

Equality clauses in public contracts

Workshop – examples of positive action

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THE BLUE AND YELLOW GLASS HOUSE: STRUCTURAL DISCRIMINATION IN SWEDEN (SOU 2005:56) (English summary)

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Do you have prejudices? Do you apply them?

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Who is free from prejudice?

- Harvard Implicit Association Test
(<https://implicit.harvard.edu/implicit/demo/>)
- People with openly racist/sexist/homophobic/etc opinions have the same levels of underlying prejudices as those who of us who are “good” people
- Difference between the man on the soap-box and those in the crowd?

I know my own mind.

***I am able to assess others in a fair
and accurate way.***

Based on current research about hidden biases as well as their connection to behaviour, the authors seriously challenge these self-perceptions.

It is a sad historical fact that privileged groups have seldom given up their privileges voluntarily.

Martin Luther King

- Earl Warren – Chief Justice US S Ct 1953-1969

Many believed "that you cannot wipe out racial discrimination by law, only through changing the hearts and minds of men."

This is a "false credo. True, prejudice cannot be wiped out, but infliction of it upon others can."

- Lesson – see to it that discrimination costs

- If discrimination costs, or carries with it cost risks, people with the power to discriminate will often change their behavior.
- Beyond the risk of paying damages in individual cases, the most important complementary measure is the use of anti-discrimination or equality clauses in public contracts.
- If a business risks losing a contract worth millions, it is more likely that they will act proactively to prevent discrimination/promote equality.
- This is one reason why there are more women in middle management and above in the Canadian and US private sectors than in Sweden

Why anti-discrimination clauses? 1

- State agencies and local governments are already involved in public contracts – Sweden 600 billion SEK in total annually / 450 billion SEK of that locally.
- Democracy – Residents/taxpayers have the right to believe that public funds are not going to businesses that will discriminate against them.
- Quality – A company that refrains from a contract due to a clause against discrimination, wants to retain the right to hire less qualified persons, since equality law only requires that you not disregard the most qualified persons due to irrelevant factors. This means a risk of lower quality from the supplier.

Why anti-discrimination clauses? 2

- Equality – anti-discrimination in public contracts has been shown to work in the US and Canada and there are positive indications in the UK. See for example the work of Jonathan Leonard.
- They are legal – both according to EU law and Swedish law. Since the 1990s the EU commission has pointed out the importance of social clauses and public contracts.

- Most discrimination law is complaints-based. The individual carries the burden of social change. The process is long, the risks are high. And the potential compensation in Europe is low.
- Some add proactive duties. These put pressure on employers, agencies, with the power to discriminate, to prevent discrimination and promote equality.
- But proactive duties seldom carry substantive risks related to failure to comply.
- It is doubtful that the basics of damages will change in Europe.
- Thus the idea of anti-discrimination clauses in public contracts in Europe which can increase cost risks.

Clauses are legal under EU law

http://aei.pitt.edu/1220/1/procurement_gp_follow_COM_98_143.pdf

Public procurement in the European Union. Commission Communication Brussels, 11.03. 1998 COM(1998) 143 final p 28-29

The Commission has already indicated in its Green Paper the conditions under which social criteria can play a role in contract award procedures, particularly the possibility of including the obligation to comply with existing social legislation, especially Community social legislation and, where appropriate, that emerging from the International Labour Organisation (ILO).

There is a range of possibilities for public administration to take the pursuit of social objectives into consideration in their purchasing:

The rules of the public procurement directives allow the exclusion of candidates who breach national social legislation, including those relevant to the promotion of equality of opportunities.

A second possibility is to lay down as a condition of execution of public contracts compliance with obligations of a social character, aimed for example at promoting the employment of women or encouraging the protection of certain disadvantaged groups....

In this context the Commission encourages the Member States to use their procurement powers to pursue the social objectives mentioned above. The Commission will act similarly in its own procurement activity.



DIRECTIVE 2004/18/EC Article 26

- **Conditions for performance of contracts**
- Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.
- <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0018&from=EN>

Sweden is lagging behind comparable nations when it comes to “exploiting the possibilities offered by the legislative route in terms of integrating social and ethical considerations in public procurement. This legal situation seems not to be a result of deliberate policy but rather an indirect consequence of a radical ‘precautionary principle’ in combination with a lack of political will to seize the opportunities that exist, and a lack of motivation among the competition authorities to pursue the matter.”

- **CHAPTER II, General rules, Article 18**
- **Principles of procurement**
- 2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

Annex X – 2 ILO conventions (nr 100 and nr 111).

- *Article 70*
- **Conditions for performance of contracts**
- Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

How can public contracts be used to promote equality?

- **Ensure that the contract serves everyone. Accessibility / language competency / gender**
- **Disqualify those who have discriminated**
- **An anti-discrimination clause for the term of the contract**

Elements to consider in a clause?

- **CONTRACTOR AGREES TO FOLLOW THE NATIONAL LAW AGAINST DISCRIMINATION**
- **DUTY TO REPORT**
- **APPLY TO SUB-CONTRACTORS**
- **RETAIN THE RIGHT TO CANCEL THE CONTRACT**

Equality clause in the Glass House Inquiry

- § 1 The supplier shall throughout the contract period, in his business activities in Sweden, abide by the current law against discrimination.
- § 2 The supplier, during the contract period, has a duty, at the request of the contracting entity, to provide a written report concerning the measures, equality plans etc., that have been undertaken in accordance with the duties specified in § 1. The report shall be submitted to the contracting entity within one week after a request is made unless some other agreement has been reached in the individual case.
- § 3 In the contracts with sub-contractors, the supplier shall apply the same duty to them as is specified in § 1. The supplier shall be responsible to the contracting entity for a sub-contractor's violation of the duties in § 1. The supplier shall also ensure that the contracting entity can upon request be informed of the sub-contractor's measures, plans etc. in accordance with § 2.
- § 4 As it is of substantial importance to the contracting entity that its suppliers live up to basic democratic values, a violation of the duties in §§ 1-3 shall constitute a significant breach of the contract. The contracting entity therefore retains the right to cancel the contract if the supplier or a sub-contractor violates the conditions in §§ 1-3. However, the contract will not be cancelled if the supplier immediately remedies the situation or undertakes other relevant measures with the purpose of achieving compliance with § 1, or if the violation is considered to be insignificant.

Another clause – what do you say about them?



1. The supplier, in regard to contracts for services in Sweden, agrees to abide by the Swedish laws against discrimination during the contract period. The law that applies from the beginning of the contract is the Discrimination Act (2008:567). If nothing else is stated, this does not apply to the part of the service contract that applies to goods.

2. The supplier shall upon request of the contracting authority, within one month, deliver the following information and documents in accordance with the undertaking above:
 - a/ Gender equality plans according to the Discrimination Act's Chapter 3 § 13 or information on the number of employees at the end of last year in order to confirm that such a plan was not required.
 - b/ Information concerning the active measures undertaken according to chapter 3, §§ 3-9, Discrimination Act.
 - c/ Statement of the truth (sanningsförsäkran) saying whether the supplier or an employee, has in a final court judgement been found to have violated a criminal provision or the ban on discrimination in the Discrimination Act.

3. If the supplier does not provide the information within the required time or if the supplier has not fulfilled the duties concerning active measures in accordance with the Discrimination Act, the supplier shall be required to pay a contract penalty of 1000 Swedish Crowns for each violation and a maximum of 3000 Swedish Crowns per year.

Aha! Now I see them...!



That was easy! Thank You!

