

Sustainable Procurement Cupboard – The Legal Shelf

Top 10 actions to embed sustainability legally into the procurement process

- 1 Understand your powers to incorporate sustainability initiatives into your procurement.
- 2 Use available guidance and legislation to justify your actions.
- 3 Embed sustainability into your organisation's policy framework and document it.
- 4 Include sustainability at the earliest possible stage in the procurement process, i.e. when making the business case for the procurement, so that it is within your core requirements for the procurement.
- 5 Ascertain technical capacity and ability to deliver economic, social and environmental well-being outcomes within the contract requirement by asking relevant questions in PQQ.
- 6 Describe sustainability requirements in your specification in as specific ways as possible.
- 7 Get the bidders to expand in their method statements on their delivery of sustainability based outcomes and outputs described in the specifications with sufficient clarity that you will be able to measure the contractor's performance.
- 8 Use contract conditions to enforce social and environmental requirements in contracts.
- 9 Develop criteria for awarding contracts which address how value for money will be measured against comprehensive specifications which embed social and environmental issues as part of the whole contract requirement.
- 10 Educate and train your people so that sustainability becomes the norm in procurement.

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Brief Synopsis

This legal shelf starts with the bigger picture of powers and the European framework, and gradually moves towards the detail of tendering for and awarding a contract. The principles of sustainable procurement have a role to play at each stage, and the more they are taken on board, then the firmer the footing will be.

Chapter 1 Purpose of this Shelf

- Explanation of the intention behind this guide.

Chapter 2 Overview of the Legal Approach

Chapter 3 [Powers](#)

- Deals with legal powers of the public sector to take on the approach advocated by the SPT in 'Procuring the Future'. In the context of local authorities, it notes that the 'well-being' powers are a useful starting point. A previously tight regime for counsel (in terms of what could not be considered in the procurement process) has been to some extent loosened. Other public sector bodies (such as central government departments, the National Health Service, and housing associations) also have the power to move on this agenda.

Chapter 4 [EU Framework](#)

- In the chapter on the EU framework, it is noted that there has been a move from 'whether' sustainable procurement is possible to 'how' it can be achieved. The detailed legal basis for this is set out, starting with the Consolidated Directive on procurement, moving through a series of cases, and looking also at two particularly helpful European 'Communications' on areas at the heart of the sustainable procurement agenda. This chapter also considers state aid issues and where this can be relevant to procurement issues.

Chapter 5 [Policies](#)

- Moving from the law itself to the UK policy which is relevant to it, this chapter considers local authorities' duty to produce a community strategy and looks at how

this can be used in relation to sustainable procurement. Local Area Agreements and other policy documents are also reviewed.

The remaining chapters in this legal shelf move from the overarching structure to the detail of the actual procurement process.

Chapter 6 [Business Case](#)

- Deals with the importance of a good business case and how this links back to the legal and policy framework already considered. It looks also at how sustainable procurement issues such as 'whole life costs' can fit in. It considers too the balancing act between core and secondary requirements, and the extent to which sustainable issues can be counted as 'core' requirements. The chapter ends by looking at the importance of being able to effectively monitor performance, so that the value can be demonstrated.

Chapter 7 [OJEU Notice](#)

- Includes tips on how to complete the OJEU notice so as to maximise sustainability in procurement.

Chapter 8 [PQQ](#)

- Includes tips on how to complete the pre-qualification questionnaire so as to maximise sustainability in procurement.

Chapter 9 [ITT](#)

- Deals with the invitation to tender stage. Covers the usefulness of method statements, weighting, and considering good practice (amongst others things).

Chapter 10 [Specification](#)

- Gives detail on what can be included in the specification.

Chapter 11 [Contract Conditions](#)

- Looks briefly at the place for specifically drafted contract conditions.

Chapter 12 [Award](#)

- Moves on to consider the actual award of the contract and covers some relevant European cases on the issue. It looks at what can and cannot be taken into account, in the sustainable procurement context, when choosing the successful bidder.

Chapter 13 [Contract Management](#)

- Reviews contract management. This includes issues relating to making sure that the contractor does what it should be doing, not only in relation to the core requirements, but also in terms of the sustainable procurement aims.

Much of the work in this legal shelf is derived from work undertaken by Anthony Collins Solicitors LLP with Richard Macfarlane and so any queries relating to its content should be raised with either of them.

Chapter 1 – Purpose of this Shelf

What's the guide about?

The Sustainable Procurement Cupboard provides a framework for procurement professionals to find case studies, tools, primary documents, and contracts to deliver on multiple public sector targets.

The Cupboard is user-driven, enabling you both to find others' work and to share your work with others.

This is the Legal Shelf for the Cupboard, providing an overview of good legal practice and then introducing users to some of the relevant law surrounding the embedding of sustainability into procurement practice.

So this shelf is commissioned by the New Economics Foundation to be a useful resource for:

- Commissioners: the public sector commissioners of goods, services in works;
- Providers: the range of providers or works and services in the public arena;
- Intermediaries: this group is quite varied, but would include business advisers, environmental advisers, economic development officers, government officers, community engagement officers and legal advisers;
- Champions: essentially "the champions of sustainability" who work in and with a range of public bodies to explore better ways of delivering public services harnessing the sustainability agenda.

This guidance, though primarily written from the perspective of English law and policy, also applies largely to the rest of the United Kingdom – Scotland, Wales, and Northern Ireland. Where we are aware of particular differences in law, policy, or practice, we have highlighted this in the text.

The ongoing chapters expand on the art of the possible and seek to answer some of the problematic issues as they arise.

Chapter 2 – Overview of the Legal Approach

Good sustainable procurement practice should be good procurement practice. So, running through a procurement process, this requires a commissioner to open its mind to the range of social and environmental requirements it would be buying usually for the same money as it would normally spend or for a proportionate difference in cost.

Having done that, the commissioner can do some good preliminary work which, once it is done, will stand it in good stead over and over again. This work falls into 2 categories:

- understanding the purpose and powers of the organisation and the ways they can be applied to the widest objectives possible (within this is the potential to work with other public agencies to achieve even greater benefits);
- adopting the kind of policies which enable a wider range of social, economic and environmental benefits to be promoted and delivered by the commissioner, partly through its own resources and partly through its contracting and partnering relationships.

So for local government, this is relatively straightforward because of its obligations to its area and the people who live there. For organisations in the NHS, many of the rationales for recognising the importance of economic, social and environmental factors are in the realm of addressing public health issues. In the case of other Government departments, there has to be more of a policy shift to recognising the role they play not just in terms of services for the national benefit, but the input regional offices and central government services have on local communities and the obligations that should arise from this.

Having got a process and policy framework clarified and adopted through the governance structures of the commissioner, the commissioner can then pursue them through every business case it makes for the delivery of services and procurement of requirements with any sort of external organisation. In the context of a competition under EU rules, that means:

- OJEU Notice: having reference to the inclusion of social and economic benefits under contract conditions;
- Specification: ensuring that the benefits sought are clearly the subject matter of the contract;

- Pre-qualification: testing each bidders' capability to deliver the requirements of the commissioner, with reference to the entirety of the subject of the proposed contract;
- Award: having criteria which include measurement of the environmental and social requirements within the subject matter of the contract;
- Contract management: having robust veritable mechanisms for measuring and rewarding/pending performance.

Chapter 3 – Powers

Chapter Summary

Local Authorities

- Local authorities now have a sustainability function encapsulated in their “well-being” power under Part I Local Government Act 2000.
- Local authorities can include training, employment and workforce matters within the requirements of their procurement.
- Local authorities should audit trail their policies for social issues/community benefits in their community strategies, best value plans and procurement strategies.
- Local authorities do need to consider whether the social issue in question is covered by any of the other “non-commercial considerations” still applying.
- Local authorities should use the best practice procurement processes applying to all public bodies (including explicit mention of social requirements in OJEU notices).

Other public bodies

- A commissioning authority must verify the powers it has to pursue sustainability considerations in the exercise of its functions.
- A contracting authority must ensure it is acting reasonably within the “Wednesbury” principle.
- Sustainability considerations should be within the ambit of Neighbourhood Regeneration Vehicles’ core purposes (see [Neighbourhood Regeneration Vehicles](#)).
- Further and higher education and NHS bodies can take account of sustainability factors in their procurement if such factors facilitate their role in creating a healthy and prosperous environment. Further guidance from government could help to stimulate this (see [National Health Service](#)).
- Government departments can implement sustainability considerations into their procurements but need to ensure the core purpose of the procurement embraces such social factors (see [Government Departments](#)).
- Registered social landlords are now generally considered to be contracting authorities, reflected in Housing Corporation guidance of 2004 (see [Registered Social Landlords](#)).

Local Government powers and duties – England and Wales

The powers of most contracting authorities are set out in statute. In considering whether a local authority is able to promote sustainability initiatives (aside from European regulatory considerations), the following issues have to be addressed:

- Does the local authority at first sight have the necessary powers, express or implied, to pursue such matters in the cause of the exercise of their functions?
- Are there any express prohibitions that prevent the exercise of such powers?
- Are there any conditions set out in legislation to be satisfied if such matters were to be pursued lawfully?
- Has the local authority followed the appropriate procedures, in particular any procedures that it has adopted itself?
- Has the local authority taken into account all the matters it should take into account (the “Wednesbury” principle)?

Local authorities have only those powers conferred upon them by statute and may use those powers only for the purposes contemplated by the statute. The long established principle that councils have express or implied powers to enter into procurement contracts for the purpose of obtaining the goods and services they need was confirmed by Section 1 Local Government (Contracts) Act 1997.

In previous years, the main power that local authorities would rely upon to promote labour and enterprise initiatives was their function to promote economic development under Part III Local Government and Housing Act 1989. This wide-ranging power was probably under-utilised by local authorities, because of the application of Part II Local Government Act 1988 (‘non-commercial considerations’). Part III Local Government and Housing Act 1989 is now repealed, and replaced by the more enabling ‘well being’ power in the Local Government Act 2000 (“LGA 2000”) (see [well being](#))

For information on more specific local government powers, please see the following sections:

- [The well-being power](#)
- [Other specific powers](#)

Local Government 'Well-being' power

Under Section 2(1) Local Government Act 2000, 'Every local authority are to have power to do anything which they consider is likely to achieve any one or more of the following objects:

- the promotion or improvement of the economic well-being of their area;
- the promotion or improvement of the social well-being of their area; and
- the promotion or improvement of the environmental well-being of their area'.

This power can be exercised 'in relation to or for the benefit of:

- the whole or any part of a local authority's area; or
- all or any persons resident or present in a local authority's area'.

(Section 2(2) LGA 2000)

In other words, there is an express power for a local authority to do anything that they consider likely to promote the economic, social and/or environmental well-being of their area or principally for the benefit of a locality or person within their area (Section 2 LGA 2000).

The power is wide-ranging, and enables local authorities to improve the quality of life, opportunity, and health of their local communities, so linking directly to innovation and delivery of community strategies. The breadth of the power is such that local authorities can regard it as a 'power of first resort', and can consider the impact that this relaxation of ultra vires will have upon decision-making and policy development. 'Ultra vires' here relates to the powers of the local authority – it is not permitted to do anything which is 'outside its powers', sometimes referred to as 'ultra vires'. The 'well-being' powers referred to above act in this way as a counterweight to the general ultra vires principles.

Sustainable procurement has been defined as 'a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits to the organisation, society and the economy,

whilst minimising damage to the environment'.¹ The social, economic and environmental elements of sustainability are apparent in this definition, and there is therefore a clear link between sustainability and sustainable procurement and a local authority's 'well-being' power.

There is a restriction to the general power under Section 2(1) Local Government Act 2000. A local authority can only use this power if it would not be against any other law which prohibits, restricts, or limits the power of the authority. . The redefinition of 'non-commercial' considerations described in '[other specific powers](#)' means that local authorities should be able to take into account further sustainability considerations in their procurement.

Other specific powers

Non-commercial considerations

Until 13 March 2001, local authorities could not promote labour issues in their procurements without potentially falling foul of Part II Local Government Act 1988. There are some other matters that are unlawful for them to take into account in their procurements.

It is the duty of every local authority to exercise relevant 'functions' without reference to non-commercial matters and to avoid the inclusion of non-commercial matters within its contract documentation. These non-commercial matters are listed in Section 17(5) of the Local Government Act 1988, covering:

- (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;

¹ Sustainable Procurement Task Force, – Sustainable Procurement Action Plan, - <http://www.sustainable-development.gov.uk/publications/procurement-action-plan/documents/full-document.pdf>

- (d) The conduct of contractors or workers in industrial disputes between them or any involvement of the business activities of contractors in industrial 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 authority gives or withholds support;
- (h) Use or non-use by contractors of technical or professional services provided by the authority under the [1984 c. 55.] Building Act 1984 or the [1959 c. 24.] Building (Scotland) Act 1959.

Relevant 'functions' 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 authority, 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 authority:—
 - (iii) the inclusion of persons in or the exclusion of persons from the group of persons from whom tenders are invited,
 - (iv) the accepting or not accepting the submission of tenders for the contract,
 - (v) the selecting the person with whom to enter into the contract, or
 - (vi) 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 authority:—
 - (vii) the giving or withholding approval for, or the selecting or nominating, persons to be sub-contractors for the purposes of the contract, or
 - (viii) the termination of the contract.

Without modification, the provisions of Part II Local Government Act 1988 went further than the EU case law inasmuch as even contract conditions relating to the use of unemployed labour, which were not discriminatory in European law, were outlawed.

The Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001² ameliorated the impact of Part II Local Government Act 1988 in England by providing that the matters specified in Section 17(5)(a) and the conduct of contractors or workers in industrial disputes between them as specified in section 17(5)(d) are not to be non-commercial matters:

- (a) to the extent that a best value authority considers it necessary or expedient, in order to permit or facilitate compliance with the requirements of Part I of the 1999 Act (Best Value), to exercise the functions regulated by that section in relation to its public supply or works contracts with reference to those matters; or
- (b) for the purposes of any functions regulated by that section in relation to public supply or works contracts which involves a transfer of staff to which the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 1981 may apply.

In Wales, under the Local Government Best Value (Exclusion of Non-commercial Considerations) (Wales) Order 2002 the matters specified in section 17(5)(a) and (d) of the 1988 Act ceased to be non-commercial matters for the purposes of that section.³

² SI 909/2001

³ By way of contrast it is interesting that in Scotland under the Local Government in Scotland Act 2003 the matters specified in section 17(5)(a) (b) and (d) of the 1988 Act ceased to be non-commercial matters for the purposes of that section to the extent that:

- the local authority reasonably seeks to ensure that a contractor with the authority will comply with the contractor's obligations under the contract;
- the local authority reasonably seeks to ensure that a contractor with the authority will perform the contractor's obligations under the contract in a way which will not prevent the authority from securing best value or hinder it in doing so; and
- the local authority has reasonable grounds for believing that the trade contractor's implementation of the contract with the authority would entail a relevant transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (S.I. 1981/1794) or any regulations replacing those regulations, as from time to time amended.

The provisions of Section 17(5) of the 1988 Act that are not modified by any of the legislation described above remain in force.

What is still unlawful?

The matters listed in Section 17(5) not dealt with by the legislation described above remain non-commercial considerations that must be disregarded by local authorities in their procurement exercises. This may inadvertently have some consequences that are not necessarily within the intentions of the Government.

On the one hand, for example, the stance taken by the OGC note Social Issues in Purchasing against the boycotting of suppliers has a statutory footing for local authorities in:

- (a) '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'.

On the other hand, for example, arguably the adoption of fair trade could be beyond the scope of a local authority because of the peculiar way in which the following non-commercial consideration is framed:

- (b) 'any involvement of the business activities or interests of contractors with irrelevant fields of Government policy'.

Under Section 17(8) Local Government Act 1988 'Government policy' falls within 'irrelevant fields' for the purposes of this section 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". This is very broad wording, which may inadvertently cover the support by a local authority of fair trade.

Section 17(5)(h) of the 1988 Act ceased to have effect in relation to local authorities in Scotland altogether.

Local authorities are still subject to case law about the purposes for which they can exercise their powers (see below). Local government has also been given considerable freedoms in the way functions are exercised in recent years. **[obligations?]**, local authorities are under greater constraints than other contracting authorities.

Proper purposes?

This question was raised in *R v Lewisham L.B.C., ex p Shell UK*⁴. In that case the local authority had adopted a policy of refusing to purchase the products of Shell UK where equivalent products were available elsewhere on reasonable terms. The reason for the policy was Shell UK's membership of a multi-national group of companies with trading links with South Africa (although Shell UK itself did not trade in South Africa).

The Court indicated that the policy would have been lawful had it been adopted solely from a desire to promote good race relations within the area, since under Section 71 of the Race Relations Act 1976 the authority was obliged to consider the need to promote good relations between persons of different racial groups. However, the Court found that the policy had also been influenced by the desire to put pressure on Shell to cease its trading links with South Africa, and this the Court held to be an 'extraneous and impermissible purpose'.

The Court did not, however, make it clear exactly what secondary considerations are prohibited. The Shell case appears to permit the use of procurement in pursuit of any policies entrusted to the authority by other legislative provisions, even if the possibility of using its contracting processes to support such policies is not expressly contemplated.

Best Value

There is much misapprehension about what Best Value is about in the context of local authorities. Under Section 3(1) Local Government Act 1999, 'a best value authority [which covers local authorities and a variety of 'special purpose' authorities] must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness'.

⁴ [1998] 1 All ER 938

In the light of the Order made in 2001, in order to show that a council has properly considered its policy on the use of social considerations in its procurement operations relating to all of its functions, it is recommended that express reference is made to such practices and how they enable a local authority to perform its functions in a way that is intended to achieve continuous improvement in their delivery. Such a statement can be used, for example, in the context of an authority's commitment to alleviating unemployment and promoting the development especially of small and medium-sized enterprises in its area. A council should show how it is continuously improving the performance of its functions through the use of social and environmental considerations. Nowadays, it is very easy to show this in relation to the well-being power, which is an express remit for pursuing sustainability. Establishing the right 'audit trail' is not difficult for councils; but it is essential that the trail be shown.

Powers of other contracting authorities and public bodies

Since the 1980s, there have been a plethora of statutory and corporate bodies that have been established to run particular services in the public sector. These include higher education corporations (nowadays the "new" universities); further education corporations (F.E. colleges can be a major contributor to local training initiatives); NHS trusts and primary care trusts.

Each of these organisations typically have widely framed subsidiary powers, often with a subjective element (e.g. "which appears to it"). As such bodies are encouraged to consider their role in creating a healthy and prosperous environment as "stakeholders" in their local environment, they have the option to take into account sustainability factors in their procurement activity. In the case of the National Health Service, this will require central ownership and direction (within the Department of Health) if it is to be a reality.

National Health Service

In the report for the NHS Community Benefits and Procurement (CBIP) Programme, 'Policies, Powers and Rationale – A Basis for Action'.⁵(*'A Basis for Action'*), the powers of NHS organisations are discussed.

The report explains that *'policy statements indicating a desire to achieve sustainable development objectives do not provide the power for a NHS body to use their procurement to achieve this end... this goal could be pursued through a non-contractual 'corporate social responsibility' approach, or it could be approached by providing encouragement, information and exemplars. While these non-contractual approaches may be valid and may be thought appropriate in some circumstances, the objective of the NHS CBIP programme is to develop an additional tool: the inclusion of these sustainable development requirements as part of the specification and as contract conditions. This approach requires the procuring entity to have the power to procure these wider outcomes'*.⁶

The power of all NHS agencies, Authorities and Trusts derives from the powers given to the Secretary of State for Health, who *'has power to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by the National Health Service Act 1977, and to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to the discharge of such a duty'*.⁷

In that Act, it states Specifically the Secretary of State has to provide, to such extent as he considers necessary (and amongst other things) *'such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service'*.⁸

⁵ NHS Community Benefits in Procurement Programme, A Report for the NHS London Cabinet: Policies, Powers and Rationale – A Basis for Action, March 2005, Anthony Collins Solicitors and Richard Macfarlane

⁶ Op. cit., Powers, Policy & Rationale – A Basis for Action, 2005, p13

⁷ Halsbury's Laws, National Health Service, paragraph 17

⁸ NHS Act 1977 S3

These powers can now be read in the context of *Choosing Health*⁹ and its argument that the NHS should use its resources to maximise the employment and training opportunities for people that are recovering from illness or at risk of illness due to poverty and social exclusion. It can also be read in the context of the threat of labour and skill shortages, and subsequent increases in NHS costs and risk to the quality of service.¹⁰

'A Basis for Action' concludes that 'it appears that NHS bodies do have the powers and policies to include recruitment and training requirements in their procurement, where this will achieve:

- A reduction in unemployment, poverty and deprivation;
- Increased life-long earning potential and therefore a reduced risk of future deprivation;
- An increased workforce (with appropriate skills) for the NHS and its contractors;
- Improved whole-life costs for a contract, or a hedge against future cost rises that could arise from skill and labour shortages'.¹¹

That report proposes that 'the use of contracting to achieve targeted recruitment and training opportunities for people recovering from illness or at risk of illness because of their unemployment or poverty would appear to fit within the functions of a Health Authority.

Neighbourhood regeneration vehicles

It has become common practice to establish not-for-profit organisations at a local level to be the champion of neighbourhood renewal. Typically, these will be companies limited by guarantee, sometimes with a charitable constitution. Often, though not always, such an organisation will be a contracting authority satisfying one of the tests for a "body governed by public law". This is particularly likely to be the case when such an organisation is the accountable body for a Government programme such as the Single Regeneration Budget or New Deal for Communities. Care has to be taken to give such an organisation as much flexibility in its 'objects' (the legal term for an organisation's objectives) as possible, which tend to focus on an "area for benefit" and to include "assisting people to find employment".

⁹ *Choosing Health: Making healthy choice easier*, Department of Health White Paper, November 2004

¹⁰ *Op. cit.*, Powers, Policy & Rationale – A Basis for Action, 2005, p13

¹¹ *Ibid.*, p14-15

Procurement taking into account sustainability considerations should therefore be within the ambit of such an organisation's core purposes.

Government departments

The functions of Government departments are framed by reference to legislation scoping the relevant Secretary of State's powers and duties, and, in the absence of such a framework, the "royal prerogative". There is no reason why Government departments cannot adopt coherent and positive policies towards sustainability considerations in Government procurement.

Registered Social Landlords

In guidance published in September 2004, the Housing Corporation acknowledged that the Government had accepted a Commission ruling that registered social landlords be classified as 'bodies governed by public law', and must therefore comply with EU law in relation to procurement. Prior to this, registered social landlords had generally not been regarded as contracting authorities.

Regional Development Agencies

There are nine Regional Development Agencies (RDAs), set up as non-departmental public bodies across the English regions. They act as 'strategic drivers' of regional economic development and regeneration in each of the regions. They have five statutory purposes under the Regional Development Agencies Act 1998, which are as follows:

1. to further the economic development and regeneration of its area,
2. to promote business efficiency, investment and competitiveness in its area,
3. to promote employment in its area,
4. to enhance the development and application of skills relevant to employment in its area, and
5. to contribute to the achievement of sustainable development in the United Kingdom where it is relevant to do so.¹²

¹² Regional Development Agencies Act 1998, s4

According to 'Transforming England's regions through sustainable economic development', England's RDAs' mission statement, the RDAs' agenda includes regional regeneration, taking forward regional competitiveness, taking the lead on regional inward investment and, working with regional partners, ensuring the development of a regional skills action plan to ensure that skills training matches the needs of the labour market.

In essence, a development agency that is established by the Regional Development Agencies Act 1998 may do anything that it considers expedient for its purposes, or for purposes incidental thereto.¹³

Sustainable procurement activities such things as targeted recruitment and training are clearly incidental to all of the above purposes, so Regional Development Agencies have the capacity to include sustainability benefits within their contracts.

Why the Sustainable Community Strategy is so important

Under section 4 of the Local Government Act 2000, every local authority must prepare a strategy (referred to as a community strategy) for promoting or improving the economic, social and environmental well-being of their area and contributing to the achievement of sustainable development in the United Kingdom. Local Strategic Partnerships were also introduced by the Local Government Act 2000.

A number of mechanisms to help local authorities deliver sustainable communities on the ground have been put in place, including:

- **Local Strategic Partnership (LSP):** Brings together the views of the local private, voluntary and community sectors with the sustainable community strategy in an area, to turn the vision of a sustainable community into a reality.
- **Sustainable Community Strategy:** Creates a long-term, sustainable vision in an area and sets the agenda for priorities in the local area agreement.
- **Local Area Agreement (LAA):** A three year 'contract' between a local area (represented by the local authority and other partners through the local strategic partnership) and

¹³ Regional Development Agencies Act 1998, s5

central Government to deliver particular priorities as set out in its sustainable community strategy.

Sustainable community strategies have a vital role to play in helping to deliver genuinely sustainable communities. All councils and LSPs have a community strategy in place. A number of local authorities have already begun to embed sustainable development into their community strategies (see 'Making it Happen' at <http://www.sustainable-development.gov.uk/advice/local/localleadership.htm>).

For a local authority to enter into a contract or to impose any particular sustainability requirements, they need the power to do so, but also the appropriate internal policies. The Sustainable Community Strategy is the key justification for introducing sustainability elements into their contracts and improve their sustainable procurement.

Best Value – arrangements for the continuous improvement of functions delivery

There is much misapprehension about what Best Value is about in the context of local authorities. Under Section 3(1) Local Government Act 1999, “a best value authority [which covers local authorities and a variety of “special purpose” authorities] must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness”.

These arrangements are reflected in various processes which are subject to the inspection of the Audit Commission, in particular best value reviews of the local authority's functions (which means under case law, any of its statutory powers or duties) and annual best value performance plans. A considerable amount of guidance and practice has been developed about the undertaking of such reviews and the preparation of best value performance plans. Usually best value performance plans contain updates of the best value reviews by a local authority of its different functions, over a five-year rolling period.

A local authority must show that it has properly considered its sustainable policy in procurement. To demonstrate this, it is recommended that express reference is made to such practices. It is also recommended that the local authority shows how this enables it to achieve continuous improvement in delivery of its functions. For example, such a statement can be used in the context of an authority's commitment to alleviating unemployment or

promoting the development especially of small and medium-sized enterprises in its area. It is likely that a local authority's commitment to exploring and implementing sustainability in its procurement and financial assistance will be particularly relevant to its exercise of its well-being functions and should therefore be reflected in its community strategy.

Local government white paper implications

The local government white paper, 'Strong and prosperous communities' emphasises the need for local authorities to be 'place- shapers'. This means they need to consider "what should happen to ensure that their 'place' has a viable economic future; how to adapt to demographic shifts; to assess and mitigate the impact of climate change on their locality; to help turn offenders away from crime; and to build a cohesive community." All of these are sustainability considerations. The paper highlights the importance of using partnerships to address these considerations. A number of authorities have been using the introduction of Community Strategies, [well-being](#) power, Local Strategic Partnerships (LSPs) and Local Area Agreements (LAAs) to focus on the place-shaping agenda.

The white paper claims the intention to:

- **“reinforce the strategic leadership role of local government by:**
 - placing a duty on local authorities to prepare the LAA, in consultation with others as already is the case with the [Sustainable Community Strategy](#);
 - making clear our expectation that local authority leaders will play a leading role on LSPs – with an opportunity to agree the chair of the LSP; and
 - making clear that we expect local authority executive portfolio holders to play a key role on relevant thematic partnerships;
- **strengthen local partnership working by:**
 - placing a duty on the local authority and named partners to co-operate with each other to agree targets in the LAA; and
 - making clear that the Sustainable Community Strategy and other local and regional plans should have regard to each other;
- **put partnership working at the heart of local service delivery by:**
 - placing a duty on relevant named partners to have regard to relevant targets agreed between the Government and local partners in LAAs;
 - bringing more area-based funding streams into the LAAs to further improve the efficiency and delivery of outcomes;

- removing the 4-funding block structure from LAAs (to be negotiated through 4 'themes'); and
- clarifying the role of district councils;
- **strengthen and simplify local arrangements for delivering responsive services and involving local people by:**
 - streamlining procedures for involving communities in the creation of Sustainable Community Strategies, LAAs and Local Development Frameworks (LDFs);
 - improving and integrating strategic planning procedures; and
 - setting out the key principles of strategic commissioning and incentivising local authorities to focus on secure service outcomes in new and imaginative ways.”¹⁴

To underpin these reforms, there will be one, new, streamlined piece of guidance on the place-shaping role, replacing existing statutory and non-statutory guidance. Consultation on this guidance is expected during summer/autumn 2007 with the final place-shaper guidance expected during autumn/winter 2007.¹⁵ Incorporating sustainability considerations into procurement is a step forward in line with the place shaping aims.

Local Area Agreements should be used to implement Sustainable Community Strategies. Should this occur, local authorities will have the opportunity to shape sustainability targets across the activities of the public bodies involved in the Local Strategic Partnerships, rather than the activities of the authority alone.

¹⁴ Chapter 5, [Strong and Prosperous Communities, the Local Government White Paper, Volume 1](#), 26 October 2006

¹⁵ [Making it happen: the Implementation Plan](#)

Chapter 4 – European Union Framework

Current EU thinking

Summary

The Consolidated Directive

- The Public Contracts Regulations implemented the Consolidated Directive in the UK. They contain greater provision for the inclusion of social and environmental considerations in public contracts.

Case law

There have been some important cases concerning sustainability clauses in public contracts. A brief overview of the main points to come out of these cases is that social clauses must:

- be linked to the subject matter of the contract;
- not confer an unrestricted freedom of choice on the contracting authority;
- be expressly mentioned in the contract documents for the tender notice; and
- comply with all the fundamental principles of Community law, in particular, in relation to non-discrimination.

The Interpretative Communications

- To incorporate environmental requirements into the procurement process they must be able to be classified as an 'economic advantage' to the contracting authority. This way the requirement simply falls within the normal process for determining the most economically advantageous tender. The requirement must also be placed as an additional criteria.
- Social considerations must accord with community law, in particular the principles covering anti-discrimination, the free movement of goods and freedom to provide services.

Small and medium-sized enterprises

Small and medium sized enterprises often find it difficult to compete in the procurement process due to, amongst other things, their lack of resources for and experience with the tendering process. Guidance recommends that small and medium sized enterprises are recognised for their qualities, and taken into account in procurements by contracting

authorities. Recommendations for contracting authorities include giving realistic deadlines and ensuring that the process is appropriate to the size and complexity of the requirement.

State aid

In connection with sustainability considerations, State aid is best avoided by including sustainability requirements in the core requirement of the procurement, including qualitative measurement tools in the criteria for the most economically advantageous tender to measure them against, and making bidders compete by submitting a price for the whole package including the requirements.

Is a contractual approach to sustainability legal?

The simple answer to this is “yes”. In relation to public sector procurement, the conventional wisdom has been that sustainability requirements and social clauses, such as recruitment and training requirements, could not be included in the procurement process because they would conflict with the EC Treaties and Procurement Rules, and for local authorities they would contravene the Local Government Act 1998. However, there have been significant changes to each of these barriers, and the issue now is one of how it is done rather than whether or not it can be done.

For more information on the European approach to sustainable procurement, please see the following sections:

- [The Consolidated Directive](#)
- [Case Law](#)
- [The Interpretative Communications](#)

The Consolidated Directive

Public Procurement practices are affected by directives on procurement to regulate award procedures on major contracts, with, for contracting authorities in the UK, regulations by way of statutory instrument, implementing EC directives relating to the procurement of works, goods and services and utilities. The ‘Consolidated Directive’ (Directive [2004/18/EC](#), covering the award of public works supplies and services contracts) was implemented in the UK for the deadline of 31st January 2006 by means of the [Public Contracts Regulations 2006](#).

The European Commission has recognised the need to address the relevance of social, economic and environmental consultations to procurement. There is a greater provision in the new consolidated Directive for the inclusion of social and environmental considerations in public contracts. Article 26 of the Directive states that:

“Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.”

“Contracting authorities” are defined in the Consolidated Directive as meaning “the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law”.

Furthermore, contracting authorities are able to include environmental characteristics in their criteria for determining the ‘most economically advantageous tender’ under Article 53.

There have been some important cases concerning social clauses in public contracts which have had a bearing on the new consolidated directive, and the view that is taken of the use of social, economic and environmental considerations in procurement (see [Case Law](#)).

Case Law

The following are key cases in the area of social clauses in public procurement. The case law below is discussed chronologically and is not in order of importance.

- [Gebroeders Beentjes B.V. v The State \(Netherlands\) \(C31/87\)](#)
- [Nord-Pas-de-Calais Region \(C225/98 - Commission v the French Republic\)](#)
- [Concordia Bus Finland \(C-513/99 – Concordia Bus Finland Oy Ab \(formerly Stagecoach Finland Oy Ab\) v \(1\) Helsingin Kaupunki \(2\) HKL-Bussiliikenne \(2002\)\)](#)
- [EVN \(C-448/01 - \(1\) EVN AG \(2\) Wienstrom GMBH v Republic of Austria \(2003\)\)](#)
- [Insalud \(C-234/03 – Contse SA v Insalud \(Now Ingesa\) \(2005\)\)](#)
- [Other Case Law of Relevance](#)
- [Reconciling the case law](#)

Gebroeders Beentjes B.V. v The State (Netherlands) (C31/87)

In this important case on public procurement, the European Court of Justice ("ECJ") appeared to rule that a requirement for the employment of long-term unemployed persons could be included in the non-exhaustive list of factors determining award criteria for the most economically advantageous offer, if this requirement did not have a discriminatory effect. The Court rejected the possible use of the requirement to employ long-term unemployed persons as pre-qualification criteria on the ground that an authority can only pre-select a contractor on the basis of criteria relating to its economic and financial standing and their technical knowledge and ability.

The Court judgment stated that "the condition relating to the employment of long term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenders from other Members States of the Community. An additional condition of this kind must be mentioned in the contract notice". The ECJ left it to the relevant Dutch Court to determine whether the relevant requirement of the contracting authority was contrary to Community law.

In Beentjes, the contract notice included the requirement that "the workforce must be made up of at least 70% long-term unemployed persons employed through the regional employment office". The ECJ therefore seems to imply that a "local" labour clause, requiring the employment of, in this case long-term unemployed persons, from the region in which the contracting authority is based, is acceptable.

However, in the recent Interpretative Communication¹⁶ on the use of social considerations in the procurement process, the Commission states that although a requirement to employ a certain percentage of long-term unemployed persons would be acceptable, a requirement that those long-term unemployed persons be from a particular region would not. The Commission takes the view that regionalising the requirement would be contrary to the anti-discrimination laws of the community.

¹⁶ Com (2001) 566 Final

Nord-Pas-de-Calais Region (C225/98 - Commission v the French Republic)

In a more recent case, the ECJ took a slightly different view. The Commission maintained that an award criterion relating to employment was in addition to the criteria set out by Directive 93/37, being either the lowest price or “the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit”, and was contrary to Article 30 of the EC Treaty. The Commission stated in this case that whilst the taking into account of employment-related projects may be regarded as a condition of performance in the contract for the purpose of the rule in *Beentjes*, the problem in Nord-Pas-de-Calais case was that the French authorities had listed employment issues as an award criterion.

The Nord-Pas-de-Calais Region case is difficult to follow, partly because it concerned eight separate issues on which the Commission claimed that the French authorities had infringed EC Directives. This case, concerning a condition relating to employment linked to a local project to combat unemployment, seems to have turned purely on whether the contract notice correctly stated the contract criteria as the most economically advantageous tender or the lowest priced tender.

“46... The Commission claims that, in expressly setting forth as an award criteria in a number of contract notices a condition relating to employment linked to a local project to combat unemployment, the French authorities have infringed Article 309 Directive 93/37. The Commission acknowledges that the taking into account of employment-related projects may be regarded as a condition of performance for the purpose of the rule in *Beentjes* ... but it points out that, in the present case, that possibility was characterised as an award criterion in the contract notices in question. Under Article 309 Directive 93/37, award criteria must be based either on the lowest price or on the most economically advantageous tender”.

The French authorities, in response, argued that the employment criterion was a secondary criterion which is not decisive.

The ECJ stated that the European Directive 93/37 did:

“50... not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that the condition is consistent with all the fundamental principles of community law...

“51... it follows that an award criterion must be expressly mentioned in the contract notice so that contractor may become aware of its existence...”

It would seem therefore that the Nord-Pas-de-Calais Region case confirms that the inclusion of social clauses in the contract conditions is acceptable provided that those conditions do not breach Community law.

It would also appear from this case that provided a socially biased award criterion is expressly mentioned in the contract notice, a public body will not find itself outside the scope of the European Procurement Directives. In its Interpretative Communication on integrating social considerations¹⁷ the Commission gave its opinion on how and where social criteria should be published in order to be effective.

Concordia Bus Finland (C-513/99 – Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v (1) Helsingin Kaupunki (2) HKL-Bussiliikenne (2002))

This case is significant to the sustainability considerations debate as one of the questions put to the ECJ was whether, in a public services contract, a contracting authority could list among the criteria for awarding the contract to run the public bus services, a transport operator’s environmental programme, including omissions and noise level.

The ECJ found that, subject to certain provisos, it could:

“Where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender.... it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice,

¹⁷ Com (2001) 566 Final

and comply with all the fundamental principles of Community law, in particular, the principle of non-discrimination”.

The outcome was, arguably, pre-empted by the Commission which, in its Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement¹⁸ states:

“All public procurement directives contain the rule that the way contracting authorities define technical specifications is “*without prejudice to the legally binding national technical rules*”. This implies that, on condition that this legislation is compatible with community law, national legislation may, for instance, prohibit the use of specific substances which the national authorities consider harmful for the environment, or may oblige the observance of a specific minimum level of environmental performance. Contracting authorities are, of course, bound to observe such legislation.”

In December 2005, the Commission decided to refer Spain to the European Court of Justice over Decree 213/1998 of the Autonomous Community of Madrid, which obliges contracting authorities within the area to include, except in special circumstances, one or more criteria relating to the stability of employment in the tenderer's workforce. These criteria will be used to determine the economically most advantageous tender.

It is made clear in the Concordia Bus Finland case that award criteria that include social and environmental considerations must, as well as other criteria, be linked to the subject matter of the contract in question. The Commission has taken the view that some of the criteria in Decree 213/1998 do not meet the requirements of the framework of law on incorporating social considerations into public procurement, including the Concordia Bus Finland case. In particular, the Decree makes these award criteria mandatory for contracting authorities within the Autonomous Community, regardless of any link with the subject matter of specific contracts. The Commission also takes the view that some of the criteria in the Decree are selection criteria and should therefore not be used to award the contract.

¹⁸ Com (2001) 274 Final

EVN (C-448/01 - (1) EVN AG (2) Wienstrom GMBH v Republic of Austria (2003))

This case is relevant more specifically to the use of environmental considerations in public contracts. A number of questions were referred to the ECJ. In the context of considering social and environmental considerations in public contracts, those that are particularly relevant are:

1. Whether the Community legislation on public procurement, in particular Article 26 of Directive 93/36, precludes a contracting authority from applying, in its assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources.

The ECJ confirmed the Concordia Bus Finland case (see post) judgment, in particular the fact that 'Directive 92/50 cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must necessarily be of a purely economic nature'. Therefore, ecological criteria could be taken into consideration under the conditions laid out in the Concordia Bus Finland case. This particular criterion, requiring that the electricity supplied under the contract be produced from renewable energy sources, was therefore acceptable.

2. Whether the following characteristics of the criterion used were compatible with Community law:

(a) a weighting of 45% [in relation to ecological considerations?]

Provided that they comply with Community law, contracting authorities are free not only to choose the award criteria for a contract, but also to determine the weighting of those criteria. The weighting of 45% for this criteria was not felt to present an obstacle to an overall evaluation of the criteria applied.

(b) a lack of requirements permitting the accuracy of the information contained in the tenders to be effectively verified

Previous case law had shown that tenderers must be in a position of equality, both when formulating their tenders and when the contracting

Adam Wilkinson 4/9/08 11:26

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authority assesses those tenders. In particular this means that the award criteria must be applied objectively and uniformly to all tenderers¹⁹.

Objective and transparent evaluation of the submitted tenders relies upon the contracting authority being able to verify effectively whether the tenders meet the award criteria. Where a contracting authority sets out an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied (as was the case here), the principle of equal treatment cannot be ensured, as the transparent and objective evaluation of the tenderers cannot be confirmed.

The ECJ therefore confirmed that 'an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement²⁰.

(c) no defined supply period

The award criteria must be formulated in such a way as to allow all tenderers to interpret them in the same way. This assumes that the tenderers are reasonably well-informed and take a normal amount of care and attention when reading the award criteria.

In this case, the contracting authority did not set out the relevant time period in the criteria. There is an argument that, if the omission of the time period made it difficult or impossible for tenderers to understand that award criterion, then there could be a breach of EU principles. The two relevant principles are equal treatment and transparency. a requirement that tenderers state a supply volume to a non-defined group of consumers, allocating the maximum number of points to the tenderer stating the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption to be expected in the tendered contract.

¹⁹ SIAC Construction, Case C19/00 [2001] ECR I-7725

²⁰ Case C-448/01 paragraph 52.

The ECJ confirmed that an award criterion must be linked to the subject matter of the contract. In this case, the requirement was felt to unjustly discriminate against tenderers whose tender was fully able to meet the requirements that were linked to the subject matter of the contract (effectively restricting the contract to those tenderers capable of larger production quantities).

The most important point to take from this case is that, while using environmental criteria as part of identifying the most economically advantageous tender is acceptable, the accuracy of the information given by tenderers must be verifiable.

Insalud (C-234/03 – Contse SA v Insalud (Now Ingesa) (2005))

This case relates to the procurement of the supply of home respiratory treatments and assisted breathing techniques within two provinces in Spain. Tenderers were required to have at least one office open to the public for a minimum of eight hours a day, five days a week, in the provincial capital at the time the tender was submitted. In addition to this, points were scored where the tenderer, at the time of submitting the tender, satisfied the following criteria:

- Owning at least two oxygen-producing factories situated within 1000km of the province.
- Owning at least one cylinder-conditioning plant and at least one oxygen-bottling plant situated within 1000km of the province.
- The existence of offices open to the public for certain minimum hours in three particular towns in the province.

The ECJ ruled that such provisions were discriminatory and were not justified by imperative requirements in the public interest. It was apparent that the effect of these requirements was to favour the tenderer who was already present in the marketplace. A contractual undertaking to have an office available throughout the life of the contract would not have been prejudicial in the same way, and would have been consistent with the aims of the contract.

However, it was felt that to have those offices available at the time of the tender was disproportionate, and favoured those tenderers who were already established in the marketplace. Similarly, the existence of production, conditioning and bottling plants in the

region would require a substantial investment on the part of any tenderer who was not already established in the region.

Other Case Law of Relevance

1. *Du Pont de Nemours Italiana SpA v Unità Sanitaria Locale No. 2 Di Carrara* [1991] 3 CMLR 25 and *Laboratori Bruneau Srl v Unità Sanitaria Locale RM/24 De Monterotondo* [1991] 1 CMLR 707

The ECJ held that Italian legislation, which required all public bodies to obtain at least 30 percent of their supplies from undertakings established in the Mezzogiorno region as a reserved quota, discriminated against products originating in other Member States.

2. *EC Commission v Italy* [1991] 2 CMLR 115

Italian legislation dictated that only companies in which all or a majority of share capital was in public ownership could be awarded certain contracts involving the purchase of equipment, supplies and design of some data-processing and technical management systems.

The ECJ held this legislation to be discriminatory in that restricting tenders for public works to state controlled organisations discriminated against non-Italian State controlled organisations.

3. *Robert Fearon and Company Ltd v Irish Land Commission* [1985] 2 CMLR 228

The ECJ held that the Irish Land Commission was not discriminatory in only granting exceptions to the compulsory purchase of land to those who live on the land or in the immediate neighbourhood. Where the owner of the land was a limited company, each member had to live on the land or in the immediate neighbourhood for the company to qualify for the exemption.

4. *EC Commission v Kingdom of Denmark (the Storebaelt case)* C243/89 (1993) ECR I-3353

The ECJ found that a condition requiring the use of the greatest possible amount of national products and labour was discriminatory.

The ECJ also stated, however, that "observance of the principle of equal treatment of tenderers requires that all tenderers comply with the tender

conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers". If the contract conditions comply with Community and national legislation, a contracting authority can reject tenderers who do not comply with contract conditions.

Reconciling the case law

Beentjes and Nord-Pas-de-Calais, to the extent that they relate to the employment of people from specified localities, appear to be in conflict with the two Italian cases concerning Unità Sanitaria Locale in which the condition of using a percentage of products from specified localities was found to be discriminatory. This may explain why the Commission, in its Interpretative Communication on the use of Social Clauses²¹ has opined that, contrary to the decisions in Beentjes and Nord-Pas-de-Calais, a condition requiring the employment of long-term persons resident in a particular region would be discriminatory.

The decision in Concordia Bus Finland is helpful in this regard as it makes the conditions relating to the possible imposition of social clauses clearer. This is consistent with the consensus reached with OGC that if employment and other social requirements are included within the core package of what is being provided, they can be obtained in a manner which does not infringe EC procurement requirements.

The Interpretative Communications

The Commission, in 2001, published two Interpretative Communications on Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement²² (the 'Social Communication') and on Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement²³ (the 'Environmental Communication') which state the Commission's views on incorporating clauses into the procurement process and its determination to promote ownership of social issues within the private sector. These dispelled some of the uncertainty over the ability to incorporate social and environmental considerations into the public procurement process.

²¹ Com(2001) 566 final

²² Com (2001) 566 Final

²³ Com (2001) 274 Final

There has been an increasing amount of attention given to environmental considerations in public contracts, particularly in reference to the sustainable development agenda. The European Commission has recognised the need to reconcile its procurement policy and its longer-term vision for sustainable development. There have been a number of developments in this area, including the inclusion of environmental characteristics as something permitted under the new consolidated directive as a consideration in determining which contractor has offered the most economically advantageous tender.

The Interpretative Communications remain useful guidance on the incorporation of considerations, even after the implementation of the consolidated directive. The European Commission has also published a handbook on environmental public procurement entitled 'Buying Green!'²⁴. In October 2003, the OGC and DEFRA published a 'Joint Note on Environmental Issues in Purchasing'²⁵, which also provide useful guidance.

1. Environmental Communication

The European View

In this Communication the Commission stated that "If different possibilities exist for fulfilling their needs, contracting authorities are free to define the subject matter of the contract in a way that they consider to be the most environmentally sound, even through the use of variants" and that "contracting authorities have the possibility to either prescribe the solution chosen, or avoid prescribing requirements which would lead the tenderers to offer products whose production process would damage more [of] the Environment. They could, for example, require recycled paper which is not bleached".

The Commission took the view that there are two ways to incorporate environmental requirements into the procurement process: first by ensuring that any environmental requirement can be classified as an "economic advantage" to the contracting authority so that the requirement simply falls within the normal process for determining the most

²⁴ Buying Green! A handbook on environmental public procurement, Commission Staff Working Document, SEC(2004) 1050

²⁵ Joint Note on Environmental Issues in Purchasing, Office of Government Commerce and Department for Environment, Food and Rural Affairs, October 2003

economically advantageous tender, and secondly by placing the environmental requirement as an additional criteria.

The Commission encourages contracting authorities to take account of the whole life costs of a contract, which would include considerations into the costs of treatment of waste or recycling and the energy consumption of a building. This is consistent with the need to achieve value for money under OGC policy.

In this Interpretative Communication, the Commission gives several examples of environmental considerations that can provide contracting authorities with an economic advantage. The key point for contracting authorities to remember is that the environmental conditions must relate to the nature of work to be carried out or the manner in which it is done, not the way the tenderer runs its own organisation.

In the consolidated directive of 2004, "environmental characteristics" are included within the list of considerations which can be used when deciding which tender is the most economically advantageous.

The UK View

The OGC / DEFRA joint note on environmental issues in purchasing reinforces the message that environmental considerations can successfully be included in public procurement, without falling foul of the EU procurement rules or a contracting authority's value for money obligation. The note starts by reminding authorities:

*"It is important to understand that the Government's policy of achieving value for money in procurement ... applies to the **award** stage of the procurement process. It is for Departments to decide what to buy and to set the **specification**, in the context of their overall objectives, and subject to the normal public expenditure tests of need, affordability and cost-effectiveness. It is at this earlier stage that there is most scope to consider environmental issues ..."*

It then goes on to say:

“For example a Department can choose to purchase low emission vehicles (even where they might be more expensive than standard vehicles). They must, however, achieve value for money in awarding the contract, i.e. the contract for low emission vehicles should be awarded to the bidder offering the best combination of whole-life cost and quality to meet the requirement. And the requirement itself, for low emission vehicles, must be tested for need, affordability and cost-effectiveness in the context of the Department’s overall objectives. However, this is a matter of prudent financial management generally rather than specifically one of procurement policy.”²⁶

2. Social Considerations

The European View

As mentioned previously, the Commission, in the Social Communication, defines “social considerations” as covering a wide range of issues and fields including:

“measures to ensure compliance with fundamental rights, with the principle of equality of treatment and non-discrimination (for example, between men and women), with national legislation on social affairs, and with Community directives applicable in the social field. The expression “social considerations” also covers the concepts of preferential clauses (for example, for the reintegration of disadvantaged persons or of unemployed persons, and positive actions or positive discrimination in particular with a view to combating unemployment and social exclusion).”

The Social Communication on social considerations in public procurement takes a similar line to the Commission’s Environmental Communication and there is cross-referencing between both.

Like the Communication on environmental considerations, this Communication sets out how the Commission considers social considerations can be worked into each stage of the procurement process, giving examples of what, in the Commission’s opinion, are considerations which are acceptable within the ambit of Community legislation and case law.

²⁶ Joint Note on Environmental Issues in Purchasing, p1

The Commission emphasises the need for social considerations to accord with Community law, and in particular the principles concerning anti-discrimination, the free movement of goods and freedom to provide services. In this Interpretative Communication the Commission largely follows ECJ judgments in laying down what it considers to be legally acceptable. For example, the Commission states that the use of reserve price or quotas is discriminatory as was decided by the ECJ in *Du Pont de Nemours Italiana Sp A v Unità Sanitaria Locale No.2 Di Carrara*²⁷ and *Laboratori Bruneau Sri v Unità Sanitaria Locale RM/24 De Monterotondo*²⁸.

The UK View

The OGC recently published its Guidance Note on [Social Issues in Purchasing](#)²⁹. In a similar way to the EU Commission's Interpretative Communication, it identifies the following points at which social issues can be incorporated into the procurement process:

- Before a particular procurement begins;
- When deciding the user requirement;
- When writing the contract documents for a procurement; and
- Once the contract is being performed.

In terms of general advice, it recommends considering social issues from the outset, feeling that 'early action is more likely to be successful'. However, it also recommends considering:

...highlighting the importance of certain issues and clearly relevant social clauses (e.g. related to legislation) to contractors outside the formal procurement process e.g. training and development opportunities for staff, comprehensive policies on Corporate Social Responsibility (CSR). This may include working with contractors on a voluntary basis to improve their understanding and performance in relation to sustainability issues.

²⁷ [1991] 3 CMLR 25

²⁸ [1991] 1 CMLR 707

²⁹ Social Issues in Purchasing, Office of Government Commerce, February 2006

Voluntary measures are emphasised in the guidance as an alternative to using social clauses in contracts.

Both the Interpretative Communications broadly discuss the following segments, each discussed at other points in this document:

- [Definition of the subject matter of the contract;](#)
- [Technical specifications;](#)
- [Selection of candidates;](#)
- [Technical capacity;](#)
- [Award of the contract to the most economically advantageous tender;](#)
- [Execution of the contract / contract management;](#)
- [Additional award criteria;](#)
- [Abnormally low tenders;](#) and
- [The contract itself.](#)

As mentioned elsewhere (in [Case Law](#)), the Commission is of the opinion that Nord-Pas-de-Calais³⁰ means that contracting authorities can use additional criteria to decide between two economically equivalent tenders. This is not a totally secure way to implement social considerations into the procurement process and the Commission has given its own advice on how social considerations may be implemented into the different stages of the procurement process.

Small and medium-sized enterprises

A key strand of public procurement policy relates to the opportunities provided for small and medium sized enterprises (SMEs). A 'small' business is usually defined as one with less than 50 employees, whilst a 'medium-sized' one has more than 50 but less than 250. Despite accounting for over 50 percent of all employment and turnover in the UK, SMEs are often perceived as being at a disadvantage in the public sector marketplace.

³⁰ EC Commission v The French Republic C225/98

In the report [Smaller Supplier...Better Value?](#), the OGC explain that the following reasons are given for SMEs being discouraged from tendering for public sector contracts:

- Not being able to find out about opportunities
- Believing that the processes involved in bidding are unnecessarily complex and costly
- Current trends in public sector procurement towards larger and longer contracts, and rationalising the number of suppliers, meaning that smaller businesses often find the resulting contracts to large for them.
- Believing that public sector procurers perceive a risk of contracting with diverse forms of business, like social enterprise, where their value can be misunderstood and overlooked.³¹

According the SME Concordat³² SMEs can often provide value for money for contracting authorities, providing a number of benefits over larger businesses. The Concordat states that:

- *“They can often respond quickly and flexibly to customer needs*
- *They can be a source of innovation, ideas and products*
- *They can offer cash savings, improved quality, service and effectiveness*
- *They are frequently close at hand*
- *Some, like social enterprises and those operating in the voluntary and community sector, may have better access to hard to reach customer groups*
- *They may attach more importance to doing business with a Local Authority*³³

Public sector procurers are being encouraged to make their market more accessible to SMEs. ‘Smaller Supplier ... Better Value?’ gives guidance on how the public sector can encourage SMEs to tender for their contracts:

- (1) **The procurement process** – contracting authorities are encouraged to:

³¹ Smaller Supplier ... Better Value?, Office of Government Commerce and Small Business Service, Updated 2005

³² [Small Business \(SME\) Friendly Concordat: Good Practice Guide, Local Government Association](#) / DTI / ODPM, March 2005

³³ Small Business (SME) Friendly Concordat: Good Practice Guide, , p10

- (a) Use a standardised pre-qualification questionnaire for low-value requirements, as supplied by the OGC.
 - (b) Ensure the process is appropriate to the size and complexity of the requirement
 - (c) Keep tender documents concise and jargon-free
 - (d) Avoid abortive procurements or delays, by ensuring that procurements are based on sound business cases and have been fully approved
 - (e) Set realistic timetables and keep tenderers informed
 - (f) Take into account the time that companies new to the public sector will need to respond to requests for information
- (2) **Where to find opportunities** – contracting authorities are encouraged to:
- (a) Publicise opportunities widely, using the relevant trade press, as well as publicising in the obligatory places (i.e. OJEU notices for larger contracts); use organisations such as Business Links and Euro Info Centres to publicise opportunities
 - (b) Make OJEU advertisements clear and concise, giving as full a description as possible of the goods / services / works required
 - (c) Refresh supplier lists regularly, and make it easier for new suppliers to become listed.
 - (d) Use their own website as constructively as possible.
- (3) **Contract size** – contracting authorities are encouraged to:
- (a) Consider the advantages of dividing a contract into lots
 - (b) Be open to the possibility of supply chains, allowing SMEs to work as sub-contractor where they are not able to bid for a complete contract.

The SME Concordat

The National Procurement Concordat for Small and Medium-sized Enterprises is a statement of principles to encourage effective trade between local authorities and SMEs. It sets out a number of commitments made by local authorities that sign up to the Concordat under the following headings:

1. Procurement strategy

Local authorities commit to publishing a procurement strategy which will include certain commitments:

- To the role procurement plays in delivering the authority's objectives and its contribution to the community strategy, workforce issues, diversity and equality and sustainability.
- To how the authority will encourage a diverse and competitive supply market
- To ensure that the authority's approach to individual contracts is supported by a sound business case and options appraisal
- On occasions where the authority decides best value is to be achieved by aggregation, longer term contracts or framework agreements, to invite bidders to demonstrate their track record in achieving value for money through effective use of their supply chain.

2. Access to contract opportunities

Local authorities commit to publishing on their websites:

- Guidance for suppliers on how to do business with them
- Details of forthcoming bidding opportunities
- Contact details for each contract, with appropriate links to any regional site and the national public sector opportunities portal.

3. Details of key suppliers

Authorities commit to advertising their contracts using a range of publications and other means in order to encourage greater diversity and competition

Authorities further commit to giving potential suppliers the opportunity to discuss a procurement, and to work with prime contractors to establish the contribution that can be made by small firms, ethnic minority businesses, social enterprises and voluntary and community sector suppliers can make.

4. Fair tender processes

This includes a general commitment to fairness in applying rules and policies, and a more specific commitment to:

- Ensuring that all tenderers have equal access to information
- Keeping the tender process simple to minimise the cost to suppliers
- Using an authority-wide pre-qualification questionnaire containing common core questions.

- Assessing potential suppliers against published pre-qualification and tender evaluation criteria.

There are limited ways in which a contracting authority could use social clauses to encourage the participation of SMEs in the public sector marketplace. A direct specification that tenderers must be SMEs would clearly be discriminatory against larger organisations. It might, however, be possible for contracting authorities to encourage large contractors to use SMEs as subcontractors, where this is relevant. However, as seen above, guidance indicates that the best approach by which contracting authorities can utilise the wealth of benefits that SMEs provide is by making it as easy as possible for SMEs to participate in the tendering process, and to allow the natural benefits of those SMEs to reveal them as the preferred tenderer, should this be the case.

Case Studies – examples of good practice in other parts of Europe

Please click to view the full text and also see summaries below.

- [Vergabe ABM – Germany](#)
- [Aarhus, Denmark](#)

Vergabe ABM – Germany

This case study relates to measures that used public works to provide much needed job opportunities for unemployed people of various categories. The persistent and large structural unemployment in Germany, particularly in the Eastern Regions, has resulted in a wide range of support measures for unemployed people; at the same time, the entire social security and unemployment benefits system has been radically changed and amalgamated through the measures known as Hartz II to IV. This case study focuses on a measure known as Vergabe ABM³⁴, which practically ceased to operate by the end of 2004, although it still appears to be on the statute books.

Vergabe ABM can broadly be described as a contracted out employment creation scheme. Private companies were invited to tender for public contracts containing requirements to employ staff nominated by the local labour exchange, initiated by local authorities or other public bodies and intended to provide employment opportunities.

³⁴ ABM = ArbeitsBeschaffungsMassnahme = Labour creation measure

Once funding support for ABM projects had been agreed, these were tendered in open tender following all normal procedures. The social clause element in these tenders related to the requirements to employ ABM people on the contracts and could extend to training and skills development issues. Tendering the works followed conventional practice. Tenders were normally open and invited nationally, with exceptions for low value projects. The invitation to tender described the circumstances and conditions surrounding the project and any special aspects relating to ABM participation.

Prospective tenderers had to be informed in detail of:

- the scope and type of work to be done by ABM participants;
- the number of ABM people involved and their qualifications;
- pay detail and other employment conditions;
- documentation required of them for calculation of ABM subsidies.

The number of contracts that were let by public sector bodies under the Vergabe ABM category were considerable. Delivery organisations were generally private sector organisations such as building firms, garden contractors and similar. Works contracted out included building and interior renovation, road construction, leisure facilities, and landscaping. There is no evidence of contracts that were large enough to have required an EU wide tender.

The Federal Labour Agency paid the personnel costs for ABM and the employer's share of social security contributions. Wages on Vergabe ABM schemes were limited to 80 percent of the going market rate, with exceptions.

Municipality of Aarhus – Denmark

This case study originates from the City of Aarhus on Jutland, Denmark. It is based on a number of service contracts that have been let at the pilot stage of introducing social clauses in the city together with information from a contract that has recently been let and started to operate at the beginning of January 2006.

It was felt that the demand for social clauses could only be made an absolute requirement and cannot be used as an award criteria and hence as a competition criteria. It is essential to

show in the contract when and how the social clauses should be implemented. The social clauses applied in this case study are thus contract clauses.

All the clauses have been tested at national and local level by senior legal executives to ensure they meet the requirements of EU legislation. Clauses are related specifically only to the contract in hand and are valid for the duration of the contract only. In Aarhus these clauses, which are now being used in all contracts, are tailored to the size of contract. Aarhus Kommune made an in-principle decision to use social clauses for all their contracts, and the pilots were based on that decision.

There is a strong financial incentive for local authorities to pursue these clauses as there is a direct advantage to the local authority in reducing the number of people on employment or disability benefits, as these are paid for by the local authority. Any reduction in the number of individuals that require such benefits has a direct beneficial impact on the local authority's financial situation.

There was a wide range in the size of contracts, and social clauses, for example requiring 10% of employees to be in certain categories, appeared unrealistic for smaller contracts. The consultants recommended that in future social clauses be adapted to the size and complexity of the contract in hand and be used only for contracts over a certain size, a recommendation that has been accepted and built into guidance for the use of social clauses.

The Danish social clauses referred to in this case study have been drafted carefully, with the support of legal experts at national and local level to ensure they are in conformity with EU procurement regulations and would stand up to legal challenges. The financial implications of the contract clauses themselves appear to be marginal, and those costs that do arise are saved in any case through the reduction of direct support to the individuals employed. The case studies do not provide a full costing which includes training need, potential mentoring, support by colleagues etc.

State aid

“State aid” is one way in which competition in the European Union can be distorted, and for this reason it is generally forbidden. The basis of the rules is at Article 87(1) of the EC Treaty, which states:

“Save as otherwise provided by the Treaty, any aid granted by a Member State through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.”

‘Aid’ is widely defined and can include grants, rent-free periods, and even tax breaks as well as a more obvious cash handout. The rules apply to Member States and to linked public bodies, such as local authorities and central government departments. ‘Undertaking’ includes any organisation carrying out economic activity, which has been held to include not-for-profit bodies such as charities.

“State aid” is increasingly being considered by public bodies in determining to what extent they can provide financial assistance to other organisations in support of their businesses. In the context of public procurement, the EC Treaty prohibition on State Aid has been considered by Jens Hillger in the journal *Public Procurement Law Review* (“The Award of a Public Contract as State Aid within the meaning of Article 87(1) EC” (2003) 12 PPLR Issue 3). A summary of his article is attached in the Annex to this note.

In the context of the UK, the European Commission gave a ruling on whether the arrangements contemplated for the London Underground Public Private Partnership were compatible with the common market and the EC Treaty rules on State aid. It concluded that the PPP contracts, procured using the negotiated procedure with prior advertisement, did not raise any State aid concern (C (2002) 3578, 02.10.2002).

In connection with sustainability considerations, State aid is best avoided by taking the following steps:

- include sustainability requirements in the core requirement of the procurement;
- in determining the criteria for the economically most advantageous tender or offer, include in the qualitative elements ways of measuring how the contractor will fulfil the sustainability requirements in the brief; and
- hold a competition in which the bidders submit a market price for the whole package, including the sustainability requirements.

Where competition is not undertaken in the grant of a contract (for example, because it is for a "Part B" service which is not required to be advertised and tendered in competition under the EC rules) the various tests for State aid must be considered:

- *does the public contract have an element of aid?* This may not be the case where the procuring authority is paying for the value of community benefits delivered – the issue is whether market price is being paid. This could be assessed by an independent expert;
- *is the aid granted by a public body?* This includes central, regional, or local authorities, and even private bodies controlled by the State.
- *does the aid favour certain undertakings?* The definition of an 'undertaking' is very wide and covers any body engaged in economic activity, even non profit-making bodies such as charities.
- *does the aid distort or threaten to distort competition?* This includes a potential threat to competition: the DTI's State Aid Policy Unit ("SAPU") warns that "almost all selective aid will have potential to distort competition – regardless of the scale of potential distortion or market share of the aid recipient"³⁵
- *does the aid have an effect on trade between Member States?* The view of SAPU is that the test includes potential effects and so "aid for almost any selected business or economic activity is capable of affecting trade between States"³⁶; this would presumably cover many Part B services such as health and social services.

An investigation from the Commission may come from the Commission directly, but may also come from an aggrieved competitor who is unsuccessful in the procurement process.

³⁵ The State Aid Guide, September 2005 edition

³⁶ The State Aid Guide, September 2005 edition

It is worth taking the time and effort to investigate the potential for any State aid that is incompatible with the Common Market at an early stage, since the consequences of failing to do so may be serious. The ultimate sanction is repayment of the aid plus interest at a commercial rate (5.33% in 2006 plus an additional 4% where no security is taken).

For the reasons stated above, when planning a major procurement which might include an element of State aid which is prohibited, it is a good idea to consult the Department for Business Enterprise and Regulatory Reform's State Aid Branch (formerly the State Aid Policy Unit of the DTI) at business case stage, with help of the sponsoring Government department if it has an interest in the strategic nature of the project. BERR's State Aid Branch can help advise whether or not the European Commission should be notified of the project.

Chapter 5 – Policies

Summary

Local authorities produce community strategies with their partners. The nature of the local authority and the partners they are working with will determine how 'sustainability focused' their strategies are. The increased emphasis on community participation through the Local Government Act 2000 may help towards a stronger focus on sustainability considerations in community strategies.

The Local Area Agreement maps out how the community strategy will be delivered. It will focus on the main issues, if sustainability considerations a priority of the community they are likely to feature in it. Other sustainability initiatives can then stem from this.

What to look for in a Sustainable Community Strategy

All local authorities are expected to work with partners to produce a community strategy (see [Why the Sustainable Community Strategy is so important](#)). These vary in style and content between authorities. However, they are not usually drafted as a basis for supporting sustainability matters in the partners' procurements or other agreements. This may arise because a range of partners are involved in the drafting process, including some to whom the approach is not relevant, and some to whom it not a current priority (for example, even though targeted recruitment and training requirements (TR&T) would help reduce demand for their services, NHS Trusts do not prioritise this particular consideration).

The community strategy is intended to encourage a multi-agency approach. This is not easy in relation to TR&T. The lead agencies in this area tend to be Jobcentre Plus, the Learning and Skills Council, and Connexions. All of these organisations are used to working with non-employed people, but are much less used to working with employers and encouraging them to recruit such people. The local authority could provide a more balanced approach, but is not seen as the lead agency.

The Local Government White Paper³⁷ states, "The Local Government Act 2000 and other reforms...changed the relationship between councils and other public, private and voluntary

³⁷ DCLG 'Strong and prosperous communities' The Local Government White Paper (October 2006) [Volume 1](#), [Volume 2](#), [Summary](#)

bodies operating in their area and with local people. Local authorities were placed under a duty to develop a Community Strategy for the area with local citizens and with public and private sector partners. Councils were also given wide new powers to take actions to improve the economic, social and environmental well-being of places.”

The increased emphasis on community participation should result in a more express consideration of sustainability and employment and skills in a local authority’s Community Strategy.

- **Case studies:** See the Government’s Sustainable Development website <http://www.sustainable-development.gov.uk> for useful further information. This includes the following case studies focussing on a number of local authorities have already begun to embed sustainable development into their community strategies and local area agreements:

- [Oldham Partnership - planning for sustainable communities](#)
- [Durham's LSP - sustainability appraisals](#)
- [Holistic thinking embeds sustainability into Birmingham's LAA](#)
- [Kingston's LAA builds on sustainability in community plan](#)
- [Shropshire's LAA - prioritising 'sustainable communities'](#)
- [Triple bottom-line built into Cornwall's LAA](#)
- [Kirklees Metropolitan Council - a sustainable agreement](#)

How that impacts on other Council policy documents (e.g. procurement; planning)

As has already been mentioned (see [What to look for in a Sustainable Community Strategy](#)) the Local Government White paper states, “Local authorities are already under a duty to prepare a Sustainable Community strategy which sets the strategic vision for an area. We will now require county and unitary authorities, in consultation with local partners, to prepare a delivery plan for the strategy – known as a Local Area Agreement.”³⁸

³⁸ Executive Summary

Local Area Agreement

The negotiation of a Local Authority Agreement (LAA) may involve similar issues to the Sustainable Community Strategy.

Under the Local Government White Paper³⁹, LAAs will be the delivery plan for the Sustainable Community Strategy focused on a relatively small number of priorities for improvement. Some of these will be agreed in negotiation with Government and will reflect national priorities. Others will be purely driven by the LSP and will concentrate on other more local priorities affecting local citizens and communities. LAAs will then form the central delivery contract between central Government and local government and its partners.

In this multi-agency policy development context the economic development officers of the local authorities need to make a strong case for the inclusion of text that will support the intention of the local authority and other partners to use their procurement and other activities to ensure for example that opportunities are targeted at local residents⁴⁰ who are disadvantaged in the labour market. Equally it is for other appropriate officers to target other sustainability issues in this way.

Other policy documents

- In general, the Sustainable Community Strategy will link with a local authority's policies on matters such as procurement and planning. As discussed above (see [Why the Sustainable Community Strategy is so important](#)) the Sustainable Community Strategy provides a platform from which local authorities can springboard sustainability initiatives, and a policy document from which the justification for such initiatives can be drawn. It is clear from this just how much of a link the Sustainable Community Strategy could be between different local authority policies and departments. Please see [Sunderland City Council's Corporate Procurement Strategy](#) as a *[good example of joined-up policy in this area]*.

³⁹ paragraph 5.35 [Volume 1](#), [Volume 2](#), [Summary](#)

⁴⁰ It is appropriate to refer to 'local' in the context of a Community Strategy, but this should not translate into 'local employment' requirements in a procurement context.

Mapping a Council's resources to make sustainable procurement happen

Resourcing and coordinating

A final concern for the gatekeepers to contracts and agreements is how to specify, measure and monitor the sustainability requirements. Such requirements may be outwith their previous experience, and are not provided for in standard documents or precedents.

Issues of measurement, monitoring and precedents are addressed elsewhere on this website (see [Ensuring there is the capacity to monitor and measure](#)). However, use of these will require new organisational arrangements, in particular the involvement of economic development officers in transactions that have not traditionally required their involvement. For example, the procurement of a schools building programme would traditionally involve a client department (Education) and service departments (perhaps Procurement and Legal). To include targeted recruitment and training in the building programme requires the involvement of recruitment and training officers as both a client (they are representing the Authority's desire to purchase these outcomes) and as a service department that can advise on what outcomes should be specified and the way these can be resourced without impacting on the school building budgets.

Case Studies

[Birmingham City Council Climate Change Strategy Consultation](#)

[Sunderland City Council Procurement Strategy](#)

Chapter 6 – Business Case

Summary

Business Case

Business cases involve a detailed insight into what the contracting authority requires. Sustainability considerations can be incorporated into the business case if they represent value for money, they must be measurable and quantifiable in order to assess this. It is far easier to incorporate sustainability considerations relating to a core part of the contract and not a secondary factor.

Subject Matter

Sustainability considerations can be included in the subject matter of the contract. Contracting authorities can specify their preferred method that meets their sustainability requirements, provided this does not result in tenderers from other states being treated unfairly or restricted access to the contract.

As with the business case, wherever possible, sustainability considerations should be included as a core requirement. If core requirements have already been decided and the tender process started they can be added as additional or secondary requirements. If the contracting authority feels they do not have a sufficient policy basis to include sustainability requirements as a core requirement they can also be added as additional or secondary.

Incorporating sustainable procurement into good practice for business case preparation

Before embarking on a procurement, a contracting authority must work out where and how sustainability is relevant to the procurement. This must then be worked into the business case for the procurement.

In preparing a business case a contracting authority must consider many issues including:

- ensuring that financial provisions are made for the entire project, including environmental and social outcomes such as training needs;
- identifying who the beneficiaries of the outcomes will be; and
- confirming that documents adequately support the proposed scope of the procurement (for example, a local authority's community strategy and Best Value performance plan or improvement plan).

Once a business case has been developed, a contracting authority should be able to appreciate fully all the issues involved and what is required of a contractor. Preparation of the business case may entail a soft market-testing exercise to scope with potential contractors the level of community benefits required.

Once a contracting authority has prepared its case for procurement, it must be able to confirm that the business case is robust and feasible. For social considerations this will mean ensuring that it is sufficient to achieve the contracting authority's objectives (including any social or environmental issues) and that it will assist in providing wider planned social or regenerative benefits.

To be able to justify a business case fully, an authority should draft a high-level definition of its project requirements to ensure that there is a clear and agreed understanding of the business goals and of what is required of contractors to be able to meet those goals.

Where any sustainability considerations are included in the procurement process, they must still result in value for money (VFM), in addition to the economy, efficiency and effectiveness of the contract's objective. This is very difficult to achieve if the considerations are not part of the core purpose of a contract but are a secondary factor. In the large part, this will be determined by how the procurement is structured, and how the business case for the procurement has been prepared. For example, in a contract for the construction of a community centre, a condition requiring that a percentage of long-term unemployed people be engaged by the contractor to construct the community centre, a secondary factor, will not achieve VFM in the community centre. The number of unemployed people utilised on the project has no effect on the quality of the community centre and may in fact increase the cost of construction should those people require training.

Conversely, if the core purpose of the contract is both the construction of a community centre and the regeneration and sustainability of the community, the training of long-term unemployed people would provide VFM as an effective way of meeting the customer's requirements.

Whole Life Costs

The OGC / DEFRA Joint Note on Environmental Issues in Purchasing separates whole life costs into three categories, Acquisition Costs, Operating Costs and Disposal Costs, and gives the following examples of whole life costs that may relate to environmental issues:

- Acquisition Costs
 - Initial purchase price
 - Installation
 - Transport

- Operating Costs
 - Energy/water consumption
 - Annual licence fees
 - Maintenance
 - Indirect costs (e.g. less energy efficient IT equipment will produce more heat, which putting greater pressure on an air conditioning system, increasing costs).
 - Staff
 - Training
 - Insurance premiums
 - Environmental taxes

- Disposal Costs
 - Site clean up
 - Refuse collection
 - Recycling (recyclable products may have lower disposal costs)

A contracting authority must also ensure that all of its social objectives can be quantified and measured. This will assist the contracting authority in establishing that the sustainability aspects of the procurement contract represent value for money. ***[Can we refer to NEF's tool on valuing this?]***

Opportunities for market sounding the widest social and environmental outcomes

Preparation of the business case may entail a soft market-testing exercise to scope with potential contractors the level of community benefits required. Engagement with users can prove vital to the successful management of a contract. As discussed in relation with [poor performance and contract failure](#), requirements which are well thought-out and relevant to the contract will generally be more successful, and engagement with the users is an important part of this process.

- Case study: [Raploch URC and Stirling Council Roads Management](#)

The time and money spent in consultation are justifiable where this is used to tailor the contract requirements to the needs of the people and organisations it will affect. This is something which can usefully be done before finalising a tender, but also throughout the life of a contract to ensure that requirements remain the optimum means by which to achieve the desired goals, and that the goals themselves remain the same.

Stakeholder involvement

NHS PASA (Purchasing and Supply Agency) appear to take advantage of stakeholder consultation within their procurement process. An example of where stakeholder involvement was key to successful implementation was that of catering for meals for ethnic minorities in hospitals. By consulting cultural and religious leaders in the attempt to achieve ethnic food that was both nutritious and authentic, PASA ensured that their meals were appropriate and beneficial.

Similarly, consultation with stakeholders in the School Fruit and Vegetable Scheme ensured greater success for that project. While key stakeholders such as the Food Standards Agency were consulted as part of the procurement process, school children's preferences were also researched.

- Case studies: more information on the sustainable procurement of NHS PASA is available from their website at: <http://www.pasa.nhs.uk>

Understanding the Core Specification

Definition of the Subject Matter of the Contract

The European Commission identifies this as the first opportunity to take into account sustainability in a contracting authority's procurement. Put simply, the contracting authority can decide to procure something that is environmentally, economically or socially acceptable. The Commission suggests that at this stage contracting authorities can choose a product or service that accords with its objectives and *"if different solutions exist which would meet the needs of a contracting authority, the contracting authority is free to define contractually what it considers as corresponding best to its social concerns in the subject matter of the contract, and it may also use variants in this respect"*.

The Communication states that *"[c]ontracting authorities are free to define the subject matter of the contract, or alternative definitions of the subject matter through the use of variants, in the way that they consider to be the most environmentally sound, provided this choice does not result in a restricted access to the contract in question to the detriment of tenderers from other Member States"*⁴¹

Similarly, the OGC guidance is that *"at this stage, prior to setting a specification, there is little in terms of procurement policy or the EU rules that affect the scope to take sustainable development into account"*. The guidance recommends that:

"Procurement staff should be aware of which social policy priorities the Government and governmental organisations are pursuing in the UK and abroad. This will help purchasing staff, on a contract-by-contract basis, to identify which social policy considerations are relevant to the procurement they are undertaking, and the scope to integrate these aims into their particular user requirements."

The Core vs Secondary Argument

Core Requirements

Any issue that is part of what is being purchased – the 'subject of the contract' – should be within the powers of the procuring entity to buy, and have policy support. The latter is

⁴¹ *ibid.*, p8

necessary to avoid arbitrariness that would not be compatible with the requirements for propriety and regularity. They should also comply with the EU procurement rules, which can usually be accommodated in the procurement procedure and contract documentation. However, within these broad parameters there is nothing to prevent a relevant issue being included in the basket of goods, services or works that the procuring entity decides to buy.

It is commonplace for different core requirements to be given a different weighting e.g. in assessing the relative strengths of potential bidders in putting together a tender list. In this process a particular sustainability concern could be given a low weighting without affecting its status as being a core requirement.

Secondary or Additional Requirements

Sustainability concerns that a procurer wishes to see delivered but which are not part of the core requirements have been termed 'secondary' or 'additional' requirements.⁴² These should not influence the award of the contract and therefore should not be included in the selection of bidders or the specification. However, they can be introduced as contract conditions provided that "*They ... [are] ... able to be met by whoever wins the tender, from the time at which the contract starts.*"⁴³ Circumstances where a procurer might choose to include social issues as secondary or additional matters include:

- Where the decision to introduce sustainability has been taken after the decision about core requirements has been made, and possibly after the procurement process has been started, for example at the time of issuing the invitation to tender;
- Where the procuring entity does not feel it has a sufficient policy basis for procuring the social issues as a core requirement and therefore wants to exclude it from the award process.

The European case law and EU guidance is largely directed at the introduction of social issues as secondary or additional requirements i.e. as contract conditions. However, as the OGC's Social Note makes clear, it is possible, and perhaps preferable, for social issues to be a core requirement.

⁴² *Social Issues in Purchasing*. OGC, London, February 2006, page 15.

⁴³ *Ibid.*, page 28

Creating verifiable performance requirements

Sustainability requirements have to be verifiable to be permitted under EU law. This could take the form of quarterly and cumulative monitoring information that will provide evidence of the implementation of the method statement (see [Requirements for method statements as part of bid](#)).

Example: Social Clauses, Local Employment – [Glasgow Housing Association \(GHA\)](#)

Monitoring and Evaluation

This case study looks at ways in which GHA uses monitoring and evaluation processes to demonstrate the value of social clauses. For GHA, the core aim of the clauses is to get more local people into employment. To help achieve this aim, it uses a standard pack of monitoring documents and encourages contractors to complete them. GHA has also adapted its system over time, with a view to improving it.

The monitoring requirements relating to local employment are set out in a Constructor Training and Employment Monitoring Pack. This contains:

- an overview of the monitoring arrangements;
- copies of the monitoring forms:
 - New Start Personnel Record
 - Employee leaver form
 - Quarterly Report form
- New start definition flow-chart
- Guidance and a Glossary of terms for completing the Quarterly Report.

Before starting an element of the works, all contractors appointed meet together. GHA sends the monitoring pack to the contractors before this meeting. It is then discussed with each individual contractor at GHA monitoring meetings. These meetings are intended to reaffirm the commitment to monitoring and to explain the format and reporting methods. Officers from the GHA Team are subsequently available on an on-going basis to answer any queries, provide advice on completion of the forms, and check submissions.

So far all contractors have completed the monitoring forms although there has been some reluctance by one contractor in relation to the personal information contained in the New Start Personnel Record.

Monitoring requirements and the key performance indicators (KPI's) against which performance is judged should obviously be closely linked. For both it is important to establish standard and well-defined units of measurement.

In GHA the early documents referred to the number of jobs that would be created or available to local people. However, `a job` in the construction industry can be of short duration and so the standard measure that was adopted by GHA was the % of the works undertaken by the target groups. To achieve this the standard unit of measurement of a person-week⁴⁴ was adopted, but the Method Statement required a projection of both person-weeks and the number of staff required (full-time equivalents) to deliver these.

The original contracts tendered by GHA⁴⁵ were developed before the detailed monitoring arrangements were set up. They therefore determined what monitoring and data processing arrangements should be established by both the contractor and the client. This had resource implications for both parties. It was recognised that GHA would have to develop a good database to receive and process the monitoring information that would be required to properly verify the contractors` performance against the employment and training requirements.

A good database has been established by GHA employing an IT graduate sourced through the Scottish Enterprise `Graduate for Business` Scheme.⁴⁶ However, the design of the actual monitoring arrangements (and the associated data-base) is different from that anticipated in the early contract documents. The latter anticipated a system that would obtain information on every person engaged on a GHA contract, and then the number of person-weeks that they delivered through a weekly form that listed the time each person had spent on the contract. This would theoretically provide verifiable information on the total labour used and

⁴⁴ Equivalent to a person working for five days

⁴⁵ E.g. Works Type 1 Roofing & External Wall Cladding

⁴⁶ The original one-year appointment has been extended. A person with excellent IT skills was required to design efficient and effective monitoring arrangements.

create a database that could produce information on the time inputs by trainees, new recruits obtained from local sources etc.

The system that has been established requires a personal record form for all new starts, but not for employees transferred from other sites, and the weekly record of all labour used has been replaced by a quarterly report by each contractor of the total labour used on the contract. These changes to the monitoring system reflected three factors:

- agreement with Construction Glasgow on their role to provide validation information to verify contractor information provided to GHA;
- the need to prioritise the limited resources within the Regeneration Team
- the need to develop a workable monitoring system that would not be overly burdensome or complex for contractors.

However, following an external evaluation, Construction Glasgow closed in March 2006 shortly after the commencement of the first GHA contracts that included the targeted recruitment and training requirements.

There are two important implications that arise from the changes to the monitoring system

- it does not provide a means of checking whether contractors and subcontractors are notifying all vacancies to the named local supply agencies: they could claim that new starts recruited without the local agencies are `existing employees`;
- it does not provide a means of fully verifying the total labour engaged on the contract, a figure that is used to calculate the % of trainees that is an important KPI in the contracts.

Steps are being taken to remedy this including:

- obtaining confirmation from GHA contract officers that the total time utilised by each contractor is in the range expected, given the volumes of work undertaken each quarter

- setting up new labour and trainee supply arrangements with local agencies (potentially the LDCs⁴⁷) that can also provide confirmation of the numbers of vacancies advised by GHA contractors and the numbers of these vacancies that are offered to their clients
- validating Apprenticeship information provide to GHA by contractors with SEG

Improving the robustness of the monitoring and reporting arrangements is important as it is possible that over time contractors will learn that they can manipulate the Quarterly Reports and this will weaken their commitment to actually delivering the job and training outcomes that they are contractually committed to provide;

To further assist the monitoring and evaluation of GHA's approach to securing targeted employment and training and to support GHA's partnership with SEG, an independent Key Advisor has been appointed.⁴⁸ The commission covered a period of 15 months from November 2005 and included:

- providing an overview from an independent perspective, on the employment and training partnership;
 - ensuring the employment and training processes being developed are effective and offer value for money;
 - liaising with key employment and training stakeholders (including contractors);
 - preparing reports for GHA and SEG
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- To read the full case study - [Glasgow Housing Association](#)

⁴⁷ Local Development Companies (LDCs – 8 across Glasgow but restructuring to 5 in 2007-8) and not-for-profit organisations that undertake neighbourhood-based economic development

⁴⁸ The commission was awarded to Professor Alan McGregor from the Training and Employment Research Unit (TERU), Glasgow University.

Chapter 7 – OJEU Notice

Summary

It is best practice for the contracting authority to state that they are seeking sustainability requirements in their OJEU notice. If sustainability considerations are a core requirement they should be built into the award criteria with a weighting in the assessment for value for money and the award of the contract. Secondary or additional requirements should not be a consideration in the award process.

There needs to be a clear differentiation between three situations:

- where sustainability requirements are part of the subject of the contract they can be used as selection and award criteria and as contract conditions provided this was mentioned in the contract notice;
- where the sustainability requirements are only a condition relating to the execution of the contract they should not be selection criteria;
- sustainability objectives which are not core requirements should not be award criteria except in a tiebreak situation and then only if this was mentioned in the contract notice.

Flexible wording to keep options wide

For most requirements there will be an advert either in the national press or the Official Journal of the European Union (OJEU) or in trade magazines. The advert is the first of a number of stages in the procurement process. Be aware that OJEU adverts are limited to a certain number of words and it is possible to give extra information, such as in an information memorandum supplied with any pre-qualification questionnaire. Best practice requires the OJEU advert to state that the purchaser may be seeking social or environmental requirements.

Reference to qualification criteria

In principle, sustainability concerns that are 'core considerations' should not be seen as 'regulation' (see [Understanding the core specification](#)). While legislation and regulation are used to impose requirements that Government consider to be for the common good, they are rarely specific to individual contract circumstances. Regulations that are designed to set out

specific requirements for a range of different circumstances necessarily become long and complex, and a severe barrier to entry for new businesses.

As a contrast, sustainability concerns that are included in the procurement can be designed for their particular context, and can form a part of the value for money of the contract. Because they are contract-specific they can be made more appropriate in scope and scale. This remains the case even where the requirement is used to supplement legislation and regulation. ***[Please see my handwritten note on original pages]***

However, the 'in principle' position of sustainable elements to a contract may be different if they are used only as general pre-qualification criteria and are not made contract-specific. For example, a qualification requirement that all suppliers must conform with the Ethical Trading Initiative Base Code effectively introduces entry criteria that have the effect of regulation.

The core / secondary decision has important implications for the assessment of value for money, which is the basis on which contract award decisions must be made, and which is based on the core requirements alone. If a sustainability concern is a core requirement it can be given a weighting in the assessment of value for money, and in the award of the contract.

Indeed, the sustainability elements within the core requirements of a contract should be part of the early stages of the procurement procedure – the Contract Notices and selection of tenderers (either through a pre-qualification process or in forming a select tender list) since it would be inappropriate to include contractors in the selection process that did not have the technical and managerial experience to deliver all aspects of the core requirements. Secondary or additional requirements should not be a consideration in the award process.

Building in appropriate contract award criteria

There needs to be a clear differentiation between three situations:

- where sustainability requirements are part of the subject of the contract they can be used as selection and award criteria and as contract conditions provided this was mentioned in the contract notice;
- where the sustainability requirements are only a condition relating to the execution of the contract they should not be selection criteria;

- sustainability objectives which are not core requirements should not be award criteria except in a tiebreak situation and then only if this was mentioned in the contract notice.

Any of these situations could apply to the provision of works and services. It is difficult to conceive of sustainability conditions that would relate to the execution of a supplies contract – although the provision of monitoring information relating to the sustainability requirements could be relevant - so the use of social requirements in supply contracts may often be limited to the selection of tenderers under the first option. **[?]**

Model Wording

The use of sustainability considerations in contract conditions must be mentioned in any OJEU notice by a contracting authority. The following model wording is suggested, under the section in the OJEU Notice typically headed 'other information'.

“Under this [procurement / project] the [contractor / developer] is required to participate actively in the economic and social regeneration of the locality of and surrounding the place of delivery for the [procurement / project]. Accordingly contract performance conditions may relate in particular to social and environmental considerations.”

When focussing on sustainability requirements it is useful to adopt the Common Procurement Vocabulary (CPV), for example, “*labour recruitment and the provision of personnel services*” would be appropriate for targeted recruitment and training. (Its reference is 74500000-4).

Case Studies

Building Schools for the Future (BSF) examples

Currently many of the Building Schools for the Future contract notices are good examples, with the following wording under the heading – “Other particular conditions to which the performance of the contract is subject:

“Under this project the lead contractor and its supply chain will be required to actively participate in the achievement of social and/or environmental policy objectives relating to recruitment and training and supply chain initiatives. Accordingly contract performance conditions may relate in particular to social and environmental considerations”.

Chapter 8 – PQQ

Summary

Questions need to be asked at the pre-qualification stage to satisfy the contracting authority that the tenderer can meet the requirements of the contract and will be able to comply with the contract conditions (this covers all requirements including sustainability). The contracting authority can ask as many questions as they wish provided they are careful not to exclude tenderers from other member states.

Examples of questions

The pre-qualification stage helps the contracting authority to determine which tenderers are most likely to be able to meet all of their requirements. They must be satisfied that the tenderers will be able to comply with the contract conditions at the time the contract is awarded. Questions can inquire about tenderer's previous experience and track record with meeting sustainability requirements. Future plans regarding sustainability and evidence to support them can be requested and assessed. Local authorities and their partners can link their questions to their community strategies and wider policy documents.

Questions must not distort competition and exclude tenderers from other member states. Asking for 'or equivalent' information can often help to address this issue particularly where, for example, a certain standard to be met is country specific.

When deciding on questions contracting authorities should also bear in mind that the selection criteria should be linked to the subject matter of the contract. This emphasises the importance of incorporating sustainability as a core requirement at the earliest opportunity.

In any pre-qualification questionnaire the following questions can be used in the section of the questionnaire that assesses technical capacity and ability:

"Please give examples of your involvement in each of the following:

- generating employment and training opportunities for long-term unemployed people;

- providing training opportunities for young people;
- promoting supply-chain opportunities to new and small enterprises;
- the development of trade skills in your existing workforce; and
- equal opportunities recruitment procedures.

What was your exact involvement in each of the above activities? Which of the examples you have cited have been more successful, and which have been less successful, and why?"

Case Studies

Full text

[Glasgow Housing Association \(GHA\) Works Contracts](#)

Summary

Glasgow Housing Association (GHA) Works Contracts

This case study examines the social requirements sought to be delivered on construction projects for Glasgow Housing Association (GHA), one of Britain's largest housing stocktransfer associations. As part of the housing stock transfer a commitment was made to maximise employment and training from GHA's investment programmes, and GHA is also strategically committed to a contribution to the social regeneration of its neighbourhoods. The approach also addresses the community regeneration policy of the Scottish Executive that makes clear the importance of tackling poverty and providing access to suitable employment.

The initial value of the procured contracts was £630m with approximately a further £150m to be procured before the end of 2006, taking the total value to £780m. The framework contracts are for 3-5years. The longer-term relationships introduced through partnering and framework agreements provide contractors with continuity and security of work, and it is hoped that this should enable them to increase the number of 'new entrants' and apprentices they engage. The PQQ process described in this section was used by GHA.

To date eleven contracts have been procured for housing refurbishment work. There are a number of contractors delivering works for GHA in relation to the refurbishment works but for this case study one contractor was interviewed. Lovells has been selected as a preferred

contractor in three refurbishment work areas: roofing and cladding, kitchens and bathrooms and T84 improvements.

Lovell describe themselves as leading providers of affordable housing, operating from nine regional offices in England, Wales and Scotland. Their Scottish office(s) turned over £32 million in 2005 (nationally £380 million). The organisation is a management contractor, subcontracting 90 percent of trades.

Glasgow Housing Association also participated in the Scottish Executive's 'Community Benefits in Public Procurement' pilot programme. This allowed them to clarify what powers permitted them to procure the training and employment requirement and gave access to specialist consultancy support.

The principal recruitment and training requirements are:

- The submission of a targeted recruitment and training method statement with the tender, using a standard format;
- All vacancies, including those with subcontractors, to be notified to Construction Glasgow;
- 10% of the person-weeks required to deliver the contract to be provided by new-entrant trainees;
- the equivalent of up to 5% of the person-weeks required to deliver the contract to be made available for unwaged work experience on site by trainees (although this has subsequently been dropped);
- the provision of monitoring information.

Lovells understood the training and employment requirements to be a contractual obligation: they regarded them as legitimate but ambitious requirements. Contractors were not asked to price the delivery of these training and employment requirements and Lovells expected the costs to be covered, in part, by grants available from CITB and Scottish Enterprise Glasgow (SEG). However, the cost of additional management and supervision would be incurred by the company. Lovells have for many years had an active policy and approach of taking on trainees and apprentices and have accepted the associated costs as an overhead. However, the percentage target set for new entrants by GHA is higher than they have previously worked to on projects.

The GHA approach probably represents the largest works contract in the UK to include targeted recruitment and training requirements in its procurement process. It was part of the CBIP pilot programme and obtained consultancy support from this programme. Works on the contract commenced in early 2006 so it is too early to reflect on the outcomes, but the case study will report on the lessons learnt from the procurement process.

Chapter 9 – ITT/ITN/ITA

Summary

Method Statements

Method statements are a useful tool to assess if tenderers are likely to be able to meet the contract conditions and requirements. There are different methods of incorporating them into the quality assessment score for the tender.

Good Practice

Do not underestimate the relevance of successes in other areas. If good practice is established in one area it can often be applied across the board. Equally if you find something to be a success/useful, share it with others.

Cost Neutrality vs Additional Cost

There are four main patterns:

- cost savings – savings obtained;
- a cost neutral approach – contractor obtains additional resources to cover the costs;
- a budget-uplift approach – contracting authority obtains additional resources to cover the costs; and
- unspecified framework values – additional costs are not clearly defined.

Requirements for method statements as part of a bid

It is good practice to ask bidders to submit with their tender a method statement setting out how they will achieve the sustainability requirements. This is then evaluated and scored, and this score forms part of the quality assessment (score) for the tender.

One process would be to evaluate the method statement to ensure that it achieved a required 'threshold' of acceptability and a pre-requisite for the tender being evaluated as a whole.

An alternative and more sophisticated approach to the scoring of social requirements would be to use a scoring framework that identified:

- the subjects where a response from the bidder was expected, with each subject given a weighting (number of points); and
- the types of actions that were expected to be offered under each subject, with each action then being given a weighting – a breakdown of the points available for that 'subject'.

Prioritisation and weighting of award criteria

As long as the criteria comply with the Treaty principles, contracting authorities are free to choose both their award criteria and the weightings attached to them, provided that the weightings enable an evaluation of the most economically advantageous tender to be made.

For details of European case law relevant to the prioritisation and weighting of award criteria, please see the [Case law](#) section.

Good practice is good practice

In February 2006 the Office for Government Commerce issued its long-awaited guidance [Social Issues in Purchasing](#) (the Social Note), designed to further understanding of how such issues can be legitimately incorporated into the purchasing cycle. It reinforces good practice in procurement emphasising that:

- social issues must be relevant to the subject matter of the contract;
- actions must be consistent with government procurement policy based on value for money; and
- sustainable procurement must be approached from a whole life cost prospective.

There is concern that by incorporating sustainability requirements into contracts it results in less good value for money for the public sector. The report for the Manufacturing Forum⁴⁹ on using social clauses in public procurement touches on this issue by producing a cost-benefit analysis for each of the case studies. The report notes that there is a difference between the voluntary approach and contractual approach in two case studies, that being that the contractual approach was far more effective in terms of results. [?][?]

To read the case studies in full:

⁴⁹ Crown Copyright July 2006, ['The Scope for Using Social Clauses in UK Public Procurement to Benefit the UK Manufacturing Sector - A Report for the Manufacturing Forum'](#)

- [Raploch Urban Regeneration Company and Stirling Roads Maintenance](#) – contractual approach
- [Manchester City Council](#) - voluntary approach

The report also highlights that for a number of the case studies the cost-benefit comparison looks promising. This indicates that good practice in terms of sustainability may also result in good practice for value for money. If this is correct, then it is not a choice between sustainability and value for money, but instead it is about finding ways to achieve both.

Cost neutrality vs additional cost

For case studies that touch on the area discussed below, please see the following:

- [Raploch Urban Regeneration Company and Stirling Roads Maintenance](#)
- [London Borough of Haringey and Hays Specialist Recruitment](#)
- [Glasgow Housing Association](#)
- [East Ayrshire Educational Services](#)
- [Aarhus, Denmark](#)
- [Vergabe ABM, Germany](#)
- [Transport for London](#)
- [Dundee City Council Social Work Department](#)
- [Manchester City Council](#)

In relation to affordability, four patterns can be seen from case studies that are available:

- **cost savings** – social requirements can be introduced and savings obtained; the best overall bidders for contracts that include sustainability elements often bring forward the most appropriate and innovative response to the achievement of the requirements. This may help achieve both the specific requirements and value for money;
- **a cost-neutral approach** – e.g. the contractor obtains grants from other sources to cover any additional costs; the requirements may have been included as contract conditions that were not specifically costed as part of the tender process, or it was made clear that the contractor was expected to obtain whatever additional resources they required to deliver the requirements from other public agencies, and information on a range of such resource-suppliers was provided to bidders. The cost-neutral approach to affordability is

possible where there are external resource-providers and delivery of the social requirements is included in the contract notices and early briefings;

- **a budget-uplift approach** – extra costs are covered by the purchaser, perhaps by obtaining grants from other sources; the requirements may add significantly to the cost of the contract, but this additional cost might be met by additional external funding, and thereby mean that the impact of introducing the requirements is cost-neutral to the procuring entity;
- **unspecified framework values** – the requirements are not clearly defined and no additional costs are identified. Where requirements are unspecified, each bidder would need to decide what additional action they would undertake to deliver the values, and what this would cost, and this cost would need to be covered by the bidders' overhead charges. The purchaser may be content that an appropriate level of stakeholder contact has been carried out and that this is reflected in the contract specifications, and may not be interested in particular performance targets reflecting their requirements.

Core Requirements

Where the requirement is supported by the powers and policies of the purchasing organisation and forms part of the core requirements for the contract then the issue of value for money is determined by the additional costs *[?] [Is this additional costs in achieving the social objectives compared with not achieving them?]* incurred relative to the outputs achieved. On the cost side consideration would need to be given to:

- additional costs incurred in preparing for the procurement process, including officer and consultants' time in drafting the requirements;
- additions to the contract costs related to the delivery of the requirements, including both direct costs and overheads.

The latter might reflect increased costs because of a shortage of bidders willing and able to deliver the mix of traditional requirements and sustainability elements.

On the benefit side consideration would need to be given to the outputs achieved and how these compare to what would have been achieved by other means e.g. voluntary commitments made after the award of the contract or direct funding through grants unrelated to the procurement process. These are considerations for a purchaser at the Business Case stage of a development. Once the judgment has been made that the social requirements are

core requirements in the procurement life cycle then the use of good procurement practice, followed by good contract management, should deliver value for money.

Secondary Requirements

It could be argued that since secondary requirements are not part of the subject of the contract they should always be, at worst, cost-neutral since value for money is based solely on the core requirements. It is harder to show value for money where the secondary requirements add costs.

Chapter 10 – Specification

Summary

Specifications need to:

- draw on the policies and/or relevant law behind the reasons for the contracting authorities sustainability requirements. Here a well thought out business case will be useful;
- include measurable performance indicators for monitoring together with a requirement to monitor and review.

Technical specifications can specify:

- products such as recycled paper, 'green electricity', energy efficient appliances, organic food and wood from renewable sources as long as this is in line with the contracting authority's policies and they do not specify any specific brands etc.; and
- particular relevant legislation that the contracting authority requires compliance with.

Value for money

Any project that a contracting authority undertakes must represent value for money. This looks at the 'optimum combination of whole life costs and quality to meet the user's requirement.' Sustainability considerations are a part of this equation.

Specification

The specification sets out the detailed requirements for the contract, including the community benefits. It is important to consider what community benefits are appropriate for inclusion in the contract on a case by case basis (ideally in the business case).

While the details will vary from contract to contract there are a number of common elements that need to be included in all 'community benefit' specifications. These include:

- some reference to the policy or legal underpinning for the requirements;
- measurable performance indicators either within the specification or in an addendum, relating to, for example:
 - the required outputs, and/or
 - where relevant, a recruitment process that has to be followed (e.g. for site vacancies);

- monitoring and performance review requirements; and

As with all other elements of the specification, care will need to be taken in determining what specific sustainability requirements are appropriate and deliverable. These need to be drafted into clauses that are unambiguous and provide a 'level playing field' in the tendering process for contractors. A key element of achieving this 'level playing field' may be the availability of supply-side agencies that can ensure equal access to appropriate support and resources.

Technical Specifications

There is the opportunity at this stage to incorporate sustainability considerations, as contracting authorities are able to make decisions on how to draw up their specifications. The Joint Note points out that contracting authorities 'do not need to specify the cheapest product, and are able to purchase products such as recycled paper, 'green' electricity or energy efficient appliances in accordance with their own policies and objectives, and those of the Government, and the need to ensure efficient and effective use of financial resources'.⁵⁰

While EU procurement rules prohibit the mentioning of specific brand names or sources of a particular product, contracting authorities are obliged to indicate the technical specifications in the documents relating to a contract. As a general point, the Communication states that *"[c]ontracting authorities are free to define on specific points that they require a higher level of environmental protection than that laid down in legislation or in standards, on condition that the level required does not limit the access to the contract and lead to discrimination to the detriment of potential tenderers"*.⁵¹

Contracting authorities are free to prescribe which primary materials should be used. For example, a contracting authority could specify that any wood used should come from a renewable source of timber, or that any glass used should be recycled. Similarly, contracting authorities could require the use of specified processes. An example of this would be to specify that foodstuffs be organically grown.

⁵⁰ *ibid.*, p6

⁵¹ *ibid.*, p11

The OGC guidance states that *“Departments have a great deal of scope to decide how they draw up their specifications provided they are non-discriminatory and meet the tests of need, affordability and cost-effectiveness”*. The guidance also suggests that *“by focussing on an outcome or desired levels of functionality, Departments can give suppliers the opportunity to be innovative, to suggest solutions with added social impact, and to find the most cost-effective ways of meeting the social requirements of the contract”*.

A contracting authority can insist that tenders comply with any national legislation concerning the technical specification of products and services. The UK has such legislation in areas of health and safety and discrimination, some of which is derived from European-made law and some of which is purely national law.

Any specifications must relate to the service or product and not the way a tenderer runs its own business. For example, although acceptable to require that a building completed under a public works contract has disabled access to all areas, a contracting authority could not insist that a tenderer’s own premises conforms to such standards.

Understanding value for money

A contracting authority must be able to justify that any project it undertakes represents value for money. This is defined as the optimum combination of whole life costs and quality to meet the user’s requirement. Social and environmental issues, as well as economic issues, can be considered when evaluating the ‘whole life cost’ of a tender. Fitness for purpose and the user’s requirements can also contain sustainability aspects.

The Government’s procurement policy is that all public procurement is to be based on value for money, having due regard to propriety and regularity:

“The Government’s policy of achieving value for money – defined as the optimum combination of whole life cost and quality (fitness for purpose) to meet the user’s requirement – applies to the award stage of the procurement process. In the context of its overall objectives a Department should decide what to buy and set the specification accordingly, and ensure that its requirement is subject to the normal public procurement expenditure tests of need, affordability and cost

*effectiveness. It is at this earlier stage that there is most scope to consider social issues.*⁵²"

The above quotation is crucial for the implementation of sustainability issues in procurement since it makes clear that it is for the user to decide what they want to buy: their requirements. They have to do this on the basis of their needs and 'overall objectives' and they must take into account propriety, regularity, affordability and cost-effectiveness, so it is not an unconstrained choice. It is clear that the choice of what to buy, and in what combination, is delegated to the user rather than being pre-determined by a procurement code issued by Government. This principle applies also within local authorities and other public procurement bodies and makes sense, since only procuring body's procurement operation will have knowledge of how best to use available resources to achieve the optimum benefits for their organisation and the population they serve.

It is therefore for the individual procurement team to consider what sustainability issues they wish to achieve through the procurement pursuant to the policy framework adopted by that authority: what sustainability issues will help them achieve their objectives, including wider sustainability policies (e.g. sustainable development, or for a local authority the delivery of a community strategy).

It is this delegated responsibility that contributes to centre-periphery tensions around the inclusion of sustainability requirements in the procurement process. The above quotation also identifies the importance of considering sustainability issues very early in the process of deciding what to buy. They should be subject to the same tests of need, affordability and cost-effectiveness as other elements of the procurement. This is where tensions around 'innovation' can be played out. [?]

⁵² [Social Issues in Purchasing](#). OGC, London, February 2006. Page 3

Chapter 11 – Contract Conditions

Contract Conditions

Specific contract conditions can be developed on a project by project basis. In procurement processes that allow scope for negotiation (for example on the basis of a service delivery plan or method statement) specific clauses can be incorporated into contract documentation to tie the contractor / developer to specific targets and outcomes.

Examples in common use:

We are aware of contract conditions being drafted specifically for use in each of the following areas:

Targeted Recruitment and Training:

- Housing Renovation contract
- Streetworks contract
- Building Schools for the Future PFI Model
- Clauses for a competitive dialogue approach to a PFI contract
- Model Clauses for a Planning Agreement
- Multi-Annual Planning or Development Agreement with default payments
- Planning Agreement or Development Agreement with a training bond payment

For more information please call Mark Cook on 0121 212 7472 or email mark.cook@anthonycollins.com

Chapter 12 – Award

Summary

There are different methods of scoring tenders such as threshold criteria and weighting. Tenderers can be excluded on two grounds potentially relating to sustainability requirements. Firstly any relevant convictions or misconduct (could be environmental or socially unacceptable) and secondly if they do not meet any of the technical requirements in the specification.

Sustainability considerations can also be taken into account when considering the most economically advantageous tender as long as they are relevant to the subject matter of the contract, provide a benefit to the contracting authority and are consistent with basic Treaty principles.

Scoring Methodologies

EU case law, including those cases discussed below, has much to say about what can and cannot be considered when choosing a successful tenderer.

Nord-Pas-de-Calais Region (C225/98 - Commission vs the French Republic)

The Nord-Pas-de-Calais Region Case⁵³ dealt with an award criterion in relation to ascertaining the most economically advantageous tender (“MEAT”) relating to employment linked to a local project to combat unemployment. The French government argued for a two tier system of firstly, award criteria which were “primary award criteria” and went to determining MEAT and secondly, criteria which were not decisive in relation to MEAT such as a local labour criterion. The ECJ held that contracting authorities could use such a criterion provided that it was consistent with the fundamental principles of Community law, in particular, the principle of non-discrimination; and it was expressly referred to in the contract notice.

However, the ECJ judgment is vague in the sense that it falls short of discussing the issue of ‘local’ requirements. Rather than referring to the criterion linked to a local project, the

⁵³ Commission v The French Republic (C225/98)

judgment refers more vaguely to “*the campaign against unemployment*”. It is unclear from the judgment whether this is intended to refer to the specific local project in the case, or a more general campaign to combat unemployment. As such the ECJ did not expressly say that a local labour condition was acceptable.

This case has been interpreted differently by various bodies. The Commission argues at Section 1.4.2 of its Interpretative Communication on social considerations in public procurement that such local labour award criterion can only be applied as an “additional criterion” where the MEAT assessment of the bids on a purely economic basis has revealed “two or more economically equivalent tenders”.

The judgment and the conclusions that the Commission adopted from it should be treated very carefully. The court seems to have confused the grounds for holding a tender non-compliant with grounds for exclusion and award criteria. The idea of a second type of award criteria which is non-decisive - but which can be used to decide when bids are otherwise equal - is inherently contradictory. While that argument was advanced by the French in this case the court did not approve it as such.

Concordia Bus Finland (C-513/99 – Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v (1) Helsingin Kaupunki (2) HKL-Bussiliikenne (2002))

This judgment is interesting in that it appeared to acknowledge that a contracting authority was entitled to include environmental considerations in its criteria. Firstly, the ECJ was clear that award criteria need not be purely economic in nature:

Article 36(1)(a) [of Directive 92/50] cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority⁵⁴

⁵⁴ C-513/99 – Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v (1) Helsingin Kaupunki (2) HKL-Bussiliikenne (2002), para 55.

The ECJ further held that the principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment, such as those at issue in the main proceedings. On this point the judgment states:

In the light of ... Article 6 EC, which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender.⁵⁵

The judgment sets the conditions under which such criteria may be used. Firstly, it sets out that “the criteria adopted to determine the economically most advantageous tender must be applied in conformity with all the procedural rules laid down in Directive 92/50, in particular the rules on advertising”.⁵⁶ Criteria must also comply with the fundamental principles of EU law, in particular the principle of non-discrimination. The judgment concludes that a contracting authority may take into account ecological criteria provided that:

- they are linked to the subject-matter of the contract;
- do not confer an unrestricted freedom of choice on the authority;
- are expressly mentioned in the contract documents or tender notice, and;
- comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.⁵⁷

EVN (C-448/01 - (1) EVN AG (2) Wienstrom GMBH v Republic of Austria (2003))

In EVN the ECJ confirmed the Concordia Bus Finland case judgment, in particular the fact that “Directive 92/50 cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must

⁵⁵ Ibid., para 57

⁵⁶ Ibid., para 62

⁵⁷ Ibid., para 64

necessarily be of a purely economic nature". Therefore, ecological criteria could be taken into consideration under the conditions laid out in the Concordia Bus Finland case.

The particular criterion used in this case, requiring that the electricity supplied under the contract be produced from renewable energy sources, was acceptable as a matter of broad principle. Provided the criteria comply with the Treaty principles, contracting authorities are free to choose both their award criteria and the weightings attached to them, provided that the weightings enable an evaluation of the most economically advantageous tender to be made.

However, the ECJ held that the actual criterion used was not permissible on the basis that it infringed, for a number of reasons, the principle of equal treatment and transparency. This included the premise that "an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement". The accuracy of the information sought from tenderers must be capable of being verified so as to preserve the objectivity and transparency of the procedure.

In the case, which concerned a procurement of electricity from sustainable sources for the regional administration's office buildings in Carinthia, points were given for the amount of excess supply - above the needs of the offices - that the suppliers could generate, supposedly with a view to ensuring reliability of supplies. The ECJ stated in its judgment that such an award criterion was not permissible because "*an award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract*".⁵⁸ As such, the ECJ rules that award criteria that are not linked to the subject matter of the contract were not permissible.

Threshold requirements

It is good practice to ask bidders to submit with their tender a method statement setting out how they will achieve the particular sustainability requirements. This is then evaluated and scored, and this score forms part of the quality assessment (score) for the tender.

⁵⁸ C-448/01 - (1) EVN AG (2) Wienstrom GMBH v Republic of Austria (2003), para 68

One process would be to evaluate the method statement to ensure that it achieved a required 'threshold' of acceptability and a pre-requisite for the tender being evaluated as a whole.

An alternative and more sophisticated approach to the scoring of requirements would be to use a scoring framework that identified:

- the subjects where a response from the bidder was expected, with each subject given a weighting (number of points); and
- the types of actions that were expected to be offered under each subject, with each action then being given a weighting – a breakdown of the points available for that 'subject'.

This approach is tested by a contracting authority's evaluation team and then used to score each tender submitted. The resulting scores are then incorporated into, say, a 30% 'quality' element of the evaluation, which is then combined, for example, with the remaining 70% price element of the evaluation.

This approach uses the specialist knowledge and skills of the relevant officers within the contracting authority to develop a robust and fair means of evaluating method statements.

Whichever method is used, pro-forma method statements should be issued to ensure that all bidders answer the same questions and provide the same core information. This helps ensure a level playing field is put in place between bidders and reinforces the message that these are not voluntary or 'best endeavours' elements of the contract, but contractual requirements for a core aspect of the procurement in question.

When scoring a method statement thought should be given to:

- the weighting that should be given to each section of the Method Statement;
- the weighting to be given to each question within a section; and
- what is being looked for in response to each question: what is a good answer?

It may be advisable for each Method Statement to be scored by several people, using the scoring framework, and then the scores combined and averaged. Test runs should be done and evaluated before the first real scoring takes place.

Selection of candidates

There are two points within the selection stage where there is scope for the consideration of environmental issues. Firstly, there are certain grounds on which candidates can be excluded from participating, which could potentially relate to environmental or social concerns. In particular these are identified as where the potential participant has:

- Been convicted of a criminal offence concerning professional conduct; or
- Been guilty of grave professional misconduct proven by any means that the contracting authority can demonstrate.⁵⁹ (See above discussion of the Interpretative Communication, which also mentions this point).

Secondly, candidates are selected according to their technical capacity. Technical requirements must be directly relevant to the subject of the contract. The EU procurement rules provide for an exhaustive list of the evidence that contracting authorities are able to take into account as proof of a candidate's technical capacity. Specifically, the note suggests that the following can be applied to environmental considerations:

- Specific knowledge or experience and, for services contracts, ability.
- Description of technical facilities and measures for ensuring quality.
- Statement of tools, plant and technical equipment.
- Indication of environmental management measures.

The Joint Note also refers to things that cannot be done at this stage, mentioning:

- Asking for evidence that is not directly linked to the subject of the contract.
- Asking about candidates' general policies, where this goes beyond what is necessary to assess the candidates' capacity to perform the particular contract. Any information that is requested would be assumed, by the courts, to have been taken into account, even if only the relevant aspects of that information were considered.⁶⁰

⁵⁹ *ibid*, p8

⁶⁰ *ibid*, p9

The Commission reminds us that if national legislation “qualifies the non-compliance with environmental legislation as an offence concerning professional conduct” a contracting authority can exclude a tenderer which it can prove has breached such legislation. At present no Community legislation distinguishes such breaches as professional misconduct, however, the Commission has proposed a directive dealing with this.

The Commission gives the following as being capable of relating to environmental aspects:

- “a statement of the tools, plant and technical equipment available to the candidate for executing the contract;
- a description of the supplier's technical facilities, its measures for ensuring quality and its study and research facilities;
- a statement of the technicians or technical bodies which the candidate can call upon for executing the contract, whether or not they belong to the firm, especially those responsible for quality contract.”

Under the procurement directives, contracting authorities can only have regard to tenderers' economic, financial or technical capacity when making their selections and it is difficult to envisage how social concerns may be implemented into this process unless regeneration and sustainability is a core aim of the project. If a core aim of the project is sustainability, a contracting authority may include a tenderer's focus on sustainability when looking at that tenderer's technical capacity.

Only if national legislation labels certain actions to be professional misconduct and a tenderer is convicted of an offence of professional misconduct or a contracting authority can prove a tenderer to be guilty of grave professional misconduct, can a tenderer be excluded from the procurement process. The UK Government's approach to regulation differs to that of other European governments. According to the Commission's Interpretative Communication on social considerations, in Spain non-compliance with employment legislation concerning the disabled constitutes grave professional misconduct and the French Government has implemented thirty grounds for grave professional misconduct. The UK government should perhaps be encouraged to promote wider considerations in procurement as a matter of policy, rather than through legal regulation, which is more likely to be against Britain's natural instincts.

Award of the contract to the most economically advantageous tender

There is scope, within the Government's value for money requirement and the EU concept of the 'most economically advantageous tender', to take sustainability considerations into account.

Value for money is defined as the optimum combination of whole life costs and quality to meet the user's requirement. In order to comply with EU procurement rules, the Joint Note points out that the criteria used to determine the 'most economically advantageous tender' must:

- Be relevant to the subject of the contract
- Give a benefit to the contracting authority
- Be consistent with basic Treaty principles.

At the time of writing the Environmental Communication, the Commission's position was to state that the criteria for deciding the most economically advantageous tender must be non-discriminatory and must provide the contracting authority with an economic advantage. The Commission gave an example of an environmental factor that provides a contracting authority with an economic advantage as the energy consumption of a product. A contracting authority could also take account of whole life costs of a product or works, for example, the costs of energy needed to run a building, the costs of high level insulation to save energy costs and the costs of maintenance or recycling.

The Commission also recognised that although external costs, which are borne by society, do not qualify as award criteria, *"contracting authorities retain the possibility to define the subject matter of a contract or impose conditions relating to the execution of the contract and to integrate at these stages of the tender procedure their environmental preferences linked to eventual occurrence of external costs"*.

Once tenderers have been shortlisted, the award criteria for selecting the successful tenderer, if choosing the most economically advantageous tender, should not be discriminatory, should be linked to the subject matter of the contract or the manner in which it is performed and should generate an economic advantage for the contracting authority in order that tenderers can be compared objectively.

Although the public procurement directives do not include social considerations among the possible award criteria the Commission takes the view that:

“if the term “social criterion” is construed as a criterion that makes it possible to evaluate, for example, the quality of a service intended for a given category of disadvantaged persons, such a criterion may legitimately be used if it assists in the choice of the most economically advantageous tender within the meaning of the directives.”

Such a criterion will also be directly linked to the value for money of a procurement.

However, criteria relating to the type of person employed by tenderers or tenderers' training programmes would not be award criteria under the directives as they do not relate to the manner in which the contract is performed, unless, of course one of the core purposes of the contract is to train people.

The Commission also considers that each individual award criterion must provide an economic advantage that directly benefits the contracting authority rather than simply being measurable in economic terms. However, this point was put to the ECJ in the Stagecoach Finland case⁶¹, in which the ECJ found that the legislation *“cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature”*.

The OGC guidance point out that award criteria must:

- Be relevant to the subject of the contract
- Be from the point of view of the contracting authority
- Be consistent with basic EU Treaty principles
- Relate to the specification
- Be distinct from selection criteria.

⁶¹ C513/99

Additional award criteria

The Commission does not give guidance on the use of additional award criteria but merely alludes to ECJ case law, namely *Beentjes*⁶² and *Nord-Pas-de-Calais*⁶³.

In *Beentjes* the ECJ held that although not an award criterion as defined by the public procurement directives, a contract condition concerning the employment of long-term unemployed persons is compatible with the directives.

The Commission is of the opinion that in the later case of *Nord-Pas-de-Calais*, the ECJ stated that such a criterion could be used only when there was a tie between two economically equivalent tenders.

Abnormally low tenders

Where contracting authorities consider a tender to be abnormally low, they have an obligation to ask for an explanation from the tenderer before considering rejecting the tender. Contracting authorities may reject an abnormally low tender where this is due to non-compliance with employment or labour laws, or if it feels that the tender is unreliable. Article 55 of the new consolidated directive lists certain things that the contracting authority can take into account when determining whether or not to reject an abnormally low tender. These include:

- the economics of the construction method, the manufacturing process or the services provided;
- the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;
- the originality of the work, supplies or services proposed by the tenderer;
- compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;
- the possibility of the tenderer obtaining State aid.

⁶² *Gebroeders Beentjes B.V. v the State Netherlands* [1990] 1 CMLR 287

⁶³ *EC Commission v France* C225/98

Case study examples

Please follow the below link for various case studies including food, timber and ethical trading.

www.sustainable-development.gov.uk/what/best-practice/procurement.htm

Chapter 13 – Contract Management

Summary

Sustainability requirements need to be monitored (supplying information regarding performance) and verified (providing the contracting authority with a means off checking the monitoring information).

There are a number of options available for poor performance on a contract or for when it fails. These include:

- Specific performance;
- Injunctions;
- Damages;
- Contractual penalties – Incentive payments;
Grant payments; and
Default notices and termination.

Introduction

Execution of the contract / Contract Management

The Joint Note points out that 'there may be opportunities to work cooperatively with suppliers to reduce environmental impact, and that of their supply chain. For example reducing packaging, looking at delivery frequency and scheduling, or the hazardous material content in products. This can be mutually beneficial'.⁶⁴

Contract conditions can also be used to consider environmental issues. However these should comply with the relevant procurement rules. They should be relevant to the contract, and to the achievement of value for money. Equally, under EU rules, they should not be used to essentially disguise additional technical specifications or selection or award criteria. Furthermore, the general EU duty of transparency 'requires that conditions of contract should

⁶⁴ *ibid*, p12

be advised in advance to candidates. Details should be included in the contract notice or tender documentation'.⁶⁵

Following Storebaelt⁶⁶, if contract conditions comply with Community and national legislation, a tenderer must agree to comply with them. Contract conditions relate to the execution of the contract. The Commission gives the following as examples of contract conditions which both have environmental objectives and observe Community law:

- delivery / packaging of goods in bulk rather than by single unit;
- recuperation or re-use of packaging material and the used products by the supplier;
- delivery of goods in re-useable containers;
- collection, take-back recycling or re-use of waste produced during or after use or consumption of a product by the supplier;
- transport and delivery of chemicals (like cleaning products) in concentrate and dilution at the place of use.

From a European perspective, the best way in which to implement social considerations into the procurement process is to dictate the manner of execution of the project by using specific contract conditions. A contracting authority can reject any bid by a tenderer who refuses to agree to such conditions, provided the conditions are not discriminatory and comply with Community law.

The Commission gives examples of such a contract conditions as:

- "the obligation to recruit unemployed persons, and in particular long-term unemployed persons, or to set up training programmes for the unemployed or for young people during the performance of the contract;
- the obligation to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity;

⁶⁵ *ibid*, p12

⁶⁶ EC Commission v Kingdom of Denmark C243 /89

- the obligation to comply with the substance of the provisions of the International Labour Organisation core conventions during the execution of the contract, in so far as these provisions have not already been implemented in national law;
- the obligation to recruit, for the execution of the contract, a number of disabled persons over and above what is laid down by the national legislation in the Member State where the contract is executed or in the Member State of the successful tenderer.”

The OGC guidance states that ‘public sector contracts are often criticised for their length and complexity. Numerous social contract conditions may add to this problem and therefore compromise efforts to make public procurement more accessible to bodies in the SME sector’. It may be the case that moderation should be used in the application of social considerations; success is more likely from a straightforward contract condition than extensive, complicated provisions, and the simplicity is likely to have the additional benefit of encouraging small businesses, voluntary sector organisations and other minority enterprise to participate in the procurement process.

Ensuring there is the capacity to monitor and measure

Monitoring, Verification & Reporting

Monitoring and verification are critical issues when sustainability requirements are included as contract conditions. It is important for the contracting authority to know what is being delivered, especially where they are paying for the outcomes. Monitoring refers to the supply of information on performance. Verification aims to provide the client with a means of checking the monitoring information.

In a contracting context there is no point in specifying outcomes that cannot and will not be monitored and verified. This risks diverting the effort of the client team and the contractor for little measurable gain, and probably little actual gain. So the decision about what requirements to include in the specification must be influenced by the systems and resources available for the monitoring and verification of outcomes. This requires choices to be made, and the choices depend on priorities. It is better to include a few requirements and know these are being delivered than to be over-sophisticated in setting targets and then not be able to monitor and verify the outcomes.

It is therefore recommended that some shared priorities for which a monitoring and verification system can be designed are identified, and implementation is focussed on these.

Improved value from investment in facilitation will be achieved if the monitoring and verification system is electronic and fairly automatic. Essentially, a database system should be developed where contractors' monitoring information is fed in electronically, aggregated, and then used to provide site output reports for the client site meeting and for the facilitation officers. This system may include internal verification (that is, the system looks for outcomes that diverge sharply from the norm) and external verification (for example, checks with site records or the records of training and job-matching agencies).

The development of a standardised monitoring and reporting system will add significantly to the efficiency of the targeted recruitment and training activities envisaged. However, it does depend on prior agreement to a relatively narrow range of requirements that are to be included as requirements and then monitored.

Also, where the monitoring service is closely aligned with the supply-side services it should be easier to verify the data being obtained – for example whether a person being counted as a trainee by a contractor is registered with a training provider.

What to do in the case of poor performance and/or contract failure

1. Poor Performance

A capacity for monitoring, reporting and measurement will go a long way towards avoiding situations of poor performance from ever arising. For further discussion on monitoring and measurement, see [Ensuring there is the capacity to monitor and measure](#).

- Case study: [Raploch URC and Stirling Council Roads Management](#)

In this contract, the contractor was required to take on a minimum of four long-term unemployed people, who would be given accredited training over a thirteen-week period, with the possibility of a job with the contractor at the end of that period. This was voluntarily repeated later in the contract with a further four trainees. The contractor was also required to consult with the surrounding community before works began on the road.

The contractor was very aware of the continual monitoring in this contract, but felt that this was beneficial to all parties. Had there been any problems with the trainees, these could have been flagged up with Raploch URC. SCRM felt that they would have been supported by Raploch URC had they needed to take any action. Monitoring helped to maintain a good relationship, and it was felt that the opinions of both SCRM and the trainees themselves would be respected.⁶⁷

Another straightforward way in which poor performance can be avoided is to be aware of the suitability of sustainability elements to the contract. Where requirements are determined by the scale and length of time envisaged in a contract, they are likely to be more successful; realistic requirements will be more readily met. Sustainability considerations ought to be relevant to the contract in question, appropriate to the size of the contract, and well-planned.

⁶⁷ Crown Copyright – The Scope for Using Social Clauses in UK Public Procurement to Benefit the UK Manufacturing Sector

2. Contract disputes and enforcement

The stipulation of a sustainability clause, be it an award criteria or not, will be a term of the contract. As such, all or any remedies for a contractor failing to implement the social clause will be in contract law.

Following the ECJ judgment in the Storebaelt case⁶⁸, a contracting authority can reject any tenderer who does not agree to a clause being present in a procurement contract. However, what can a contracting authority do to enforce social clauses once the contract has been entered into?

(a) Specific Performance

An order by a court for specific performance would make a contractor perform the contract, which would be the ideal solution for any contracting authority. However, there is never any certainty of obtaining specific performance as it is at the court's discretion whether or not to award it. As a rule specific performance will not be awarded if damages are an adequate remedy or if it would place particular hardship or unfairness on the party ordered to perform the contract. For this reason specific performance should never be relied on as a possible remedy.

It is also unlikely that a court would order specific performance of a sustainability clause, particularly if it involves labour or training, because a court is likely to view an order for specific performance on the contractor as too harsh. As a rule specific performance is not awarded when a contract involves personal services such as employment because of the relationship that should exist between employer and employee and because to do so may mean that a contractor would have to get rid of people it was already employing or training.

(b) Injunctions

Injunctions can be negative, in that they prevent future breaches by a contractor, or positive, in that they order a contractor to do something or undo a breach.

Injunctions may be a useful remedy, especially concerning environmental clauses. However, like specific performance, they are rarely ordered by courts and if a court chooses, it will award damages instead. Injunctions, therefore, like

⁶⁸EC Commission v Kingdom of Denmark C243/89

specific performance, should not be relied upon as a way of forcing a contractor to perform its contractual obligations.

(c) Damages

Although damages are generally available for the innocent party of a breach of contract, it is questionable as to what pecuniary loss a contracting authority may suffer as a result of a contractor not performing a social clause.

In such circumstances where pecuniary loss cannot be shown, a court may award nominal damages. However, this will not force the contractor to perform the social clause. The damages awarded may not be great in any event.

(d) Contractual Penalties

Due to the lack of certainty in being able to judicially enforce contractors' contractual obligations to perform social clauses and the time and expense court proceedings necessitate, it is expedient to ensure that sustainability clauses are drafted as clauses that are vital to the very existence of the contract itself.

For this reason also, it is important that any sustainability clauses within contract documentation stem from the contracting authority's own policies and functions which it pursues in exercising all of its functions. By ensuring social clauses relate to policies, it will be easier for contracting authorities to argue the importance of social clauses should they be challenged either at the contract negotiation stage or at a later date by the contractor.

There are several ways in which the contracts themselves can ensure adherence to social clauses by the contractors, some of which are listed below. One important point to remember is that the contract should not require either the contractor to pay money to the contracting authority or for the contracting authority to pay the contractor a reduced figure should the contractor not perform the social clause. This would be viewed as a penalty in law and would not be enforceable.

(e) Incentive Payments

Increasing the price payable to the contractor if it meets certain targets, such as the performance of social clauses, is allowable in law. Whether this would be a viable option, however, is for each contracting authority to decide.

(f) Grant Payments

An alternative to incentive payments would be the payment of a grant to the contractor by the contracting authority for each trainee or labourer from within the benefit area.

The award of a grant will depend on the powers of the contracting authority. A regeneration company will have the power to grant money as one of its objectives will be to promote employment within its benefit area. A local authority would also have the power to award grants under the well-being power.

(g) Default notices and termination

The only certain way to ensure that a social clause is viewed as a vital element of the contract is to specify it as a condition of the contract. It is important to actually state that the social clause is a condition of the contract because if catch-all terminology is used stating that the breach of any clause by the contractor will allow the contracting authority to terminate the contract, the contracting authority may find itself in the same position as Great Yarmouth Borough Council when the Court of Appeal decided that a catch-all clause “flies in the face of commercial common sense”⁶⁹ and its appeal against a high court ruling that it was not entitled to terminate a contract was dismissed.

In defining the social clause as a condition of the contract, the contracting authority would be able to terminate the contract if the contractor breached the social clause. The threat of termination may force the contractor to adhere to the social clause.

In addition to the threat of termination, the contract could allow for the contracting authority to serve default notices on the contractor requiring performance within a specified time (which should be reasonable). This would at least give the contractor one last chance to comply with the social clause.

⁶⁹ Rice (T/A The Garden Guardian) –v- Great Yarmouth Borough Council, Court of Appeal Friday 30 June 2000

Whether a contractor would agree to such termination provision is, however, questionable. The contracting authority may want to terminate the contract if the social clause was a result of a key policy item. This may be the case for a regeneration company or for local authority regeneration projects (however, it is unlikely that a social clause would result from a key policy of an NHS Trust).

In conclusion, it appears that the performance of social clauses by contractors must be taken on trust. It is unlikely either that such clauses will be enforced by the courts or that contractors will agree to contracts which provide for termination for non-performance of social clauses.

(h) Contracting Authority's Liability

On a final note, it is worth pointing out that if the contracting authority limits the contractor's choice of employee by insisting on a certain percentage of local employees or trainees, the contractor may be able to argue, should the contract be behind schedule or not performing to the standard expected, that the reason is the local labour and is thus not the fault or responsibility of the contractor. This should be covered in the contract, by a realistic programme for completion which addresses the training needs of the workforce.

Engagement with Users

Linked with the monitoring of performance, engagement with users can prove vital to the successful management of a contract. As discussed in relation with [poor performance and contract failure](#), requirements which are well thought-out and relevant to the contract will generally be more successful, and engagement with the users is an important part of this process; what better way to ensure that the requirements are relevant to the contract than by engaging the end user.

Case study: [Raploch URC and Stirling Council Roads Management](#)

Market consultation is generally worthwhile, again as a means by which the requirements can be tailored to the contract and to the people and organisations it will affect. This is something which can usefully be done before finalising a tender, but also throughout the life of a contract to ensure that requirements remain the optimum means by which to achieve the desired goals, and that the goals themselves remain the same.

Stakeholder involvement

NHS PASA (Purchasing and Supply Agency) appear to take advantage of stakeholder consultation within their procurement process. Naturally, in developing ethnic meals for the NHS, stakeholder involvement was key to the successful implementation of the project. By consulting cultural and religious leaders in the attempt to achieve ethnic food that was both nutritious and authentic, PASA ensured that their meals were appropriate and beneficial. Similarly, consultation with stakeholders in the School Fruit and Vegetable Scheme ensured greater success for the project. While key stakeholders such as the Food Standards Agency were consulted as part of the procurement process, school children's preferences were also researched.

- Case studies: more information on the sustainable procurement of NHS PASA is available from their website at: <http://www.pasa.nhs.uk>

