Chapter 8

Contract-Based Proactive Obligations to Promote Equality in Employment: Four Approaches


An integrated European Union presents certain challenges for member countries wishing to promote equality in employment through the use of the public procurement process. The EU public procurement rules are intended to bring about a total harmonization of the public procurement processes in member states in order to give effect to the EU treaty principles of free movement of goods and services. Public procurement directives, which have been transposed into national law in all member states, require specified procurement procedures for contracts above certain threshold values. The
purpose of these harmonized procedures is to ensure effective competition, non-discrimination of non-national contractors/bidders and transparency of process. However, even public contracts not subject to the directives, must be awarded through procedures which are in conformity with the treaty-based principles of non-discrimination, equal treatment, transparency and proportionality.\(^3\)

Contractors from all member states are entitled to participate in the public procurement processes of each other member state. The trans-border aspect of procurement creates significant challenges for contract compliance. For example, the British government would have no authority to require German or Danish contractors to carry out ethnic monitoring of their respective workforces in Germany or Denmark in order to promote equality in employment.

In 2001 the European Commission issued an Interpretative Communication\(^4\) so as to clarify the possibilities for integrating social considerations (such as equality in employment) in public procurement. Subsequently, in 2004 a new Council and Parliament Directive was adopted entitled the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts.\(^5\) This consolidated 2004 Directive is to be implemented by all member states by 31 January 2006, and the older (current) directives shall be repealed upon implementation. On several significant points, the new directive confirms the Commission’s interpretation of EU procurement law put forth in the Interpretative Communication.

The Communication divides the procurement process into four phases: (1) definition of subject matter of contract, (2) selection of candidates or tenderers, (3) award of the contract and (4) execution of the contract.

**Phase 1** (Definition of subject matter of contract): The Communication sees no problems with taking social considerations into account when defining or specifying

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2 The private employer seeking to sell goods, services or construction works to the federal government is referred to as the *contractor*, while the department, agency or unit of the federal government entering into contract to purchase is referred to as the *contracting authority* or *contracting agency*.

3 These EU treaty principles and the rules of the procurement directives are incorporated into the Agreement on the European Economic Area (EEA) and thus are also binding on member states of the EEA.
