

# Achieving community benefits through contracts

Law, policy and practice

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# Acknowledgements

Although this report covers a range of legal and policy matters, at its core is a detailed presentation of the legal and policy issues relating to public sector procurement. Our understanding of the procurement issues has been furthered by discussions with officials at HM Treasury, the Office of Government Commerce and the Scottish Executive. The authors gratefully acknowledge their input.

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## Authors' note

While every effort has been made to ensure the accuracy of the report content at the time of completion (9 August 2002), advice should be taken before action is taken or refrained from in specific cases.

# Executive summary

## Introduction

Each year millions of pounds of mainstream public expenditure goes into areas with high levels of unemployment, for the provision of services or the development of new facilities such as housing, schools, hospitals, roads and business parks. This expenditure could be a means of bringing non-working local people back into the workforce, but too often this opportunity is missed because neither the purchaser nor the provider has this as a priority.

To make employment and training a key outcome of a public expenditure programme it needs to be incorporated in the specification of what is being purchased. However, the legislative and policy frameworks for doing this are complex and there has been a lack of detailed guidance, especially in relation to the European treaties and procurement directives. This report provides this guidance in relation to employment and training and other community benefits.

Large amounts of public funding are also given as grants and an increasing proportion of public sector development is undertaken through private companies. This report also provides guidance on other forms of public sector leverage (such as grant conditions and planning powers) that can be used to achieve community benefits.

## Maximising the impact of public expenditure

This report focuses on ways in which the 'conversion rate' between public expenditure and community benefits – especially actions to tackle

social exclusion – can be maximised. All UK public expenditure, whether on education, health, housing, transport, social welfare or in other areas, seeks to benefit the people of the UK. Often, such expenditure is directed at particular areas of need within the remit of the spending body. However, the commitment of the current government to 'joined-up thinking' and 'partnership working' has resulted in an interest in how public expenditure can achieve additional benefits: for example, how expenditure on health or housing can support employment and training initiatives.

To some extent there is always a 'trickle-down' effect from public expenditure: housing, regeneration and other spending will benefit people who are disadvantaged, for example through new job opportunities. This report focuses on actions to improve the efficiency and effectiveness of this 'trickle-down' effect: to maximise the benefits that accrue to disadvantaged communities to enable them to take responsibility for themselves and their families, compete effectively in the job market and share in the success of the UK economy.

## Clarifying the policy and legal frameworks

The inclusion of community benefit requirements in contracts and agreements is put forward as an important tool, which can be used by public bodies involved in 'joined-up thinking' and 'partnership working'. In the recent past there has been considerable uncertainty about how these requirements could be incorporated by public bodies, especially in their procurement

activities. There has been a lack of information and guidance on the extent to which such requirements could be compatible with the UK policies of value for money and competition, and European Community (EC) treaties and directives. For some public bodies, most notably local authorities, there was also specific legislation that governed their actions. However, the last few years have seen some clarification of the policy and legal framework:

- The EC is clarifying the scope to take account of ‘social considerations’ in the revised public procurement directive and has issued an interpretative document that assists in this.
- UK legislation has given local authorities new powers, redefined their responsibilities in respect of service delivery and procurement, and changed or removed the specific barriers to the use of community benefit requirements in their procurement activity.
- Policy development work with government agencies (as part of this work) has identified the flexibilities in UK procurement policy that permit the inclusion of relevant community benefit requirements in public sector contracts.

Through detailed legal and policy research, this report describes this ‘clarified approach’. It shows that a wide range of public bodies can include community benefit requirements in their activities, where they consider this to be necessary, provided that they pay careful attention to how this is done: to the specification of their requirements, and to the procedures and documents that are used. This report demystifies the position and should help to dispel the perception that it is inappropriate and illegal to include the delivery of these wider community benefits in the procurement process. With the help of government officers<sup>1</sup>, the flexibilities in the current rules and policies have been identified.

## Opportunities and challenges

For public bodies this report is timely. Over the coming years there will be a significant increase

in their budgets as investment in the public sector is stepped up. There will also be an increase in expectations about the quality of the services delivered (including the community benefits), and changing expectations about how they will procure facilities and services (for example, with more partnership working and private finance initiatives). This changing environment presents both opportunities and challenges to the use of the flexibilities identified in this report. The opportunities arise from the increased expenditure and new partnership approaches; these will provide more occasions on which public bodies could take action to contribute to the government’s social inclusion objectives. The main challenge is that, because of the history of inaction and the perceived complexities in the new approaches to procurement, the relevant officers will not want to include community benefit requirements in procurement and other agreements.

To maximise opportunities and counter the perceived risks it will be important that a range of public bodies – at central, regional and local levels – pilot the new approach, thereby developing the skills and confidence to enable wider community benefits to become a routine consideration in all public expenditure decisions. Only then will the full potential of the government’s agenda to counter disadvantage be realised.

## Key findings

The key findings set out in the report are:

- Contrary to common perceptions, the inclusion of community benefits in procurement contracts can be permissible under UK public procurement policy and EC treaties, articles and directives.
- When a contracting authority has adopted appropriate policies, the community benefit can be one part of their ‘core requirements’, can be reflected in appropriate specifications, and (in most cases) in the selection and award criteria.
- Community benefits do not have to provide a monetary benefit to the contracting authority to be a legitimate part of their core requirements, but they must relate to the subject of the contract.

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<sup>1</sup> From HM Treasury, the Office of Government Commerce and the Scottish Executive. The views of the Office of the Deputy Prime Minister on community benefit requirements are set out in Appendix B.

- A contracting authority may include community benefits in its contract conditions even though it is not a 'core requirement', but, in this situation, it must not include the community benefits in the award procedure and must ensure that value for money is achieved in terms of the core requirements alone.
- To avoid contravening the UK equal opportunities legislation and disadvantaging contractors that do not have a local base, it is best to use general categories of beneficiary (for example, unemployed people, trainees, young people) and target the benefits through supply-side activities.
- Local authorities in England and Wales can include employment matters in contracts provided these are supported by their Best Value policies (for example, the Community Strategy). Similar arrangements are being introduced in Scotland.
- Community benefit requirements can be included in planning agreements, funding agreements and grant conditions provided they do not require either party to act in an illegal or discriminatory way.
- The use of community benefit requirements needs to be supported by 'supply-side' actions (for example, training and job-matching services) to help the other party to deliver on their commitments. Monitoring and post facto evaluation arrangements are also important.

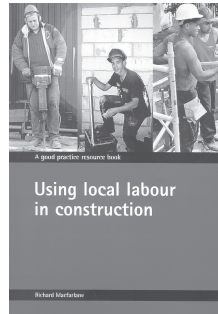
## Other titles by Richard Macfarlane

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# Introduction

## The context

“Combating disadvantage is – as it should always be – a *core function* of our mainstream public services....” (Sally Keeble MP, 2002)

This report looks at ways of incorporating community benefits into procurement contracts, partnership agreements, funding agreements and planning agreements. There has long been interest in this area, with social and community requirements being set out in fair wages clauses<sup>2</sup>, equal opportunities clauses, local employment and training clauses, and human rights clauses (for example, in funding agreements with developing countries).

The incorporation of community benefits into an agreement can have both direct and indirect outcomes:

- *direct*: to achieve the stated benefits;
- *indirect*: to raise the profile of the social issue and provide a framework within which the partners to the agreement can decide how best to maximise the community benefits.

In this report the primary focus is the use of community benefit requirements in contracts and other agreements as a way of achieving social inclusion, in particular by targeting the employment and training benefits that arise from public expenditure. However, the report’s findings are also relevant for the achievement of other social outcomes, such as local consultation, equal opportunities, environmental improvements and ‘considerate contractor’ arrangements.

This report is timely, since the possibility of including community benefit requirements in procurement has been the subject of some debate in recent years. In its April 2000 report *Employability and jobs: Is there a jobs gap?*, the House of Commons Education and Employment Committee stated:

It is important to ensure that those who are unemployed benefit from the employment opportunities being created through regeneration schemes in their local areas ... [and the government should] ... issue guidance to local authorities encouraging them to incorporate local labour clauses in contracts.... (HCEEC, 2000a, para 65)

In March 2001 the House of Commons Health Committee second report reflected an increasing awareness of the importance of social, economic and environmental factors in promoting health. It recommended that:

... the substantial resources of the NHS at all levels are used, as far as practicable, to improve health through direct and indirect employment and through its procurement and planning functions. (HCHC, 2001, para 125)

The idea that public procurement should be used to help achieve social policy objectives is given support in the report of the government-sponsored taskforce on local government procurement in England (chaired by Sir Ian Byatt). This states:

In deciding on the provision of goods, services and works, local authorities may wish to take account of wider objectives such as protection of the environment or

<sup>2</sup> Which were widely used in Britain in the 100 years to 1981.

encouragement of local businesses, support for the local economy and local employment.... (DTLR, 2001a, clause 3.8)

However, the Byatt Report (DTLR, 2001a) also emphasised that any actions must take account of the relevant legal frameworks, should follow good procurement practice and should not result in a 'fudging' of objectives. Doubts have therefore persisted about what actions are possible within the policy and legal frameworks provided by UK government procurement policies, UK legislation and EC procurement rules. This report seeks to provide a detailed analysis of what can be done, offering procurement officers, local authorities and regeneration practitioners further clarity and guidance.

### Use of a community benefit requirement

A community benefit requirement is used as a means of including community or social benefits in a contract or agreement. The European Commission has identified three categories of 'social consideration':

1. measures that will ensure compliance with fundamental rights and the principle of equality of treatment and non-discrimination;
2. measures that will ensure compliance with national legislation on social affairs and Community directives in the social field; and
3. measures for the integration of disadvantaged or unemployed people with a view to combating unemployment and social exclusion. (CEC, 2001a, Introduction)

In the context of neighbourhood renewal and combating social exclusion in the UK it is this last point that is of particular interest, although in some local contexts other social considerations may be important.

In the report much of the focus is on procurement issues because this is where the law, public policy and existing practice is most complex. However, some attention is also given to the use of community benefit requirements in other contexts, for example, in relation to grant giving

and the use of local planning powers. This wider use brings into consideration other key areas of public policy, such as public sector recruitment and equal opportunities practices.

It is recognised that the incorporation of community benefits in an agreement is only the first step in achieving the intended outcomes. The organisation instigating the clause may also need to take action to help other parties achieve the desired outcomes, for example, by organising the labour supply or training provision, monitoring and progress chasing. Some best practice on these implementation issues is included, especially in Chapters 4 and 5.

The use of community benefit requirements in contracts and agreements is not the only way of achieving community benefits and will not be appropriate in all circumstances. An alternative may be the use of a voluntary agreement or a local employment charter. However, the advantage of using a community benefit requirement in a contract or agreement is that it fits more easily within commercial procedures and gives contractual weight to the achievement of the desired community benefits. What this report shows is that:

- community benefit requirements can be an effective tool for social inclusion;
- there are ways of including these requirements in contracts and other agreements within the current legal and policy frameworks;
- there is already a body of good practice that can be followed by practitioners.

### Government procurement policy

The Office of Government Commerce (OGC) is responsible for promoting and maintaining the UK government's procurement policy (set out in the procurement policy guidelines; see [www.ogc.gov.uk](http://www.ogc.gov.uk)). Each government department is free to pursue their own procurement strategies within the overarching policy. However, each departmental accounting officer (the permanent secretary) is responsible and accountable for their procurement decisions and, ultimately, may need to defend them personally before the Public Accounts Committee.

The procurement policy guidelines are not directly applicable in Scotland, Wales and Northern Ireland since procurement policy in these countries is the responsibility of the devolved administrations (the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly). However, in practical terms the policies of the three devolved administrations remain in line with the procurement policy guidelines that ministers have endorsed, in part because they have agreed to implement the existing priorities on value for money and competition.

The current procurement policy guidelines require all public procurement to be based on value for money, defined as:

... the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user's requirement. (OGC, 1998, s 2.1)

To maximise value for money it is important to have clarity about what is being purchased, that is, the requirements. In *Gateway* terms (see Chapter 3) this is the 'business justification' for the procurement. The requirements, including any community benefits, must be critically examined for need, cost-effectiveness and affordability (OGC, 1991, s 4.2).

This situation can be contrasted with one in which community benefits are not part of the subject of the contract or consistent with the achievement of value for money. In this case, the inclusion of the community benefits would be regarded as an 'other aim' in the procurement process. The government's view is that it is "... not consistent with value for money policy for public purchasing power to be used to pursue other aims" (OGC, 1998, s 2.4).

The HM Treasury/DETR (1999) paper, *Environmental issues in purchasing*, is not directly concerned with social considerations but helps to clarify what might constitute a 'core requirement'.

The paper interprets 'quality to meet the customer's requirements' in the definition of value for money as enabling departments to:

Specify what they need to meet their own operational and policy objectives while contributing to the government's objectives on environmental matters. (HM Treasury/DETR, 1999, para 3)

This suggests that a 'core requirement' of a contract is one that is set out in the specification and/or contract conditions and satisfies one or both of the following criteria:

- it meets the operational requirements of the purchaser;
- it contributes to the achievement of the policies adopted by the purchaser: this is one aspect of the 'quality' requirements.

By adopting appropriate policies, purchasers can take into account benefits (for example, in specifying their requirements) that also accrue to parties other than the purchaser. For example, a policy to encourage the use of materials or technologies that reduce harmful emissions would produce benefits for wider society as well as the purchaser, but need not produce monetary benefits to the purchaser. This principle could equally be applied to social considerations such as the reduction of unemployment or upgrading the skills in the local labour market, provided this is considered on a case-by-case basis to ensure conformity with the legal and policy framework.

The paper also includes the following two phrases:

Departments should not seek to use their purchasing power as a means of pursuing wider environmental ends (ie those outside of the scope of the contract). (HM Treasury/DETR, 1999, para 14)

The award of contracts should not be made subject to criteria or conditions of an environmental nature which are not directly relevant to the product or service, which is being procured. (para 15)

These quotes suggest that a 'core requirement' should be directly relevant to the product or service being procured. As noted above, an 'other aim' is one that has no connection with the product or service being delivered. Using this principle, a requirement that a contractor recruits and trains unemployed people to help deliver the service or works that are the subject of the

contract would be a core aim. A requirement that the contractor takes part in a national training programme would be an 'other aim', even though this might be highly desirable.

There are two other key concerns within the procurement policy guidelines. The first is that the procuring body's strategy must follow the policy guidelines and the UK legislation implementing EC procurement directives, as well as the UK's other international obligations. This is a matter that is given detailed consideration in Chapters 2 and 3.

The second key concern is that goods and services should be acquired by competition unless there are convincing reasons to do so otherwise (OGC, 1998, s 5.1). The rationale for this is that "... competition promotes economy, efficiency and effectiveness in public expenditure" (OGC, 1998, s 5.2).

Competition should be undertaken in accordance with guidance relating to the use of objective criteria and a fair and transparent evaluation and award procedure. In all cases the evaluation of bids and the award of the contract must take account of a range of factors (not just price). In relation to community benefits it is important that any requirements are:

- clearly stated (preferably in terms of output and performance<sup>3</sup>);
- capable of being evaluated against objective criteria;
- of benefit (that is, they provide a monetary benefit or help achieve a policy objective<sup>4</sup>) to the contracting authority.

The use of community benefit clauses to incorporate clear and measurable social requirements into the procurement process will help ensure that the requirements of the value for money policy are met, thereby assisting the competitiveness of suppliers.

The principle is therefore very clear. It is legitimate for a public body to seek community

benefits through its procurement procedure provided that:

- it is a core requirement of the contract;
- this is properly supported by its strategies and policies;
- the required outputs are clearly stated and are capable of comparative evaluation;
- the requirements have been critically tested;
- the contract award procedure achieves value for money (as defined above);
- the procurement process complies with the principles of the EC Treaty, the procurement directives and the UK's international obligations.

## EC policy

Within the European Community (EC) 'social considerations' (typically referred to as 'social clauses', and, in this report, included in the term 'community benefits') are primarily linked to a need to alleviate poverty and promote social inclusion, with a view to also improving the conditions for competition. There has been a long debate about how far public procurement should be used to require contractors to employ people who are disadvantaged in the labour market<sup>5</sup>.

The EC is currently considering the need to address both social and environmental issues in procurement activities. For example, in the proposed text for the revised single procurement directive the Commission has stated:

The conditions governing the performance of a contract may concern social and environmental considerations. (EC amended proposal concerning the coordination of procedures for the award of public supply

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<sup>3</sup> Suitable measures have been used by the DTLR (now the Office of the Deputy Prime Minister) and the Employment Service for many years.

<sup>4</sup> Achievement of a policy objective is a part of 'quality (or fitness for purpose)' in the definition of value for money (see page 3).

<sup>5</sup> In May 1988 the European Parliament suggested a provision "... permitting contracting authorities to require, as a condition of participation, contract measures to alleviate youth and long-term unemployment" (McCrudden, 1994, p 2). A modified proposal was accepted by the Council of Ministers in November 1988, by the European Parliament in February 1989, and then by the EC. However, when the matter returned to the Council of Ministers in July 1989 they rejected the above 'unemployment conditions'.

contracts, public service contracts and public works contracts, May 2002)

And in its recent interpretative communications on integrating social considerations into public procurement the European Commission states:

... contracting authorities have a great deal of scope for taking social considerations into account and choosing a product or service that corresponds to their social objectives. (CEC, 2001a, p 7)

The proposed amendments to the procurement directives (see page 12) suggest that the EC is clarifying the scope for social considerations to be included in the relevant stages of the procurement process, provided they are non-discriminatory, relevant to the subject of the contract and, at award, provide a benefit to the contracting authority.

This clarification of the EC rules is consistent with the government's procurement policy, except in relation to contract conditions. On these, the EC rules simply require that such clauses are non-discriminatory, whereas the UK procurement policy requires that they do not distort value for money.

## Local authority use of community benefit clauses

Local authorities (LAs) have a pivotal role in the delivery of social inclusion and neighbourhood renewal policies:

Under the 2000 Local Government Act LAs in England and Wales have a general power to promote the economic, social and environmental well-being of their area, and a specific responsibility to prepare (in consultation with local stakeholders) a community strategy that sets out how this will be achieved.

Under the 1999 Local Government Act LAs in England and Wales have a responsibility to achieve continuous improvement in the performance of their functions (Best Value), but more freedom to choose how this is done.

Proposals in the government's Green Paper on Planning (DTLR, 2001b) suggest that there should

be a direct link between the community strategy (carrying forward the achievement of community well-being) and the local development frameworks and action plans that will guide the LAs' development control activities.

LAs have a key role in local strategic partnerships, which will establish the priorities for local neighbourhood renewal activities.

It is proposed that LAs in Scotland be given similar Best Value and 'well-being' powers to those in England and Wales (Scottish Parliament, 2002), and they will also be seen as the initiators and facilitators of a community planning process that involves a range of local public service providers (Scottish Executive, 2002b, s 46).

In this new and emerging context LAs are likely to have an increased interest in using their budgets and other powers, as well as their community leadership role, to maximise social inclusion. There may also be more pressure from local people (for example, through the community strategy and community planning processes) for LAs to take this 'common sense' approach. Community benefit clauses offer a method for delivering this, in a way that is compatible with good procurement and administrative procedures.

However, earlier work on the use of local labour in construction (Macfarlane, 2000a) and planning agreements (Macfarlane, 2000b) has shown that only a small minority of LAs have sought to use their leverage to achieve employment and training benefits for local people. To understand the reasons for this, research was undertaken in three LAs operating within different legal and policy frameworks, which are at different stages of development in respect of community benefit requirements.

Nottingham City Council is at the most advanced stage. It has been proactive in the use of local employment clauses since the development of its first code of practice for 'local labour in construction' in the early 1990s. Over a 10-year period it has developed procedures to obtain a contractual commitment to local employment and training in many of its construction contracts, and it has developed the infrastructure to support the delivery side, for example, a construction training programme and a job-matching service. However, it has not focused only on construction

and has recently introduced a new recruitment procedure to help maximise opportunities for people from 'excluded communities'.

Dundee City Council has developed a good policy framework for the use of community benefit clauses through its anti-poverty strategy. However, it has struggled to find a way to implement this through its procurement activity and in-house recruitment because the Council has been advised that such action could be outside the legal framework provided by the Local Government Acts of 1988 (on procurement) and 1989 (on council recruitment).

It is perhaps significant that there has been less innovation in the use of procurement to achieve social inclusion by LAs in Scotland (relative to England), so individual authorities may find it more difficult to access new ideas about how to achieve their social objectives within the relevant legal framework.

Torfaen County Borough Council in South Wales reflects a very different situation. This is a relatively small and new authority that covers two large towns (Pontypool and Cwmbran) and a semi-rural area. The north of the Borough is an old industrial area, and considerable effort has been put into regeneration and tackling social exclusion. Much of the population in the south lives in a 'new' town, but at 50 years old, this too has some significant renewal and regeneration needs, and pockets of deprivation and exclusion. The authority has developed a social inclusion strategy and has appointed a small specialist team to implement this, although the authority's size and resources have limited the scope to develop and use community benefit requirements in its contracts.

The three case study areas shared a commitment to tackling social exclusion, but the resources and the experience they could apply to this varied. The legal framework for the use of community benefit clauses by local authorities is complex, and to develop a good procedure requires scarce time and resources. Add to this a paucity of advice about how to implement such clauses within the EC procurement framework and UK procurement policy, and the will to innovate in this area has been understandably weak.

Nottingham City Council, however, is one of a number of English LAs that have developed a

process for using social clauses in their neighbourhood renewal work under pressure from local communities. In both Nottingham and Manchester, early innovations were under the City Challenge programmes of the early 1990s and, after the failure of voluntary codes, the LAs devised ways of using contract clauses. Use was then extended to a range of their procurement activities.

In all three case study authorities the discussion of incorporating community benefit requirements in their contracts and agreements comes at a time when much larger changes to procurement are underway. As well as Best Value there is a move towards 'partnering agreements' and private finance initiatives (PFIs) as a way of procuring major works and services. These changes provide opportunities and challenges to greater use of community benefit clauses. The opportunities arise from increased expenditure on works and public services that will create more job opportunities, and from a more collaborative relationship with providers that can facilitate a better sharing of, and respect for, each others' objectives. The challenges are that the new procurement arrangements are complex and somewhat untested, and the officers involved may be reluctant to incorporate new social requirements into an already complex system.

The local visits highlighted the challenges that must be overcome if community benefit clauses are to be more widely used. These are:

- a lack of resources available for developing and implementing the use of community benefit clauses in many public bodies;
- other changes that are taking place in procurement that make officers less willing to take on new issues and include additional matters;
- a widely-held perception that the use of community benefit clauses is inappropriate or illegal;
- lack of good information on how to use community benefit clauses in the context of the current legal and policy frameworks.

The above challenges relate to a wide range of public bodies, not just LAs, and need to be overcome if public spending is to realise its full potential in combating disadvantage. It is hoped that this report will go some way towards overcoming these difficulties by providing legal

and policy information, a practical approach and some confidence based on the experience of pioneering LAs and specialist legal opinion.

#### Note

It remains the responsibility of individual contracting authorities to satisfy themselves that they are meeting the legal requirements of EC procurement rules and UK legislation.

# 2

## The legal framework

### Introduction

This chapter looks at the ability of public bodies to include social considerations in their procurement of goods, services and works within the boundaries of UK legislation, government policy and European legislation as implemented in UK law.

Procurement is often viewed as involving the acquisition of goods, services or works on the best possible terms. Historically, 'social clauses', which seek to achieve wider benefits, are seen as being 'secondary' factors. But, the line between the primary objectives of a public body and its (potential) secondary motivations is often not clearly delineated. Objectives that might, in the past, have been regarded as 'secondary', are now being required as 'primary', as the government and other public bodies realign their priorities. In this way, such considerations become, de facto, relevant to the subject of the contract. This is particularly true of the 'sustainable environment' agenda, but could also apply to other matters such as social inclusion. These issues will be discussed below.

There is a wide range of legal and policy issues relevant to the use of community benefit clauses and the inclusion of social considerations in public procurement. This chapter covers the issues in the following order:

- UK value for money policy, while not a legal requirement, has a huge bearing on what is acceptable to the UK government within the overall legal framework;
- EC procurement implications;
- specific requirements for local authorities (including Best Value) and other bodies that might be contracting authorities in the UK;
- discrimination under UK equal opportunities legislation;
- data protection;
- competition;
- the enforceability under English contract law of community benefit/social consideration requirements;
- an overview of the appropriate options available in procurements in the UK.

Chapter 3 goes on to offer a method for incorporating community benefits and/or social considerations into a procurement that is consistent with the UK government's Gateway Review process, beginning with the preparation of the business case for the procurement and ending with post-contract award monitoring of the contract.

### Value for money

As indicated in Chapter 1, the UK government's procurement policy defines value for money as "the optimum combination of whole-life costs and quality (or fitness for purpose) to meet the user's requirement" (OGC, 1998, s 2.1). In other words, value for money is about achieving economy, efficiency and effectiveness.

A contracting authority must be able to justify that any project it undertakes represents value for money. Value for money is therefore a crucial aspect of the whole procurement process. Any contracting authority that cannot justify the value for money of a product or service that it purchases may find itself challenged by a range of



accounting and audit offices and, ultimately, by Parliament (the Public Accounts Committee).

From a legal perspective, value for money policy has important implications, particularly for how a contracting authority specifies its requirements and how it applies its contract award criteria.

Local authorities make their own decisions about procurement within the regulatory framework, including their duty of Best Value (see pp 15-16).

### Contract specification

In the joint HM Treasury/DETR (1999) note on *Environmental issues in purchasing*, the following statement is made:

The emphasis on whole life costs means that departments are required to take account of all aspects of cost, including running and disposal costs, as well as the initial purchase price. The reference to “quality to meet the user’s requirement” [in the value for money definition] enables departments to specify what they need to meet their own operational and policy objectives while contributing to the government’s objectives on environmental matters. Departments must, of course, satisfy themselves that specifications are justifiable in terms of need, cost effectiveness and affordability. (HM Treasury/DETR, 1999, s 3)

To “meet the user’s requirement” means that a contracting authority in the UK is considered to have the scope to determine whatever is needed to achieve the quality demanded by the user.

The joint note gives examples of environmental factors that contracting authorities can build into their assessments of the whole-life costs needed to meet their requirements. These include, for example, reduced levels of energy consumed over the product’s lifetime.

Similar conditions apply to the inclusion of measures to combat deprivation and other wider community benefits. For example, in the building of a community centre, requirements such as the provision of training or the creation of employment for long-term unemployed people can be identified as a direct benefit to the

contracting authority in its specification of its procurement requirement.

As indicated above (page 3), the procuring body can take into account benefits that accrue to the wider community and can therefore include these in its specification provided there is a direct link to what is being procured.

### Illustration A

In pursuit of a public body’s environmental policy to reduce harmful emissions it can specify the use of equipment that uses reduced amounts of energy. Such equipment may cost more to purchase, but, in value for money terms, this can be counter-balanced with lower long-term operating costs and benefits to the wider (global) community that accrue from the reduction in energy consumption. Public bodies should be able to justify any premium paid on the grounds that it furthers its policies and thereby represents value for money for the taxpayer (but note the discussion on page 10 of the use in the award procedure of requirements that do not provide a measurable benefit to the procuring body).

Where a purchaser has a policy to combat disadvantage it would be able to specify employment or training matters in their procurement. The purchaser can, at procurement design stage, define the aims of the authority (which may include, for example, securing a trained workforce to maintain future projects in the area). In value for money terms this can be justified because it is achieving the policy objective of combating disadvantage.

### Award criteria

Contracting authorities should also be able to build social considerations into their award criteria, provided they are essential to the delivery of the contract. This would enable a core requirement of a project, including social elements, to be evaluated with reference to the most economically advantageous tender (MEAT) or value for money. Value for money considerations must be built into any project, including procurements undertaken, to comply with the EC procurement legislation. The given examples of which criteria can be used in deciding who should be awarded the contract on

**Table 1: Examples of criteria for awarding MEAT contracts**

Criteria	Works	Supplies	Services
Price	✓	✓	✓
Period for completion	✓		✓
Running costs	✓	✓	
Profitability	✓		
Technical merit	✓	✓	
Delivery date		✓	✓
Cost effectiveness		✓	
Quality		✓	✓
Aesthetic and functional characteristics		✓	✓
After sales services		✓	✓
Technical assistance		✓	✓

an economically advantageous basis are shown in Table 1.

These examples are non-exhaustive and contracting authorities can list other criteria relevant to the contract. In relation to training, such criteria might be the extent to which a bidder’s proposed programme is deliverable and affordable, and the quality and type of training offered.

However, in order to respect principles of equality, only award criteria which provide a measurable benefit (economic and/or qualitative) to the procuring body should be used. Criteria relating to non-measurable outcomes, such as a reduction in global warming or a reduction in social exclusion, should be avoided. Government policy makers have indicated that the use of such general criteria are incompatible with the present and the proposed EC procurement regime, as they do not enable tenders to be compared and assessed objectively.

An important distinction may be between criteria that relate to generalised outcomes (such as reducing global warming) and outcomes that are directly linked to the contract under consideration and which the contracting authority is in a position to be able to evaluate (for example, the provision of on-site training or targeted recruitment). When a contracting authority has included measurable outcomes in its specification and has agreed a budget to pay for this element, it should include appropriate award criteria for it.

Value for money is assessed on the optimum combination of all of the factors that form the award criteria. This will often depend on the weight contracting authorities give to each criterion according to its importance to the project. Contracting authorities are increasingly used to making assessments about the MEAT with reference to a range of weighted criteria, and such processes can be adopted in a procurement with training and employment outputs (see Illustration B).

### Illustration B

A contracting authority can include community benefits in their contract specifications, provided that these requirements have been critically assessed for need, cost-effectiveness and affordability in line with value for money considerations, and that it is within the powers and agreed policy of the contracting authority. It is necessary to demonstrate that the community benefits are a 'core requirement' (see Illustration A) at the stage of defining the range of services to be commissioned.

A contracting authority can include community benefits in the contract award procedures provided they are a 'core requirement', that is, they provide a monetary benefit and/or help achieve one of the contracting authority's policy objectives (see page 3). However, care must be taken to ensure that the award criteria clearly relate to a requirement that provides an economic benefit to the authority.

## European legislation

### Introduction

The EC is tasked with the removal of barriers to trade and the establishment of a common market, permitting the free movement of goods, services, labour and capital. Where there is conflict between EC law and UK law, as a fundamental principle, EC law will take precedence.

EC legislation is set out in two ways:

- Articles of EC treaties – Articles 28 (free movement of goods), 43 (freedom of establishment), 48 (free movement of labour)

and 49 (freedom to supply services) are relevant here;

- EC directives that set out detailed procedures for ensuring that the treaties are implemented, in some or all contexts.

Interpretation of the legislation rests ultimately with the European Court of Justice (ECJ) and a body of case law has developed over time.

The Treaty and the directives only apply to contracting authorities. In EC directives on the award of public service contracts, the award of public supplies contracts and the award of public works contracts, a ‘contracting authority’ is defined as:

the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

‘Body governed by public law’ means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and
- having legal personality; and
- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law. (Directives 92/50/EEC; 93/36/EEC; 93/37/EEC)

A non-government body would only be included under the third criteria if it received over 50% of its financing from public bodies. Such public funding encompasses both capital and income revenue and would include Estates Renewal Challenge Funding or other similar grants made on the transfer of local authority housing. It would not include funding through Housing Benefit, as this is a tenant’s entitlement not an RSL’s.

When more than half of the membership of an organisation’s management, administrative or

supervisory board are appointed by a public body, the organisation is considered to be a ‘body governed by public law’, that is, a contracting authority (but see the discussion about the position of RSLs on page 18).

In this context, the first issue that an organisation wanting to achieve community benefits through its procurement must clarify is whether it is a contracting authority as defined above. For some organisations this could vary from year to year, depending on the proportion of its budget expected to come from a public source. If an organisation is not a state body or a contracting authority, the EC treaties and the procurement directives do not apply to their procurement procedures, including the use of community benefit clauses.

### Procurement legislation

The EC public procurement rules are intended to open up procurement by contracting authorities to suppliers from across Europe and to ensure that there is no discrimination against undertakings from other member states, or the products of those states, in the award of public contracts for works, supplies and services.

While the primary object of procurement may be the acquisition of goods, services or works on optimum terms, secondary factors have often been of importance in the public sector, because of special consideration for social and economic concerns. However, as discussed above, secondary factors may not sit comfortably within the requirements of value for money.

The EC is also recognising the need to address social and environmental issues. The current public sector procurement directives give examples of award criteria that can be considered in deciding on the MEAT (see the table on page 10). The EC (CEC, 2000) includes ‘environmental characteristics’ as possible considerations for deciding which tender is the most economically advantageous.

Commenting on the proposed EC directive, the Committee of the Regions commented that the Commission should go further and state explicitly that it is possible for contracting bodies to use social or environmental considerations as award criteria.

The Internal Market Council has reached political agreement on the new consolidated directive on public procurement. This will now be considered by the European Parliament in the autumn of 2000 at second reading. This will include in the recital of the new directive the following amendment:

(22) Contract performance conditions are compatible with the Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may in particular be intended to favour on-site vocational training, employment of people experiencing particular difficulties in achieving integration, to fight against unemployment or to protect the environment. For instance, mention may be made, amongst other things, of the requirements – applicable during the performance of the contract – to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic ILO conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

And in the main body of the new directive:

Article 26a

Conditions for performance of contracts

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

### *To what sort of contracts do the EU procurement rules apply?*

Whether or not a contracting authority must follow the European procurement directives depends on whether the value of the contract they are pursuing is above the relevant

'threshold'. For local authorities the thresholds are currently: £154,477 (€249,681) for supplies and services and £3,861,932 (€6,242,028) for works (the thresholds can be found on the Office of Government Commerce [OGC] website; [www.ogc.gov.uk](http://www.ogc.gov.uk)).

### *Case law on local labour*

There have been some important recent cases concerning the use of both social and environmental conditions in contract performance and award criteria in public contracts.

In *Gebroeders Beentjes BV v The State (Netherlands)* (C-31/87) (*Beentjes*), the ECJ ruled that a condition of contract performance to employ long-term unemployed persons *can* be compatible with the EC procurement directives as long as it complies with all the relevant provisions of Community law (in particular the principle of non-discrimination) and is mentioned in the contract notice. The ECJ stated that such a condition has no relation to checking a contractor's suitability in relation to its economic and financial standing and its technical knowledge and ability. The ECJ therefore held that a 'local labour' condition in a procurement contract, requiring the employment of, in this case, long-term unemployed people from the region in which the contracting authority was based, would be acceptable if it was non-discriminatory.

In *EC Commission v Kingdom of Denmark* (C243/89) (the *Storebaelt* case), the ECJ stated that, if the contract conditions comply with Community and national legislation, a contracting authority must reject tenderers that do not comply with contract conditions to ensure equal treatment.

*Commission v The French Republic* (C225/98) (the *Nord-Pas-de-Calais* case) concerned an award criterion relating to employment linked to a local project to combat unemployment. The French government argued for a two-tier system of 'primary award criteria' that go to determining MEAT and, second, criteria that were not decisive in relation to MEAT, such as the use of local labour. The ECJ held that contracting authorities could use a local labour criterion provided that (as in *Beentjes*) 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.

This case has been interpreted differently by various bodies. The Commission argues that such a 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” (CEC, 2001b, section 1.4.2). However, if the community benefit requirements of a contracting authority are in the contract specification they are considered ‘core purpose’ requirements and therefore outside the scope of *Beentjes* and *Nord-Pas-de-Calais*.

It would appear from the *Nord-Pas-de-Calais* 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, as long as the criterion is non-discriminatory. The EC has stated that a condition requiring the employment of long-term people resident in a particular region *would* be discriminatory (CEC, 2001a)<sup>6</sup>.

### Recent EC interpretative communications

In its two interpretative communications of July and October 2001 (CEC, 2001a, 2001b), the EC has given its own, non-legally-binding opinion on the ability to incorporate social and environmental considerations into the public procurement process.

#### Pre-qualification

The Commission states that in short-listing candidates it is not possible for social considerations to be included in the assessment of the economic and financial standing of tenderers. However, they can be included in the assessment of a tender’s technical capacity provided the social consideration has a direct link to the contract subject matter as defined in the technical

specifications (that is, it is a core purpose of the contract).

The 1993 Public Services Contracts Regulations (Statutory Instrument 1993/3228) state that, in evaluating the ability of the contractor to perform the services in question, regard can be had to their skills, efficiency, experience and reliability. Thus, for a contract in which the technical specification includes the provision of training for unemployed persons, an evaluation of a tenderer’s track record in providing such training will be crucial in determining whether a tenderer has the technical capacity to carry out the job. In some circumstances, therefore, a tenderer’s track record in providing social considerations can be considered in the selection of a shortlist.

#### Contract award

The Commission is of the view that social and environmental criteria can be incorporated into the process of awarding the contract in one of two ways:

1. By ensuring that any social or environmental considerations can be classified as an ‘economic advantage’ to the contracting authority so that the consideration simply falls within the normal process for determining the MEAT; or
2. By specifying the consideration as an additional criterion.

Where the social or environmental consideration is within the core requirement and technical specification of the contract, it can be taken into account in awarding the contract if it provides an economic advantage to the contracting authority. Economic advantage in this sense has a broad meaning, including the achievement of the contracting authority’s policies, for example on environmental issues or social inclusion.

Economic advantage can be a direct or an indirect advantage under the contract. In its interpretative communications the EC has stressed that contracting authorities can integrate environmental preferences into their contract specifications including those which produce eventual indirect economic advantages to the contracting authority (CEC, 2001b).

<sup>6</sup> Some lawyers suggest that *Robert Fearnon and Co v Irish Land Commission* ([1985] 2 CMLR 228) implies that ‘local’ or ‘neighbourhood’-based labour clauses would not necessarily be discriminatory under the Treaty, but see the discussion on page 19 of the impact of UK anti-discrimination legislation.

For example, the use of solar panelling in the construction of a building would create direct economic advantage by reducing the electricity costs, but also an indirect advantage by reducing the demand for electricity produced by non-renewable sources (such as burning fossil fuels). Training programmes can provide an indirect economic advantage by increasing the number of people with suitable skills in the local labour market (for the procurement body or their suppliers to use), and the economic costs of social exclusion will be reduced.

The EC (CEC, 2001a, 2001b) refers to the concept of additional award criteria as laid down in the *Beentjes* and *Nord-Pas-de-Calais* cases. It is widely understood that the *Nord-Pas-de-Calais* case indicated that such criteria could only be used to distinguish between two or more economically equivalent bids (see CEC, 2001a, para 1.4.2). The Commission gives no guidance other than that laid down by the ECJ on when such additional criteria can be taken into account.

### Discrimination against non-local companies

By including community benefit requirements in the procurement process, will a public body discriminate against non-local tenderers? To answer this question one must consider whether the implementation of a particular social benefit under the contract can be met by a smaller proportion of non-local tenderers or potential tenderers than local tenderers.

The public procurement directives impose the principle of non-discrimination on all contracting authorities. Contracting authorities cannot set selection criteria, contract conditions or award criteria that would benefit local tenderers and be to the detriment of tenderers from other member states.

In both the *Beentjes* and *Nord-Pas-de-Calais* cases the ECJ did not address the factual question of whether the additional criterion of the employment of local long-term unemployed people was discriminatory. In its interpretative communication on social considerations (CEC, 2001a), the EC considers that contracting authorities may stipulate a certain percentage of (for example) long-term unemployed people or trainees on a project, but stops short of stating

that the engagement of these groups *from the locality* could be stipulated.

In both the *Beentjes* and the *Nord-Pas-de-Calais* examples, the contractors were required to recruit unemployed people from a named local source. Having this source, which was open to any contractor, may be seen as a sufficient way to alleviate any potential disadvantage to non-local companies who might otherwise have been disadvantaged by their lack of knowledge of the local labour market.

In these circumstances a contracting authority has two options:

1. Specify community benefits that could be met from anywhere in Europe (for example, unemployed people, trainees), rather than benefits that are locally referenced (for example, local residents, people on specific UK training programmes).
2. Specify local benefits but take action to ensure that any contractor has equal ability to deliver the local benefits (for example by organising a local labour register and a source of local trainees) and rely on this as a defence against any challenge from tenderers that do not have a local base.

With either option, the local benefits will be maximised by taking appropriate 'supply-side' actions and working in partnership with the contractor.

## Illustration C

Community benefits and other social considerations can be included as conditions of performance in contracts that are subject to EC procurement regulations provided the requirements do not disadvantage tenderers from other EU member states and are included in the Official Journal of the European Communities (OJEC) Notice.

If the community benefit requirement is part of the core purpose of the contract, it can be included in the technical assessment of potential contractors and in the award of the contract (but see the discussion about award criteria on page 10).

If the community benefit requirement is identified as a secondary purpose of the contract, it cannot be used in the technical assessment of potential contractors and (it appears) can only be used as an additional award criteria, for example to choose between two 'economically equivalent bids', and only then if this was included in the OJEC Notice.

## Specific UK requirements for local authorities and other bodies that are public funded

### Local authority

#### Powers to contract

The long established principle that councils have express or implied powers to enter into procurement contracts for the purpose of obtaining the goods, services and works they need is now confirmed by Section 1 of the 1997 Local Government (Contracts) Act. In recent years the main power on which local authorities would rely to promote economic development was under Part III of the 1989 Local Government and Housing Act. This wide-ranging power was probably under-utilised by LAs because of the application of Part II of the 1988 Local Government Act ('non-commercial considerations'). Part III of the 1989 Local Government and Housing Act is now repealed and has been replaced by the more enabling

'well-being' power in the 2000 Local Government Act (LGA).

#### Well-being power

Under Section 2 of the 2000 LGA (relating to England and Wales) LAs are given an express power to do anything that they consider likely to achieve the economic, social and/or environmental well-being of their area, or principally for the benefit of a locality or person within their area. In Scotland, a similar provision is included in Part 4 of the 2002 Local Government in Scotland Bill (Scottish Parliament, 2002).

This power does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made), including the use of 'non-commercial' considerations in their procurements (see below).

Each local authority must demonstrate that it has made its own judgement about whether a procurement with outcomes that embrace community benefits are for the well-being of their area. The best way to achieve this is to adopt clear policy statements in the relevant council's community strategy.

#### Non-commercial considerations

Part II of the 1988 LGA made it a duty of every local authority to exercise "relevant functions" without reference to non-commercial matters listed in Section 17(5) of the Act, and to avoid the inclusion of non-commercial matters within its contract documentation. Section 17(5)(a) lists as non-commercial matters:

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.

The 2001 Local Government Best Value (Exclusion of Non-commercial Considerations) Order (Statutory Instrument 909/2001) relates only to England, and came into effect from 13

March 2001. It ameliorated the impact of Part II of the 1988 LGA by providing that the following matters specified in Section 17(5)(a) are not considered 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 1 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 the 2002 Local Government Best Value (Exclusion of Non-commercial Considerations) (Wales) Order came into effect on 31 March 2002. Through the Order matters listed in Sections 17(5)(a) and (d) of the 1988 LGA cease to be non-commercial considerations for local authorities. Therefore, unlike in England, there is no statutory hurdle of demonstrating Best Value before taking into account employment and training matters.

In Scotland a similar amendment to the 1988 LGA is included as Section 10 of the Local Government in Scotland Bill (Scottish Parliament, 2002). This proposes that Sections 17(5)(a), (b) and (d) would cease to be non-commercial considerations in the following circumstances:

- where the local authority reasonably seeks to ensure that the contractor ... will comply with the contractor's obligations under the contract;
- where the local authority reasonably seeks to ensure that the contractor ... will perform the contractor's obligations ... in a way that will not prevent the authority from securing best value or hinder it in doing so; and
- where ... the implementation of the contract ... would entail a relevant transfer within the meaning of the Transfer of Undertakings (Protection of

Employment) Regulations 1981.  
(Scottish Parliament, 2002, clause 10)

In response to this report the Office of the Deputy Prime Minister (ODPM) has provided a view on the use of social considerations in procurement (see Appendix B); LAs in England may wish to refer to this.

Therefore, under the right circumstances LAs can now pursue employment initiatives within their procurement contracts and other 'partnerships'. However, in order to use social considerations concerning employment, councils in England must demonstrate that such factors facilitate compliance with the requirements of Part I of the 1999 Local Government Act (Best Value).

The enactment of the 'well-being' power makes it easier to show that community benefit initiatives are within the contemplation of the legislative framework for local authorities.

### Proper purposes?

In *R v Lewisham London Borough Council, ex parte Shell UK* ([1998] 1 ALL ER 938) (*Shell*) it was found that an LA's policy of refusing to purchase the products of Shell UK when equivalent products were available elsewhere on reasonable terms had been influenced by the desire to put pressure on Shell to cease its trading links with South Africa. The court held this 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 power in pursuit of any policies entrusted to the authority by other legislative provisions, even if the possibility of using contracts to support such policies is not expressly contemplated in these policies.

Since the enactment of the well-being power, provided local authorities adhere to the processes within the framework of the new power, they are unlikely to be successfully challenged under *Shell*.

### Best Value

In England and Wales the 1999 LGA requires a Best Value authority (which covers local



authorities and a variety of ‘special purpose’ authorities; for example, police and fire authorities to:

... make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to combination of economy, efficiency and effectiveness. (section 3[1])

Best Value authorities must therefore seek continuous improvement, having regard to value for money<sup>7</sup>.

In order to show that an LA has considered properly its policy on the use of community benefits in its procurement operations, it is recommended that express statements be made setting out how these will enable it to perform its functions in a way that is intended to achieve continuous improvement in service delivery. In England and Wales, this should be in the community strategy and in the Best Value performance plan (England) and improvement plan (Wales), but could also be included in corporate strategy statements and standing orders. In Scotland, similar Best Value requirements are included in Part 1 of the Local Government in Scotland Bill (Scottish Parliament, 2002). Scottish LAs might seek to include appropriate policy statements in the community planning process proposed in Part 2 of the Bill, as well as in their corporate strategy statements, anti-poverty plans and standing orders.

The intention by an LA to include community benefits in procurement and other activities can be set in the context of an authority’s commitment to alleviating unemployment and social exclusion and promoting the development of small- and medium-sized enterprises.

### *Housing action trusts*

Housing action trusts (HATs) have a long track record in undertaking procurements that incorporate social considerations, including the promotion of training and employment of local residents. This largely derives directly from their

## Illustration D

An LA wishing to achieve community benefits through its procurement should underpin its actions by adopting appropriate policy statements.

In England, councils can seek ‘employment benefits’ through their contracts where they are necessary to achieve Best Value, that is, continuous improvement in service delivery and value for money. The justification for this will be enhanced if appropriate policies are included in the community strategy and Best Value performance plan. In Wales there is no statutory Best Value hurdle, and this is also likely to be the position in Scotland.

original purposes and their primary objects in relation to their ‘designated area’ under Section 63(1) of the 1988 Housing Act. These objectives not only relate to the improvement and effective management of housing accommodation but also generally to secure or facilitate the improvement of living conditions of those living in the area, as well as the social conditions and general environment of the area.

HATs have a wide ‘subsidiary power’ under Section 63(3) to “generally do anything necessary or expedient for the purposes of those objects and issues or for purposes incidental thereto”. It is therefore core to the functions of a HAT to undertake procurements taking into account social considerations, both in terms of the final contract and in determining the criteria for the most economically advantageous offer. Clearly, as in the case of other contracting authorities for which the EC procurement requirements apply, HATs must undertake their procurements within the framework available for social considerations.

### *Other neighbourhood regeneration vehicles*

It is increasingly common in 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, although not always, such an organisation will be a contracting authority satisfying one of the tests for ‘body governed by public law’ under the definition of a contracting

<sup>7</sup> In Scotland Best Value is incorporated in the Local Government in Scotland Bill 2002 (Scottish Parliament, 2002).

authority (see page 11). This is particularly likely to be the case when the organisation is the accountable body or the lead procurement agency for a government programme such as the Single Regeneration Budget or New Deal for Communities. Consideration should be given to extending as much flexibility as possible to not-for-profit organisations in their objectives, for example, including an ‘area for benefit’ and powers to ‘assist people to find employment’. Procurement taking into account social considerations should therefore be within a not-for-profit organisation’s core purposes (for further guidance on the governance of community-based organisations see Knox et al, 2002).

### Other public bodies

Since the 1980s there has been a wide range of statutory bodies that have been established to run particular services in the public sector, including higher education corporations (the ‘new’ universities), further education corporations, NHS trusts and primary care trusts. Each of these organisations typically has widely framed subsidiary powers, which may include a subjective element (for example “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, it is open for such bodies to take into account social factors in their procurements. In the National Health Service, this will require central ownership and direction (within the Department of Health) if it is to become a reality. Currently, the main drawback for such organisations is that they are often not provided with an adequate budget to undertake procurement that includes broader regenerative objectives, even when these may have a positive impact on public health. These wider objectives may be achieved through joint procurements or other arrangements with contracting authorities, which do have the resources to undertake regenerative objectives. For example, New Deal for Communities funding has been made available to enable the training of local people in the building and maintenance of primary care facilities.

### Government departments, executive agencies and non-departmental public bodies (NDPBs)

The functions of government departments and other agencies are framed by reference to any relevant legislation that outlines the Secretary of State’s powers and duties, and the royal prerogative. There is no reason why government departments cannot adopt coherent and positive policies towards social considerations in government procurement, provided such action is within the policy and legal framework.

### Registered social landlords

Whether or not it is a contracting authority, an RSL must take account of The Housing Corporation’s (2000) Scheme Development Standards. The standards state that RSLs should “ensure best value for money, probity and accountability in commissioning development work” and should follow the key principles set out in HM Treasury Guidance Note 3, ‘Appointment of consultants and contractors’ (see [www.ogc.gov.uk](http://www.ogc.gov.uk)).

To date, RSLs in England have generally not been regarded as contracting authorities – this is the current opinion of The Housing Corporation. However, in light of recent EC case law, particularly *Commission v France* C237/99 (a case about French social housing providers), discussions continue between The Housing Corporation, the National Housing Federation (NHF), the OGC and the ODPM concerning the status of RSLs as contracting authorities in England.

Whether or not individual RSLs will be contracting authorities for the purposes of procurement legislation will depend on whether they are a ‘body governed by public law’ as defined on page 11.

An RSL would only be caught by the first test (see page 11) if it received over 50% of its financing from public bodies. Such public funding encompasses both capital and income revenue and would include Estates Renewal Challenge Funding or other similar grants made on the transfer of local authority housing stock and grants from the Home Office for the provision of accommodation for asylum seekers. It would not

include Housing Benefit as this is a tenant's entitlement and not a RSL's entitlement.

In Wales, RSLs are no longer subject to the supervision of Tai Cymru, which was the Welsh equivalent to The Housing Corporation. Welsh RSLs are now regulated by the National Assembly for Wales, which has issued guidance to the effect that RSLs in Wales are contracting authorities for the purposes of EC procurement legislation. Scotland has yet to make its position clear.

## Local targeting

### *Discrimination against individuals (UK law)*

UK legislation prevents discrimination against anyone because of their race, gender or disability under the 1976 Race Relations Act, the 1975 Sex Discrimination Act and the 1995 Disability Discrimination Act.

There are two main types of discrimination. Direct discrimination occurs when a person or group is treated less favourably than others because of, for example, his/her/their colour, race, nationality or ethnic or national origins. Indirect discrimination occurs when a requirement or condition that is applied equally to all people cannot be met by an equal proportion of people from a particular group, the condition or requirement is not justifiable and is to the detriment of those who cannot comply. Many seemingly innocent situations can in fact discriminate indirectly against certain groups.

It is illegal to publish discriminating conditions in advertisements or to instruct others to discriminate. It is therefore illegal to instruct a tenderer to discriminate.

In Britain the 2000 Race Relations (Amendment) Act came into full force on 2 April 2001. This amends the 1976 Race Relations Act (RRA) and places a general duty on various public bodies to have regard to issues of discrimination when exercising public functions.

Section 19B has been incorporated into the RRA and states:

it is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination.

The 2000 Race Relations (Amendment) Act affects a range of public bodies that are listed in Schedule 1A of the Act, including local authorities, HATs, The Housing Corporation, the Regional Development Agency and health authorities. The Home Office is proposing to add other public bodies to Schedule 1A.

The 2000 Race Relations (Amendment) Act applies whenever a public body exercises a public function, and when a public body contracts out a public function it must ensure that it contractually binds the contractor to fulfilling the requirements of the Act. This clause should require the contractor to:

- eliminate unlawful racial discrimination; and
- promote equality of opportunity and good relations between persons of different racial groups.

Contracting authorities should also be aware of two EC directives based on Article 13 of the Treaty of Amsterdam. These directives will:

- make discrimination on the grounds of religion or belief, disability, age or sexual orientation in employment or training unlawful;
- make racial discrimination in the areas of employment, training, education, access to social security and health care, social advantages and access to goods and services unlawful.

A local labour clause or a training clause may be indirectly discriminatory if the benefit area does not contain representation of all racial groups found within the wider area (what this wider area is requires consideration in each instance). For example, if in procuring work for a building contract the contracting authority specifies that a certain percentage of the construction workforce must be made up of residents of a certain part of town, if that part of town is predominantly white or black, but the racial mix is varied elsewhere in the town, there would be an argument for indirect racial discrimination. Without a non-racial justification this may be unlawful.

If there is a legal challenge (on the basis of discrimination) to a contracting authority's

targeting requirements, one defence would be that of 'justification'. If the contracting authority is a regeneration company with a stated area of benefit, a justification may be fairly easy to prove, as the company's objectives will include provisions benefiting the residents of the local community. Likewise, if the contracting authority is an LA that has adopted local targeting as part of its work to reduce social exclusion (for example, in its community strategy), it may be justified in requiring its contractors to target their recruitment. However, it is still important to avoid discrimination. To achieve this the local targeting should be done on the basis of 'social exclusion characteristics', such as long-term unemployment, underachieving young people, those who have been long-term sick and so on. This would apply to all of the population in the target area regardless of race, gender, disability, age, sexual orientation and so on.

Although justification is option for defence, the safest way to avoid indirect discrimination is to use a wide area for targeting, but to focus supply-side activity in the areas with the highest levels of social exclusion.

Apart from the danger of indirect discrimination there is no barrier to a contracting authority targeting the community benefits at a selected area. Indeed, Section 2 of the 2000 LGA expressly permits LAs in England to use their well-being powers for the benefit of "... a locality or person within their area", as well as the whole of their area (see paragraphs 4.1.1 and 4.1.2 of the LGA).

### Discrimination against non-UK workers

EC law not only covers the right of firms to provide services, but also for the free movement of labour (Article 48 of the Treaty of Rome). Work undertaken by James Goudie QC indicates that the interpretation of Article 48 in relation to local labour clauses is difficult. The Article provides for:

The abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work or employment. (unpublished client notes, 1995)

It could be argued that the inclusion of a local labour clause would amount to direct or indirect discrimination, but Goudie argues that:

- local labour clauses would not be discriminatory on grounds of nationality;
- case law suggests that such indirect discrimination may be justified on the basis of 'objective criteria';
- the 1984 case of *Fearnon & Co v Irish Land Commission* established the principle that "... a state is entitled to treat some of its nationals more favourably than others; the fact that foreigners fall into the category of nationals treated less well is not sufficient for a finding of discrimination". (unpublished client notes, 1995, p 21)

While the position remains somewhat unclear, it is not the case that any community benefit clause that favours local recruitment is in immediate conflict with the EC treaties and leaves the public body open to challenge on the grounds of indirect discrimination against workers in other EC member states.

### Conclusions

In the context of neighbourhood renewal, contracting authorities may well be keen to target the community benefits that arise from their regeneration spending (including mainstream programmes) at neighbourhoods that have high levels of social exclusion. In doing this there is a risk that they could face a challenge on the basis of indirect discrimination.

The risk of challenge can be reduced by:

- ensuring that the selection of a target area is justified by the contracting authority's objectives or policies, or has a 'typical' racial mix (or other relevant 'mix');
- specifying general categories of beneficiary (for example, unemployed people, trainees) and a broad area of benefit, but then maximising the benefits to a target community through actions that will maximise their take-up of the benefits (for example, outreach work and pre-recruitment training).

## 1998 Data Protection Act

The 1998 Data Protection Act (DPA) regulates the use of personal data, and may have some bearing on the use of community benefit clauses such as employment and training conditions. For example, if a contractor is to receive payments towards targeted employment and training, it will be important for the contract officers to be able to verify that the conditions have been met, by viewing individuals' training or employment records. These records would be classified as 'personal data' under the DPA and the employer would not be able to provide access to records without the employees' consent.

These issues also apply to an organisation that engages self-employed contract staff and casual labour and to the recruitment or engagement of staff.

To comply with the DPA it is important that contracting authorities ensure that a contractor obtains the permission of its employees to provide the contracting authority with data for monitoring purposes. This could be included in employment contracts or in the site security records.

## 1998 Competition Act

In paragraph 3.11 of the Byatt report (DTLR, 2001a) the 1998 Competition Act is mentioned in the wider context of the fact that EU rules prohibit actions that would damage fair and open competition or equality of treatment between tenderers. The 1998 Competition Act introduces two prohibitions, reflecting Articles 81 and 82 of the Treaty of Rome (as amended by the Treaty of Amsterdam):

- the prohibition of agreements (whether written or not), which prevent, restrict or distort competition and which may affect trade within the United Kingdom ('the Chapter 1 prohibition');
- the prohibition of undertakings that amount to an abuse of a dominant position in a market and which may affect trade within the United Kingdom ('the Chapter 2 prohibition').

In most circumstances a procurement by a public sector body is unlikely to be affected by the 1998 Competition Act. Prohibitions under the Act affect public bodies only insofar as they are acting as an 'undertaking'. Even if a public body acts as an 'undertaking' it is unlikely to be in a dominant position, and the implementation of social considerations into the procurement process is unlikely to have an 'appreciable effect' on trade. If in doubt, legal advice should be sought on a case-by-case basis.

## Enforcement of social considerations

If a social element is part of the core purpose of a project, any terms relating to it in the procurement are likely to be conditions of the contract, breach of which would allow the contracting authority to terminate the contract if it wished to do so. It may also be possible to obtain specific performance or damages for a contractor's breach of social clauses.

In contrast, if secondary social considerations are used a contracting authority would probably be unable to obtain specific performance, damages or termination of the contract for any breach of a social clause by the contractor. This is because a secondary social element is not a core to the contract. For example, if a contractor is contracted to build an office but fails to perform the secondary consideration of training, the contracting authority will not have lost a great deal in financial terms because it still gets the office (the core purpose of the contract).

To prevent adversarial approaches to disputes between a contracting authority and contractor over the performance of a procurement contract, some form of partnering agreement is recommended.

## Partnering

### *How partnering can be used to implement social considerations*

The concept of partnering was developed within the construction sector. It is about developing relationships within which people are prepared to

work openly together in the spirit of trust and mutual cooperation.

As partnering maximises the effectiveness of each party's resources, it is likely to provide economic advantage to the contracting authority and should be listed as a contract specification. The OGC recommends that partnering should be adopted as far as possible on all new and existing contracts (OGC, no date a).

However, partnering is not a way to implement social considerations that were not specified before the award of the contract. Thus, if social considerations, such as the provision of training or work for unemployed people, are not included in the contract specification, a contracting authority can use post-contract award partnering to discuss whether or not such considerations can be implemented, but they cannot require the contractor to embrace them.

If the provision of training or work for unemployed people is specified as a core objective of the contract, it is likely that the contractor will already have been evaluated on its plans to meet this objective within the evaluation of MEAT. Partnering can then be used as a process of implementing these plans and developing them further. For example, once it has awarded the contract, the contracting authority may wish to use the partnering process to negotiate how the provisions for training or employment can best benefit the local community.

### Making partnering work

A partnering agreement traditionally runs parallel to the main contract and is a non-contractually binding document that is not enforceable.

However, case law suggests that a partnering agreement may be used as evidence of the parties' intentions in order to determine disputed clauses of the main contract (*Birse Construction v St David Limited* [1999] BLR 194). With this in mind, a partnering agreement may require the same application of contract law principles in the same way as a normal contract so that it can best evidence the parties' intentions with regard to the main contract.

Successful partnering requires strong leadership and commitment. Information, such as the

evaluation of risks, should be shared between the parties to minimise the chance of contentious disputes.

### Voluntary commitment

An alternative to a partnering agreement is a voluntary commitment. This could be a local employment charter that is marketed to local companies, or a separate agreement that is negotiated with a successful contractor after they have been awarded the contract. However, whether a tenderer has signed up to a charter or is offering to enter a voluntary agreement must have no bearing in choosing the contractor.

The most certain way to obtain community benefits is therefore to make them part of the core requirements of the contract and include them as a contract clause. However, a voluntary commitment can be inserted into a contract if the contractor, having already been chosen after an assessment on MEAT, volunteers to have its commitment set out as a contractual requirement.

Voluntary agreements can be successful when good cooperation from the contractor can be assured, that is, when there is a shared commitment to achieving the community benefits. The advantage of using a voluntary commitment is that it cannot be challenged. The disadvantage is that it is impossible to enforce.

### Bringing the law together

There are three possible approaches to including social and environmental considerations into the procurement process:

- incorporating social and environmental considerations into the core purpose of the project;
- trying to achieve social and economic objectives through a purely voluntary approach;
- using social and environmental considerations as secondary 'additional criteria'.

The effectiveness and risk of each of these options is considered below.

### Core requirement of procurement

The safest way to incorporate social and environmental considerations into the procurement process is to specify the consideration as a core requirement of the contract. For example, having a joint core purpose of building a leisure centre and of training people.

Where there is doubt as to whether public bodies, such as NHS Trusts, have the power to procure contracts for elements such as training it would be possible for a NHS Trust and a local authority to jointly procure a project, and therefore utilise the authority's 'well-being' power as a means of meeting the broader social needs of a community.

In specifying the social element as a core requirement, the contracting authority shall easily be able to show value for money in the project, therefore meeting the government's procurement policy.

Providing it does not discriminate in any way, for example, by specifying an employment or training requirement restricted to *local labour* (see page 20), a contracting authority should be able to satisfy the requirements of the procurement directives with ease. In specifying a social consideration as a core element of the contract, the contracting authority can also require evidence of potential contractors' previous experience in delivering similar social elements in contracts as part of the assessment of tenderers' technical capacity.

Partnering can also be used to facilitate the implementation of the social considerations.

### Voluntary commitment

As noted above, the risk associated with voluntary commitment is that there is no way to ensure that a contractor will sign up to a voluntary charter or agreement and, even if it does sign up, there is no way to enforce the commitments written in the charter/agreement.

### Secondary factors or 'additional criteria'

There are a few cases in which it is not possible to include community benefits as a core purpose, for example:

- when a contracting authority has failed to recognise a requirement for training and/or employment until later in the procurement process;
- when the contracting authority does not have the powers or policies in place to include the community benefits in its core requirements, and it is inappropriate (or impossible) to correct this situation in the available time.

The EC gives guidance that all secondary or additional considerations should be specified in the OJEC Notice, but cannot form part of the selection or award processes. However, the ECJ has accepted that secondary considerations could be additional award criteria when these have been included in the Notice and (it is suggested) the additional criteria are only used to choose between two or more equivalent bids.

However, the secondary requirements can be the subject of discussions with the contractor after appointment (perhaps as part of a partnering agreement), which may result in substantial delivery of the requirements even when this is unenforceable through the contract.

### The recommended approach

The best way to achieve community benefits through a procurement contract is to state them as a core requirement of the contract, both in terms of outcomes and in the range of services and works procured, against which tenderers can be evaluated. This approach satisfies the requirements of the EC's procurement directives in that the social criterion can be evaluated for MEAT and the requirements of value for money. However, if the community benefit requirements are targeted at a local area, care must be taken to ensure that this does not produce indirect discrimination, for example on the basis of race, or disadvantage to non-local contractors (see page 20).

The core requirement route is easily achieved by local authorities and other regeneration bodies that have community benefits as part of their purpose and their policy infrastructure.

The best way to facilitate the social elements of a contract is to embrace partnering and work jointly with a contractor to achieve the regeneration and sustainability of the community. In Chapter 3, the procedures for implementing social considerations into the procurement process are considered.



# Using social considerations in the procurement process: practical guidance

Chapter 2 concerned the legal issues that can affect the use of social issues in procurement. This chapter looks at how to successfully include such considerations into the procurement process within the policy and legal framework.

As noted in Chapter 2, there are potential legal problems that can arise in trying to integrate community benefits into the procurement process when they are not a core requirement of the contract. This chapter will concentrate primarily on the implementation of social considerations which are a core objective of procurement.

In working out a successful procurement strategy, a modified form of the OGC's 'Gateway Review' (OGC, no date b) is a helpful starting point. All of the Gateways provide useful advice on dealing with individual contracts, but Gateway 2, which deals specifically with procurement strategy, is of particular importance. For local authorities, guidance given by the Audit Commission is also relevant (Audit Commission, 2002).

We recommend that, for each procurement that includes a social or environmental consideration as a core requirement, the following method be used.

## Preparing the business case

Before embarking on a procurement, a contracting authority must assess the extent to which the procurement requires the achievement of community benefits and work this into a business case.

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

- ensuring that financial provisions are made for the entire project, including social outcomes such as training needs (for example, by identifying a special budget such as New Deal for Communities or Neighbourhood Renewal funding);
- whether the social consideration can be properly resourced internally (for example, by supplying contractors with a list of unemployed people they may wish to take on) and externally (for example identifying potential contractors that can meet the joint core specifications of constructing a building and training people);
- identifying who the stakeholders will be (for example, identifying long-term unemployed people or those who need training);
- whether policy 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 fully appreciate all the issues involved and what is required of a contractor.

## Business case justification

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 fully justify a business case, 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.

A contracting authority must also ensure that all of its social objectives, such as training programmes, can be quantified and measured. This will assist the contracting authority in establishing that the social aspects of the procurement contract represent value for money.

## Procurement strategy

Having ensured that the business case and its justification is up to date and has the full support of those within the contracting authority, a procurement strategy needs to be decided on that conforms to the policy and legal framework (see Chapter 2). The boxes below list all the areas for consideration.

### Choose procurement procedure

In circumstances where the EC procurement requirements apply (see pages 10-12), the contracting authority must first decide whether it will use the open, restricted or negotiated procedure as laid down in the procurement directives. If the open procedure is used, an invitation to tender must be sent to all parties responding to the OJEC Notice. If the restricted or negotiated procedure is used, the two-stage process described below will apply.

In circumstances where the EC procurement requirements do not apply, the contracting authority must comply with its own competition standing orders and procurement policies and procedures, as well as UK policy requirements relating to that particular body. If it is a 'contracting authority' (see page 11) it must also ensure that its requirements do not discriminate (see pages 14, 19 and 20).

### OJEC Notice

In drafting the OJEC Notice, the authority must ensure that all of its requirements, including those of a social nature, are clearly set out, so that potential tenderers know the exact contract requirements. Specific mention of such requirements can be set out under the heading 'Other information' in the OJEC Notice. It is important to remember that any criteria that are not described in the contract documents cannot be used to assess tenders when choosing a contractor.

Where an OJEC Notice is not needed, consider including a description of community benefits and social considerations in any other advertisement of the contract opportunity.

### Prequalification questionnaire

The prequalification questionnaire (which can also form part of the OJEC Notice) is used by contracting authorities to assess whether a candidate has the required economic, financial and technical capacities. If one of the core requirements is a social consideration, such as training or the alleviation of unemployment, the questions must be sufficiently detailed to allow the contracting authority to assess the technical capacity and/or ability of a tenderer to provide any training programme.

On the basis of the responses to the prequalification questionnaire, the contracting authority can select those candidates that have the required economic, financial and technical capacity and eliminate those that do not.

## Invitation to tender/negotiate

Once the contracting authority has selected potential contractors on the basis of the prequalification questionnaire, an invitation to tender (ITT) or an invitation to negotiate (ITN) is sent, depending on whether the restricted or negotiated procedure is used.

In their responses to the ITT or ITN, tenderers set out their proposed solutions to achieving, inter alia, the core social requirements such as training. Contracting authorities can include these proposed solutions within the assessment of the quality of the tenders for the purposes of identifying the most economically advantageous tender.

## Contract documentation

Having specified one of the core requirements of the procurement as a social criterion (such as training) and evaluated tenderers throughout the procurement process on their ability to provide the social requirement, clauses within the contract documents can be used to enforce the delivery of the goods, works or services by the chosen contractor, in the way described in the contracting authority's specification and any service delivery plan provided by the contractor in response.

## Partnering

Contracting authorities may wish to consider using the partnering process to assist in the implementation of the social issues incorporated into the contract.

## Implementing the project

Before a procurement contract is awarded, a contracting authority should revisit its business case and its business case justification to ensure that the proposed contractor does, in fact, meet the authority's requirements fully. The contracting authority should also ensure that it has all the necessary support systems in place to monitor and control the performance of the

contract, including the performance of the social objectives.

## Monitoring performance

Gateway 4 (OGC, no date b) suggests that contracting authorities should continually monitor the performance of procurement contracts against the original business case to ensure that all objectives (including social ones) are being achieved. To achieve this it will be important to include the provision of appropriate monitoring information for the social considerations as a contract condition. (For a more detailed analysis of how to monitor the achievement of social objectives, see page 42-43.)

## Lessons learnt from a procurement contract

Throughout the life of a procurement contract a contracting authority should conduct benefit evaluations to ensure that a project is still meeting the business case and is delivering value for money.

Because social considerations are likely to concern the method of delivery of the contract rather than the final product, it is important to undertake frequent evaluation and progress chasing throughout the delivery period, not just after completion (see page 42-43).

At Gateway 5, OGC (no date b) recommends that projects which do not include contracts entailing the provision of an asset should be evaluated 6 to 12 months after its completion. For long-term service contracts such as PFI, benefits reviews should be undertaken every three years.

Benefits reviews allow contracting authorities to assess whether or not their business case justification was realistic. Lessons can be learned so that other projects that have social considerations as core requirements can be made more successful, thus benefiting the implementation of an authority's long-term policies (including social issues).

## Voluntary commitments

As discussed in Chapter 2, the use of a voluntary commitment by a contracting authority is not specified within a procurement strategy and the contracting authority must not award a contract to a tenderer on the basis of whether or not it has already signed up to the voluntary commitment.

After awarding the contract under the rules stated in the procurement directives, a contractor is able to choose whether to sign up or not. This must be a purely voluntary commitment on the part of the contractor.

## Secondary considerations

If a 'social consideration' is specified in the OJEC Notice it can be a core purpose of the contract and can be used to evaluate tenders. If such a requirement is not within the Notice and the technical specification, a contracting authority cannot evaluate tenderers on their ability to provide these 'secondary considerations' at any stage.

However, if a contracting authority wishes to include a social consideration but does not have the powers or policies in place to support the inclusion of social considerations as a 'core requirement' (see page 3), they could adopt the following procedure. This procedure is within the advice given in the EC Interpretative Communication (CEC, 2001a), although, different considerations apply in respect of the government's procurement policy.

1. Describe the desired community benefit in the contract requirements.
2. Disregard the community benefit in the selection of the contractor, only using it as an award criteria when there are two or more equivalent bids (when the offer on the secondary social consideration *can* be used to choose between contractors).
3. Include the contractor's offer in respect of the social consideration as a contract condition (see page 13-14).

Alternatively, the contracting authority can seek to achieve the social considerations through a voluntary agreement.

## Traps for the unwary

There are several legal and policy issues that can cause problems for contracting authorities. These issues should be borne in mind by a contracting authority at the very start of the procurement process, when the authority draws up its business case. To recap, the main traps to look out for are as follows.

### *Value for money*

In all procurements, when setting out its requirements in a business case a contracting authority must consider whether the proposed project will represent value for money (both in public expenditure and procurement terms). By incorporating social objectives into the contract's core requirements, account may be taken of any social benefits that will be obtained in making an assessment of the MEAT and value for money (value for money and MEAT are different things).

### *Discrimination legislation*

If a contracting authority specifies a requirement that is specific to a locality, whether or not it is core to the contract, such a requirement may be held to be discriminatory under both the EC Treaty, the procurement directives and UK legislation (see pages 14 and 19-20).

### *Data protection issues*

In monitoring the performance of social considerations, contracting authorities must ensure that they do not infringe the 1998 Data Protection Act (see page 21).

# Including community benefit clauses in other agreements

Procurement may be a big-budget item for public bodies, but it is only one of several activities that can be used to help achieve their regeneration and social inclusion objectives. In this chapter we will set out other key activities in which the use of a community benefit clause may be appropriate.

## Funding agreements and grant conditions

### *The legal position*

A public body can include community benefit requirements in funding agreements and as grant conditions to extend the purpose of the grant. In relation to neighbourhood renewal and social inclusion, two of the most powerful requirements would be that the recipient:

- targets the employment and training opportunities that arise from the use of the grant;
- targets employment opportunities that arise from all of its activities, not just those that are grant funded.

Such requirements can encourage the recipient body to re-examine the way in which it operates, especially in relation to recruitment. However, conditions relating to recruitment are among the more difficult to impose because of equal opportunities legislation. So what is the legal position? And how can targeted recruitment be achieved within this framework?

When administering grants a public body must not be discriminatory and must not require any one else to commit an act that is contrary to:

- the UK anti-discrimination laws: the 1975 Sex Discrimination Act; the 1976 Race Relations Act; the 1995 Disability Discrimination Act; and the 2000 Race Relations (Amendment) Act;
- the EC treaties, articles and procurement directives – if applicable (see pages 10-12).

The basic principle is that organisations (including public bodies and contracting authorities) are free to employ any person of their choosing providing they do not breach any of the anti-discrimination laws. Although, any organisation which falls under the definition of a public body in the 2000 Race Relations (Amendment) Act has a duty to consider discrimination issues when exercising its public functions. This includes both its own recruitment and recruitment by contractors carrying out functions on its behalf.

There are also two process issues that need to be considered in asking a grant recipient to target its recruitment:

- an organisation could face challenge under the Race Relations Acts if the community that it targets does not have the same ethnic mix as the wider community within which it is based;
- a local authority (and other organisations covered by the 1989 Local Government and Housing Act) must appoint on merit.

How can a grant recipient target its recruitment in this context?

### *Race relations*

With regard to the Race Relations Acts there appears to be no scope for mounting a rational argument in defence of having a target area that is not representative. For example, there is often

a correlation between areas with high levels of social exclusion and areas with high proportions of people from one or more ethnic minority communities. A programme designed to tackle social exclusion in such an area would want to encourage the recruitment of people from the area, but to specify this in a community benefit clause would run the risk of indirectly discriminating against the wider population.

In this context there are several actions that a grant recipient can agree to undertake to target some jobs locally:

- they can check whether any of the jobs can legitimately be targeted at particular ethnic groups because this is required to improve service delivery to the local population;
- they can check whether local residence or knowledge of the local community can legitimately be included as a part of the job specification or person specification for any of the jobs;
- they can undertake pre-recruitment activity that will increase the chances of people from the target area applying for and obtaining the jobs.

Pre-recruitment activity could include local promotion of the job vacancies, outreach work to attract local residents who may not be actively jobseeking or may not consider themselves a possible candidate, pre-recruitment training to increase the chances of local people being appointed, and assistance with filling out application forms.

Thus, although the Race Relations Acts constrain the demand-side actions of grant recipients they do not constrain the supply-side support that can be given to a target population.

### *Appointment on merit*

When an employer is required to appoint on the basis of merit (to comply with the legal framework or internal policy) the position is potentially more difficult. One of the characteristics of social exclusion is disadvantage in the labour market and it is probable that 'appointment on merit' will disadvantage the socially excluded.

However, once again, there are actions that can be taken that will legitimately increase the level

of job appointments from within a target community.

First, it is important to re-examine the criteria being used for selection. Is each of the criteria essential for entry to the job to be carried out? If it is not essential then it is unnecessary. This process could include:

- the elimination of criteria and personal characteristics that are not 'essential' for the post, including qualifications and experience that could be provided through post-appointment work and in-service training;
- a requirement that candidates show training and/or experience equivalent to a named qualification, rather than the qualification itself;
- re-examination of subjective criteria that are potentially discriminatory, for example, 'must be well spoken' and 'must be of smart appearance';
- a re-examination of the language used in describing the job: is this unnecessarily technical or culturally-specific.

Within this process it is possible to consider what weight, if any, should be given to knowledge of the local community (especially minority ethnic communities) or local residence, within the essential selection criteria<sup>9</sup>.

Second, it is possible to reduce the size of the pool from which the recruitment is made without affecting appointment on merit. Judgements are already made about this in recruitment; for example it is typical to advertise certain types of jobs on a 'travel-to-work' basis and others on a national basis. This reflects judgements about what size of pool is necessary to attract a range of suitable applicants. If this approach is applied to entry-level jobs, it may be unnecessary to advertise across the whole travel-to-work area since an adequate pool of candidates can be obtained from within a single neighbourhood. Appointment is still made on the basis of merit.

The above approach has been adopted by Nottingham City Council, following a Best Value review of its recruitment procedures. This review identified that Best Value could be achieved by

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<sup>9</sup> Again, it is important that the legitimacy of using local knowledge or residence is carefully considered, as it could be discriminatory. Is it really essential for the job?

eliminating city-wide advertising for entry-level jobs. An adequate range of candidates can be obtained (at a much lower cost) by using the local JobCentre and by placing adverts in council offices, libraries and community facilities.

Third, it is possible to increase 'local take-up' by undertaking the supply-side activities set out above on page 30.

Opportunities for local residents can also be obtained through a focus on 'hard-to-fill' vacancies. With falling unemployment there are many areas of the country where it is becoming increasingly difficult to fill vacancies with suitable candidates, despite area-wide advertising. In Nottingham the Employment Initiatives Team in the City Council is in discussion with council departments to identify hard-to-fill jobs, which have already been advertised, that would provide entry-level vacancies. Having failed to appoint (for example, because there were insufficient candidates that met the essential criteria) the department is able to participate in a customised training programme and offer a job interview guarantee to people that complete the course. Candidates are then appointed on merit.

Entry to customised training programmes can be targeted at people on government schemes (such as the New Deal for Employment), people living in neighbourhood renewal areas, and people from ethnic groups that are underrepresented in the employee profile of the potential employer. This targeting could be done by outreach work and so on. In Nottingham some of the costs of the customised training programmes have been met from the budget of the recruiting department, from the savings achieved by not advertising the post in the local press.

Some local authorities have distinguished between the criteria they use for permanent jobs and those they apply to limited-term employment contracts. In the Northeast of England one authority operates a 200-place training scheme which is partly funded by a range of neighbourhood renewal schemes on the basis that recruitment is limited to disadvantaged young people from within their areas of operation. The trainees are on one- or two-year limited-term contracts. In essence this is a 'transitional work programme': the participants receive training and personal development support and are helped to find permanent employment as the end of the

training period approaches. This includes applying for local authority jobs.

The above examples show the wide range of actions that can be undertaken if an employer wishes to extend access to employment opportunities as part of its commitment to neighbourhood regeneration and social inclusion. Such actions are not just philanthropic. In the context of a tightening labour market they may be essential for enabling the grant recipient to recruit suitable people and avoid wage-led rises in costs. For local authorities, increasing the number of suitably trained people in the labour market will help to achieve the 'continuous improvement in services' to which they are committed. Without such actions the quality of local services may be at risk.

## Use in planning agreements

### *The rationale*

In many regeneration schemes the economic benefits will become available through new commercial activities that occupy sites towards the end of the regeneration programme, for example, new retail stores, warehouses, offices, factories, hotels and leisure services. After land clearance and decontamination funded by the public sector, much of the development is undertaken by the private sector and sites are then occupied by private companies. The public sector investment is typically justified by the benefits that redevelopment will have for a disadvantaged local population, but, in a development process that relies heavily on private sector input, how can we ensure that the number of job opportunities for this target population are maximised?

Every site development must go through the local planning process and the inclusion of community benefit requirements in planning agreements can help ensure that local people get access to jobs on the site, in both the construction and the end-use phases.

### *Law and policy*

A 'planning agreement'<sup>10</sup> is a legally binding commitment made by a developer during the

process of seeking planning permission. The key purpose of such an agreement is to help overcome any adverse effects of the development on the surrounding area, but they are not limited to this. An agreement differs from a planning condition in that it can cover off-site requirements, can include the provision of money to enable another body (for example, a local authority) to undertake the necessary remedial actions, and are not subject to appeal through the planning process.

The legal basis for planning agreements is provided by Section 106 of the 1990 Town and Country Planning Act in England and Wales, and Section 75 of the equivalent Scottish Act (the Town and Country Planning [Scotland] Act [1997]). In practice, the agreement is a deed entered into by 'anyone with an interest in the land'. This deed becomes a 'land charge' in England and Wales and can be registered as a charge in Scotland, which means that the obligations entered into are transferred with the title to the property for which planning permission has been acquired. The agreement is normally arrived at by negotiation, but under Section 12 of the 1991 Planning and Compensation Act a developer can create an obligation by a 'unilateral undertaking'.

The use of planning agreements is the subject of guidance issued by the ODPM (for England), the Scottish Executive and the National Assembly for Wales (DoE, 1997; Scottish Office, 1996; Welsh Office, 1997). The guidance issued has so far been very similar and is based on the following principle:

The government believes that planning agreements ... should only be sought where they are required to make a proposal acceptable in land use planning terms. (Scottish Office, 1996, pp 1-2)

The guidance then sets out five tests that should be applied to items in an agreement:

- they are necessary to make the proposal acceptable;
- they are 'relevant to planning';
- they are directly related to the proposed site;

- they are fair and reasonable in scale and kind;
- they are reasonable in other respects. (DoE, 1997, p 7)

However, this guidance has been undermined by case law (especially *Tesco v Secretary of State* [1995]) and it now appears that only three tests need be satisfied. The agreement must:

- be for a planning purpose;
- have some connection to the development site;
- be *Wednesbury* reasonable, that is, a fairly rational thing to request (see Macfarlane, 2000b, pp 8-9).

When the requirement in the agreement is 'fairly and reasonably' related to the site, it must be taken into account in determining the planning application. However, the planning authority can decide what weight to give to the agreement (Mole, 1996, p 191).

On the basis of this less restrictive interpretation of the law it is possible to include community benefit clauses in planning agreements, for example, to require developers to target the employment impacts of their development in both the building and the end-use phases. This is critical in neighbourhood regeneration programmes when a significant part of the programme involves the redevelopment of industrial or retail sites. In most cases the sites are sold to private developers and occupied by companies that have no local links. The redevelopment may provide facilities for job growth and indeed improved services for local people (such as shops or a hospital), but they will not necessarily make a contribution to improving the employment and income levels of local residents.

The use of planning agreements to maximise local employment opportunities should be supported by policy statements. This is not essential because anything to which a developer has agreed is binding until the planning authority decides that the commitment has been fulfilled. However, the legal position and the negotiating position of the authority will be enhanced if the local plan and other planning documents (such as supplementary planning guidance and site development briefs) include:

<sup>10</sup> These are also referred to as Planning Obligations or as Section 106 Agreements in England and Wales, or Section 75 Agreements in Scotland.



- a clear statement on the importance of development that will create employment opportunities for local people, especially for those who are disadvantaged in the labour market;
- clear indication that the planning authority intends to use planning agreements to help achieve this objective.

It is also helpful if the desire of the authority to target jobs at disadvantaged people is raised at early meetings with the developer.

There is an ongoing debate about the use of planning agreements. Much of this relates to the lack of transparency in the process and the fear of misuse. Embedding the use of social clauses in planning policy documents and providing early information to developers will help overcome these concerns.

As with the use of community benefit clauses in contracts, there are likely to be some problems in enforcing a community benefit clause. For this reason the use of such a clause in a planning agreement should be seen as a basis for establishing and maintaining a relationship with the developer and end-users of developments. The provision of funds from the developer (via an agreement) that can be used for local recruitment and customised training can help ‘oil the wheels’ of this relationship.

### The Planning Green Paper

In December 2001 the Department for Transport, Local Government and the Regions (now the ODPM) published a Green Paper – *Planning: Delivering a fundamental change* (DTLR, 2001b)<sup>11</sup>. This sets out the government’s proposals for changes to the planning system in England. They also published a discussion document setting out options for revisions to the regime for planning agreements or obligations.

The current proposals for England should not make it more difficult to obtain targeted employment and training opportunities (or other community benefits) through the planning process. The Green Paper proposes that a new system of local plans called local development

frameworks would be introduced. These would “... connect up with the local Community Strategy and help deliver the policies it contains” (DTLR, 2001b, Clause 2.9). If there are clear requirements for local targeting of jobs in the community strategy, then there is potential for introducing this into the new frameworks.

The consultation document on planning agreements refers to the role of the planning obligation<sup>12</sup> system in “... providing social, economic and environmental benefits to the community as a whole” (DTLR, 2001c, Clause 1.3). The government is proposing that the current system of negotiated obligations be replaced with a standard tariff; this would be set by LAs as part of the local development framework, subject to guidance from the government. The standard tariff could be supplemented by the negotiation of a planning obligation where this is necessary to deal with exceptional circumstances.

Under this arrangement it would be the LA’s responsibility to decide how to allocate the funds obtained via the standard tariff, although they may have to take account of government guidance. The LA could decide to allocate some of the tariff income to local employment initiatives.

However, there are three areas of concern in the current consultation documents:

1. There is a clear priority to using the tariff income – including that from commercial development sites – to support the provision of more social housing rather than employment initiatives.
2. The tariff system assumes that all social needs can be met through the provision of money but, in relation to local employment, the cooperation of the private sector is just as important (see the Greenwich example on page 35).
3. One of the options for changes to the current system would reintroduce the test of ‘necessity’ (that is, a planning obligation would only be valid if it was necessary to allow the development to go ahead). Most obligations relating to targeted employment and training would fail this test.

<sup>11</sup> The National Assembly for Wales will issue a Paper for Wales.

<sup>12</sup> Planning obligations are similar to planning agreements, although there are small technical differences.

It seems likely that the planning process and the arrangements for planning agreements will change significantly in the coming months. Practitioners will need to consider the implications of these changes if they seek to use planning powers and processes to help achieve social inclusion.

### Examples of current practice

The report *Local jobs from local development* (Macfarlane, 2000b) examined the use of planning agreements to target the training and employment outcomes of developments. A 1999 survey found

that 13% of LAs had used agreements for this purpose, or sought to do so. These were clustered in the South of England where pressure for development was the most intense, but there were examples in other areas, including the North of England, Scotland and a number of rural districts (Macfarlane, 2000b, p 13). The main barriers to use were 'not having thought about it', concern about the use of planning powers in this way and issues of enforcement.

The study identified some examples in which planning agreements had produced important benefits in targeting jobs at local people.

## London Borough of Greenwich Council

The most systematic use of planning agreements to obtain local employment and training outcomes has been in some of the London boroughs. This reflects the pressure for development in London, but also the degree of commitment by LAs that experience some of the highest levels of social exclusion in Britain.

In the London Borough of Greenwich, the excellent coordination between the economic development team and the planning team means that some form of local employment and training benefits are obtained from most development. This action is justified by the local plan, which includes three relevant policies:

- encouraging developments that provide jobs suitable for local skills and especially opportunities for the most disadvantaged groups;
- encouraging an expansion of training;
- increasing the extent to which the benefits of development are targeted at the local community (London Borough of Greenwich, 1994, pp J8-J10).

Although each planning agreement is negotiated on its own merits the Council typically requires the developer to:

- endorse the activities of Greenwich Local Labour and Business (GLLaB) and be fully committed to ensuring that local people and businesses are able to benefit directly from the development;
- give prior notice to GLLaB of local employment and business opportunities;
- provide monthly monitoring information (in a standard format);
- provide a serviced on-site recruitment centre if requested to do so;
- pay a training sum to the Council.

GLLaB is a Council-run agency that provides training and business development support to the local community. It provides the 'supply-side' activity that is essential to convert the commitment of the developers into good outcomes for local residents. Over the first three years of operation GLLaB obtained over £1.7million in contributions from developers. The value of this was enhanced by using it to match funding coming from other sources, including the Single Regeneration Budget and the European Social Fund. In this initial period the outcomes from GLLaB included 2,100 people trained, 1,500 jobs filled, 200 businesses receiving advice and 118 businesses winning contracts worth over £9million on the major development sites (Macfarlane, 2000b, pp 24-5). This includes work related to the Millennium Dome, where 16% of the construction labour came from the Borough, resulting in over 100 jobs.

## Southampton City Council

In Southampton the Council entered into a planning agreement worth a total of £5.37million (in 1995) in relation to a new 96,500m<sup>2</sup> retail development called West Quay. The sum was to be inflated in line with the retail price index. The agreement included the following:

[the developer will] ... pay to the Council (or such other party as the Council shall direct in writing) the sum of £350,000 (as varied by the application of the index) for the provision of vocational training facilities. (Macfarlane, 2000b, p 17)

The 'training sum' was payable at the rate of £3.62 per m<sup>2</sup> of development, within two months of the commencement of each phase.

The rationale for the inclusion of the training sum was:

- the need to increase the numbers of people in the retail labour market because West Quay would create an additional 3,000-3,500 jobs;
- a desire to target the job opportunities at an inner-city regeneration area which has a 30% minority ethnic population and relatively high levels of unemployment;
- a concern that failure to train local people to be able to take up the new jobs would result in additional commuting and associated traffic pollution;
- concern about the failure of previous large developments to create jobs for Southampton residents.

The development went ahead in two phases. In between, the ownership of the land was transferred several times, and several years passed when there was no development.

In the first phase the training money was 'matched' from other training budgets and used to provide prerecruitment training for workers in a leisure complex (500 jobs) and in retail stores. In the second (much larger) phase the existence of the training clause led to a partnership between the developer (Hammerson PLC), the Council (led by the training initiatives manager), the Employment Service and the city college. The funding provided by the planning agreement was used to support a local recruitment programme, which included:

- a recruitment 'bus' that toured areas with high unemployment to promote interest in the new retail employment opportunities;
- prerecruitment training in customer care and basic skills, provided by the college;
- a retail skills register established and maintained by the Employment Service, which could be accessed by retail employers in both the new development and elsewhere in the city;
- close liaison between Hammerson PLC and the newly established stores in West Quay, to encourage the latter to recruit via the skills register.

The result was that approximately 70% of the new jobs were filled by people who had been previously unemployed. A total of 11% of the recruits were from minority ethnic communities that comprise about 5% of the population in the city, but which experience higher levels of social exclusion (data supplied by Southampton City Council). These outcomes suggest that the recruitment programme was very effective.

## St Fergus

In Scotland planning agreements have been used on a number of major petrochemical developments. For example, on phase three of Mobil's St Fergus Terminal (in Aberdeenshire), a local recruitment requirement resulted in 47% of the construction staff being drawn from the local area (a number of small towns within a 30-mile radius). This was possible because the developer ensured that, whenever possible, the civil engineering work was undertaken by local contractors (Macfarlane, 2000b, p 31).

Research suggests that the key requirement in a planning agreement (relevant to local employment and so on) is cooperation between the developer (and the end users) and a local employment and training agency. It is this that will achieve employment and training opportunities for local people. This is important because one of the arguments made against the use of planning agreements for employment is that the additional cost will deter inward investment. An agreement to cooperate in a local recruitment and training plan need not cost the incoming employer money. Indeed, it can save them money on recruitment and training. However, as can be seen from the Greenwich and Southampton examples, obtaining funding can also be useful and can be increased when it is used to match public money available for regeneration and training.

Good practice in the use of social clauses in planning agreements includes:

- the requirements should be durable since the development of the site may be delayed: cooperation and funding are durable;
- the requirements should be easily monitored: payment of money is easy to monitor;
- there should be clear statements and justifications for targeting employment outcomes, within planning policy documents;
- the expectations and benefits of targeted recruitment should be discussed at early meetings with developers;
- the provision of monitoring information should be included as one of the explicit requirements in the agreement.

## The sale of land and leases

The rationale and best practice that arises from the use of community benefit clauses in planning agreements also applies to the use of a community benefit clause in the sale of land or a lease. Here, the key requirement is cooperation.

There is nothing in principle to prevent a public body including a community benefit clause in a contract related to property. For example, when a local authority or another development agency has assembled a site through compulsory purchase or reclaimed a contaminated industrial site, it could make it a condition of sale that the purchasers target their recruitment. This could be done by supporting a local agency (such as GLLaB in Greenwich) or by implementing a local employment charter (see Chapter 5).

For LAs it is important that the agreement by a purchaser to comply with such a requirement is not achieved via a reduction in the value obtained from the transaction, unless this reduced value has the consent of the Secretary of State or is in a class of disposal for which this approval is not required (1972 Local Government Act, section 123; see also DETR, 1998). In other circumstances the community benefit requirements must merely be a condition of sale that applies to any purchaser, regardless of the price. This 'no-cost' approach will be more secure if the supply-side activities that the purchaser agrees to support are clearly funded from other sources. Under these circumstances it will be difficult to argue that the agreement to support local employment initiatives has resulted in a reduction in the price offered.

## Key points

In this chapter it has been argued that the inclusion of community benefit requirements in a range of agreements is possible, provided that this does not require the recipient to act illegally, for example, by contravening equal opportunities legislation or EC treaties and articles. This approach can:

- encourage employers to re-examine and revise their recruitment processes;

- encourage employers to develop an ongoing relationship with agencies that can help them target their recruitment;
- provide additional resources for local employment and training activities;
- improve the conversion rate between local investment and opportunities for people who are socially excluded.

To reiterate, it is important to recognise that putting a requirement in an agreement is unlikely to achieve the desired outcomes. It must be matched with good monitoring, progress chasing and supply-side support. The final chapter of this report therefore focuses on these support activities.

# 5

## Getting organised for delivery

### A planned approach

To maximise the impact of a community benefit requirement it is essential to plan how the requirements will be monitored and reviewed, and to consider what delivery support should be made available. This might be in relation to the use of a community benefit requirement in just one contract or agreement, or in preparation for their use in a wide range of agreements. In either situation the same range of actions must be considered:

- the provision of information on the aims, and what support is available to help achieve these;
- the provision of model documents that can be used for implementation and monitoring;
- the provision of supply-side activities, for example, prerecruitment training, vocational training, job matching and recruitment support;
- the provision of monitoring, progress chasing and reporting in relation to the community benefit requirements.

If community benefit clauses are designed as one part of a social inclusion strategy (or similar for other social considerations), it is obviously worth investing in more robust operating and support arrangements.

### A local employment code

There is over ten years' experience of developing local employment codes or charters. Charters can:

- summarise the aims of a programme and describe the services available;

- be available for inclusion as an addendum that provides full details of the client's requirements: compliance can be made a contract condition by the inclusion of a simple clause in the specification or contract;
- act as a marketing tool when promoting the local employment or social inclusion programme to employers, developers and so on;
- give credibility to an initiative by listing (or quoting) high-profile sponsors and supporters of the code.

Rather like a community benefit clause, a local employment code or charter will have little impact on its own. It must also be actively supported with supply-side activities and progress chasing. Greater impact is achieved by building and maintaining relationships with employers.

A code or charter should be short and clear. It should seek partnership and cooperation, and should spell out the benefits to employers that become involved. It is likely that some information in the code or charter will date quite quickly (for example, any grant regimes); this could be resolved by presenting the code in a loose-leaf folder, in which individual pages can be updated easily. This also allows different information to be provided for employers in different sectors, or in different local areas.

Nottingham City Council is currently revising its construction code of practice. The new version will be the third in ten years. As can be seen from the extract below, the code will be implemented in all City Council construction contracts, and will be a condition of acceptance on the city's construction select tender lists. The rationale for the code is:

- the Council's interest in ensuring that all of its contractors fulfil the Council's commitments under the 2000 Race Relations (Amendment) Act;
- the Council's need to ensure that the highest standards of health and safety are provided on its sites: training and qualifications are key to this;
- the Council's interest in ensuring that there is sufficient recruitment to the local construction industry so that it can meet its commitments

under Best Value, that is, continuous improvement in performance;

- to help create "... a more sustainable and inclusive local economy..." (Nottingham City Council, 2002a) by enabling non-employed people to enter the labour market.

It is anticipated that other developers in the city will adopt the code, either voluntarily or as a requirement under a planning agreement, funding agreement or a land purchase or lease. The city

## Nottingham City Council: construction code of practice for employment and training

This code requires that all construction employers address workforce issues when carrying out works for Nottingham City Council and other clients who have adopted the code.

### *Principles:*

1. Employers will be required to have and implement an equal opportunities policy in recruitment, employment and service delivery.
2. Local people must have access to all the vacancies created through construction works covered by the code. Vacancies must be advertised locally and a clear recruitment and selection process implemented.
3. Employed-status training will take place within the industry, particularly for people who are being supported by government-funded social inclusion programmes.
4. Local sub-contractors will have the opportunity to be included on main contractors' approved sub-contractors lists and given an opportunity to tender for works.

### *Actions:*

1. All contractors wishing to be on the City Council's approved list are required to endorse the code of practice for employment and training, and to have completed the City Council's questionnaire on their application for inclusion on the approved list.
2. Employers will place 100% of all vacancies created by the construction works with the Employment Service.
3. Employers will state the number of employed-status trainee positions being offered within the contract, specifying trade area and making a commitment to accredited training both on and off site.
4. The main contractor will require the sub-contractors to endorse and implement the actions of the code, including taking into account the sections on **equal opportunity**, and **health and safety**.
5. The main contractor will monitor the process on a weekly basis. Main contractors are encouraged to implement the 'Respect for people' toolkits, which will enable them to measure their own performance in continuous improvement.
6. At the point of tendering, contractors will set out their proposals for implementation of actions 1 to 5 above. Advice and guidance will be available from City Wide Construction<sup>13</sup>. (Nottingham City Council, 2002b)

<sup>13</sup> City Wide Construction is a council unit that supports construction employment initiatives in Nottingham.

has used each of these forms of leverage in the past.

The Nottingham code is focused on construction. In Salford, the city has been operating a multisector employment charter for several years, although they have not sought to use community benefit requirements in contracts to encourage employers to participate. This has been successful in obtaining support from 700 local companies and in placing unemployed Salford residents in work, sometimes in conjunction with a wages subsidy scheme.

The Salford Employment Charter and Code of Practice will link major investments in regeneration to the development of skills and employment opportunities for local people. We are asking you to endorse the principles of the Charter as a demonstration of your commitment. (City of Salford)

The Salford charter offers a model that could be adopted for use with major employers, or incoming employers (for example, to a new business park), where a community benefit clause is being used to secure commitment.

## Model documentation

If the community benefit clause is intended for use on a number of occasions, it will be useful to produce some model documentation that can be used by the officers responsible for each contract or agreement. It is likely that these officers will want to 'tune' the documents to individual situations, but to have a tried-and-tested model saves time and gives them confidence.

Different model clauses will be required for different types of agreement, for example, what is needed for a funding agreement or planning agreement will be different from that needed for a construction contract. There are also different approaches to the level of detail that is included in the community benefit clause. Three options are:

1. The clause merely states that the other party (for example, the contractor) must maximise the use of (for example) trainees or

unemployed people. This minimal approach relies heavily on the development of a shared understanding of what is required at a later stage.

2. The clause makes it a requirement that the other party implements a code that is included as an addendum. This reduces the size of the community benefit clause in the contract or agreement but details the requirements in the separate document.
3. A clear and complete list of what is required is inserted in the specification and contract clauses.

In relation to procurement it is important that each tenderer works from the same, unambiguous, specification. Otherwise, they can make different interpretations of what is required and will not be tendering on the same basis. This suggests that the second or third of the above options should be used when there is a competitive tendering process.

The contractor is to comply with the employment requirements as detailed in Addendum F of these Employers Requirements. All costs incurred by the Contractor in complying with this provision are deemed to be included within the contract sum and identified separately on the Tender sum Analysis. (Extract from the Employer's requirements for estate works, Landport, Portsmouth, cited in Macfarlane, 2000a, p 55)

As a general principle the model documents should include:

- a statement of aims;
- definitions, for example, what is meant by 'unemployed';
- any specific outputs, for example, 15 long-term unemployed people, 45 days of training;
- the requirement to provide a method statement about how these outputs would be achieved;
- the duty to provide monitoring information: when and to whom and a facility for progress reviews.

In addition it may be appropriate to include a pricing mechanism so that the cost of the social clause can be clearly identified. This may be necessary if the community benefit requirements are being funded from a different source or if the client wants to be able to assess value for money



for the community benefits and the other elements, separately.

When organisations (including the funder or client) are providing services to the other party, to enable them to fulfil the social clause, it is important to include caveats that limit the responsibility of the ‘supply-side’ organisations. For example, if an LA is helping with the recruitment of local people or putting forward local suppliers, it must be made clear that they are not guaranteeing the availability, quality or suitability of the local people. Otherwise, the supply-side organisations could become liable for any costs associated with a failure to deliver local labour or poor work undertaken by the people referred.

The agreement of employment targets and an employment Provisional Sum does not comprise or imply any promise on the part of the Employer or their Agents to provide labour, trainees and/or firms. Any action taken by the Employer to broker relationships between the Contractor and individuals/firms does not imply and should not be deemed to imply that the Employer or their Agents considers the individuals/firms as suitable for engagement by the Contractor or sub-contractors. (Extract from the Employer’s requirements for estate works, Landport, Portsmouth, cited in Macfarlane, 2000a, p 56)

A wide range of examples of ‘targeted employment clauses’ is included in *Using local labour in construction* (Macfarlane, 2000a). Contract clauses and text to be used in OJEC Notices have also been developed to reflect the guidance in this report.

## Supply-side actions

The success of a community benefit clause in relation to targeted recruitment and training will rely on the availability of a ‘local delivery infrastructure’ that is prepared to help the other party (to the contract or agreement) deliver on their obligations. This is especially important where:

- the community benefit requirement is likely to have a small impact on the choice of supplier,

and a supplier with little experience of delivering the community benefits could be appointed;

- the employment and training provisions are included in a contract clause that is subject to EC procurement rules: in this instance a resource of local skills made available to all bidders should reduce any potential disadvantage to firms with no UK base.

The elements of a local delivery infrastructure will vary with the type of community benefits being sought. In relation to local employment and training it is likely to involve:

- a coordination function – someone who is responsible for liaising between different parties, ensuring that the supply-side services are in place and monitoring outcomes;
- a prerecruitment service that undertakes the outreach work within the target populations, undertakes initial assessments and helps tackle barriers to employment;
- training provisions, varying from prevocational and basic skills, to ongoing vocational training;
- a job matching service and ‘after-care’ service that links (and supports) both employers and employees;
- a ‘supply-chain’ service that facilitates contacts with small firms in the locality.

This range of activities could be undertaken by one agency that focuses on one sector.

Alternatively, a network of local agencies could be created that, together, can meet all of the above. This network might include:

- community-based employment projects that do the outreach and initial support work;
- a college or training centre that can provide the prevocational and vocational training;
- Employment Service offices that provide the job-matching;
- a small business agency that works on the ‘supply chain’.

The most common model is for the LA to undertake a lead agency role, for example City Wide Construction in Nottingham and GLLaB in Greenwich, London. These bodies:

- promote the local employment initiatives (for example, the inclusion of community benefit requirements in contracts);

- work with contractors and others that have agreed to target their recruitment or provide training;
- obtain funds to support the local recruitment and training activities;
- provide training management and contracts for training delivery with local providers;
- work with the local employers to enable them to take on more work and then recruit locally;
- develop new initiatives to overcome barriers to employment;
- provide monitoring and reporting services.

In other areas there may be just one agency (for example, a training provider or local recruitment agency) that acts as a coordinator or initiator, with perhaps a more modest set of tasks. Their ability to ensure that the supply-side infrastructure is in place will rely on good networking with other agencies.

The choice of approach will depend on the scale of the use of community benefit requirements, funding and the strength of existing partnership working through other structures, such as local strategic partnerships. The scale of what can be achieved will rely on the supply-side resources that are available and the positioning of these resources. For example, in London Docklands a local business liaison manager employed by the developer (Canary Wharf Group PLC) was able to broker relationships between local firms and the company's procurement managers. Over a three-year period this produced over 220 contracts for Tower Hamlets firms, worth £133.5million (Macfarlane, 2000a, p 36).

## Monitoring

When preparing a community benefit requirement it is important to consider how the outcomes will be measured. In the past, the difficulty in using community benefit clauses in LA contracts, for example, has led to a reliance on 'best endeavours' clauses and voluntary agreements. It has proved difficult to compare the impact of these approaches, because the expected outputs were poorly defined and the provision of monitoring information was patchy because it was, at best, a voluntary requirement.

There have also been problems in relying on other agencies to provide monitoring information

since their methods of measurement may not be appropriate. For example, the Employment Service may record the number of vacancies filled, but may have little interest in whether the recruit was from a target community, whether they were retained in employment or what proportion of the total workforce (or all vacancies) these successes represented.

As has been made clear throughout this report, the achievement of the community benefit requirements will depend on the development of a partnership relationship with the provider. However, this relationship needs to be underpinned by a clear and measurable set of goals and a good monitoring process. This is especially important when the community benefit requirements are not normally delivered. In these cases it is important to treat the requirements in the same way as other parts of the contract or agreement in order to convey the client's or funder's commitment to achieving these outcomes.

Taking a formal and professional approach to the use of community benefit requirements will also have an impact on LA and other internal staff who are asked to prepare documentation and manage contracts and agreements, and who may have initial doubts about the validity of the community benefit clause. These staff are a crucial interface with the providers and, if they see the requirements as unrealistic (or merely of token value), they may not give them sufficient weight in their work. Good monitoring information and good audit procedures will help develop their understanding and commitment.

Good output monitoring requires:

- a clear and appropriate specification of how outputs are to be measured, for example, numbers of jobs or numbers of weeks of work for the target community;
- a clear statement of the actual outputs that will be delivered: this can either be specified in the community benefit clause or supplied by the other party in a method statement or service delivery plan prior to commencement of the contract or agreement;
- a requirement that the other party provide monitoring data in an agreed format and at agreed times;
- a means of verifying the output data.

This approach to monitoring the impact of community benefit requirements should be no less rigorous than that applied to other core elements of the contract or agreement. It fits with good procurement procedures and provides an 'audit trail' for any expenditure related to the community benefit elements. However, as was raised on page 21, some consideration needs to be given to the 1998 Data Protection Act, since this may influence the way in which other parties provide monitoring and verification information, especially on employment.

Finally, it is important to allocate a progress-chasing role and establish formal progress review arrangements in relation to the community benefits. In construction contracts, this can be achieved within the normal contract relationships, for example, the outcome monitoring and verification is undertaken by a clerk of works or employers agent, and progress is reviewed at the client's monthly site meeting. With an area-wide scheme it is important that this information is fed into a central database that can produce reports on the outputs achieved by the use of community benefit clauses, and establish performance benchmarks.

## Key points

As can be seen from the discussion in this chapter, there is more work involved in organising the delivery and monitoring aspects of using a community benefit clause than there is in negotiating the use of a clause in the first place. Although there may be benefits from a one-off use, it will be more cost-effective to see this as a pilot for a wider programme that justifies establishing good supply-side systems and monitoring arrangements.

However, in many areas with high levels of unemployment and social exclusion, including most regeneration areas, many of the supply-side activities will already be in place. In this context the use of community benefit requirements to increase employment opportunities for the target communities will increase the conversion rate between public expenditure and local benefits, and therefore produce improved value for money for public investment.

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# B

## Appendix B: Views of the Office of the Deputy Prime Minister

### The use of community benefit requirements in contracts

The department's view on social clauses in procurement is as follows:

Individual local authorities may seek to use local labour clauses in contracts particularly in the interest of wider regeneration objectives. However, the scope to do so is limited by the EC Treaty and the European Public Procurement legislation. The European Commission has recently provided some clarification on the possibilities that Community law offers public purchasers who wish to take account of relevant social considerations into public procurement procedures. This clarification takes the form of an Interpretative Communication that explains how social concerns may be taken into account at each separate stage of the contract award procedure.

The interpretative document goes some way to clarifying these complex issues but is not entirely clear. Difficulties remain about the boundaries of what is admissible. There is limited case law in this area. A contracting authority *must* make its own judgement about the use of social clauses in procurement. Each case will be different and *must* be judged on its merits.

Contracting authorities can apply additional award criteria relating to a campaign against unemployment when awarding a contract, provided that this condition is in line with all the fundamental principles of

Community procurement law, eg non-discrimination, equal treatment and transparency, and is contained within the contract notice.

The Interpretative Document makes it clear that labour (possibly local) clauses could be used as a contract condition provided that this is non-discriminatory and included in the contract notice. A statement from a tenderer that they are presently and will in the future, be unable to comply, could rule their bid out as non-compliant.

If the subject matter of the contract (the supply or service in question) requires specific know-how in the 'social' field, specific experience in this field may be considered when checking the technical capability of tenderers.

It remains the responsibility of individual local authorities to make their own judgement about the use of social considerations in procurement, consistent with domestic law, including the duty of best value, and the EC legal framework.

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