

Equal opportunities for **men** and **women** in public procurement contracts

A few recommendations



INSTITUTE
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OF WOMEN
AND MEN

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Foreword

The law of 16 December 2002 establishing the Institute for equality between women and men explicitly states that one of its tasks is to “oversee observance of equality between women and men, combat any kind of sex discrimination and gender-based inequality, and develop instruments and strategies based on an integrated approach to the gender issue.”

The Institute wants to use various channels to see to it that equality of the sexes is introduced in various areas of society.

In this framework a law on gender mainstreaming was developed: the law of 12 January 2007 which aims to monitor application of the decisions of the world women’s conference which was held in September 1995 in Beijing and to integrate the gender issue in all federal policies⁽¹⁾ (referred to hereinafter as the law on gender mainstreaming). This law contains new guidelines for federal government departments and agencies, with a view to implementation of gender mainstreaming. More especially, it targets the institutionalisation of the gender mainstreaming process or the integrated approach to sex equality in all the government’s policies and actions thanks to the introduction of various effective mechanisms and instruments.

This law expressly exhorts all (federal) government departments and agencies to ensure acceptance of the principle of “equal opportunities between men and women”, among other things in public procurement contracts⁽²⁾. Also in the framework of European Council Directive 2004/113/EC of 13 December 2004 a government department should be able to vouch for the fact that equal opportunities between men and women are guaranteed in all the services it offers.

The purpose of this handbook is to serve as a tool for achieving that goal.

When public procurement contracts are awarded, the economic aspect in particular usually plays an important role. However, the Institute, in cooperation with the Purchasing Policy and Advice Unit of the Federal Government Department for Personnel and Organisation, wishes to bring a new aspect to the fore. It wants to introduce “the principle of equal opportunities” as a possible point of special interest in public procurement contracts.

For that matter, in the context of the transposition of European Directives 2004/17/EC and 2004/18/EC, this principle was explicitly included in Article 40 of the new law on public procurement contracts of 15 June 2006⁽³⁾, which relates more specifically to the contract performance conditions.

However, the principle of equality of the sexes can also play a part in other stages of the procedure concerning public procurement contracts.

In this handbook you will find a number of points of interest, tips and practical examples.

The Institute hopes that this handbook will provide you with sufficient inspiration for you to start up initiatives aimed at getting the principle of equal opportunities accepted in public procurement contracts⁽⁴⁾.

The Institute’s aim is to collect these good practices together and pass on the knowledge provided in this way. The idea then is to extend this handbook to include even more examples.

Therefore we would be grateful if you could keep us informed of your initiatives.

1 Belgian Official Journal (B.O.J.), 13 February 2007.

2 See in particular Article 3 of the law on gender mainstreaming.

3 Law on public procurement contracts and certain contracts for works, supplies and services of 15 June 2006 (see below).

4 The handbook targets contracting authorities in the traditional system.

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1. Introduction and **current** legislation governing public procurement contracts

Introduction: what are public procurement contracts?

For the definition of public procurement contracts, reference can be made to Article 5 of the law of 24 December 1993 on public procurement contracts and certain contracts for the contracting of works, supplies and services (see also Article 3 of the new law of 15 June 2006).

A distinction is made between public procurement contracts for works, supplies and services.

Current legislation governing public procurement contracts

The law on public procurement contracts is based on European directives. This means that these directives apply in all Member States of the European Union. In Belgium these European directives are transposed by the law of 24 December 1993 and its implementing orders (see in particular the Royal Decrees of 8 and 10 January, 18 June and 26 September 1996).⁽⁵⁾ This handbook focuses on public procurement contracts awarded by the contracting authorities under the traditional system. Public procurement contracts in special sectors (water, energy, transport and postal services) are not covered in this handbook.

Law 24-12-1993 on public procurement contracts and certain contracts for the contracting of works, supplies and services stipulates, among other things, the way in which adjudication criteria may be applied (see Articles 15 and 16 of the law). The explanatory notes to this law contain explanations as to what should be understood under these criteria.

Royal Decree 08-01-1996 on public procurement contracts for the contracting of works, supplies and services and concessions for public works (hereinafter referred to as the Royal Decree of 08.01.1996) contains the performance rules regarding both qualitative selection and contract adjudication.

Royal Decree of 26-09-1996 stipulating the general rules for performance of public procurement contracts and concessions for public works, with the general contracting conditions as an annex, contains the rules applicable to the performance of public procurement contracts.

In the field of ministerial circulars, special reference can be made to the circular from the Prime Minister dated 10 February 1998 on the qualitative selection of contractors, suppliers and service providers.

⁵ This legislation entered into force on 1 May 1997 (see Royal Decree of 29 January 1997). See website: <http://www.belgium.be>

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2. **New** legislation governing public procurement contracts

For the transposition of two new European directives, namely Directives 2004/17/EC and 2004/18/EC of 31 March 2004 on public procurement contracts, new legislation was passed to replace the law of 24 December 1993.

This concerns more especially the law on public procurement contracts and certain contracts for works, supplies and services of 15 June 2006 and the law of 16 June 2006 on adjudication, information to candidates and tenderers and waiting time in respect of public procurement contracts and certain contracts for works, supplies and services, as well as the modifying laws of 12 January 2007. These laws were published in the Belgian Official Journal of 15 February 2007.

The Commission for Public Procurement Contracts has in the meantime started preparing the new implementing orders.

For the time being, and until the new legislative and regulatory framework comes into effect, the law of 24 December 1993 (see above) and its implementing orders remain in force, notwithstanding application of the new directives, especially insofar as contracts attaining the European thresholds are concerned.

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3. Basic principles governing public procurement contracts

Basic principles governing public procurement contracts:

Public procurement contracts should always be awarded in observance of the principles of equality and non-discrimination, transparency, competition and a flat-rate basis (see in particular Article 1 of the law of 24 December 1993 and Articles 5 and 6 of the law of 15 June 2006).

These principles imply that:

- ◆ the candidates and tenderers should be treated in an equal and non-discriminatory manner;
- ◆ free competition and free movement of goods and services should be guaranteed. Free competition implies that a contract must always be awarded either, in the case of an invitation to tender, to the tenderer who has submitted the lowest offer, or, in the case of a request for a quotation or a negotiation procedure (in the latter procedure, when other adjudication criteria are used in addition to the price), to the tenderer who has submitted the most economically advantageous offer;
- ◆ the award of the contract should occur in a transparent fashion. This means that in principle for each public procurement contract, a contract announcement and/or a set of specifications should be published, mentioning – depending on the case – the selection criteria, adjudication criteria and terms and conditions of performance⁶

⁶ Only in the event of a negotiation procedure without publication is no prior publication needed; this does not therefore implicitly mean that no competition has to be organised.

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4. Equal **opportunities** for men and women as grounds for exclusion and/or a **selection criterion** ?

4.1. Investigation of individual situation and qualitative selection: general

In the phase involving investigation of the enterprises' individual situation and qualitative selection, the contracting authority on the one hand looks into whether the candidates or tenderers are not in a situation of exclusion (grounds for exclusion), and on the other hand investigates whether the candidates or tenderers have an adequate financial, economic and technical capacity (selection criteria).

Investigation of individual situation: grounds for exclusion

The grounds for exclusion are mentioned in Articles 17 (works), 43 (supplies) and 69 (services) of the Royal Decree of 8 January 1996. The contracting authority may exclude from participation in the contract those candidates or tenderers to whom the grounds for exclusion listed in the aforementioned articles are found to apply. These grounds for exclusion include failure to comply with obligations in the field of social security, being in a state of bankruptcy or liquidation or having ceased trading or having reached a judicial settlement, being found guilty of an offence adversely affecting professional integrity, failure to ensure correct and timely compliance with tax obligations, a case of serious shortcoming in the execution of their professional duties, and having made false declarations when providing information on the grounds for exclusion. Candidates or tenderers who have been guilty of an infringement of the social legislation when this infringement is regarded as a case of serious shortcoming in the execution of their professional duties may therefore be barred (see below, 4.2.1.).

However, this can only occur if the contract announcement or the specifications clearly state(s) that any infringement of the social legislation referred to shall be considered by the contracting authority as a case of serious shortcoming in the candidate's or tenderer's execution of its professional duties. The burden of proof in this case lies with the contracting authority.

Qualitative selection: economic, financial and technical selection criteria

The economic, financial and technical selection criteria should enable the contracting authority to assess whether the candidates or tenderers are sufficiently capable of performing the contract, from an economic, financial and technical point of view.

The regulation gives an exhaustive list of the criteria that can be used in the context of the investigation into their technical competence (see Articles 19, 45 and 71 of the Royal Decree of 8 January 1996). The contracting authority may therefore not use any other criteria. The contracting authority indicates the references it wants in the contract announcement or specifications.

For public procurement contracts for services ⁽⁷⁾, however, in addition to the listed references, account may also be taken of the professional skill, effectiveness, experience and reliability of the service provider (see Article 71 of the Royal Decree of 8 January 1996).

Monitoring of the enterprises' individual situation

As of 1 May 2007 the monitoring of enterprises' individual situations in the framework of the investigation of the individual situation must take account of the circular of 23 April 2007. With a view to further reducing the amount of red tape for candidates and tenderers, the council of ministers' meeting of 23 June 2006 decided to introduce the principle of the declaration on oath for contracts awarded by federal contracting authorities. In the contract announcement or specifications, as the case may be, the contracting authority stipulates that simply by taking part in a procedure for the award of a public procurement contract, the candidate or tenderer declares that none of the exclusion cases referred to in Articles 17, 43 and 69 of the Royal Decree of 8 January 1996 on public procurement contracts for the contracting of works, supplies and services and concessions for public works, apply to it, to the extent that the contracting authority has to or wishes to take these cases of exclusion into consideration for the contract in question.

The contracting authority then only checks the veracity of the implicit declaration on oath on the part of the tenderer whose offer is ranked highest. To this end the contracting authority asks the tenderer or candidate by the swiftest means for the information and documents enabling a verification to be made of its individual situation. The information and documents that the contracting authority can itself retrieve free of charge by electronic means (see in particular the digiflow system), should be retrieved directly via this channel from the data managers.

⁷ As well as (since 1 February 2008) contracts for works and supplies for which fitting or installation activities are required, when the sum of these contracts reaches the threshold stipulated for European publication.

Then two hypotheses are possible: the candidate's or tenderer's individual situation on the last date for receipt of applications for participation in a restricted procedure or negotiation procedure with publication, or on the last date for receipt of offers in the event of an open procedure:

- 1) is in line with the implicit declaration on oath: the contract can be awarded to this tenderer.
- 2) is not in line with the implicit declaration on oath, or proves no longer to be in line with the implicit declaration on oath during the course of the procedure: the contracting authority cannot award the contract to the tenderer in question and adjusts the ranking taking into account the repercussions of the application for participation or offer being removed from the ranking. The contract can be awarded to the next highest ranked tenderer once the same check is made of this tenderer's implicit declaration on oath and provided the examination demonstrates that the implicit declaration on oath tallies with reality.

4.2. Equal opportunities and selection criteria?

4.2.1. Equal opportunities as grounds for exclusion

Example from abroad

The Federal Equal Opportunities Office in Switzerland has included the principle of equal pay for men and women in the national legislation on public procurement contracts⁽⁸⁾. Companies competing for a public procurement contract subscribe to the principle of equal pay and sign a declaration stating that they apply the principle in their company. Companies unable to give this guarantee are excluded from participation in the public procurement contract. Companies that have signed the declaration may be subject to an inspection by the Office. The Office has developed two instruments that are used to check whether companies do indeed actually apply the principle. The first instrument concerns a kind of self-control, to the extent that it enables the companies to perform an audit themselves⁽⁹⁾. The second instrument is a sophisticated tool enabling a detailed analysis to be carried out and on the basis of which policy proposals can also be deduced. This audit can only be carried out by experts made available to companies by the Office.

⁸ Federal law on "public procurement contracts" of 16 December 1994, no 172.056.1 (state 27 December 2006), Articles 8 and 11.

⁹ The test can be downloaded free of charge from the website: www.equality-offi ce.ch/f/mogib.htm

Is this exclusion a concealed selection criterion?

The answer is no.

The Federal Equal Opportunities Office in Switzerland uses the philosophy that companies that discriminate in the field of pay for the same work may not compete for public procurement contracts because they fail to observe the basic principles of public procurement contracts. After all, a company that applies equal opportunities in all aspects is unable to compete with a company that discriminates and for example pays female staff a lower salary. Seeing as this company is not operating on a “level playing field”, a contracting authority cannot make a correct comparison between the offers made by these companies. The principle of equal pay is stated to be generally binding and laid down in ILO conventions (no. 100 and 111), in the Treaty Establishing the European Community (former Article 119 and new Article 141) and European Directive 75/117/EEC of 10 February 1975⁽¹⁰⁾.

A company not applying the principle is thus in contravention of international, European and national rules.

On the other hand, the European directives in force concerning public procurement contracts contain provisions on the grounds of which candidates and tenderers “failing to observe the social legislation, including provisions concerning the promotion of equal opportunities”, may be excluded from participation in the selection phase.

This means that national legislators may lay down rules excluding candidates and tenderers who have infringed the social legislation (including equal treatment). However, the infringement must be described in the tenderer’s country as a serious shortcoming in the execution of the party’s professional duties or an offence attacking professional ethics.

In the Commission’s interpretative communication on Community law applicable to public procurement contracts and the possibilities of social aspects being incorporated into it⁽¹¹⁾, the infringement of social legislation, in particular legislation promoting equal opportunities, is expressly mentioned as an example.

On the other hand, the concept of “serious shortcoming” has not been described and should therefore be defined in greater detail in national legislation.

Conclusion: failure to abide by the law on equal opportunities = possible exclusion

The principle of “equal pay for equal work” is described in the social legislation in Belgium. Other principles concerning equal opportunities for men and women are also described in the social legislation. Within the current framework of public procurement contracts, the legislation on equal opportunities, and more specifically in respect of equal pay, should also be observed. In this context companies infringing this legislation may be excluded⁽¹²⁾. In this case it should be explicitly stated in the contract announcement/the specifications that infringement of the social legislation to which reference is made will be considered by the contracting authority as a serious shortcoming in the execution of the party’s professional duties.

10 In Belgian law the principle of equal opportunities is described inter alia in the law of 10 May 2007, Article 6 (Belgian Official Journal of 30 May 2007) and collective labour agreement no. 25 of 15 October 1975 on equal pay for male and female employees.

11 See communication; Brussels 15.10.2001; COM (2001) 566 definitive. pt 1.3.1 (Publication sheet no. C-333 of 28/11/2001, pages 27-41); see also Article 45 point 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public procurement contracts for works, supplies and services.

12 The competent Department of the Federal Ministry for Employment, Labour and Collective Bargaining was asked for an interpretation on infringements concerning equal opportunities in social legislation as a possible serious shortcoming.

4.2.2. Equal opportunities as a selection criterion with regard to technical competence?

The question is whether “respect for sex equality in the contractor’s team performing the contract” can be used as a selection criterion. A potential contracting party who does not have an equal number of men and women would not be able to submit an offer in that case.

The answer is “no”.

According to the current legislation, “the composition of the team as regards sex” does not fall under these criteria; not even in application of Article 71 which leaves room for the service provider’s competence to be taken into consideration. After all, linking sex to competence is dangerous, as it would mean that someone of one sex were incompetent or less competent, which is in itself discriminatory.

And in the new legislation?

According to Article 20 of the aforementioned law of 15 June 2006, the provisions governing right of access and the qualitative selection of candidates and tenderers are determined by Royal Decree. However, the situation on this subject will not change substantially, since according to the European directives the contracting authorities can only make requirements of the candidates and tenderers in the field of their financial, economic and technical capacity. Moreover, the directives stipulate that these requirements should be proportional.

It is therefore **impossible** for the composition of the team according to sex to be a selection criterion.

4.3. Possible Belgian actions:

- ◆ state in the contract announcement/the specifications that companies that infringe the social legislation, and more specifically in the field of equal opportunities for men and women ⁽¹³⁾, will be considered as companies guilty of a serious shortcoming in the execution of their professional duties (the contracting authority should provide proof of this infringement);

and

- ◆ state in the contract announcement/the specifications that by taking part in the adjudication procedure, companies implicitly declare that none of the grounds for exclusion applies to them and in particular state that they have not infringed the relevant social legislation on equal opportunities in the past.

13 See list in annex.

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5. Equal **opportunities** for men and women as an **adjudication criterion** ?

5.1. Adjudication criteria: general

The adjudication criteria are the criteria listed in the contract announcement and/or the specifications, which the contracting authority will use to assess the intrinsic value of the tenderers' offers.

The adjudication criteria are intended to assess the intrinsic value of the offers.

In a public call for tenders there is only one adjudication criterion, the price. The contract will then be awarded to the selected tenderer who has submitted the lowest lawfully valid offer.

In a request for a price quotation, in addition to the price ⁽¹⁴⁾, there are one or more other adjudication criteria. The contract will then be awarded to the selected tenderer who has submitted the most economically advantageous lawfully valid offer. The adjudication criteria must relate to the subject of the contract, for example the quality of the products or services, price, technical value, aesthetic and functional character, environmental characteristics and social considerations, costs of use, profitability, after-sale service and technical support, delivery date and lead time for delivery or performance ⁽¹⁵⁾.

The adjudication criteria must always relate to the subject of the contract or the way in which it is performed. An adjudication criterion should make it possible to assess the intrinsic qualities of a product or service.

¹⁴ Theoretically a request for offers could also be made without the price criterion, but this seldom occurs.

¹⁵ Article 16 of the law of 24 December 1993

New legislation?

Article 25 of the new law states that: “The adjudication criteria must relate to the subject of the contract and be stated in the contract announcement or in the specifications. The criteria are, for example, the quality, price, technical value, aesthetic and functional characteristics, environmental characteristics, social considerations, costs of use, profitability, aftercare and technical support, delivery date and lead time for delivery or performance.”

The social adjudication criteria are thus introduced again in the new law. The concept of “equal opportunities” could be linked to these. But as in the case of ethical criteria, it is in practice almost impossible for this to be applied. After all, the criteria must always relate to the subject of the contract and make it possible for the economically most advantageous offer to be chosen.

5.2 Adjudication criteria and equal opportunities

The principle of equal opportunities is not recognised as a separate adjudication criterion in the current legislation or in the new law.

5.3. Possible Belgian actions

What can be done at the moment?

- ◆ For some contracts it is possible for a sub-criterion concerning equal opportunities to be used within the adjudication criterion of “quality”, such as, for example, the balanced composition of the team. The balanced composition of the team could be regarded here as promoting the quality of the contract. It should be in connection with the subject of the contract and should also make it possible to assess whether it can yield an economic advantage ⁽¹⁶⁾.
- ◆ If such a measure were taken, it should be mentioned in the contract announcement/the specifications.

Example?

Selor included “equal opportunities” as part of the adjudication criteria in certain contracts. For example, in the offer for the development of selection tests, “equal opportunities” constituted a sub-criterion within the adjudication criterion “quality of the test offered”. The contracts were screened for the methodology used in the drafting of the tests and more specifically for the tests’ gender neutrality.

¹⁶ Commission interpretative communication concerning Community law applicable to public procurement contracts and the possibilities of social aspects being included in them; Commission of the European Communities; Brussels, 15.10.2001; COM (2001) 566 definitive; page 16; point 1.4.1.

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6. Equal opportunities for men and women as one of the contract performance conditions

6.1. Contract performance conditions: general

The contract performance conditions are the terms and conditions applicable to performance of the contract.

In the framework of Belgian regulations, performance of the contract is governed by the Royal Decree of 26 September 1996 defining the general performance rules governing public procurement contracts and concessions for public works, and in particular the general contracting conditions forming an annex to this decree.

The European directives do not contain any specific provisions pertaining to performance conditions, but for the general provision of Article 26⁽¹⁷⁾ and preamble 33. However, the principles of the EC Treaty do have to be respected here. In particular it must be ensured that imposition of the performance conditions does not lead to any of the tenderers suffering discrimination vis-à-vis the others.

Each contracting authority may draft contract clauses on contract performance.

Notification of the performance conditions should be given in the contract announcement or in the specifications.

One important point is that these performance conditions may not be veiled selection or adjudication criteria. This means that these terms and conditions may not have any impact on whether or not a candidate or tenderer is selected. They may not have any effect on the assessment of the intrinsic value of the offer, either.

¹⁷ The contracting authorities may define special conditions under which the contract is performed, provided these are compatible with Community law and are mentioned in the contract announcement or in the specifications. The terms and conditions governing performance of the contract may in particular relate to social or environmental considerations.

The performance conditions thus constitute contractual obligations that the contractor must accept and which relate to performance of the contract. In principle, by submitting their offer, the tenderers are accepting that if they are awarded the contract, they will observe the terms and conditions during contract performance. The terms and conditions do not have to be observed at the time the offer is submitted. For this reason, the offer of a tenderer who does not wish to accept the terms and conditions may be rejected.

6.2. Equal opportunities as a performance condition

As regards the performance conditions, an explicit mention concerning equal opportunities was included, in part at the Institute's incentive, in the new law on public procurement contracts of 15 June 2006, namely in Article 40 of this law. In actual fact a specific mention was not necessary, since the list in Article 40 is not exhaustive. Performance conditions may therefore be laid down at any time, subject to observance of the principles of the EC Treaty (see point 3). However, it could be expected that an explicit mention in the law will have a greater impact and the contracting authorities will urge candidates and tenderers to take it into account.

Statutory basis:

Article 40 states the following: "In accordance with the principles of the Treaty on the establishment of the European Community, and insofar as they are not directly or indirectly discriminatory, and are mentioned, as the case may be, in the contract announcement or in the specifications, the contracting authority may impose performance conditions making it possible for account to be taken of objectives such as:

"the promotion of the equal opportunities policy in respect of labour market participation of persons insufficiently integrated into the labour process".

The explanatory memorandum gives the following explanation in respect of this article:

Which does not correspond with the explanatory memorandum, it is more like a free interpretation that goes a lot further.

Article 40 states that the contracting authority may lay down contractual terms and conditions with a view to meeting social objectives when the contract is performed. These performance conditions may relate to objectives such as training the long-term unemployed and young persons, helping to get people who are not sufficiently integrated in the labour process into employment, and measures to promote the non-represented sex, persons with a disability and persons of immigrant origin.

Other measures could include combating unemployment, environmental protection or the obligation to comply with the provisions of the basic conventions of the International Labour Organisation, or the essence thereof, when these conventions are not applied in national law. The basic conventions concerned are:

- ◆ ILO conventions nos. 29 and 105 prohibiting forced labour;
- ◆ ILO convention no. 87 on the right to trade union freedom;
- ◆ ILO convention no. 98 on the right to organise and collective bargaining;
- ◆ ILO conventions nos. 100 and 111 on the ban on any form of discrimination in respect of employment and remuneration;
- ◆ ILO conventions nos. 138 and 182 on the minimum age for admission to employment and measures to eradicate the worst forms of child labour.

Equal opportunities with regard to participation in the labour process may therefore be mentioned in the performance conditions, provided that Community law is observed and there is no direct or indirect discrimination against foreign tenderers.

Under this condition, for a public procurement contract it can be stipulated that during performance of the contract account will have to be taken of a performance condition pertaining to equal opportunities between men and women.

Before such performance conditions are laid down, the contracting authority is advised to carry out market research on the feasibility of those conditions in the framework of the public procurement contract in question. Transparency also has to be guaranteed by the performance conditions being mentioned in the contract announcement and/or the specifications. In this way all candidates and tenderers can familiarise themselves with them.

If the market research reveals that a particular performance condition is not feasible in practice, it is advisable that this not be used. An example would be if the market research reveals that the situation on the labour market is such that not enough workers of one sex are available for particular positions/lines of business, meaning it is impossible for staff of this sex to be deployed for these positions for the contract.

6.3. Examples of performance conditions concerning equal opportunities in respect of participation in the labour process

In the Commission's interpretative communication on Community law applicable to public procurement contracts and the possibilities of having social aspects included in them, equal treatment at the work place is given as an example of a performance condition. "In a contract for services it may for example involve the implementation of a policy promoting ethnic and racial diversity at the work place, which manifests itself in instructions to those responsible for recruitment, promotion or training of the staff. The contractor may also be obliged to give a manager responsibility for the implementation of such a policy at the work place"¹⁸.

In Italy, in the case of public procurement contracts concerning architecture, conditions are imposed regarding the sex of the staff performing the work. Seeing as female architects are under-represented, a quota is laid down for the presence of female architects in public procurement contracts. Were this condition to be laid down as a selection criterion, it would contravene the legislation governing public procurement contracts. However, this measure could be applied as a performance condition.

The contracting authority is in this case best advised to carry out market research to ascertain whether such a condition is feasible in practice and does not constitute a veiled selection criterion (see above).

¹⁸ Interpretative communication of the Commission on Community law applicable to public procurement contracts and the possibilities of having social aspects included in them; Commission of the European Communities; Brussels, 15.10.2001; COM (2001) 566 definitive, page. 19. Pt 1.6.

6.4. Examples of performance conditions concerning equal opportunities also outside the labour process

In the new law on public procurement contracts the mention of the possibility of performance conditions being laid down with a view to promoting the equal opportunities policy is expressly linked to participation in the labour process. On the basis of this it could be assumed that conditions can only be laid down in that framework.

However, the list in Article 40 is not exhaustive. Therefore, there is nothing to prevent a contracting authority from laying down performance conditions outside the context referred to, subject to compliance with the basic principles of Community law (the performance conditions are not discriminatory, are mentioned in the contract announcement and/or in the specifications, relate to the contract, etc.).

Other performance conditions that can be laid down are, for example, the following ⁽¹⁹⁾.

General:

- ◆ The contractor undertakes to abide by and apply all provisions of the equal opportunities legislation and the non-discrimination legislation at the work place and in its policy.

More specifically:

The contractor undertakes to ensure that...

- ◆ all communication in the framework of contract performance counters sex stereotyping and is gender neutral, as regards both images and language.
- ◆ there is a balanced representation of the sexes in the composition of its team.
- ◆ attention is given to a balanced representation of the sexes when experts are consulted or when support groups are assembled.
- ◆ both male and female target groups are involved when needs surveys, needs assessments, preliminary studies, empirical research, surveys, etc. are carried out, so that account can be taken of the similarities between and specific characteristics of both sexes ⁽²⁰⁾.
- ◆ all statistical data collected, drawn up and/or ordered in the framework of the contract are broken down by sex and that these data should be subject to a gender analysis.

¹⁹ Here the recommendation that the contracting authority should ideally examine whether the condition it has laid down is indeed feasible is also applicable.

²⁰ In the context of a contract for the installation of street lighting or station lighting, the request may be made for market research to be carried out on the population's needs and for special attention to be given to the gender aspect, such as, for example, whether women feel safe or not.

Otherwise it should be pointed out that in addition to laying down the performance conditions, the contracting authority should also check whether there is a possibility of the gender aspect being connected to **the subject of the contract**.

After all, in the philosophy of the law on gender mainstreaming, whenever any new action is taken, such as when a call for tenders is made for a public procurement contract, every authority should check whether the gender aspect can be taken into consideration. Prior to organising the call for tenders for a contract, the contracting authority should thus ideally collect enough information (fact sheets, figures, studies, information on the end target group, etc.) to be able to make a judgement on this⁽²¹⁾.

- ◆ For example a government campaign can be used to request explicitly that the principle of diversity or equal opportunities between men and women be applied or that measures be taken to combat stereotypes.
- ◆ In the case of a public procurement contract concerning an empirical study on the victims of “violence against women”, a balance in the numbers of men and women in the research team is necessary for the victim surveys to be conducted, and therefore essential for the quality of the study.
- ◆ In the case of a public procurement contract concerning the establishment of databases of experts, the requirement can be laid down that the result should also include the under-represented sex.

6.5. Possible Belgian actions:

- ◆ Preliminary examination of the possible gender aspect in the contract;
- ◆ (Devise) Conduct market research to ascertain whether the performance conditions are feasible and are not such as to possibly discriminate against any of the tenderers;
- ◆ Determine the possible performance conditions;
- ◆ Announce the specific conditions that will be laid down in the terms and conditions of performance in the contract announcement and/or the specifications.

21 For further information, see “Gender Mainstreaming Handbook”. PDF version: www.igvm.fgov.be



7. Conclusion: proposal for an action plan

STEP 1: Preliminary study

Preliminary study to examine whether the gender aspect should be included in the contract.

Collection and analysis of information (fact sheets, gender statistics, research) and/or the conducting of a study or survey on the gender aspect and/or the contacting of experts.

Determination of the way in which the gender aspect can be included in the contract and definition of possible performance conditions.

Market research to be (prepared and) carried out to ascertain whether the intended performance conditions are feasible and cannot be discriminatory against the tenderers amongst themselves.

STEP 2: Preparation of contract announcement/specifications

Mention in the contract announcement/the specifications that by participating in the adjudication procedure, companies implicitly declare that none of the grounds for exclusion applies to them and in particular that in the past they have not infringed the relevant social legislation (mention of the legislation referred to, with references) concerning, among other things, equal opportunities.

Mention in the contract announcement/the specifications whether the “equal opportunities” aspect is to be used as an adjudication criterion (insofar as it relates to the subject of the contract and enables the most economically advantageous offer to be determined).

Mention in the contract announcement/the specifications that companies that infringe the social legislation, and more specifically the regulations concerning equal opportunities between men and women (with a mention

being made of the articles of the laws), shall, in the event of performance of this contract, be regarded as companies guilty of a serious shortcoming and on the basis of this may be excluded (if the contracting authority can prove this infringement).

Mention in the contract announcement/the specifications of the specific “equal opportunities conditions” which will be laid down in the performance conditions.

STEP 3: Selection

Possibility of companies being excluded in the event of an infringement of the social legislation (if this is to be considered as a serious professional shortcoming and if the contracting authority can prove the infringement).

STEP 4: Examination and evaluation of the offers

Examination of the equal opportunities aspect as a sub-criterion of the adjudication criterion “quality”, provided it is in relation to the subject of the contract and enables an objective comparison of the offers on the basis of a value judgement.

STEP 5: Examination of the declaration on oath

The contracting authority examines the correctness of the implicit declaration on oath, chiefly in respect of the grounds for exclusion, on the part of the tenderer whose offer is ranked highest. To this end the contracting authority asks the tenderer or candidate, by the swiftest means, for the information and documents enabling an assessment to be made of its personal situation.

STEP 6: Monitoring of compliance with the performance conditions during performance of the contract



8. Annexes

8.1. Legislation on equal opportunities for men and women

1. As regards equal pay

- ◆ The law of 12 April 1965 on the protection of employees' remuneration (Belgian Official Journal, 30 April 1965);
- ◆ Collective labour agreement no. 25 of 15 October 1975, concluded in the National Labour Council, on equal pay for male and female employees, made binding by the Royal Decree of 9 December 1975 (B.O.J., 25 December 1975);
- ◆ The law of 10 May 2007 establishing measures combating discrimination between women and men (B.O.J., 30 May 2007).

2. As regards respect for equality in other employment conditions

- ◆ The law of 4 August 1978 for economic reorientation (B.O.J., 17 August 1978);
- ◆ The Royal Decree of 8 February 1979 establishing the cases in which mention can be made of the sex in the conditions for admittance to a job or a professional activity (B.O.J., 16 February 1979);
- ◆ The law of 10 May 2007 establishing measures combating discrimination between women and men (B.O.J., 30 May 2007);
- ◆ The law of 5 March 2002 on the principle of non-discrimination for the benefit of part-time workers (Belgian Official Journal, 13 March 2002, err. B.O.J., 3 April 2002).

3. As regards the protection of female employees in the event of pregnancy and maternity

- ◆ The labour law of 16 March 1971 (Belgian Official Journal, 30 March 1971; err. 12 October 1971) and the following implementing measures:
- ◆ The Royal Decree of 11 October 1991 establishing more specific rules for the exercising of the entitlement to leave for compelling reasons (B.O.J., 6 December 1991);
- ◆ The Royal Decree of 2 May 1995 on maternity protection (B.O.J., 18 May 1995; err. B.O.J., 12 October 1995);
- ◆ The Royal Decree of 17 October 1994 on the conversion of maternity leave into paternity leave in the event of death or hospitalisation of the mother (B.O.J., 9 November 1994; err. B.O.J., 15 December 1994);
- ◆ Collective labour agreement no. 80 of 27 November 2001, concluded in the National Labour Council, introducing a right to breastfeeding breaks, made binding by the Royal Decree of 21 January 2002 (B.O.J., 12 February 2002).

4. As regards positive measures, equality plans and an annual report on equal opportunities for men and women

- ◆ The Royal Decree of 14 July 1987 on measures promoting equal opportunities for men and women in the private sector (B.O.J., 26 August 1987), amended by the Royal Decree of 12 August 1993 (B.O.J., 24 September 1993).

5. As regards protection against undesired sexual conduct and sexual harassment

- ◆ The law of 4 August 1996 on well-being at work (B.O.J., 18 September 1996).

6. As regards supplementary social security benefits

- ◆ The law of 28 April 2003 on supplementary pensions and the tax system applicable to these pensions and to certain supplementary social security benefits (B.O.J., 15 May 2003).

7. As regards measures for combining work and private life

- ◆ The law of 3 July 1978 on contracts of employment (B.O.J., 22 August 1978; err. 30 August 1978), in particular Articles 30, 30b and 30c relating to leave;
- ◆ The Royal Decree of 28 August 1963 on the maintenance of normal pay for days off work on the occasion of family events or the fulfilment of civic obligations or civil assignments (B.O.J., 11 September 1963);
- ◆ Collective labour agreement no. 45 of 19 December 1989 on the introduction of leave for compelling reasons, declared generally binding by the Royal Decree of 6 March 1990 (B.O.J., 21 March 1990).
- ◆ The recovery law of 22 January 1985 on social provisions (B.O.J., 24 January 1985) and the following implementation measures:
- ◆ The Royal Decree of 29 October 1997 introducing the right to parental leave in the context of a career break (B.O.J., 7 November 1997);
- ◆ The Royal Decree of 10 August 1998 introducing the right to a career break to support or care for a seriously ill family member (B.O.J., 8 September 1998).

8.2. Legislation on public procurement contracts in the traditional sectors

- ◆ The law of 24 December 1993 on public procurement contracts and some contracts for the contracting of works, supplies and services (B.O.J., 22 January 2004);
- ◆ The Royal Decree of 8 January 1996 on public procurement contracts for works, supplies and services and concessions for public works (B.O.J., 20 January 1996);
- ◆ The Royal Decree of 26 September 1996 laying down the general performance rules for public procurement contracts and for concessions for public works + annex: general contracting conditions for public procurement contracts for the contracting of works, supplies and services and for concessions for public works (B.O.J., 18 October 1996);
- ◆ The law on public procurement contracts and certain contracts for works, supplies and services of 15 June 2006 (B.O.J., 15 February 2007).

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