

Procurement and Disability

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Introduction

- 'Buying Social Justice'
 - Issue: using public procurement to advance disability rights
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Linkage

- Concept of “linkage”
 - “Participating in the market as purchaser, and at the same time regulating it through the use of purchasing power to advance equality”
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How is linkage done?

- Specification of what is being purchased
 - Specification of the processes by which the contract must be delivered
 - Regulating who can tender for the contract
 - Attempting to influence supply chain by including provisions on sub-contractors
 - Denial of ability to tender as a sanction for breach of social law
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How is linkage done?

- Including social and ethical issues as considerations to be taken into account at the award stage
 - Granting price preferences to selected tenderers
 - Enabling selected tenderers to match lowest offers
 - Conditions regulating post-award delivery of the contract
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Four basic models

- Tenderer qualification model
 - Contract conditions model
 - Award criterion model
 - Technical specifications model
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Procurement and disability: origins

- Disabled ex-service men and procurement in Britain, 1919
 - UK Priority Suppliers Scheme
 - US Javits-Wagner-O'Day Act (1938, 1971)
 - Germany's preferences for 'sheltered workshops'
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Procurement and disability: more recent developments

- US Rehabilitation Act 1973: ‘contract compliance’ and ‘affirmative action’
 - Section 508, requiring federal agencies to procure accessible electronic and information technology
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Arguments in favour of linkage

- Inadequacy of other methods of securing compliance
 - “Mainstreaming” requires linkage
 - Limits of a commercial model of government contracting
 - Internalizing externalities
 - Sustaining and increasing competition
 - Supplying the public good of equality
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Objections to Linkage

- Irrelevance to the function of purchasing
 - Costs of linkage
 - Fairness arguments
 - Direct regulation preferable to procurement linkages
 - Regulatory capture
 - Good governance objections
 - Abuse of power
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Different roles law plays

- Law explicitly limits certain uses of public procurement
 - Legislation explicitly permits but does not require public bodies to advance certain social policies, e.g preferences for sheltered employment
 - Legislation directly requires public bodies not to give contracts under certain circumstances
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Legal limits

- Legal issues: does linkage run the risk of exposure to
 - domestic?
 - EU?
 - international (WTO) litigation?
 - issue is whether these developments restrict linkage at the national level
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European Union developments

- Crucial role played by the European Court of Justice in set of crucial cases
 - *Beentjes (1987), Nord-Pas-de-Calais, Concordia Bus (2002), EVN (2003)*
 - Communication by the European Commission (October 2001)
 - Development of CSR procurement, including disability (“Build for All”)
 - Recent package of legislative reform measures (2004)
 - Heavily negotiated on the social issues by Council, Commission, Parliament
 - Relationship between social/ethical issues and the subject matter of the contract
 - Linkages progressively given greater regulatory space preferably as a method of enforcement of EU social policy
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Two main EC Procurement Directives

- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors *Official Journal L 134/1, 30/04/2004*
 - 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 works contracts, public supply contracts and public service contracts *Official Journal L 134/114, 30/04/2004*
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EU approach

- Equal treatment requirements
 - Detailed regulation only above thresholds
 - Transparency requirements
 - Qualification criteria permitted, within limits
 - Contractual conditions permitted, within limits
 - Award stage possibilities (tie-break) permitted, within limits
 - Set-asides permitted, within limits
 - Technical specifications to include accessibility considerations, wherever possible
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Contract conditions

- Recital 33/Recital 44: Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour ... the employment of people experiencing particular difficulty in achieving integration, For instance, mention may be made, amongst other things, of the requirements - applicable during performance of the contract - ... to recruit more handicapped persons than are required under national legislation.
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Set asides

- Recital 28/39: Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for public contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes.
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Set asides

- Article 19/28 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.
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Technical specifications

- Article 23/34 Technical specifications
 - 1. The technical specifications ... shall be set out in the contract documentation, such as contract notices, contract documents or additional documents.
Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.
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Criteria for judging linkages

- Effective?
 - Transparent?
 - Targeted?
 - Proportional?
 - Cost effective?
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