

Supported Factories & Businesses



OGC Guidance on reserved contracts for supported factories & businesses

Reserved contracts for supported factories and businesses in the 2006 Public Contracts and Utilities Contracts Regulations

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1. Introduction

- 1.1 The Government is committed to ensuring equality of opportunity for everyone and access to employment opportunities is key to achieving this goal. Supported factories and businesses for people with disabilities (sheltered workshops) have a valuable role in assisting people with disabilities to integrate into the labour market and helping to improve their overall independence. However, supported factories and businesses may sometimes find it difficult to access and obtain public contracting opportunities. In recognition of this fact, the Public Sector Procurement Directive¹ ("the Directive") permits contracting authorities to reserve procurement competitions for sheltered workshops.
- 1.2 This guide provides practical advice on what is meant by reserving contracts, how contracting authorities can reserve contracts for supported factories and business and the benefits of doing so whilst still achieving value for money. The guidance is not intended as a substitute for project specific legal advice, which should always be sought by a contracting authority where required.
- 1.3 Article 19 of the Directive states:

"Reserved Contracts Member states may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

¹ Directive 2004/18/EC of the European Parliament and of the Council of 31st March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Please see: Official Journal L 134

The contract notice shall make reference to this provision."

Similar wording is to be found in Article 28 of the Utilities Directive².

2. The 2006 Regulations

- 2.1 The provision on reserving contracts for supported factories and businesses is included in Regulation 7 (public sector) and Regulation 10 (utilities) of the UK Regulations³, which implement the Procurement and Utilities Directives. These Regulations came into force on 31 January 2006. They enable contracting authorities to reserve the right to participate in public contract award procedures to supported factories and businesses, or to economic operators, which operate supported employment programmes.

3. What are sheltered workshops?

- 3.1 The term "sheltered workshops" comes from the European legislation. In the UK, the term used is supported factories and businesses. These terms are defined in the Regulations as follows:

² Directive 2004/17/EC of the European Parliament and of the Council of 31st March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

Please see: Official Journal L 134

³ The Public Contracts Regulations 2006 (http://www.opsi.gov.uk/si/si2006/uksi_20060005_en.pdf) and the Utilities Contracts Regulations 2006 (http://www.opsi.gov.uk/si/si2006/uksi_20060006_en.pdf)

- 3.2 A supported factory is: ‘An establishment where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market.’
- 3.3 A supported business is: ‘A service where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market.’
- 3.4 A supported employment programme is: ‘A scheme under which work is provided for disabled persons and where more than 50% of the workers so supported are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market.’ Under the EU Directive, these are known as sheltered employment programmes. In the UK, such programmes are usually operated through the Department for Work and Pensions’ WORKSTEP programme.
- 3.5 WORKSTEP is a government funded programme that provides individually tailored and flexible support for people with disabilities in the workplace. Disabled people often face complex barriers to finding or keeping a job. But with the right support they can realise their full work potential in a wide range of jobs.

4. Definition of disability

- 4.1 Section 1 of the Disability Discrimination Act 1995 defines a disabled person as someone with “a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities.” Schedule 1 of the Disability Discrimination Act contains provisions, which supplement the definition of disability in Section 1, e.g. it provides definitions for impairment and disfigurement etc.

5. What does “reserving” contracts mean?

- 5.1 ‘Reserving’ a contract means that only supported factories and businesses or economic operators operating supported employment programmes can bid for that particular contract. These organisations can be from anywhere in the EU, but where a contract has been reserved under this provision, the process must allow for fair and open competition amongst the suppliers that bid for such contracts. Contracts cannot therefore be reserved for a specific organisation and all bids from supported factories and businesses submitted under the reserved contracts arrangements are still assessed on a value for money basis, with award to the bid offering the best value for money.
- 5.2 It is for the contracting authority to decide whether to reserve a contract using this provision. Section 6 outlines some things to consider when deciding whether to reserve a contract. Where a contract is reserved, the contracting authority should indicate in the Official Journal of the European Union (OJEU) Contract Notice that the contract is “reserved for sheltered workshops under Article 19 of the Directive”:

6. What types of contracts are suitable for reserving?

- 6.1 Supported factories and businesses can provide a wide range of goods and services. Many of these organisations have websites and electronic catalogues, which provide product and service lines and also details of their capacity potential. Before taking the decision to reserve a contract, contracting authorities should consult the market in order to establish whether or not supported factories and businesses will be able to meet their requirements and provide value for money. Further details on achieving value for money can be found in section 8.
- 6.2 Details of the goods and services provided by supported employment organisations within England, Scotland and Wales can be found on the On-line Supported Business Directory website at www.base-uk.org/business.

7. Why reserve contracts for Supported Factories or Businesses?

- 7.1 It is Government policy to, as far as possible, give people with disabilities the opportunity to enter the labour market. It is for this reason that Government sponsors supported employment. Public expenditure should be used in a way that supports this objective wherever practical. One route is by reserving contracts for supported factories and businesses. This also contributes towards meeting a contracting authority's Corporate Social Responsibility objectives.
- 7.2 As a matter of Government policy, contracting authorities should aim to have at least one or more contracts with a supported factory or business. There is no restriction on the size and type of contracts that can be reserved

under this provision, and the principle can be applied to major contracts as well as contracts for niche products or services. The use of supported employment organisations can increase supplier diversity in the public sector and help in the delivery of quality public goods and services. Though it cannot be made a requirement, main contractors should be actively encouraged, on a voluntary basis, to use supported employment organisations as sub-contractors on public sector (and other) contracts. For example, this could be done through relationship management with the supplier and by highlighting the importance of the supported employment agenda to Government. The use of supported employment sub-contractors can also help private sector organisations to meet their Corporate Social Responsibility targets.

8. Achieving value for money

- 8.1 Supported factories and businesses already provide a wide range of goods and services across both the public and private sectors, and many are competitive and able to offer value for money within the market sector in which they operate. The example on page 6 illustrates where a supplier has offered value for money under the reserved contracts provision.

Under the Article 19 provision, a supported business won a 5 year public contract for community equipment, involving delivery, collection, refurbishment, servicing and administration of hospital beds. When put out to tender, the contract contained performance indicators on which to assess performance. The tender submitted by the winning supported business was scrutinised thoroughly by various parts of the contracting authority, including their financial department, and it was assessed that the supported business was able to provide value for money in delivering the contract. This was demonstrated by the improvement in delivery response times by 1 day over the previous contract, thus improving on Government assessment targets. In addition to this, savings were also made on bed deliveries with this new contract compared with the previous contract. This contract commenced in October 2006 and turnover is circa £3million. To date, this has been a very successful arrangement with wider social benefits including an increase in the employment of disabled people in the local area and the training and development of staff in a variety of skills.

- 8.2 The Government's procurement policy is that all public procurement of goods, works and services is to be based on value for money. Decisions to award public contracts must be made following fair and open competition and with the overriding aim of identifying the supplier that offers the best value for money over the whole life of the contract awarded. Value for money is not about identifying the bid offering the lowest price, it is about optimum combination of whole-life cost and quality to meet the user requirement.

- 8.3 Value for money and the use of reserved contracts can go hand in hand. When deciding to reserve a contract, contracting authorities should have already assessed that supported factories or businesses can meet their user requirement and specification. This can be done by comparing procurement needs, such as the goods or service to be procured, with those offered by supported factories and businesses, for example, looking at what product or service lines they are able to provide that meet your requirement. Departments should compare or benchmark quality, prices and capacity potential with the

rest of the market and against previous contracts for similar goods/services. This assessment should be made before the formal procurement process starts, that is, when the contracting authority defines their needs and sets out their business case.

- 8.4 When formulating the business case, where appropriate, contracting authorities should bear in mind wider benefits to society where these are relevant to the procurement process. This means that as well as taking into account the direct costs of the contract, consideration should also be given to the wider social benefits. Although it is not always possible to place a market value on some of these benefits, they should not be overlooked, but rather that they should be considered in terms of the actual social benefits that they bring against any costs. These benefits could include the following:
- Contributing to the wider Government commitment to enable greater access to employment opportunities for disabled people to help achieve equality for disabled people by 2025;
 - Increasing the diversity of the public sector supplier base to help deliver better public goods and services that meet the needs of those who use them;

- Drawing on the wider pool of talent and skills available in the workforce that are currently under utilised;
 - Increased social inclusion and interaction of disabled people in the labour market and their communities;
- 8.5 Many supported factories and businesses operate within niche markets, offering specialised products, which can often be reflected in the quality of the goods they produce. Due to their specialised nature, many are flexible in what they can offer their customers, and using supported employment is often a cost effective way of contracting.
- 8.6 Organisations that bid for public contracts under the reserved contracts provision still compete amongst the group of suppliers that bid for reserved contracts. This competition is likely to be reflected in the bids that they submit as they compete against each other, as contracting authorities will still award contracts on the basis of value for money.
- 8.7 As with all contracts, once awarded and in place for a period of time, contracting authorities can assess the performance of the contract. During this process, contracting authorities can examine the actual outcomes, the delivery of the procurement against what was expected and extent to which value for money is achieved. Where supported factories and businesses have been used and delivered value for money, these positive experiences and benefits could be used to promote future procurement decisions to reserve a contract.
- 9. What about framework agreements and dynamic purchasing systems?**
- 9.1 The Directives, and the Regulations which implement them, clarify the scope to use framework agreements and dynamic purchasing systems under the EU rules. The scope to reserve contracts to supported factories and businesses applies also where these systems and approaches are used. It will be important, when reserving contracts in this way, to ensure that the framework agreement or dynamic purchasing system is set up and operated in accordance with the relevant parts of the Regulations. The OJEU Contract Notice, at the start of the procurement for a framework agreement or dynamic purchasing system, will need to make it clear that the contract, framework agreement or dynamic purchasing system is reserved for sheltered workshops (the EU term needed for the notice) under Article 19 of the Directive.
- 9.2 Where appropriate, contracting authorities can also reserve a lot or category within a framework for supported factories and businesses to compete for. Where permitted, contracting authorities can also utilise existing framework agreements that use supported factories or businesses.
- 9.3 The ability to reserve the right of participation to supported factories and businesses also applies to public contract procedures and framework agreements concluded by central purchasing bodies. The central purchasing body will need to ensure that the OJEU Contract Notice contains the Article 19 details referred to above.

10. Contracts below the EU financial threshold

- 10.1 There are no specific provisions that allow for the application of the Article 19 derogation to below threshold contracts. However, there are strong arguments, based on the Directive and general European law to support such a measure. The Directive does not apply to contracts below a certain value threshold, but the ECJ case law has made it clear that the fundamental principles of EC law do.
- 10.2 On that basis, since the Directive creates a specific exception for sheltered employment programmes, a similar approach can be applied, in principle, to below-threshold contracts. Providing reserving a below threshold contract can be justified on public policy grounds, and all other fundamental EC principles are observed, such an approach will be compatible with European legal requirements.
- 10.3 As part of observing those EC principles, contracting authorities will need to consider advertising such contracts appropriately, for example on www.supply2gov.uk, indicating that the relevant contracts are reserved for sheltered workshops.

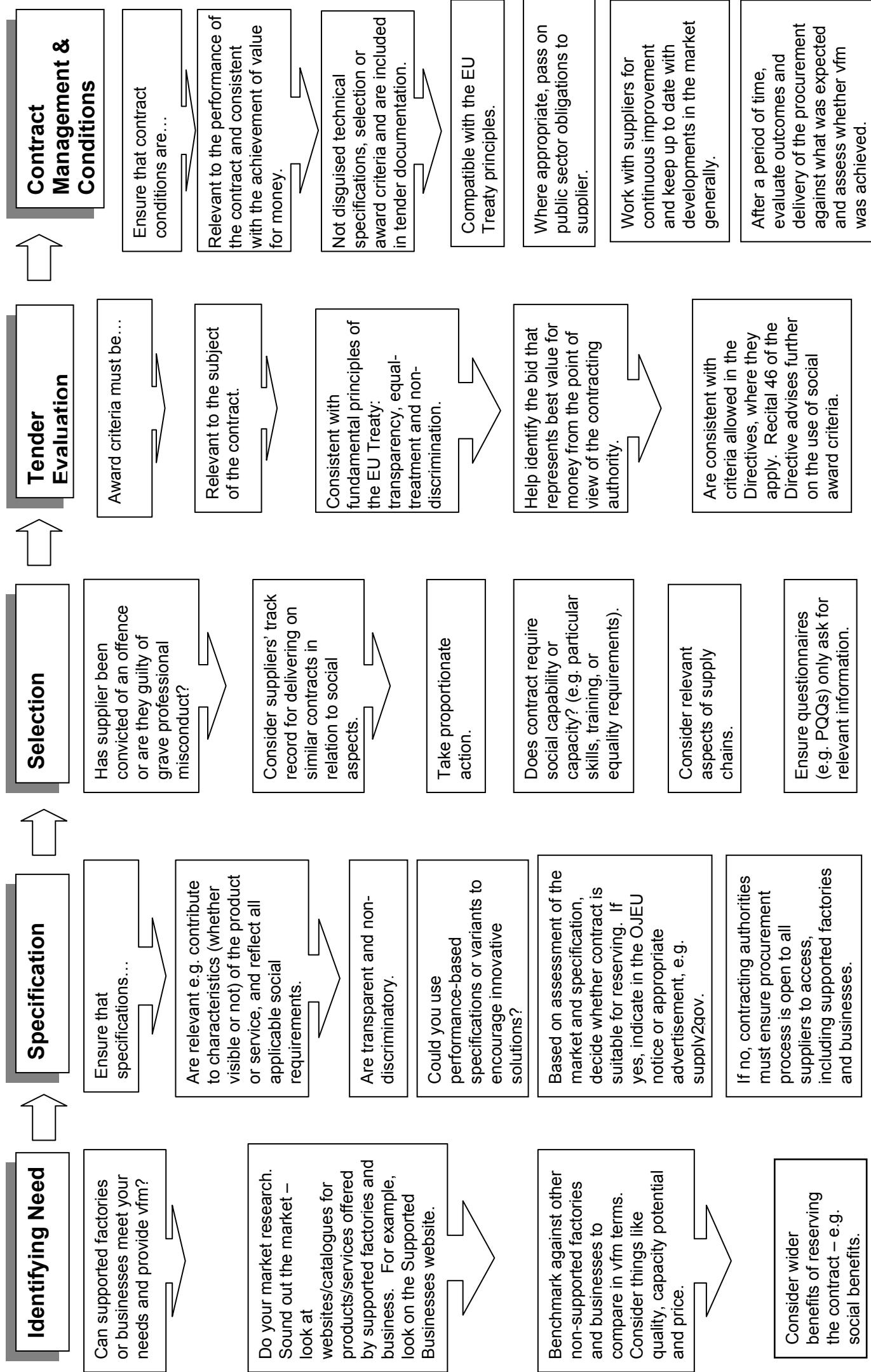
11. Removing barriers

- 11.1 In addition to reserving contracts, contracting authorities should ensure that there are no barriers to the participation of supported factories and businesses in procurement exercises more generally, in competition with other suppliers and service providers. So, where a decision is taken not to reserve contracts, contracting opportunities should still be made accessible to supported factories and businesses and contracting authorities can encourage their participation. Quite often, the barriers faced by supported factories and businesses are likely to be similar to those affecting small and medium sized enterprises (SMEs). For more information on this, see '*Small Supplier, Better Value*', which can be found on the OGC website at:
http://www.ogc.gov.uk/documents/CP008_3_Small_supplier_better_value.pdf

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This table illustrates what should be done at each stage of the procurement process when reserving contracts under Article 19. It should be used in conjunction with the rest of this guidance, which provides more detailed advice.



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