

COMMITTEE ON EQUALITY OF OPPORTUNITY

Date: 17 January 2001

Venue: Committee Room 3, National Assembly for Wales

Title: Contract Compliance

The Question

The Counsel General was asked for his opinion on the following question:
"Does the National Assembly for Wales have any and, if so, what powers to enforce [equal] opportunities obligations against its contractors and sub-contractors".

Summary of Conclusion

His opinion is summarised below. He proposes to attend the meeting on the 17th January to speak to the paper. The conclusions were:

1. The Assembly is not an enforcement agency and cannot therefore enforce the contractors' statutory obligations of employers. It is not part of the Assembly's function to enforce these statutory provisions.
2. The Assembly's standard conditions of contract require contractors to abide by their statutory obligations under, for example, equal opportunities legislation, race relations legislation, equal pay legislation and so on and to indemnify the Assembly against any breaches of those obligations by the contractors. In theory, therefore, the Assembly could take proceedings for breach of contract or terminate the contract for breach by the contractor of those obligations or any of them. However, without a finding by a court or tribunal of competent jurisdiction, in which proceedings the Assembly would not normally be involved as a party, the Assembly should be very slow to terminate the contract for breach of the standard term. To do so would be fraught with difficulties for the Assembly.
3. The Assembly, too, has equality obligations all of its own (Sections 48 and 120 of the Act). These, oddly enough, provide a more effective way of ensuring that contractors adopt and abide by good employment practice and in particular with the Assembly's arrangements under section 120 securing equality of opportunity for everyone.
4. The basis of the conclusion in paragraph 3 is:

- (a) the Assembly has wide powers to enter into contracts for the provision of goods and services;
- (b) the range and number of individual bodies wishing to do business with the Assembly is vast;
- (c) consequently, the Assembly is in a strong position to influence those wishing to be placed on the Assembly tender lists;
- (d) the Assembly cannot avoid its statutory responsibilities simply by entering into contracts or arrangements for the provision of goods and services relating to the conduct of its business and functions (Section 41(2));
- (e) consequent on (d), the Assembly has a very real interest, indeed a duty, to ensure that contractors are "signed up" to the Assembly's good practices and its arrangements under section 120 of the Act for securing equality of opportunities for everyone.

5. To achieve the objectives described in paragraph 3 above the Assembly would need to:

- (a) make arrangements under Section 120 of the Act involving consideration of whether tenderers for the award of contracts have in place policies for promotion of equal opportunities and to take the absence of such a policy into account in determining whether to award them a contract or not.
- (b) draft appropriate contractual provisions obliging the contractor to comply with the equal opportunity policy in the discharge of the contract.
- (c) adopt a policy to the effect that the Assembly will support businesses which have an equality conscience and that it will have regard to (a) above when selecting contractors;
- (d) confirm that there is nothing in the Assembly's procurement procedures or in the EU Public Procurement Regulations which stands in the way of 5(c) above.

Both (a) and (b) are related to the Assembly's functions ie selecting a contractor and determining the terms of the contract.

6. Subject, therefore, to it being compatible with the procurement regulations and procedures and with the point that an inflexible policy requiring all tenderers including small firms to have formal policies on equality of opportunities might be held to be *Wednesbury* unreasonable, the Counsel General is of the opinion that it would be lawful for the Assembly to adopt such a policy but the procurement point needs further consideration with the policy division and OCG to ensure compatibility.

7. Two points are of central importance. First, the Assembly is in a peculiarly good position to influence those with whom it does business to adopt those standards which are applicable to the Assembly in the conduct of its business and in the exercise of its functions. It stands to reason that as the Assembly is under a duty to promote equality of opportunities for everyone that it will wish to ensure insofar as it reasonably can that those with whom it enters into contracts in relation to its business and functions adopt similar standards. Otherwise, the Assembly is at risk of being criticised for not complying with its

own statutory obligations. It might, therefore, wish to consider adopting a policy which invites those who might wish to be included on its tender list to sign up to a voluntary scheme for the promotion of equality. This approach has greater bite and more virtue than enforcement proceedings. Companies which do not sign up to the scheme would realise that they would become victims to those who do. The Assembly's health warning could be that "signing up to the voluntary scheme could seriously improve your business". There is nothing unreasonable in the Assembly stating publicly that it will support businesses which have an equality conscience. Profit and equality go hand in hand. Value for money is not just about cost accounting.

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COUNSEL GENERAL

12TH JANUARY 2001