

Appendix 3

Article 19 of the Local Government Northern Ireland) Order 1992 sets out restrictions on Council's freedom to consider various matter when procuring Works or Goods by declaring certain items 'non-commercial considerations' which can't be taken into account as part of a procurement process.

19.—(1) Subject to Articles 20[F1, 20A] and 21(1), every council shall, 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 Article, exercise that function without reference to matters which are non-commercial matters for the purposes of this Article.

(2) The contracts which are public supply or works contracts for the purposes of this Article are contracts for the supply of goods or materials, for the supply of services or for the execution of works; but this Article does not apply in relation to contracts entered into before the coming into operation of this Article.

(3) The functions regulated by this Article 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 council, 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 council—

(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 of the person with whom to enter into the contract, or

(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 council—

(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.

(4) The following matters are non-commercial matters as regards the public supply or works contracts of a council, 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 council gives or withholds support.

(5) The matters specified in paragraph (4) include matters which have occurred in the past as well as matters which subsist when the function in question falls to be exercised.

(6) Where any matter referable to a contractor would, as a matter specified in paragraph (4), 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 Article.

[F2(7) The Department may by order provide, in relation to councils, for a specified matter to cease to be a non-commercial matter for the purposes of this Article.

(8) An order under paragraph (7) may—

(a) provide for a matter to cease to be a non-commercial matter for specified purposes or to a specified extent;

(b) apply in relation to specified councils, functions or contracts;

(c) amend a statutory provision;

(d) include supplementary, incidental, consequential and transitional provisions.

(9) No order shall be made under paragraph (7) unless a draft of the order has been laid before, and approved by resolution of, the Assembly.]

As can be seen, the definition of a public supplies contract includes contracts for both goods and services.

The list of matters that can't be taken into consideration are noted at paragraph (4).

The two subparagraphs that would serve as the greatest restriction for the Council in meeting its social value aspirations would be subparagraphs (4)(a) and 4(e).

4(a) would, for example, prevent the Council from asking potential contractors to take on apprentices, and 4(d) would prevent the Council from pursuing a buy local policy.

As you will note there is provision in the Article, at paragraph (7) for the Department to make an order to the effect that any matter shall cease to be a non-commercial consideration.

The Department has actually already done this through the Local Government (Exclusion of Non-commercial Considerations) Order (Northern Ireland) 2015 which provided that Article 19(4)(a) of the 1992 Order and the conduct of contractors or workers in industrial disputes between them as specified in Article 19(4)(d) of that Order shall cease to be non-commercial matters for the purposes of Art 19.

This 2015 Order has therefore removed one of the constraints that the 1992 Order placed on Councils, and means that it is permissible now for the Council to ask Contractors to, for example, employ apprentices.

This does, however, leave the exclusion at (4)(e) in force. This could prove a considerable bar to the Council, as it will prevent the Council, as an example, specifying it wants goods or services supplied by a local supplier.

There is a relatively straightforward procedure available to the Department to make an Order similar to the 2015 Order removing this exclusion. If this could be done, it would greatly widen the available options for the Council in seeking to ensure social value for Belfast through its procurements.

There are a couple of additional points to make. This legislative provision is unique to Local Government, which means that we aren't subject to the same rules as other areas of government, making it difficult to compare what the Council is doing to other governmental departments. The second point is that this is all in relation to below threshold procurement. For anything over threshold other rules apply, that could make considerations different for larger value procurements. Up until Brexit that would have been the European procurement rules. For the moment, these have been replicated into UK law, but this could all change very quickly, as the UK seeks to impose its own rules.