



# Local Government Act 1988

## 1988 CHAPTER 9

### PART II

#### PUBLIC SUPPLY OR WORKS CONTRACTS

#### **17 Local and other public authority contracts: exclusion of non-commercial considerations**

- (1) It is the duty of every public authority to which this section applies, in exercising, in relation to its public supply or works contracts, any proposed or any subsisting such contract, as the case may be, any function regulated by this section to exercise that function without reference to matters which are non-commercial matters for the purposes of this section.
- (2) The public authorities to which this section applies are those specified in Schedule 2 to this Act.
- (3) The contracts which are public supply or works contracts for the purposes of this section are contracts for the supply of goods or materials, for the supply of services or for the execution of works; but this section does not apply in relation to contracts entered into before the commencement of this section.
- (4) The functions regulated by this section are—
  - (a) the inclusion of persons in or the exclusion of persons from—
    - (i) any list of persons approved for the purposes of public supply or works contracts with the authority, or
    - (ii) any list of persons from whom tenders for such contracts may be invited;
  - (b) in relation to a proposed public supply or works contract with the authority—
    - (i) the inclusion of persons in or the exclusion of persons from the group of persons from whom tenders are invited,
    - (ii) the accepting or not accepting the submission of tenders for the contract,
    - (iii) the selecting the person with whom to enter into the contract, or

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- (iv) the giving or withholding approval for, or the selecting or nominating, persons to be sub-contractors for the purposes of the contract; and
  - (c) in relation to a subsisting public supply or works contract with the authority—
    - (i) the giving or withholding approval for, or the selecting or nominating, persons to be sub-contractors for the purposes of the contract, or
    - (ii) the termination of the contract.
- (5) The following matters are non-commercial matters as regards the public supply or works contracts of a public authority, any proposed or any subsisting such contract, as the case may be, that is to say—
- (a) the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces;
  - (b) whether the terms on which contractors contract with their sub-contractors constitute, in the case of contracts with individuals, contracts for the provision by them as self-employed persons of their services only;
  - (c) any involvement of the business activities or interests of contractors with irrelevant fields of Government policy;
  - (d) the conduct of contractors or workers in industrial disputes between them or any involvement of the business activities of contractors in industrial disputes between other persons;
  - (e) the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors;
  - (f) any political, industrial or sectarian affiliations or interests of contractors or their directors, partners or employees;
  - (g) financial support or lack of financial support by contractors for any institution to or from which the authority gives or withholds support;
  - (h) use or non-use by contractors of technical or professional services provided by the authority under the Building Act 1984 or the Building (Scotland) Act 1959.
- (6) The matters specified in subsection (5) above include matters which have occurred in the past as well as matters which subsist when the function in question falls to be exercised.
- (7) Where any matter referable to a contractor would, as a matter specified in subsection (5) above, be a non-commercial matter in relation to him, the corresponding matter referable to—
- (a) a supplier or customer of the contractor;
  - (b) a sub-contractor of the contractor or his supplier or customer;
  - (c) an associated body of the contractor or his supplier or customer; or
  - (d) a sub-contractor of an associated body of the contractor or his supplier or customer;
- is also, in relation to the contractor, a non-commercial matter for the purposes of this section.
- (8) In this section—
- “approved list” means such a list as is mentioned in subsection (4)(a) above;
  - “associated body”, in relation to a contractor, means any company which (within the meaning of the Companies Act 1985) is the contractor’s holding company or subsidiary or is a subsidiary of the contractor’s holding company;

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“business” includes any trade or profession;

“business activities” and “business interests”, in relation to a contractor or other person, mean respectively any activities comprised in, or any investments employed in or attributable to, the carrying on of his business and “activity” includes receiving the benefit of the performance of any contract;

“contractor”, except in relation to a subsisting contract, means a “potential contractor”, that is to say—

- (a) in relation to functions as respects an approved list, any person who is or seeks to be included in the list; and
- (b) in relation to functions as respects a proposed public supply or works contract, any person who is or seeks to be included in the group of persons from whom tenders are invited or who seeks to submit a tender for or enter into the proposed contract, as the case may be;

“exclusion” includes removal;

“Government policy” falls within “irrelevant fields” for the purposes of this section if it concerns matters of defence or foreign or Commonwealth policy and “involve”, as regards business activities and any such field of policy, includes the supply of goods or materials or services to, or the execution of works for, any authority or person having functions or carrying on business in that field and, as regards business interests and any such field of policy, includes investment in any authority or person whose business activities are so involved;

“industrial dispute” has, as regards a dispute in Great Britain, the same meaning as trade dispute in the Trade Union and Labour Relations Act 1974 and “involve”, as regards business activities and an industrial dispute, includes the supply of goods, materials or services to or by, or the execution of works for or by, any party to the dispute, any other person affected by the dispute, or any authority concerned with the enforcement of law and order in relation to the dispute;

“political, industrial or sectarian affiliations or interests” means actual or potential membership of, or actual or potential support for, respectively, any political party, any employers' association or trade union or any society, fraternity or other association;

“suppliers or customers” and “sub-contractors” includes prospective suppliers or customers and sub-contractors; and “supplier”, in relation to a contractor, includes any person who, in the course of business, supplies him with services or facilities of any description for the purposes of his business;

and “employers' association” and “trade union” have, as regards bodies constituted under the law of England and Wales or Scotland, the same meaning as in the Trade Union and Labour Relations Act 1974.

- (9) This section is subject to section 18 below.

## **18 Race relations matters**

- (1) Except to the extent permitted by subsection (2) below, section 71 of the Race Relations Act 1976 (local authorities to have regard to need to eliminate unlawful racial discrimination and promote equality of opportunity, and good relations, between persons of different racial groups) shall not require or authorise a local authority to exercise any function regulated by section 17 above by reference to a non-commercial matter.

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- (2) Subject to subsection (3) below, nothing in section 17 above shall preclude a local authority from—
- (a) asking approved questions seeking information or undertakings relating to workforce matters and considering the responses to them, or
  - (b) including in a draft contract or draft tender for a contract terms or provisions relating to workforce matters and considering the responses to them,
- if, as the case may be, consideration of the information, the giving of the undertaking or the inclusion of the term is reasonably necessary to secure compliance with the said section 71.
- (3) Subsection (2) above does not apply to the function of terminating a subsisting contract and, in relation to functions as respects approved lists or proposed contracts, does not authorise questions in other than written form.
- (4) Where it is permissible under subsection (2) above to ask a question it is also permissible to make, if it is in writing, an approved request for evidence in support of an answer to the question.
- (5) The Secretary of State may specify—
- (a) questions which are to be approved questions for the purposes of this section; and
  - (b) descriptions of evidence which, in relation to approved questions, are to be approved descriptions of evidence for those purposes;
- and the powers conferred by this subsection shall be exercised in writing.
- (6) Any specification under subsection (5) above may include such consequential or transitional provisions as appear to the Secretary of State to be necessary or expedient.
- (7) In this section—
- “approved question” means a question for the time being specified by the Secretary of State under subsection (5) above;
- “approved request for evidence” means a request for evidence of a description for the time being specified by the Secretary of State under that subsection in relation to an approved question;
- “workforce matters” means matters falling within paragraph (a), but no other paragraph, of subsection (5) of section 17 above;
- and any expression used in this section and section 17 above has the same meaning in this section as in that section.

## **19 Provisions supplementary to or consequential on section 17**

- (1) The Secretary of State may, by order made by statutory instrument, specify as a non-commercial matter for the purposes of section 17 above, any other matter which appears to him to be irrelevant to the commercial purposes of public supply or works contracts of any description.
- (2) The power conferred by subsection (1) above includes power to apply section 17(6) and (7) above to any matter specified in the order and to amend any definition in section 17(8) above of an expression used in any paragraph of section 17(5) above without making any other provision.

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- (3) An order under subsection (1) above may include such consequential and transitional provisions as appear to the Secretary of State to be necessary or expedient.
- (4) No order under subsection (1) above shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.
- (5) Section 17 above applies to a public authority where, in exercising functions regulated by that section, the authority is, as well as where it is not, acting on behalf of a Minister of the Crown.
- (6) Where a public authority makes arrangements under section 101 of the Local Government Act 1972 or in relation to Scotland section 56 of the Local Government (Scotland) Act 1973 for the exercise by another public authority of any function regulated by section 17 above, section 17 shall apply to that other public authority in exercising that function as if it were exercising the function in relation to its own public supply or works contracts, any proposed or any subsisting such contract, as the case may be.
- (7) The duty imposed by section 17(1) above does not create a criminal offence but—
  - (a) in proceedings for judicial review, the persons who have a sufficient interest or, in Scotland, title and interest in the matter shall include any potential contractor or, in the case of a contract which has been made, former potential contractor (or, in any case, any body representing contractors), as such; and
  - (b) a failure to comply with it is actionable by any person who, in consequence, suffers loss or damage.
- (8) In any action under section 17(1) above by a person who has submitted a tender for a proposed public supply or works contract arising out of the exercise of functions in relation to the proposed contract the damages shall be limited to damages in respect of expenditure reasonably incurred by him for the purpose of submitting the tender.
- (9) Nothing in section 17 above or subsection (1) above implies that the exercise of any function regulated by that section may not be impugned, in proceedings for judicial review, on the ground that it was exercised by reference to other matters than those which are non-commercial matters for the purposes of that section.
- (10) If a public authority, in relation to public supply or works contracts or any proposed such contract, as the case may be—
  - (a) asks a question of any potential contractor relating to any non-commercial matter other than a question consideration of the answer to which is permitted by section 18 above, or
  - (b) submits to any potential contractor a draft contract or draft tender for a contract which includes terms or provisions relating to any non-commercial matter other than a term or provision the inclusion of which in the contract is permitted by section 18 above,the authority shall be treated, for the purposes of section 17 above, as exercising functions regulated by that section by reference to non-commercial matters.
- (11) In consequence of section 17 above, the following provisions (which require local authorities to secure the insertion of fair wages clauses in all housing contracts), namely—
  - (a) section 52(a) of the Housing Act 1985, and
  - (b) section 337 of the Housing (Scotland) Act 1987,

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shall cease to have effect.

- (12) Expressions used in this section and section 17 above have the same meaning in this section as in that section.

## **20 Duty of public authorities to give reasons for certain decisions within section 17**

- (1) Where a public authority exercises a function regulated by section 17 above by making, in relation to any person, a decision to which this section applies, it shall be the duty of the authority forthwith to notify that person of the decision and, if that person so requests in writing within the period of 15 days beginning with the date of the notice, to furnish him with a written statement of the reasons for the decision.
- (2) This section applies to the following decisions in relation to any person, namely—
- (a) in relation to an approved list, a decision to exclude him from the list,
  - (b) in relation to a proposed public supply or works contract—
    - (i) where he has asked to be invited to tender for the contract, a decision not to invite him to tender,
    - (ii) a decision not to accept the submission by him of a tender for the contract,
    - (iii) where he has submitted a tender for the contract, a decision not to enter into the contract with him, or
    - (iv) a decision to withhold approval for, or to select or nominate, persons to be sub-contractors for the purposes of the contract, or
  - (c) in relation to a subsisting public supply or works contract with him—
    - (i) a decision to withhold approval for, or to select or nominate, persons to be sub-contractors for the purposes of the contract, or
    - (ii) a decision to terminate the contract.
- (3) A statement of reasons under subsection (1) above shall be sent to the person requesting it within the period of 15 days beginning with the date of the request.
- (4) The Secretary of State may by order amend subsection (1) or (3) above so as to substitute for the period specified in that subsection such other period as he thinks fit and such an order may make different amendments of subsections (1) and (3).
- (5) The power to make an order under subsection (4) above is exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (6) Expressions used in this section and section 17 above have the same meaning in this section as in that section.

## **21 Transitional duty of public authorities as regards existing lists**

- (1) Subject to subsection (3) below, it is the duty of a public authority which, at the commencement of this section, maintains an approved list—
- (a) to consider whether persons have been included in or excluded from the list by reference to non-commercial matters, and
  - (b) if it appears to the authority that that is the case to compile the list afresh in accordance with subsections (4) to (6) below.

- (2) Persons shall be treated by a public authority as having been excluded from a list by reference to non-commercial matters if, in relation to the list, the authority has—
  - (a) circulated to potential contractors questionnaires including questions relating to non-commercial matters, or
  - (b) notified potential contractors of its intention to have regard to non-commercial matters, or
  - (c) issued statements of policy framed by reference to non-commercial matters.
- (3) Inclusion or exclusion by a local authority from its list by reference to a non-commercial matter does not give rise to the duty to compile the list afresh under subsection (1) above if that matter falls within paragraph (a) (but no other paragraph) of section 17(5) above and the local authority's action was reasonably necessary to secure compliance with section 71 of the Race Relations Act 1976.
- (4) The duty of an authority to compile afresh an approved list shall be discharged as follows—
  - (a) the authority shall publish notice of its intention to compile the list afresh and (by the notice) invite persons to apply within a specified period to be included in the list; and
  - (b) at the end of that period the authority shall proceed to compile the list afresh from among the applicants in accordance with the duty imposed by section 17 above.
- (5) Publication by an authority of the notice required by subsection (4) above shall be effected by causing the notice to be published—
  - (a) in at least one newspaper circulating in the authority's area or, if the extent of the authority's functions so require, in at least one national newspaper; and
  - (b) in at least one newspaper or journal circulating among such persons as undertake contracts of the description to which the list relates.
- (6) The period specified in the notice under subsection (4) above as the period within which applications are to be made shall not be shorter than the period of 28 days beginning with the date of publication of the notice.
- (7) The duty imposed by this section shall be discharged by a public authority as soon as is reasonably practicable after the commencement of this section and in any event within the period of three months.
- (8) This section does not create a criminal offence but paragraph (a) of section 19(7) above applies for the purposes of the duty imposed by this section as it applies for the purposes of the duty imposed by section 17(1) above.
- (9) Expressions used in this section and section 17 above have the same meaning in this section as in that section.

## **22 Exclusion of charges for inclusion in approved list**

- (1) A public authority which maintains an approved list shall not require a person to pay any sum as a condition of his inclusion or continued inclusion in the list or of his being considered for such inclusion.
- (2) Subsection (1) above does not create an offence but a contravention of it is actionable by the person seeking to be included or retained in the list.

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- (3) Expressions used in this section and section 17 above have the same meaning in this section as in that section.

## **23 Commencement**

Sections 17 to 22 above shall come into force at the end of the period of 14 days beginning with the day on which this Act is passed.