

## Commission on a Gender-Equal Economy

### PAPER 3

#### Policy Paper on Public Procurement and Gender Equality

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#### Summary

Public procurement accounts for a significant part of the economy. It is increasingly highlighted as a lever to promote gender equality. This paper outlines the legal scope for using public procurement to promote gender equality. It then highlights main features for the successful use of public procurement to foster gender equality and makes recommendations how better to promote gender equality through public procurement. More specifically, it identifies two main principles for fostering gender equality through public procurement.

First, public procurement needs to place high importance on the quality of services and working conditions of staff. This requires a lessening of budgetary constraints as well as a move towards a different culture of public procurement that focuses less on achieving ‘more with less’ (money) and more on the question how much one needs to spend to achieve the highest level of service, accommodate differentiated needs, safeguard working conditions and promote social goals.

The second principle of promoting gender equality through public procurement is the need for a continuous integration and acknowledgement of differentiated needs and impacts, from the design of a service and contract to the final evaluation. This is the focal point for the policy recommendations presented at the end of this paper.

#### 1. Public Procurement

Public procurement, the purchase of goods, services, and construction works by public sector bodies, is an important part of the economy. On average, it accounted for about 29% general government expenses and 12% of Gross Domestic Product (GDP) in the OECD in 2015.<sup>1</sup> In Great Britain, the share of public

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<sup>1</sup> OECD (2017): *Government at a Glance. General government procurement spending as percentage of GDP and total government expenditures, 2007, 2009 and 2015*. DOI: [https://doi.org/10.1787/gov\\_glance-2017-en](https://doi.org/10.1787/gov_glance-2017-en).

procurement was slightly higher. Here, it accounted for 32% of total government expenditure and 13.7% of GDP in the same year.<sup>2</sup>

Over the past few decades, increasing attention has been paid to the social impact of public procurement practices, including the relationship between public procurement and gender equality. In the late 1980s, the European Parliament urged that regulations relating to public procurement must have regard to reducing discrimination.<sup>3</sup> Since then, regulations that aim to include gender equality in public procurement practices have been adopted in different member states, including the UK.

### **1.1. The regulation of public procurement**

Public procurement is regulated by a multi-level regulatory framework, which includes regulations at international, regional (for the UK, currently European), national and sub-national level. (For the analysis here, stipulations in Free Trade Agreements have not been included.)

#### **International Regulations**

At the international level, two major agreements exist that directly target public purchasing. The Agreement on Government Procurement (GPA), which is a World Trade Organisation agreement, focuses on market-building and ensuring access to public procurement markets. It sets requirements relating to transparency and non-discrimination among tenderers that public procurement in the UK has to comply with. The second major international agreement is the International Labour Organisation's Labour Clauses (Public Contracts) Convention 1949 (No. 94). It requires signatory states to uphold certain wages and employment conditions in public contracts. While the GPA is binding for the UK, the ILO Convention 94 is currently not. As a result, international regulations oblige UK public authorities to comply with the principles of non-discrimination and transparency, but no international obligation exists relating to wage levels and employment conditions.

#### **European Regulations**

A further source of supranational regulation is European law. Since the inception of the EU, the four freedoms set out fundamental principles of transparency and non-discrimination among tenderers. European Directives adopted since the 1970s put forth detailed regulations for public contracts in the European Union. For domestic regulations and practices, case law issued by the European Court of Justice provides an important source of legal interpretation and clarification.

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<sup>2</sup> OECD (2017): *Government at a Glance. General government procurement spending as percentage of GDP and total government expenditures, 2007, 2009 and 2015*. DOI: [https://doi.org/10.1787/gov\\_glance-2017-en](https://doi.org/10.1787/gov_glance-2017-en).

<sup>3</sup> European Parliament (1987): Legislative Resolution embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a directive amending Directive 77/62/EEC coordinating public supply contracts and deleting certain provision of Directive 80/767/EEC (first reading). *Official Journal* 14.9.1987, OJ C 246/84. Available online: <http://goo.gl/enfvbQ>

Without going into detail, it is important to highlight that EU law and jurisdiction explicitly allow for social considerations (such as gender equality) in public procurement. It however subjects the use of social objectives to certain conditions, thereby shaping the scope, form and reach of equality considerations in public procurement. Most importantly, social considerations are admissible if they

- do not contravene the principles of the common market,
- do not lead to unrestricted freedom of choice for the contracting authority,
- are linked to the subject matter of the contract, and
- are stated clearly in the invitation for tender.<sup>4</sup>

As a result, European legislation precludes, for example, any consideration of general company policies. While any references to general company policies are inadmissible, stipulations that focus on the workforce employed in the execution of a specific contract are admissible.<sup>5</sup>

It is not clear what impact Brexit will have on the regulation of public procurement in the UK. Yet, it is highly likely that the core principles which apply today will continue to apply. Hence, the Political Declaration setting out the Framework for the Future Relationship between the European Union and the United Kingdom states that the UK seeks to accede to the GPA and that rules based on the GPA should be set.<sup>6</sup>

### **National and sub-national regulations in the UK**

Further regulatory policies exist at UK level and across the different nations of the UK. For Great Britain, the most important piece of legislation on equality and public procurement is the Public Sector Equality Duty, which obliges public authorities to take into account equality in all their actions, including their purchasing activities. Likewise, the Well-being of Future Generations (Wales) Act broadly requires public authorities in Wales to consider the long-term impact of their action on a range of social goals, including the impact for equality. The legislation in Northern Ireland differs from that in Great Britain. Here, the Northern Ireland Act 1998 lays out that public authorities have ‘due regard’ to promoting equality (including gender equality) in all their functions.

Specific regulations that link public procurement and gender equality exist in Scotland and Wales. In Scotland, public authorities are obliged to have due regard to equality considerations when procuring. Yet, at the same time, the Scottish Specific Duties include a loophole as they state that “Nothing in this regulation imposes any requirement on a listed authority where in all the circumstances such a

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<sup>4</sup> Dischendorfer, M. (2004) ‘The rules on award criteria under the EC procurement directives and the effect of using unlawful criteria: the EVN case. (Case Comment.)’ *Public Procurement Law Review*, 2004(3): NA74-84 and Sarter, E.K. (2015) ‘Contracting out of Services, European Public Procurement Law and Gender Equality in Tendering.’ *WAGADU. Journal of Transnational Women’s and Gender Studies*. Special Issue: Women, Gender and Government Outsourcing in Comparative Perspective, 14(3): 55-83.

<sup>5</sup> Sarter, E.K. (2015) ‘Contracting out of Services, European Public Procurement Law and Gender Equality in Tendering.’ *WAGADU. Journal of Transnational Women’s and Gender Studies*. Special Issue: Women, Gender and Government Outsourcing in Comparative Perspective, 14(3): 55-83.

<sup>6</sup> <https://bit.ly/2FHSZXA> .

requirement would not be related to and proportionate to the subject matter of the proposed agreement.”<sup>7</sup>. The Welsh Statutory Duty requires public authorities to have “due regard to whether the conditions should include considerations relevant to its performance of the general duty” [...] *if it* “proposes to stipulate conditions relating to the performance of a relevant agreement”<sup>8</sup>. In brief, both regulations give public authorities the option not to include equality considerations. To date, little is known about the impact of these loopholes in practice. Research is needed to assess whether they impede the potential contribution of public procurement to promote gender equality.

## **2. The relationship between public procurement and equality**

With nearly one third of government expenditure going towards the purchase of goods, works and services<sup>9</sup>, states and their agencies are important consumers whose procurement practices can (re)produce, increase or diminish societal (in)equality. Thereby, public purchasing of goods, works and services interacts with equality in manifold ways.

Public procurement practices can have important impacts for wages and working conditions and the quality of services, especially the emphasis given to the price, influence working conditions and the quality of a service.<sup>10</sup> Yet, given that the focus of this paper is the strategic use of public procurement as a means to promote gender equality through the conscious design of goods, services and the use of contractual obligations, this element will not be elaborated upon in the remainder of this paper.

### **Using Public Procurement to Promote Equality Within the Workforce**

Public procurement can include obligations, which can promote measures to foster equality *within the workforce executing the contract*. Such obligations can, for example, relate to targets for the employment of women in male-dominated areas, or obligations such as securing the availability of child-care facilities for the staff executing the contract.

One example of such obligations is the construction of the Olympic Park in London, where targets for the employment of women were introduced to help address women’s underrepresentation in construction.<sup>11</sup>

### **Using Public Procurement to Promote Equality Beyond the Workforce**

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<sup>7</sup> The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, 9(3).

<sup>8</sup> The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, 18(2).

<sup>9</sup> OECD (2017): *Government at a Glance. General government procurement spending as percentage of GDP and total government expenditures, 2007, 2009 and 2015*. DOI: [https://doi.org/10.1787/gov\\_glance-2017-en](https://doi.org/10.1787/gov_glance-2017-en).

<sup>10</sup> Among others: Sarter, E.K. and Karamanidou, L. (2019) ‘Quality, Qualifications, and the Market: Procuring Interpretation Services in the Context of the ‘Refugee Crisis’’, *Social Policy & Administration*, 53(3): 493-507 and Vrangbæk, K., Petersen, O. H. and Hjelmar, U. (2015) ‘Is contracting out good or bad for employees? A review of international experience’, *Review of Personnel Administration*, 35(1), 2–23.

<sup>11</sup> Wright, T. (2014) ‘The Women into Construction Project: an assessment of a model for increasing women’s participation in construction.’ Available online: <https://www.qmul.ac.uk/busman/media/sbm/research/researchcentres/cred/impact-reports/Wright.pdf>

Public procurement can also be a lever to promote equality *beyond* the workforce of individual companies. The most obvious example is probably ensuring that buildings and services are accessible. Yet, public procurement's impact on gender equality goes beyond ensuring non-discrimination and equal access.

Take the example of a health organisation that aimed to increase the uptake of GP consultations among older (and particularly older gay and single) men. To do so, it included the requirement to provide a concept of how to improve the uptake of consultation by older gay men. The successful bidder suggested distributing health information and the advice to visit GP in local pubs frequented by gay men. This led to tangible improvements in the uptake of GP consultations, thereby fostering more equal health outcomes.<sup>12</sup>

### **Creating a Business Case?**

It has been argued that including considerations of gender equality when tendering for public contracts may create a business case for gender equality that incentivises companies to adopt measures that foster gender equality. Yet, whether and to what extent including gender equality in public procurement has a practical impact on company policies remains unclear. Recent research on the impact that equality considerations in public procurement have on business practices in Scotland seems to suggest a rather limited effect. Even among companies that had already committed to socially responsible business practices, a vast majority indicated that they had not taken any action to foster equality in response to public contracts.<sup>13</sup>

### **3. Pitfalls and Prospects**

Public procurement that fosters gender equality needs to follow two major principles: First, to ensure a high standard of working conditions and goods and services provided, public procurement practices must place high importance on the quality of services, and value differentiated needs and the quality of service more than the price of the service. Secondly, to assess and accommodate differentiated needs and impacts, gender equality needs to be a fully integrated and valued consideration in all stages of the procurement process, from the design of a service and contract to the final evaluation.

As the focus of this paper is the strategic use of public procurement as a lever to promote gender equality, the next section centres on the second principle, the integration of requirements that aim to specifically promote gender equality.

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<sup>12</sup> Equality and Human Rights Commission (2013): Procurement and the public sector equality duty: A guide for public authorities (Scotland). Available online: [https://www.equalityhumanrights.com/sites/default/files/ehrc\\_procurement\\_guidance\\_2013\\_-\\_final.doc](https://www.equalityhumanrights.com/sites/default/files/ehrc_procurement_guidance_2013_-_final.doc).

<sup>13</sup> Sarter, E.K. and Thomson, E. (forthcoming) 'Fulfilling its Promise? Strategic Public Procurement and the Impact of Equality Considerations on Employers' Behaviour in Scotland', *Public Money & Management*.

## **Integrating Gender Equality into Every Step of the Procurement Process**

To be fully effective, it is vital that the integration of gender equality starts before the actual procurement process begins. The first step is to take account of existing inequalities, (potential and/ or likely) outcomes, differentiated by gender, and identifying features that have the potential to promote gender equality. As a second step, the question must be addressed how a good or a service has to be designed in order to create the optimal outcome for gender equality (ideally with attention to intersectional features). This must then be integrated into the design of the specific good or service. Contractual obligations should be introduced to require measures to promote gender equality. Once a contract has been awarded, the impact on gender equality has to be monitored on a constant basis in order to be able to adjust the service accordingly. A final evaluation should be conducted which can provide input into future public procurement processes.

Comprehensively integrating gender equality into every step of the procurement process sets a number of requirements that are essential in order to fully exploit public procurement's potential as a lever to promote gender equality.

### **Knowledge**

Including gender equality considerations in public procurement is a demanding task that requires substantive knowledge of public procurement laws, relevant jurisdiction and procedures, as well as a high level of awareness and a clear conception and knowledge of inequalities and knowledge about promoting equality through public procurement. While public procurement professionals are experts in the legal, practical and procedural aspects of public procurement, they may not be experts in gender equality.

If public procurement professionals do not have the necessary knowledge to take account of existing inequalities and foresee potential and/ or likely impacts on equality, and if they do not have access to support in integrating equality considerations, it is highly likely that public procurement's potential to foster gender equality cannot be fully exploited. Therefore, any approach to promote gender equality aware public procurement needs to focus on education, training and the availability of easily accessible help, support and knowledge for public procurement officials.

### **Networks**

To support the use of public procurement as a lever for enhancing gender equality, it is important that public procurement professionals have access to external knowledge and expertise. This includes ensuring that public procurement professionals have knowledge about approaches to integrating equality considerations from other areas.

Therefore, it is important that spaces exist where knowledge and expertise can be shared, and good and promising practices promoted. This will facilitate mutual learning and thereby promote the use of public procurement as a means to promote gender equality. It seems vital to establish institutionalised exchange among public procurement professionals and between public procurement professionals and equality organisations.

### **Resources and Incentives**

Using public procurement as a lever to promote gender equality places additional demands on public procurement officials' resources and increases their workload. This provides a disincentive to adopting public procurement strategies that comprehensively address gender inequality and foster equality. If an aspect can be integrated with a rather low increase in the workload and demands on resources, it is more likely to be included.<sup>14</sup> Therefore, an important part of promoting gender equality aware public procurement is about facilitating its implementation.

Existing (dis)incentive systems are an important factor in explaining the success (or failure) when seeking to implement sustainable public procurement.<sup>15</sup> Such disincentives may for instance be a lack of information, or ambiguous or contradictory information. Any approach to promoting gender equality aware public procurement needs to limit the negative impact of these disincentives and build strong positive incentives to include gender equality. In addition to an organisational commitment, incentives can be established by highlighting and awarding good practices.

### **Focusing on Implementation**

To use public procurement effectively as a lever for gender equality, it is essential to provide institutional support to public procurement professionals. By offering easily accessible support, knowledge and expertise on integrating equality can be provided and the workload of individual public procurement officials reduced. An institutionalised support structure can thereby foster the inclusion of equality considerations by facilitating implementation.

The available support structure should comprise a dedicated body upon which public procurement professionals can call. A good example of a body that provides support and advice and facilitates the implementation of socially responsible public procurement exists in the Netherlands: the Dutch Public Procurement Expertise Centre, PIANOo. PIANOo provides training, holds an online archive with helpful information and operates a helpline for public procurement professionals. Recent research

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<sup>14</sup> Sarter, E.K. and Sack, D. (2016) 'Von Märkten, Konsum und einer besseren Welt. Nachhaltigkeit und Fairtrade im öffentlichen Sektor.' In: Jantke, K., Lottermoser, F., Reinhardt, J., Rothe, D., and Stöver, J. (eds.): *Nachhaltiger Konsum. Institutionen, Instrumente, Initiativen*. Baden-Baden: Nomos, 379-394.

<sup>15</sup> Preuss, L. (2009) 'Addressing sustainable development through public procurement: the case of local government', *Supply Chain Management: An International Journal*, 14: 213-223. Prier, E., Schwerin, E. and McCue, C. (2016) 'Implementation of sustainable public Procurement Practices and Policies: A Sorting Framework', *Journal of Public Procurement*, 16: 312-346.

seems to suggest that free, confidential support can be an incentivising factor for companies to adopt measures to foster gender equality, particularly among those enterprises bidding for public contracts.<sup>16</sup>

### **External Pressure**

External pressure can be important for using public procurement as a lever to promote gender equality.<sup>17</sup> Equality organisations need to advocate for gender equality aware public procurement practices. To facilitate the interaction between equality organisations and public procurement officials, equality advocates need to be versed in the basics of public procurement.

### **3.5 Key policy Recommendations**

Against this background, policies to promote the use of public procurement as a lever to foster gender equality should centre on four core areas: Education & Training, Incentives & Networks, Facilitation of Implementation and the Development of Guidance.

#### **Educate for (ex)change**

- Providing training on gender equality in public procurement to public procurement professionals. Key actor for provision of training: Chartered Institute of Procurement & Supply (CIPS). Key actors for development of training: experts with dedicated expertise in gender equality and public procurement.
- Providing training to actors from equality organisations that aim to engage with public procurement professionals. Key actors for organisation of training: Equality organisations. Key actors for development of training: experts with dedicated expertise in gender equality and public procurement.

#### **Establishing incentives and networks**

- Create incentive systems that reward good practice. Key Actors: CIPS, equality organisations, the national Local Government Associations, in Wales and Scotland the devolved Governments and in Wales the Well-being of Future Generations Commissioner.
- Promote organisational commitment in the individual purchasing bodies. Key Actors: Local Government Associations (Local Government Association (LGA), Welsh Local Government Association (WLGA), Convention of Scottish Local Authorities (COSLA)), Chartered Institute of Procurement & Supply (CIPS), in Wales also the Well-being of Future Generations Commissioner, equality organisations

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<sup>16</sup> Sarter, E.K. and Thomson, E. (forthcoming) 'Fulfilling its Promise? Strategic Public Procurement and the Impact of Equality Considerations on Employers' Behaviour in Scotland', *Public Money & Management*.

<sup>17</sup> Wright, T. and Conley, H. (2018) 'Advancing gender equality in the construction sector through public procurement: Making effective use of responsive regulation', *Economic and Industrial Democracy*. Online first. <https://doi.org/10.1177/0143831X17745979>

- Establish networks for exchange of knowledge and practice. Key Actors: Local Government Associations (LGA, WLGA, COSLA), CIPS, in Wales also the Well-being of Future Generations Commissioner

### **Facilitate implementation**

- Make clear guidance easily available to procurement officers, in order to limit the increase in demands on public procurement professionals and support the implementation of gender equality aware public procurement practices, clear guidance needs to be easily available for procurement officers. Key Actors for the distribution of guidance: newly founded dedicated body (see bullet point below); for the time being: CIPS. Key actors for development of guidance: experts with expertise in procurement and equality.
- Create a dedicated body that provides free and easily accessible support and advice (online archive, helpline) for public procurement professionals. Key actors for the establishment of such a centre that provided centralised institutional support and advice are the governments.

The measures outlined so far entail the need to **develop training and guidance**. Key actors for development of guidance: experts with expertise in procurement and equality.