in carrying out any of their functions, including procurement; and
- gives local authorities a positive, enforceable, legal duty to eliminate unlawful racial discrimination, and to promote equality of opportunity and good race relations in carrying out all their functions ('the duty to promote race equality').

The duty to promote race equality applies to procurement. This means that local authorities must now build relevant race equality considerations into their procurement processes. The duty applies to the local authority whether a function is carried out by the authority or by an external contractor. In simple terms, to comply with the race equality duty, local authorities will now aim to make sure that public money is not spent on practices that lead to unlawful racial discrimination, but instead on those that support and encourage equality of opportunity and good community relations.

For local authorities, the duty to promote race equality may involve new ways of planning and carrying out procurement to incorporate race equality considerations. This will not alter any of the positive reasons for doing business with local authorities listed above. In fact, you may conclude that this change adds a further positive reason, namely that it gives you an incentive to check and,

where necessary, improve your race equality performance, which has a benefit regardless of any public sector contracts.

How does the Race Relations Act apply to our firm?

Your firm, like all organisations in the public, private, and voluntary sectors, is covered by the RRA in that you must not discriminate on racial grounds in employment, education, and housing, in the provision of goods, facilities, and services, and in carrying out public functions. You can take certain positive action measures and can be subject to proceedings for alleged breach of the RRA. After 19 July 2003, similar non-discrimination laws should apply to public, private and voluntary sector organisations in all EU Member States. However, unlike local authorities, you do not have a positive duty to promote race equality. It is for this reason that, to comply with their duty, local authorities must now take particular care to introduce race equality into their contractual relationship with external suppliers.

What does the duty on local authorities mean for our firm?

If you are doing business with local authorities, or hoping to do so, you cannot ignore the new context in which they must now operate. If you hope to be selected to tender for, or to be awarded, local authority contracts, you will be expected to meet the race equality requirements for the particular contract. You would therefore be well advised to review your own employment and service delivery policies and practices, if you have not already done so. You will then be able to make the necessary changes to your race equality policies or practice without the pressure of an imminent contract. Your first step should be to make sure you are acting within the law, and that your policies and practice are not discriminatory. Your next step is to consider ways in which you could go further in promoting equality of opportunity.

Some local authorities now want to know more about the firms that apply to them for contracts, and those that are successful. Wholly separate from any selection or tendering procedure, you may be asked for information about the ethnic origins of the owners of your firm. If you are a publicly quoted company, for which such questions are inappropriate, you would not be expected to reply. Otherwise, to ensure the accuracy of such information, and as good practice under data protection legislation, you should, if possible, ask each owner to confirm their ethnicity.

Will the duty on local authorities mean a greater burden on our firm?

In the short term, it may mean additional work and costs, but these should be more than compensated for by the long-term benefits. Local authorities' requirements will vary, depending on the nature of the contract - that is, how relevant it is to the authority's duty to promote race equality. While firms of all sizes must meet the same standards, local authorities may accept less detailed documentary evidence from small firms that may not have the resources available to large firms to implement formal equality policies. Many firms - large and small - already have effective race equality policies covering both their employment of staff, and services to their customers. Such firms should have little difficulty meeting the race equality expectations of local authorities. Other firms may need to make some adjustments to their policies and practice. The 'cost' of these changes should be outweighed by the improved efficiency and quality that greater equality of opportunity will bring.

If your firm is already involved in corporate social responsibility, or diversity initiatives, equal opportunities will help you deliver these objectives.

What benefit do we gain by promoting race equality - is there a business case?

Surveys of employers have shown that when employment is solidly rooted in equality of opportunity, firms can recruit from a wider pool, staff turnover goes down, fewer days are lost, and staff are more committed to their jobs - all of which increases productivity.



Similarly, when an organisation plans and delivers its services to meet the needs of different service users, the results can be positive for everyone - the organisation uses its resources more efficiently, staff feel more motivated, and the users receive a better, more appropriate service.

Many organisations now realise that there is also a strong business case for developing a supply chain that reflects the diversity of the populations they serve. This means trying to attract a wider range of businesses from all communities, as contractors or subcontractors. Greater 'supply-side diversity' makes it easier to meet varied demands and expectations from customers, it increases the skills and knowledge at an organisation's command, and it creates new markets.

There is also a negative business case. The costs of losing a discrimination case in a court or tribunal, or of facing enforcement action by the CRE, can be high, both in financial terms and in damage to reputation.

Will the duty do anything to improve opportunities for small firms and ethnic minority businesses to compete for local authority contracts?

The duty could improve opportunities for more firms to compete, that is to create a more 'level playing field', but local authorities are prohibited from giving preference to any firm, even if they are from a group that is under-represented among current contractors.

To comply with the duty to promote race equality, local authorities should see if their procurement policies and practice are having an adverse impact on suppliers from particular racial groups. If there is evidence of racial discrimination, they would be expected to implement changes to prevent discrimination in future.

If it appears that a local authority's procurement processes disadvantage some racial groups as suppliers, the authority would need to consider whether there are ways in which improved opportunities can be provided. The authority's aim would be to remove any barriers that prevent some firms from being able to compete on equal terms. Barriers may either lie within the authority's policies and practice - for example how they package or advertise their contracts, or provide information to suppliers, or compile approved lists - or they may be due to lack of resources or skills among suppliers. Greater opportunities for small firms and ethnic minority businesses to compete could also occur as a result of local authorities now being more aware of the importance of providing services that meet the needs of users, including any particular needs of different racial groups. So, to secure value for money, it may be appropriate for a local authority in certain contracts to encourage a more diverse range of suppliers, or, in other cases, to tender separately for one part of a contract that requires suppliers with specialist knowledge or experience.

Larger firms may also benefit from this process. If an authority helps to develop greater business skills among 'specialist' firms, these firms could be an asset as subcontractors, helping the main contractor to meet contract requirements involving services to meet the special needs of particular racial groups. In every instance, suppliers must have the requisite technical capacity, including capacity in terms of race equality in employment and, where relevant, service delivery. In every case, decisions must be based on value for money for the authority. As mentioned above, EC rules and government policy require maximum openness, as well as fairness, in local authority procurement. So, this is not about applying variable requirements, but enabling more suppliers to try to meet the same, consistent requirements. Larger firms that meet an authority's requirements should not be disadvantaged merely by having to compete in a wider field.

COMPETING FOR LOCAL AUTHORITY CONTRACTS

How will race equality be included in local authority contracts?

For every contract, the local authority needs to determine whether race equality is a core requirement of the contract. This will depend firstly on whether the goods, works, or services are



relevant to the authority's duty to promote race equality, and then on how significant race equality is to the contract as a whole.

Where race equality is a core requirement, it will be relevant to every stage of the procurement process. As a rough rule of thumb, race equality will be a core requirement in contracts that wholly or partly involve services to the public or to a section of the public. This includes education or community care services, information services, law enforcement, and management of leisure facilities and residential homes. It also includes contracts where a significant element involves direct contact with members of the public; for example, security services, housing benefit fraud investigation, and transport services, as well as certain services provided to the authority or for authority staff, including recruitment services, training, and staff catering.

Race equality is unlikely to be a core requirement in contracts that involve no real contact with members of the public or the authority's staff. These might include services of a wholly technical nature, or supplying fuel or materials used in technical processes. Contracts for goods could require the needs of particular racial groups to be met; for example, in providing uniforms or meals. Contracts for works may require measures to accommodate the needs of different groups; for example, where a contractor's staff come into contact with members of the public or with authority staff.

Can we be involved in planning and developing procurement projects?

Yes, subject to EC rules on equal treatment of suppliers. If you have a current contract with a local authority, the authority may seek your views on different aspects, including how well the present arrangements promote race equality. When a local authority is considering how best to incorporate race equality into future arrangements for the procurement of goods, works, or services, they may consult external suppliers with relevant experience. This would be an opportunity to suggest options for promoting race equality, taking into account the different degrees of risk for the authority and the supplier in different options. However, such involvement will not give you any guarantees of success when the contract is advertised.

Will race equality be a factor in the selection of tenderers?

Yes, all local authorities will want to know that you do not have a history of discrimination, and for certain contracts they will want to know you have the technical capacity to meet the race equality standards necessary to perform the contract. The extent to which your past record on race equality in employment or service delivery will be taken into account will, of course, depend on the contract. The notice in the Official Journal of the European Union (OJEU), and advertisements in newspapers or specialist journals, should indicate if a significant element of what is to be provided by the contractor relates to race equality.

In drawing up a select list or an approved list, a local authority will be looking generally for suppliers who can demonstrate they understand their responsibilities under the RRA, and operate within the law. You will be asked if a court or tribunal has recently made a finding of racial discrimination against you, or whether you have been the subject of a CRE formal investigation, and, if so, what steps you have taken to prevent discrimination recurring. You should answer this question, giving dates and other relevant information. You will not be rejected if you can show you have taken appropriate steps since the finding or investigation. You should provide enough detail to give a clear picture of the changes you have made to prevent discrimination recurring. If the court or tribunal, or the CRE, made recommendations, you should state whether you have implemented them.

If race equality is a core requirement of the contract, you may be asked for additional evidence of good race equality practice,

including whether you follow the CRE's code of practice in employment. You may also be asked for information about the way you approach race equality in relation to your customers. Again, it is important to provide detailed answers, so that the local authority has sufficient information to make an accurate assessment of your technical capacity for the contract in question in terms of race equality. You should provide evidence to support your answers.

This evidence may include:

- examples or copies of your race equality or equal opportunities policy;
- instructions to staff setting out arrangements for advertisements, recruitment, selection, access to training, and opportunities for promotion;
- copies of recruitment advertisements, and extracts from staff handbooks;
- copies of grievance and disciplinary procedures;
- copies of leaflets for customers; and
- other materials that show your firm's commitment to race equality and equal opportunities.

In assessing your answers and any evidence you submit, the local authority will take account of the scale of the proposed contract and the degree to which it is relevant to the promotion of race equality. It may also take account of the size and experience of your firm. If you are unsuccessful at selection stage, and one of the reasons is that you did not meet the criteria relating to race equality, we suggest you ask the authority for more detailed feedback. In line with their duty to promote race equality, some local authorities now offer guidance material, or make referrals to specialist agencies, to encourage firms to improve their knowledge of race equality, and their prospects for future contracts.

How should we incorporate race equality into our tender submission?

If you are selected to tender, you will want to have as much information as possible about the background and context of the proposed contract as well as the local authority's race equality objectives.

You should look for the following information in the invitation to tender or other contract documents:

- the authority's race equality scheme;
- facts about the population likely to be affected by the contract, broken down by ethnic group and, where relevant to the contract, by sex, age, or other factors;
- how the goods, works, or service are currently provided, and the results of any monitoring, consultation, or other assessment of the impact on race equality; and
- where staff will transfer under TUPE, their terms and conditions, including protection against discrimination and rights to equality of opportunity.

You will also want to know how tenders will be evaluated. Within the basic criterion of best overall long-term value for money (or, for contracts subject to EC Directives, the 'most economically advantageous tender'), the invitation to tender will list the specific evaluation criteria, including those relating to the promotion of race equality. The contract specification will describe how race equality forms part of the services, goods, or works the contractor is expected to provide. Normally, the authority's concern will be the end product rather than the process, so the specification may state the race equality outcomes the authority is looking for, leaving it to you to indicate how you will achieve them.

If a contract concerns a function that is relevant to the authority's duty to promote race equality, and has a high priority, the specification may include requirements to carry out certain measures within the authority's published race equality scheme - for example, to monitor the service for any negative effects it might



have on race equality, or to consult people affected by the contract. Your tender should explain how you would do this. You may find it useful to refer to the Commission for Racial Equality's guide on ethnic monitoring.

If the specification says you are expected to make certain improvements in race equality performance each year (for example, an annual increase in the percentage of people using the service from settled refugee communities), you should say how you expect to meet this requirement.

Where local authority staff will transfer to the contractor under TUPE, your tender should state how you will maintain high standards of employment protection, including protection for race equality. In completing your tender, you should consider whether the race equality requirements of the contract will have any implications for the staff who will carry out the contract.

For example:

- Will you need people with special knowledge or skills? At what levels? Can you provide this through training, or will you need to recruit specialist staff?
- Will you need to make special arrangements for supervision?
- Will performance of the contract benefit from employing people from a particular racial group (within the strict limits in the RRA)?

Example

A local council is proposing to award a contract for the design, print, and distribution of a leaflet explaining the services it offers to families caring for dependent elderly or disabled family members. The council is aware that ethnic minority families rarely take advantage of council services, and may be struggling to cope unassisted with difficult care arrangements.

The contract documents include a standard form, which tenderers are asked to use to set out their 'method statement'.

This should include their proposals for the following:

- identifying the languages in which the leaflet should be published, to be easily understood by at least 95% of families in the authority's area;
- distributing the leaflet, so that the maximum number of families will receive the leaflet in an appropriate language; and
- developing proposals for print and broadcast media to publicise the leaflet to the diverse target audience.

Will the contract conditions impose any race equality obligations?

Yes. Local authorities can also use contract conditions to secure race equality standards. For example, local authority contracts are likely to include a condition that you must not discriminate unlawfully under the RRA, or under all current equality legislation, and that you will make sure that your employees, agents, and any subcontractors, also do not discriminate on these grounds. Of course, any person who considers they have been subjected to unlawful discrimination will still be able to bring proceedings, as they would regardless of any contract with a local authority. However, by making compliance with the RRA a condition of contract, the local authority gives it added force, since non-compliance can also be enforced by the authority as a breach of contract.

For firms that already have procedures in place to prevent discrimination, compliance with this condition should not be an additional burden. For firms that have not yet adopted anti-discrimination measures, you should find that by doing so you will not only improve your prospects of securing local authority contracts, but you should also avoid the costs of future complaints and litigation.

Other standard race equality clauses could require the contractor:

- in contracts for works or services, to comply with the authority's race equality policies and codes of practice when their staff work on the authority's premises or alongside the authority's staff (this could be met by showing you have race equality policies at least as good as the authority's);
- to notify the authority of any investigation or proceedings under the RRA, relating to the contract, against the contractor, and to cooperate with the investigation or proceedings; or
- to indemnify the authority in the event of any investigation or proceedings under the RRA arising from acts or omissions of the contractor, their staff, or subcontractors in performing the contract.

If the contract is highly relevant to the local authority's duty to promote race equality, and good race equality employment practice is seen as necessary for effective performance of the contract, you may find additional contract clauses relating to race equality in employment.

Such clauses could require that:

- in complying with the non-discrimination conditions, the contractor observes the CRE's code of practice in employment, as far as possible;
- the contractor promotes race equality in performing the contract; and
- the contractor monitors staff engaged in performing the contract and, if there is evidence of under-representation of particular racial groups in certain jobs, adopts measures permitted under the RRA to encourage people from under-represented racial groups to apply for such jobs.

Contract conditions will not form part of the tender evaluation. However, if you fail to confirm that you will comply with the conditions of contract, including those relating to race equality, if you are awarded the contract, your tender as a whole could be rejected.

We advise you to consult all the staff who are likely to be involved in the contract, as well as the relevant trade unions, so that you can be confident your response on the race equality requirements of the contract is realistic and achievable.



AFter THE CONTRACT HAS BEEN AWARDED

If we are unsuccessful, are there any lessons we can learn?

If you are unsuccessful, you will normally be told why. If one reason for rejection was dissatisfaction with your proposals on the race equality requirements, you should ask the local authority for advice on how your response could have been better. You should also check if the authority, or others with whom it is associated, offers training or special guidance on equal opportunities for providers.

If we are successful, what do we need to do to meet the race equality requirements of the contract?

You will want to establish a positive working relationship with the appropriate representatives of the local authority.

This will be easier if you are very clear as to your role and that of the local authority:

- Is the local authority able to offer any support, for example advice on race equality training?
- How will responsibilities for monitoring race equality performance be divided between you and the authority? What is the authority planning to monitor?
- In what form, and how often, does the local authority expect you to report monitoring results?
- What are your respective roles in dealing with complaints of discrimination from employees, subcontractors, users of the goods, works, or service in question, or others?
- How will you resolve conflicts (for example, if you disagree about the implications of ethnic monitoring data or other measurements of your race equality performance)?

A first priority should be to identify any race equality training needs of staff who will perform the contract (including staff who will be transferred from the authority). You should remember that, for some staff, the race equality responsibilities of the contract may involve new ways of carrying out familiar tasks, and you should make sure they understand this. We suggest you consider giving special equality training to staff with management or supervisory roles, and to those who will be involved in monitoring race equality performance.

You should check that all the systems and procedures you described in your tender for meeting the race equality specifications, and any arrangements you will need to make to comply with the contract conditions, are fully in place before the contract start date. In particular, you should check you have made the necessary technical, organisational, and staffing arrangements for any ethnic monitoring specified in the contract.

If, after the contract is under way, you are unclear about any of the race equality requirements, you should seek clarification as soon as possible. If you fail to demonstrate race equality performance to the specified standard, this could lead to enforcement action by the local authority. In the longer term, it could jeopardise your chances of getting public sector special equality training for staff with management or supervisory roles, and for those who will be involved in monitoring race equality performance.

DOING MORE TO PROMOTE RACE EQUALITY

After award of contract, can we be asked to carry out extra race equality measures?

A local authority may be aware of additional steps the contractor could take to promote race equality. After you have been awarded the contract, the authority may, for example, ask you to agree to:

- adopt an equal opportunities policy for your organisation generally
- take positive action, as permitted under the RRA, and the Sex Discrimination Act 1975, to offer training or to encourage job applications as a way of overcoming any under-representation of



particular racial groups, or of women (or men), and to recruit disabled people

- promote subcontracting opportunities for small firms and ethnic minority businesses.

You may also be able to suggest other steps to promote race equality, which you could take on a voluntary basis.

Can we help local authorities to develop the race equality aspects of future procurement projects?

Possibly. As local authorities move towards more complex or innovative procurement projects, they may consult businesses and voluntary organisations at the initial development and planning stage. By drawing on the different perspectives, and wider experience, of the private and voluntary sectors, including in the field of race equality or equal opportunities generally, some authorities have developed better ways of defining the scope of a strategic contract.

Other sources of information and guidance: www.cre.gov.uk

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