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STATUTORY INSTRUMENTS

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**1993 No. 2810**

**The Education and Libraries (Northern Ireland) Order 1993**

**PART III**

**PUBLIC SUPPLY OR WORKS CONTRACTS**

**Interpretation of Part III**

**19.** In this Part—

“the Act of 1989” means the Fair Employment (Northern Ireland) Act 1989<sup>(1)</sup>;

“approved list” means such a list as is mentioned in Article 20(3)(a);

“associated body”, in relation to a contractor, means any company which (within the meaning of the Companies (Northern Ireland) Order 1986<sup>(2)</sup>), is the contractor’s holding company or subsidiary or is a subsidiary of the contractor’s holding company;

“business” includes any trade or profession;

“business activities” and “business interests”, in relation to a contractor or other person, mean respectively any activities comprised in, or any investments employed in or attributable to, the carrying on of his business and “activity” includes receiving the benefit of the performance of any contract;

“contractor”, except in relation to a subsisting contract, means a “potential contractor”, that is to say—

- (a) in relation to functions as respects an approved list, any person who is or seeks to be included in the list; and
- (b) in relation to functions as respects a proposed public supply or works contract, any person who is or seeks to be included in the group of persons from whom tenders are invited or who seeks to submit a tender for or enter into the proposed contract, as the case may be;

“employers' association” has the meaning assigned to it by Article 4(1) and (2) of the Industrial Relations (Northern Ireland) Order 1992<sup>(3)</sup>;

“exclusion” includes removal;

“Government policy” falls within “irrelevant fields” for the purposes of Article 20 if it concerns matters of defence or foreign or Commonwealth policy and “involve”, as regards business activities and any such field of policy, includes the supply of goods or materials or services to, or the execution of works for, any authority or person having functions or carrying on business in that field and, as regards business interests and any such field of policy, includes investment in any authority or person whose business activities are so involved;

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(1) 1989 c. 32  
(2) 1986 NI 6  
(3) 1992 NI 5

“political, industrial or sectarian affiliations or interests” means actual or potential membership of, or actual or potential support for, respectively, any political party, any employers’ association or trade union or any society, fraternity or other association;

“suppliers or customers” and “sub-contractors” includes prospective suppliers or customers and sub-contractors; and “supplier”, in relation to a contractor, includes any person who, in the course of business, supplies him with services or facilities of any description for the purposes of his business;

“trade dispute” has the meaning assigned to it by Article 2(4) to (7) of the Industrial Relations (Northern Ireland) Order 1992 and “involve”, as regards business activities and a trade dispute, includes the supply of goods, materials or services to or by, or the execution of works for or by, any party to the dispute, any other person affected by the dispute, or any authority concerned with the enforcement of law and order in relation to the dispute;

“trade union” has the meaning assigned to it by Article 3(1) of the Industrial Relations (Northern Ireland) Order 1992.

### **Board contracts: exclusion of non-commercial considerations**

**20.**—(1) Every board 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 of a board for the purposes of this Article are contracts for the supply of goods or materials to the board, for the supply of services to the board or for the execution of works for the board; but this Article does not apply in relation to contracts entered into before the coming into operation of this Article and does not authorise a board to enter into any contract which it would not be authorised to enter into apart from 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 board; 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 board—
  - (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 board—
  - (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 board, 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 trade disputes between them or any involvement of the business activities of contractors in trade 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 board 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.
- (7) This Article is subject to Article 21.

### **Exceptions for fair employment matters and matters specified by Department**

**21.**—(1) A board which takes any action reasonably necessary to secure compliance with section 41 of the Act of 1989 (restriction on execution of works, etc., by unqualified persons) does not exercise any function regulated by Article 20 by reference to a non-commercial matter.

- (2) Subject to paragraph (3), nothing in Article 20 shall preclude a board from—
- (a) asking questions seeking information or undertakings of any person relating to whether any person is or is not an unqualified person for the purposes of section 41 of the Act of 1989 and considering the responses to them; or
  - (b) including in a draft contract or draft tender for a contract terms or provisions requiring that the persons who are to carry out work or supply goods or services for the purposes of the contract are not to be unqualified persons for the purposes of that section and considering the responses to them,

if, as the case may be, consideration of the information, the giving of the undertaking or the inclusion of the terms or provisions is reasonably necessary to secure compliance with that section.

(3) Paragraph (2) does not apply to the function of terminating a subsisting contract and, in relation to functions as respects approved lists or proposed contracts, does not authorise questions in other than written form.

(4) Where it is permissible under paragraph (2) to ask a question it is also permissible to make, if it is in writing, a request for evidence in support of an answer to the question.

- (5) Nothing in Article 20 shall preclude a board from—

- (a) applying the criteria specified in an order under Article 22(1)(b) in including persons in or excluding persons from an approved list; or
- (b) asking questions specified in an order under Article 22(1)(c) in questionnaires circulated by the board to potential contractors in cases so specified and considering the responses to them.

### **Provisions supplementary to or consequential on Article 20**

**22.—**(1) The Department may by order—

- (a) specify as a non-commercial matter for the purposes of Article 20 any other matter which appears to the Department to be irrelevant to the commercial purposes of public supply or works contracts of any description;
- (b) specify the criteria to be applied by a board in including persons in or excluding persons from an approved list;
- (c) specify questions relating to non-commercial matters which may be included in questionnaires circulated by boards to potential contractors in such cases as may be specified in the order.

(2) The power conferred by paragraph (1)(a) includes power to apply Article 20(5) and (6) to any matter specified in the order and to amend any definition in Article 19 of an expression used in any sub-paragraph of Article 20(4) without making any other provision.

(3) An order under paragraph (1) may include such consequential and transitional provisions as appear to the Department to be necessary or expedient.

(4) No order under paragraph (1) shall be made unless a draft of it has been laid before and approved by a resolution of the Assembly.

(5) The duty imposed by Article 20(1) does not create a criminal offence but—

- (a) in proceedings for judicial review, the persons who have a sufficient interest in the matter shall include any potential contractor or, in the case of a contract which has been made, former potential contractor (or, in any case, any body representing contractors), as such; and
- (b) a failure to comply with it is actionable by any person who, in consequence, suffers loss or damage.

(6) In any action under Article 20(1) by a person who has submitted a tender for a proposed public supply or works contract arising out of the exercise of functions in relation to the proposed contract the damages shall be limited to damages in respect of expenditure reasonably incurred by him for the purpose of submitting the tender.

(7) Nothing in paragraph (1)(a) or Article 20 implies that the exercise of any function regulated by that Article may not be impugned, in proceedings for judicial review, on the ground that it was exercised by reference to other matters than those which are non-commercial matters for the purposes of that Article.

(8) If a board, in relation to public supply or works contracts or any proposed such contract, as the case may be—

- (a) asks any question of any potential contractor relating to any non-commercial matter other than a question consideration of the answer to which is permitted by Article 21; or
- (b) submits to any potential contractor a draft contract or draft tender for a contract which includes terms or provisions relating to any non-commercial matter other than a term or provision the inclusion of which in the contract is permitted by Article 21,

the board shall be treated, for the purposes of Article 20, as exercising functions regulated by that Article by reference to non-commercial matters.

### **Duty of boards to give reasons for certain decisions within Article 20**

**23.**—(1) Where a board exercises a function regulated by Article 20 by making, in relation to any person, a decision to which this Article applies, the board shall forthwith notify that person of the decision and, if that person so requests in writing within 15 days from the date of the notice, furnish him with a written statement of the reasons for the decision within 15 days from the date of the request.

- (2) This Article applies to the following decisions in relation to any person, namely—
- (a) in relation to an approved list, a decision to exclude him from the list;
  - (b) in relation to a proposed public supply or works contract—
    - (i) where he has asked to be invited to tender for the contract, a decision not to invite him to tender;
    - (ii) a decision not to accept the submission by him of a tender for the contract;
    - (iii) where he has submitted a tender for the contract, a decision not to enter into the contract with him; or
    - (iv) a decision to withhold approval for, or to select or nominate, persons to be sub-contractors for the purposes of the contract; or
  - (c) in relation to a subsisting public supply or works contract with him—
    - (i) a decision to withhold approval for, or to select or nominate, persons to be sub-contractors for the purposes of the contract; or
    - (ii) a decision to terminate the contract.

(3) The Department may by order subject to negative resolution amend paragraph (1) so as to substitute for any period specified in that paragraph such other period as the Department thinks fit.

### **Transitional duty of boards as regards existing lists**

**24.**—(1) Subject to paragraph (3), a board which, at the coming into operation of this Article, maintains an approved list shall—

- (a) consider whether persons have been included in or excluded from the list by reference to non-commercial matters; and
- (b) if it appears to the board that that is the case, compile the list afresh in accordance with paragraphs (4) to (6).

(2) Persons shall be treated by a board as having been excluded from a list by reference to non-commercial matters if, in relation to the list, the board has—

- (a) notified potential contractors of its intention to have regard to non-commercial matters; or
- (b) issued statements of policy framed by reference to non-commercial matters.

(3) Inclusion or exclusion by a board from any approved list by reference to a non-commercial matter does not give rise to the duty to compile the list afresh under paragraph (1) if that matter relates only to the question as to whether or not any person is unqualified for the purpose of section 41 of the Act of 1989 and the board's action was reasonably necessary to secure compliance with that section.

- (4) The duty of a board to compile afresh an approved list shall be discharged as follows—
- (a) the board shall publish notice of its intention to compile the list afresh and (by the notice) invite persons to apply, within a specified period, to be included in the list; and
  - (b) at the end of that period the board shall proceed to compile the list afresh from among the applicants in accordance with the duty imposed by Article 20.

(5) Publication by a board of the notice required by paragraph (4) shall be effected by causing the notice to be published—

- (a) in at least 2 newspapers circulating in the area of the board; and
- (b) in at least one publication circulating among such persons as undertake contracts of the description to which the list relates.

(6) The period specified in the notice under paragraph (4) as the period within which applications are to be made shall not be shorter than the period of 28 days from the date of publication of the notice.

(7) The duty imposed by this Article shall be discharged by a board as soon as is reasonably practicable after this Article comes into operation and in any event before the expiration of 3 months from the day on which this Article comes into operation.

(8) This Article does not create a criminal offence but sub-paragraph (a) of Article 22(5) applies for the purposes of the duty imposed by this Article as it applies for the purposes of the duty imposed by Article 20(1).

**Exclusion of charges for inclusion in approved list**

**25.—(1)** A board which maintains an approved list shall not require a person to pay any sum as a condition of his inclusion or continued inclusion in the list or of his being considered for such inclusion.

(2) Paragraph (1) does not create a criminal offence but a contravention of it is actionable by the person seeking to be included or retained in the list.