Social Enterprise and the Public Sector
A practical guide to law and policy
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Anthony Collins solicitors

social enterprise east midlands

mutual advantage

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Foreword

Does it matter whether or not there is a business model for the 21st Century?

As Einstein said: “We cannot solve our problems with the same thinking we used when we created them”. At their best, social enterprises create and apply new thinking- they develop new business practices, change consumption patterns, deliver services to diverse communities, include the excluded, and tackle the root causes of problems.

For public institutions it can be hard to get beyond thinking that competition is an end in itself, that public value is decided by the efficiency of converting inputs to outputs, and that social enterprises are simply an interest group. Nonetheless, changes are taking place, with some developing new approaches to commissioning in search of better public value. These public service innovators are helped by Government’s promotion of social enterprise in public service delivery, but are also hindered by confusion in practical guidance and apparent conflicts within the range of agendas the public sector pursues.

When SEEM set up the BEST Procurement Development Partnership in 2004, we provided some resource to our Partners- the innovators in the public sector and social enterprise movement- to find routes through the policy and practice jungle. We also worked with public sector staff who were externalising services to new social enterprises and being expected to take risks for reward to the public sector.

We learned that reassessing what is valued in a competition is insufficient to take advantage of the true potential of the social enterprise business model. It is also necessary to create solutions together- a joined up business model needs a joined-up customer!

Along the way Partners had many questions, which this guide answers. It does not advocate one approach, but covers a broad range of topics in a practical way. For those looking for new solutions it offers better paths through the current commissioning frameworks. It can also help today’s social enterprises understand what they can do.

The message to Government is that to accelerate the progress of innovators in the public sector and social enterprises there is a need to:

- see social enterprises as a public value partner and include them in Sustainable Community Strategy planning and market testing;
- move on from debating the legitimacy of “social issues in contracts” to recognising that public value creation crosses over administrative boundaries, and encourage commissioners to look for opportunities to achieve greater social outcome;
- make use of pilots, the “small lots” concession, and research and development contracts to support innovation and high public value service models; and
- put in place a programme for changing how value for money is used to fully consider outcomes, and improve understanding of how “user need” applies.

It matters greatly that new ways of doing business are developed for the 21st Century - new thinking is required to meet the challenges ahead, thinking that public value innovators in social enterprise and in the public sector are already trying to do.

Jennifer Inglis
Head of Policy, Social Enterprise East Midlands
“Social enterprise has a long history, from the cooperative movement and mutual organisations of the nineteenth century to the long-standing trading activities of many charities. Over the last few years, one of the most important and exciting developments in the third sector has been an acceleration of interest and innovation in social enterprise. These include community enterprises such as development trusts, new providers of public services, such as GP cooperatives, and an expansion of consumer focused enterprises... These organisations are creating new ways of delivering social and environmental outcomes through business approaches.”

The future role of the third sector in social and economic regeneration: final report - July 2007
HM Treasury/ Cabinet Office

“At their best, social enterprises can offer a high level of engagement with users and a capacity to build their trust. They are also a valuable source of innovation – including for services they do not deliver directly. Public services learn from the problem-solving spirit of social enterprises, which can help improve the quality of public services by shaping service design and by pioneering new approaches that can influence the way services are delivered by the public sector. Social enterprises often share the concerns faced by public policy makers, and are equally engaged in finding solutions to tackle social inequalities or environmental problems.”

Social enterprise action plan: scaling new heights - November 2006
Office for the Third Sector/Cabinet Office

“Social enterprise offers health and social care organisations the opportunity to deliver high quality services in ways that are flexible, non-bureaucratic and have the potential to deliver good value for money. It also allows health and social care organisations to deliver services that are tailored to their local population, and make a difference to the local community. Because staff have a stake in social enterprise organisations, experience has shown that they are very committed to the aims of the service, and that this delivers benefits for the organisation, for example, improved staff retention.”

Department of Health website:
what are the advantages of social enterprise?

“The Government believes there is significant potential for more public services to be delivered by social enterprises, and that local authorities in particular have an important role in opening up the procurement processes. We also need to build know-how in procurement issues amongst social enterprises and their advisors.”

Supporting Rural Enterprise in England: Defra
This guide identifies opportunities for the public sector to do more and better business with social enterprises. Some legal issues arising where social enterprises supply goods or services to the public sector, or deliver public services, are also covered. The guide has been commissioned by the BEST Procurement Development Partnership to be a useful resource for four groups:

- those involved in commissioning and procurement in the public sector;
- those involved in service development, economic development and strategic policy in the public sector;
- people working in social enterprises who are targeting the public sector as potential customers or are already working with the public sector; and
- those who support social enterprises by providing business advice, training, networking and/or advocacy.

Part 1 encourages readers to take a broad view of the commissioning process and how corporate objectives can be achieved as part of commissioning. It explains the overall commissioning framework that applies to Central Government, local authorities and the NHS, and highlights some of the political agendas influencing commissioning. This Part is relevant to all four audiences.

Part 2 explains the EU procurement framework, dealing with scenarios when the EU rules apply in full, clarifying what can be done when they do apply and what can be done when they do not apply in full.

Part 3 deals with a number of specific legal issues that can help or hinder social enterprises involved with the public sector. It is aimed primarily at those in the public sector involved in commissioning and procurement.

Part 4 is designed as a quick reference guide to a number of legal issues that may be faced by social enterprises working with organisations in the public sector. Each topic has been designed to be read individually. This Part will be most relevant to social enterprises and those supporting them.

Finally, Part 5 provides a set of resources: this includes comments on future developments, a section on VAT, and a glossary and information on publications and references.

How to use this guide
Social enterprises have been successfully providing public services for many years. For many of them, achieving this successful relationship was more complicated than necessary, especially when breaking new ground. At a time when more public sector markets are potentially opening up to social enterprises and when policy through procurement receives more attention, this guide seeks to explain how the public sector can take advantage of what social enterprises have to offer.

There are some things which can be done to maximise the potential for social enterprises to be engaged in public services which simply raises the bar on current good practice. There are other matters which require a sea change in policy and, most significantly, in culture at three levels: local commissioners, the UK Government and the European Union. These include:

- Developing a common language in commissioning and procurement for terms such as "public value", "social requirements" and "community benefits";
- Bridging a number of gaps between policy and regulation;
- Avoiding over-dependence on competition as the primary driver for demonstrating best value in procurement;
- Avoiding excessive use of the full EU tender process when this is not always required and alternative approaches would improve the achievement of the required outcomes, and stimulate local supply markets;
- Commissioning outcomes rather than outputs;
- Establishing a clear legal and policy framework that enables the procurement and support for innovation; and
- Developing a culture of procurement that is not overly risk-adverse.

All too often the process for commissioning remains one which depends on the expertise and approach of the commissioner using the right sort of policies e.g. through the sustainable community strategy and the local area agreement. In Central Government there is no equivalent framework for policy development, possibly because the lines of accountability to service users may be less clear than where there is an obvious "community of interest".

There is one missing link which would serve to do much to hasten the process of change in service delivery. Procurement generally depends on the commissioner taking actions: policy adoption, business case preparation, OJEU notice etc. There is no commonly held framework in the UK for social enterprises (and potential public service partners from other sectors) to take innovative ideas and develop them for adoption by the public sector in ways which recognise the endeavours of the organisations taking the initiative. A route map for doing this which has the approval of Central Government (especially the Treasury) would do much to release a new spirit of enterprise in the delivery of better services for people. Some commissioners (especially local authorities) do this on an ad hoc basis and are generally regarded as being "courageous" for doing so. If the much needed process for public service reform is to gather momentum, it cannot simply happen through centrally designed programmes: there has to be a parallel good practice route for capturing innovation at the initiative of the provider. This would be on the basis of understanding that:

- formal procurement is only one way to commission, and, if used inflexibly, may be a poor approach for delivering new services;
• social enterprises can provide public benefits that achieve better value for money. Failure by commissioners to respond to opportunities that do not fit within current administrative boundaries is a significant barrier;
• contrary to popular belief, competition is not always legally required in a procurement or partnership process. In a number of circumstances there are opportunities to negotiate directly, with a view to maximising the public value;
• an understanding of the complexity of “user need”, and a commitment to achieving the widest possible public value, enables value for money to be assessed against long-term measurement of outcomes and effectiveness, and not simply inputs, outputs and unit costs;
• artificial constraints on access to some markets should be reviewed, for example the restrictions on some forms of social enterprise providing General Medical Services or Primary Medical Services;
• much can be done to expand upon the good work that public bodies, especially local authorities, are doing to help build the capacity of social enterprises and other third sector organisations to deliver public services;
• social enterprises can be included in Sustainable Community Strategy planning, in defining soft-market testing, in supplier surveys and in all pre-contract discussions;
• contracts can be redesigned and re-packaged so that they capture greater public value;
• processes can be simplified, especially where the full EU rules do not apply;
• tax and VAT implications should be determined at an early stage; and
• a statutory basis should be developed for committing to the economic, social and environmental well-being of people served by Central Government, thus creating a platform for social considerations to be included in Central Government procurement.

While local authorities have a clear legal framework for engaging with communities, no equivalent structure is in place for Government departments or the National Health Service. A similar statutory basis for committing to the economic, social and environmental well-being of people served by Central Government would help unlock opportunities for social requirements in public procurement across the board. Perhaps as part of the ongoing constitutional review, it needs to be explicit that Government is for the common good of the people as much as this is now clear for local authorities. This will provide a platform for social considerations to be strongly embraced in central public procurement.

There is an increasing focus on better relationships between commissioners and service providers. From a legal viewpoint, commissioners should:
• understand the powers available, and the ways these can be applied to the widest objectives possible (including working together with other public agencies to achieve even greater benefits);
• adopt policies which enable a wider range of social, economic and environmental benefits to be accepted, promoted and delivered as being of public value;
• use a range of commissioning routes (including procurement) as appropriate to their purpose;
• respond proactively to proposals from social enterprises for different ways of fulfilling this purpose, where there is a good chance that this might be in the public interest;
• adopt policies which enable the widest possible public value considerations to be incorporated into what is bought;
• know when it is legitimate to hold direct negotiations with the social enterprise and when to use competition;
• prepare a robust business case prior to any competition or contracting process;
• prepare a specification which allows for the full scope of what could be delivered by the social enterprise;
be clear about the type and level of data required to measure compliance with the specification, and the delivery of value for money with reference to comprehensive core requirements which embrace a broad well-being agenda;

- publish a flexible Contract Notice alerting the market through parallel domestic publications (where there is competition);
- set realistic and sensible thresholds for pre-qualification;
- use most economically advantageous award criteria which embrace social and environmental benefits within the core of the commissioner’s requirements in a way that fully assess the costs and benefits of the whole life of the contract;
- address staff and pension issues early enough in the tendering/negotiation process to be able to address them fully and properly;
- base the decision to award to the supplier on reliable and credible data which clearly demonstrates value for money and a commitment to continuous improvement;
- establish a contract management process which allows partnering and working together on principles of mutual trust;
- agree a clear and realistic dispute resolution process with early warning systems for when things could go wrong; and
- check that everybody implements outcomes planned at the outset, with a view to service delivery transformation.

Where there is competition, commissioners can adopt model provisions not just in terms of contract conditions but provisions to be adopted all the way from OJEU through PQQ to invitations to bid. A standard approach where there is no competition should be also developed, from concept through to implementation.

There needs to be greater openness to the giving and receiving of suggestions and ideas, and when they are made, a commitment to testing them out through properly allocating resources to business case development.

But the onus is not just on the public sector. Social enterprises can and should do more to develop their relationships with public bodies so that they can find routes to having their public value offers accepted. They can find opportunities for partnering and testing out new ideas, influencing a way of determining value for money that a commissioner is prepared to accept or winning contracts and then raising standards.

In our experience, committed people in the public sector and in social enterprises can achieve much by will and determination and by harnessing the resources of those willing to assist by a “can do” approach: such people do exist!

This guide develops the art of the possible, seeks to answer some of the problematic issues that arise, and expands on the detail of what the law provides.

The guide is broken into a number of parts for ease of reference. It aims to avoid duplication: explanations given to cover one situation will be relevant to other scenarios. The guidance in this document can be adapted to a variety of circumstances: flexible application will help you make the most of the content.

Mark Cook
Anthony Collins Solicitors LLP
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Part One:
The Commissioning Framework
Part One: The Commissioning Framework
1.1 Introduction

Public bodies achieve their corporate objectives in a number of ways, both by supporting others and directly carrying out activities. In broad terms this process can be described as “commissioning”. In this Guide we use the term “commissioning” to mean the entire cycle of assessing the needs of people in a local area (or the relevant “users”), designing services and then securing them (following the Office of the Third Sector Action Plan).

“Procurement” covers the specific activities of buying goods and services, from the initial advertising through to the final contract arrangements. Other ways of delivering a commissioner’s requirements include:

- delivering the activity itself by employing people and providing the resources necessary to carry it out;
- giving a grant or subsidy to an organisation to carry out that activity;
- providing capital funding to the organisation which is then able to carry out the activity on a self-financing basis;
- giving financial support to users of the service to meet fees charged by the organisation providing the service or for them to purchase their own service;
- providing “in-kind” support (such as seconding staff, or providing services, equipment or assets) to the organisation delivering the activity;
- setting up a joint venture; or
- giving an organisation the right (a concession or licence) to provide the service.

Understanding commissioning is important both for a commissioner and a social enterprise because:

- social enterprises can proactively take steps to influence what a commissioner buys through developing good relationships before procurement commences.

An increasing amount is being written about commissioning and its challenges by both different Government agencies and the third sector itself (see, for example, the interesting discussion in “The Future of Commissioning: Leadership Challenges” (ACEVO/Futurebuilders)).

In general, social enterprises provide services to public bodies at a local level. This guide therefore concentrates on procurement at a local or frontline level, rather than procedures instigated by centralised procurement organisations, for example the NHS Purchasing and Supply Agency.

Every commissioning process should start with the public body identifying what it wants to commission. This should be considered in the broadest terms since there are many artificial boundaries within public bodies which have evolved for administrative rather than strategic purposes. Just because social housing and social care are dealt with separately doesn’t mean they don’t influence each other. A good starting point is the high level objectives of the public body, i.e. what has it been set up to do and what legal powers does it have to achieve those objectives? Local authorities have a process for doing this through their community consultation requirements, but this discipline is not so apparent for other types of public bodies. Our contention is that if they did this basic review, far from narrowing the scope of what they would commission, many commissioners would enlarge what they sought to achieve.

The decision on what to commission should reflect its corporate priorities and strategies. For example, when exercising the power to promote the economic, social or environmental well-being of their area, local
authorities are required by statute to “have regard to” their community strategy. In fact, the sustainable community strategy should be the guiding document for the exercise of all of a local authority’s functions - perhaps this should be more explicit in the legislation governing councils.

This critical stage of identifying “what” to commission or procure before commencing the process is essential if public bodies are to derive full value. This decision over what is being commissioned should then be translated into a set of outcomes that the public body would like to see being achieved as a result of its commissioning activity.

Public bodies should not move on to the “how” to commission until they have decided “what” they want to commission.

A checklist for the commissioning process could therefore read:

• What are the public body and its stakeholders looking to commission?
• Does it further the public body’s objectives?
• How does it fit into wider corporate strategies and are there any other strategies it can be linked with?
• What are the outcomes that the public body and its stakeholders want to achieve?
• Through what type of commissioning can those outcomes best be achieved?
• Does the public body have the legal powers to achieve this?
• How will value for money be assessed against outcomes being commissioned?
• What are the capabilities of potential suppliers?
• Are there innovative approaches that could be tested?

Public bodies have to exercise their statutory powers:

• for the purposes for which they are given and not for “improper purposes”;
• by reference to all relevant considerations (as set out in the statute giving the power and all other applicable statute or case law);
• without taking account of irrelevant considerations;
• without the decision being so irrational that no reasonable authority could take it;
• by the organisation itself (the organisation cannot “fetter” how it will exercise its decision making by a contract giving up its right to take decisions on the exercise of powers in favour of a third party); and
• with regard to any legitimate expectations of third parties.

These principles cut across the commissioning activities of all public bodies.

1.2 Which Commissioners?

This guide specifically addresses:

• Central Government in the UK (including Welsh Assembly Government, the Scottish Executive, the Northern Ireland Executive together with Government Departments, executive and statutory agencies and other central bodies);
• Regional Development Agencies, Local Authorities and organisations closely aligned with them, such as housing “Arms Length Management Organisations” (ALMOs) and leisure “Trusts”; and
• National Health Service (NHS) organisations.

However, there are other public bodies to whom it will be relevant.

1.3 Government Departments

The powers of the UK Central Government are derived from two main sources. The Royal prerogative involves the exercise of the Crown’s powers through Government ministers (Secretaries of State) who represent the Queen. To these are added powers and duties specifically allocated to those Secretaries of State by Acts of Parliament (known as statute law).

Each Secretary of State heads a Government Department, set up under the Ministers of the Crown Act 1975 and staffed by civil servants who undertake the commissioning on behalf of the Secretary of State.

Statutory powers can only be exercised in accordance with the terms of the statute granting them.

Within Government Departments there are executive agencies (which include organisations such as the Environment Agency, the Probation Service, the Benefit Service and the Passport Agency). Executive agencies are not to be confused with Non-Departmental Public Bodies (NDPBs, which include English Partnerships and the Arts Council), which are generally set up under a statute which sets out their objectives and powers. Most have the power to do anything “necessary or expedient” for the purposes of achieving their statutory objectives.
1.4 Regional Development Agencies

Regional Development Agencies (RDAs) are NDPBs set up under the Regional Development Agencies Act 1998. Their purposes are to:

- further economic development and regeneration;
- promote business efficiency and competitiveness;
- promote employment;
- enhance the development and application of skills relevant to employment; and
- contribute to sustainable development.

A RDA has the power to “do anything which it considers expedient for its purposes, or for purposes incidental thereto.”

RDAs must work with other regional and sub-regional bodies to agree a ten-year “Regional Economic Strategy”.

RDAs influence the commissioning process in a number of ways. They themselves are commissioning bodies. They can have a strong influence in the development of regional markets in which social enterprises have an interest.

1.5 Different types of local authorities

Local authorities are created and regulated by Acts of Parliament. The principal act defining their existence is the Local Government Act 1972. Their primary function is to act as vehicles for “local representative democracy”. They are increasingly being regarded as vehicles for “community leadership” and “place shaping”.

There are different “tiers” of Local Government. In the larger cities and medium sized towns there is a single tier of Local Government in the form of either a Metropolitan District Council or a Unitary Authority. In rural areas there are generally two tiers of Local Government, a County Council and a District Council. Although some functions (such as planning or highways and footpaths) are shared between the authorities, in general education and social services are provided by the County Council and housing, licensing and environmental health are dealt with by the District Council.

Since local authorities’ functions are given to them by statute, they may not do anything outside those statutory functions. These functions are divided into statutory duties, which authorities must carry out, and powers, where they have a choice whether or not to act. For example, local authorities pursue economic development under their economic well-being powers (see below) which replaced previous specific powers, whereas RDAs have a duty to further the economic development and the regeneration of their areas. If a local authority acts without the necessary powers or does not exercise those powers properly their decisions will be “ultra vires”. Ultra vires decisions can be held to be invalid and contracts based on them are at risk of being set aside.

1.6 The well-being power

Local authority powers were significantly enhanced by the “well-being” power in the Local Government Act 2000 (which applies in England and Wales). This gives a local authority the power to do:

“anything which they consider is likely to achieve the promotion or improvement of the economic, social or environmental wellbeing of the area, or part of the area.”

There is a specific power to incur expenditure and enter into “arrangements or agreements” when exercising the well-being power. This gives scope for innovative methods of commissioning, although the well-being power cannot be used where other specific powers exist or where a specific restriction applies (i.e., the well-being power fills gaps rather than being a blanket power). It’s certainly clear that this power enables local authorities to engage in proactive ways of engaging with social enterprises especially in circumstances where the full EU tendering rules do not apply (see Part 2).

**Case Studies**

- Fenland District Council – using the power of well-being, Fenland set up fenESS, an energy services scheme combining energy supply with the provision of measures concerned with efficient use. fenESS works with registered social landlords and other landlords in both the public and private sectors, whilst helping achieve energy conservation targets.
  
  www.fenland.gov.uk

- Kirklees Metropolitan Borough Council – the power of well-being enabled the local authority to join the UK emissions trading scheme. The scheme offered the Council the opportunity to secure additional funding to reduce carbon dioxide emissions. In return it is signed up to a legally binding reduction of 1000 tonnes CO2 for part of its municipal buildings.
  
  www.kirklees.gov.uk/community/environment/energyconservation/conservationprojects.shtml
• Nottinghamshire County Council – the well-being power enabled the creation of Renewable Nottinghamshire Utilities Limited, which aims to develop the physical and commercial infrastructure necessary to encourage the wood-heat industry in the East Midlands.

www.nottinghamshire.gov.uk/beacon-renu.pdf

It can sometimes be difficult to establish the “outer limits” of a power such as the well-being power. Recent case law suggests the Courts are looking to uphold the wide interpretation of the well-being power promoted by the Government guidance, rather than the more restrictive approach taken to the interpretation of Local Government powers in the 1990s. This supports the broader interpretation taken by some authorities.

The well-being power is available in Scotland under the Local Government in Scotland Act 2003. There are minor differences, for example over the extent to which the proposed use of the power to be in accordance with the community strategy. In Scotland, what is known as “community planning” is part of the law rather than the guidance, and is contained in Part 2 of the same Act.

There remains no equivalent to the well-being power in Northern Ireland.

1.7 Community co-ordinators

Local authorities must consult widely on a community strategy, setting out the steps they will take to promote the economic, social and environmental well-being of their area. Community plans are being renamed sustainable community plans but there is no legislation underpinning this change.

Local Area Agreements (LAAs) are increasingly being seen as the means by which local authorities implement those community strategies. The development of LAAs continues, with proposals for them to be given a statutory footing to emphasise the “place shaping” role envisaged for Local Government in the future. It is also proposed that the LAAs will be used as the forum for negotiating targets for local authorities with Central Government. These will replace the numerous centrally imposed targets that exist at the moment. The legislation also proposes placing duties on other statutory bodies to co-operate with the LAA process. The lack of such a requirement has been a weakness in the process to date.
1.8 Related companies
Bodies set up by local authorities such as housing ALMOs or leisure trusts are usually limited companies (or sometimes industrial and provident societies). Their powers to commission goods and services from others will be set out in their constitutional document. In general they will have fairly wide powers to commission goods and services. However, where the authority retains a significant involvement in their running and they do not operate as a commercial company, they must comply with the EU procurement rules in their procurement activities.

1.9 Regional Centres of Excellence
Regional Centres of Excellence were set up to promote good procurement practice and produce tools to support this in Local Government: they are likely to be superseded by new regional structures in the near future.

1.10 Non-commercial considerations
When the commissioning activity involves procuring contracts, local authorities need to be aware of section 17 of the Local Government Act 1988.

Section 17(1) states that "It is the duty of every public authority to which this section applies, in exercising, in relation to its public supply or works contracts, any proposed or any subsisting such contract, as the case may be, any function regulated by this section to exercise that function without reference to matters which are non-commercial matters for the purposes of this section." 'Non-commercial matters' are listed in s.17(5).

In terms of workforce issues in England these are now permitted (since 13th March 2001 to the extent that local authority considers it necessary for best value purposes).

There remain some archaic provisions originating from the days when the then Government sought to stop local authorities boycotting goods supplied from certain countries which require abolition, because of the strange consequences they could have in perfectly legitimate circumstances. These relate to "any involvement of the business activities or interests of contractors with irrelevant fields of Government policy" (of particular interest is that 'irrelevant' includes foreign policy) and "any political, industrial or sectarian affiliations or interests of contractors or their directors, partners or employees".

The difficulty here is that issues such as fair treatment of employees based outside of the UK, fair trade, and protection of the environment abroad could be argued to be matters of foreign policy. If they are foreign policy then they would be classed as 'non-commercial matters' and cannot be taken into account by local authorities. To counter this, a local authority (if it wants to take into account any of these things when appointing a contractor) must show that these things are pursued principally not as foreign policy but as matters of domestic policy which are not “irrelevant”; for example, “fair trade” is analysed not only for products produced abroad but principally required of products in the UK. This is an artificial distinction which it would be better to address by the repeal of Part II Local Government Act 1988 altogether.

1.11 Internal requirements
Local authorities have contract standing orders as to competition. These set down the rules which are to be followed by the local authority when entering into contracts. They deal with issues such as authorisation for signing off contracts, selection of the successful bidder, and how terms and conditions are decided. Standing orders include financial thresholds for different contracting procedures, with contracts of a low value being dealt with in a range of ways, from award of contracts subject to benchmarks of value for money, to, more typically, a limited competition for the contract opportunity. The starting point for any contract is to follow the process in the standing order. However, the local authority (acting through someone with the appropriate level of authority) is entitled to depart from the standing order in certain circumstances (known as a waiver).

Whilst the contract standing order can be waived, this should be the exception rather than the rule. The London Centre of Excellence produced its best practice guidance (in June 2006) on contract standing orders, including waivers. It concludes that "all waivers need to properly documented and an audit trail provided for the circumstances and persons involved, including full explanation and sign off"

www.lcpe.gov.uk/Library/pdf/etho-060609-Model%20CSOv2.pdf
1.12 NHS objectives and bodies
The core aim of the NHS is
“to continue the promotion in England of a comprehensive health service which is designed to secure improvement in:
(a) the physical and mental health of the people of England, and
(b) the prevention, diagnosis and treatment of illness.”

This duty is given to the Secretary of State for Health.

Strategic Health Authorities, Primary Care Trusts and NHS Trusts are currently governed by the National Health Service Act 2006. This sets out their respective functions and the relationship that they each have with the Secretary of State. Specific powers of the Secretary of State are delegated under the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002, whereas NHS Trusts have their own statutory framework. “Foundation Trusts” have constitutions that are developed for each of them: to be explored is the opportunity to develop well-being within their terms of reference.

Strategic Health Authorities manage the NHS regionally and locally and are a key link between the Department of Health and other NHS bodies. They are also responsible for ensuring that national priorities are integrated into plans for the local health service. They are required to develop strategies, ensure high-quality performance and build capacity in the local health service.

The role of NHS Trusts is to provide goods and deliver services for the purposes of the health service, principally through owning and managing hospitals and related facilities.

Primary Care Trusts (PCTs) are responsible for planning and commissioning health services for their local population. For example, PCTs must make sure there are enough GPs to serve the community and that they are accessible to patients. PCTs must also guarantee the provision of other health services such as dentists, patient transport and screening clinics. PCTs are now responsible for over 80% of the total NHS budget.

NHS bodies such as NHS Trusts and PCTs generally have the power to do anything “necessary or expedient” to further their statutory objectives.

1.13 Arrangements in Wales, Scotland and Northern Ireland
The arrangements for the NHS in Wales, Scotland, and Northern Ireland all differ from those in England.

In Wales the Department of Health is replaced by the NHS Wales Department, with Regional Offices, NHS Trusts and Local Health Boards.

In Scotland the Scottish Health Department is the Government Department, with Special Health Boards, NHS Unified Boards and Community Health Partnerships.

In Northern Ireland, health and social services are managed and delivered together. The Government Department is the Department of Health, Social Services, and Public Safety, with Health and Social Services Boards, Health and Social Services Trusts and Local Health and Social Care Groups.

1.14 NHS commissioning framework
The January 2006 white paper Our Health Our Care Our Say committed the Government to bringing in a new commissioning framework. This was followed in July 2006 by Health Reform in England: Update and Commissioning Framework, which was predominantly aimed at PCTs. In March 2007 the Commissioning Framework for Health and Well-being was issued for consultation. This is in the context of moving from the previous system (with funds often going directly to local providers under block contracts) to a new “commissioning” system that is intended to be based more on assessing health needs.

“Practice-based commissioning” (PBC) in England devolves some key commissioning decisions (and the budgets linked to them) to GP practices. Although the decisions may lie with the practice, the PCT is actually responsible for procuring what the practice wants to commission. A budget is devolved either to a single practice or to “locality cluster” of several practices.

Joint commissioning has been around for some time and is currently being encouraged as part of the strategy of joining up service delivery. For example, section 75 of the National Health Service Act 2006 now allows a joint fund to be set up by a local authority and NHS body to further shared functions. However, a key limitation on joint commissioning is that funding provided by one participant may only be used to further the functions of that participant.
It can be difficult to keep track of the latest policy moves but see, for example The Chartered Society of Physiotherapy’s useful overview Getting To Grips With NHS Commissioning, which notes the following in relation to other parts of the UK:

- new commissioning structures have been in operation in Northern Ireland since April 2007; and
- the “Delivering for Health” reforms are continuing in Scotland on the back of the Kerr Report in 2005 called Building A Health Service Fit For The Future.

1.15 Peculiarities about NHS contracting by PCTs

A PCT may enter into a contract with “any person” (meaning any organisation or individual) who is capable of delivering the primary medical services in question. However, there are requirements on the legal structure of the contractor depending on the kind of contract that is being tendered. This means that the successful tenderer must pass a two-stage test: first, having the right kind of constitution; and second, showing that it has the capacity to deliver the services.

The structural requirements for the main types of contracts are summarised below:

General Medical Services (GMS):
- a general medical practitioner;
- two or more individuals in partnership (where at least one must be a general medical practitioner and the other(s) being a medical practitioner, healthcare professional, GMS or PMS provider (or employee of one), or employee of PCT, NHS trust, or a Foundation Trust); or
- a company limited by shares (with rules on the ownership of the shares)

Personal Medical Services/Specialist Provider Medical Services (PMS/SPMS):
- a medical practitioner;
- a healthcare professional;
- an individual who is a PMS or GMS provider;
- an NHS, GMS, or PMS employee;
- an NHS Trust, PCT, or NHS Foundation Trust; or
- a company limited by shares. (all shares in which must be owned by one or more of those listed in (i) to (v) above).

Alternative Provider Medical Services (APMS):
- There are no legal structural requirements but, as with GMS or PMS, the service provider must be capable of delivering the service.

Example

If a particular social enterprise is a company limited by guarantee (CLG) then since it has company members rather than shareholders, it is clear that the Company (as it is) will only be able to bid for an APMS contract, since a CLG is not one of the permitted forms for GMS or PMS. However, there are potential issues in relation to pensions if the Company (as it is) were to be awarded an APMS contract. (In theory it would be possible to set up a community interest company limited by shares with all its shareholders being individuals as listed above, but this would not allow for wider stakeholder participation, including community and patients’ representatives.)
Section 2: The Policy framework

There are a number of themes which strongly influence the way in which commissioners procure services and which social enterprises need to understand:

- value for money;
- strategic procurement, especially the Gershon Review of Public Sector Efficiency and the Simms Review of Sustainable Procurement;
- sharing costs and benefits across the public sector; and
- stimulating a mixed economy of providers.

2.1 Value for money

"Value for money" has always been a key feature of public sector commissioning. For example, local authorities are under a duty to act in the best interests of their Council-tax payers. Central Government departments are covered by the principles in Government Accounting 2000 (as updated), and in particular chapter 22 on procurement. This states that the Government’s policy is “to achieve value for money having regard to propriety and regularity”. In practical terms, this states that

"goods, works or services should be acquired by competition unless there are compelling reasons to the contrary. Subject to the department’s legal obligations, the form of competition should be appropriate to the value and complexity of the product or service to be acquired."

The Government definition of “value for money” is “the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user’s requirement”. Value for money does not mean the lowest price.

Local authorities are subject to a duty of “best value”. This is a duty to:

“make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness”.

It is generally understood that the “arrangements” that are made should include the principle that procurement is undertaken on the basis of value for money.

Using value for money assessments in relation to the user’s needs places the onus on commissioners to obtain social benefits that can be measured within the core requirement of a contract. Commissioners should therefore simply include social and other well-being outcomes in their requirements. Too often “whole life cycle” criteria are ignored in determining value for money: developing these criteria to embrace “whole well-being” factors is a piece of work which urgently needs more attention from the Audit Commission and the National Audit Office.

There is almost universal acceptance in recent guidance that commissioning should be undertaken on the basis of value for money rather than lowest price. However, value for money can only be assessed in relation to what is being commissioned. Commissioners should therefore think carefully about what their requirements are – “user need” - and take into account the economic value of all of the public benefit outcomes they want to achieve through the commissioning process.

There is currently insufficient developed guidance on how social and environmental requirements in procurement can be developed into measurable outcomes providing the basis for determining value for money. Some intelligent thinking is reflected in the Audit Commission’s “Hearts and minds: commissioning from the voluntary sector” (July 2007)
which sets out principles capable of application to public sector contracts with social enterprises. A major conclusion arrived at in this report is that commissioners “seeking a better understanding of value for money need to collect evidence on outputs and outcomes as well as inputs”. More work does need to be done to work out what this means in practice with regard to “whole well-being” requirements.

Value for money therefore should not be thought of only in financial terms, but requires a deeper understanding and a joint approach across different disciplines. This is in significant measure because as the Audit Commission notes, “Understanding the market implies understanding how diverse and competitive it is, how much power the authority has in this market, and how the authority’s actions may influence the future development of that market.”

Service providers need to develop a better understanding of how value for money should be demonstrated. This should be considered at business case and soft market-testing stage (as to which see Part 4), with the following line of approach:

• Does the specification adequately cover measurable outcomes which reflect the best and the greatest innovation available from social enterprises?

• How does the commissioner judge any bid by a social enterprise as to how it would achieve those outcomes, against the criteria for selecting the most economically advantageous tender?

• Do the evaluation criteria match what is being sought under the specification? If not, they should!

• How is ongoing value for money measured against the specification throughout the period of the contract in a way that encourages continuous improvement?

For local authorities, the Comprehensive Performance Assessment process is soon to be replaced by the simpler but wider Comprehensive Area Assessment. All local authorities are audited and monitored by the Audit Commission. One strand of the testing is on “use of resources”: a report is based on five themes which look at how well a local authority manages its finances and delivers value for money. Use of resources, when combined with the other strands, is used to give local authorities an annual CPA star rating. Poor performance can lead to a loss of reputation for an authority, as well as a risk of reduced funding from Central Government. Social enterprises need to develop an understanding therefore not only of value for money in the contract they are performing, but the impact they can have in strategic services on the authority’s overall performance under its CPA/CAA.

Given the Audit Commissioner’s clear aim that commissioners need to understand how social and environmental objectives are factored into the value for money assessments, value for money needs to be assessed against a specification which embraces:

• outcomes from the main service in question;

• outcomes which benefit the rest of the commissioner’s objectives - “public value” - and which therefore need to be incorporated as core to the specification; and

• outcomes which are of direct benefit to other public bodies, but have arguably less direct impact on the commissioner itself – “wider public value”.

Local authorities can certainly harness such benefits through their well-being power, underpinned by their Local Area Agreements – the reverse, i.e. how PCTs and other local public agencies can do this is less clear and needs to be given express statutory footing.

**Example**

A local authority distilled “community cohesion” into specific requirements in a carer support services tendering exercise. Outputs identified included ensuring that carers were taken out of positions of isolation and supported by their surrounding community. These are verifiable requirements against which value for money judgements can be made.

### 2.2 Strategic procurement

There has been significant encouragement from Central Government to adopt a strategic approach to procurement, both within Government and the wider public sector.

This has been driven by Sir Peter Gershon’s Independent Review of Public Sector Efficiency, the need to demonstrate savings in public expenditure and a desire to improve value for money through the commissioning process, ensuring that it reflects wider corporate objectives.

Most local authorities have now adopted a procurement strategy, following encouragement to do so from Central Government, particularly in the National Procurement Strategy for Local Government. The extent to which this refers to and embraces the authority’s community strategy varies enormously.
Example
See the Government’s Sustainable Development website for case studies of local authorities who have embedded sustainable development into their community strategies, local area agreements and corporate procurement strategies:
- Oldham Partnership - planning for sustainable communities;
- Durham’s LSP - sustainability appraisals;
- holistic thinking embeds sustainability into Birmingham’s LAA;
- Kingston’s LAA builds on sustainability in community plan;
- Shropshire’s LAA - prioritising ‘sustainable communities’;
- triple bottom-line built into Cornwall’s LAA; and
- Kirklees Metropolitan Council - a sustainable agreement.

Specific commitments to giving social enterprises opportunities to provide local services should be generally be made in procurement strategies, not only of local authorities but also other public bodies. Local authorities have a clear mandate to do this through the well-being power, but the basis for Central Government departments to do so is unclear as there is no equivalent statutory framework.

A related subject is the trend for local authorities and other Government organisations to enter into strategic service partnerships, particularly in connection with corporate or back office operations. These drive service delivery improvements to support public sector organisations in their frontline services. As social enterprises will invariably be involved with frontline services, they need to understand what their relationship will be with the strategic service provider in such instances.

2.3 Sharing costs and benefits across the public sector
A very strong theme promoted by Government, following on from the Gershon Review of Public Sector Efficiency, is the promotion of shared services between public bodies in the same sectors. In addition the joint commissioning of services between the NHS and particularly local authority social services departments has statutory underpinning in the form of section 75 partnerships. These provide both opportunities and challenges for social enterprises.

A common theme that does give cause for concern is that there is no readily recognisable mechanism for one public body to achieve recognition from HM Treasury for expenditure that creates savings in
another part of the public sector. This is a particular problem for local authorities, e.g. when commissioning leisure trusts to target poorer people to undertake sport, thereby benefiting the NHS budget.

Although LAAs do offer some opportunity for joint commissioning, the opportunity for doing so at a neighbourhood level with the appointment of a single community services managing organisation is an idea which requires further development and piloting.

The National Health Service Act 2006 does provide that “in exercising their relevant functions NHS bodies (on the one hand) and local authorities (on the other hand) must co-operate with one another in order to secure and advance the health and welfare of the people of England and Wales”. Social enterprises are therefore ideal partners for assisting councils and NHS bodies to fulfil this duty.

2.4 Stimulating a mixed economy of providers

Local authorities are increasingly proficient in creating a mixed economy of service providers, ranging from large contracts with major public companies (often connected with capital investment) to smaller contracts with small and medium enterprises (SMEs). Social enterprises often fall into the category of SMEs (although there are notable exceptions). This balancing act is one for each local authority to manage – there can often be tensions, for example where the economies of scale may reduce competition.

In the report Smaller Supplier – Better Value?, the OGC gives the following reasons why small and medium sized enterprises (SMEs) are being discouraged from tendering for public sector contracts:

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

The National Procurement Concordat for Small and Medium-sized Enterprises (SMEs) is a statement of principles to encourage effective trade between local authorities and SMEs. Since many social enterprises are also SMEs, its principles are relevant to the majority of social enterprises. The key commitment here is to publish a procurement strategy that includes a commitment to the role procurement is to play in delivering the authority’s objectives and its contribution to the community strategy, workforce issues, diversity and equality and sustainability.

While there is much encouragement to stimulate a wider supplier base, there is little practical guidance on how this is to be done within the context of a commissioning process. There are different drivers in a successful social enterprise which require recognition by the commissioner in achieving a mixed economy of services. For example, if its members include staff and user representatives, it is internally accountable for its services in a way which is not achieved to same degree as a business driven principally by the maximisation of profit.

2.5 Sustainable procurement

Sustainable procurement is explored in more depth in Part 3. At a national level, sustainable procurement was moved on by the Government’s Sustainable Procurement Taskforce (“SPTF”). The SPTF produced its action plan (the Simms Report) in June 2006. Progress on sustainable development (which includes aspects of procurement) is monitored by the Sustainable Development Commission. Of particular note is the Flexible Framework which enables public bodies to measure their progress in pursuing sustainable procurement and which is a benchmark reference tool used by an increasing number of local authorities.

There are a number of publicly available tools designed to assist with achieving sustainable procurement. There is guidance from IDeA (in conjunction with SOLACE and WRAP) in the form of Sustainable Procurement – Making It Happen. Forum for the Future has developed several versions of its “sustainable procurement tool” covering the public sector, local authorities, and the NHS, including part of the BEST Procurement Development Partnership.
Key to sustainable development is the consideration of the social and environmental impact of commissioning and procurement. Work on social considerations in public procurement is considerably less developed than other sustainability considerations, and requires a broader treatment than the project on social clauses in contracts, which is the responsibility of the Office for the Third Sector, as set out in the Government’s response to the SPTF recommendations, the report of the Third Sector Commissioning Taskforce and the Social Enterprise Action Plan.

There are special labels given to different aspects of sustainable procurement which result in them being perceived as incidental rather than at the centre of a commissioner’s requirements. This means that much more needs to be done about mainstreaming economic, social and environmental benefits in commissioning so that what cannot be done is described by way of exception rather than the current fog of platitude and uncertainty. To state clearly - you can buy anything that is relevant to the subject matter of the contract and this is defined by what you choose to buy, provided you are not behaving in ways which are discriminatory.
Commissioners in the public sector can only procure goods or services within the EU procurement rules. However, this does not always require the full, detailed and complex tendering process. Nor are the rules as inflexible as is often perceived to be the case.

Social enterprises want to be in position where they can easily access information about current and future contracting opportunities. They look for a “level playing field” that provides the opportunity for them to show commissioners their capacity to achieve complex social results. This requires a procurement process which expects clear, “joined-up” outcomes and is appropriate to the scale and complexity of the service or product.

In this Part we answer three questions:

- When do the full EU rules do apply?
- What to do when they do apply? and
- What to do when they do not apply in full?

When appropriate, social enterprises seek to have assessment of the full value of their proposals including the total public benefit of their service delivery methods.

Social enterprises may help public bodies achieve the maximum possible delivery of their strategic as well as service delivery objectives through their procurement activities.
Section 3:
Do the full EU Rules apply?

3.1 Introduction
There are many situations where public bodies follow the full EU procurement rules although they do not need to do so.

Public bodies should take full advantage of their ability not to follow the full advertising requirements of the EU procurement rules when this is not necessary. This approach can reduce complexity and cost of participating in the process by a range of potential providers, including social enterprise. Public body officers need a good understanding of when the full EU rules do and do not apply.

3.2 The Legal Framework
Rules derived from the EU Treaty apply to all contracts entered into by public bodies, including:
- contracts to which the full EU procurement rules apply;
- excluded contracts;
- concessions; and
- contracts for Part B services (see below).

There are additional rules that apply to higher value contracts. These are derived from the EU Directive on the procurement of public contracts and translated into law in England, Wales and Northern Ireland by the Public Contracts Regulations 2006. In Scotland the equivalent regulations are the Public Contracts (Scotland) Regulations 2006. However, since the Regulations implement the same EU Directive, they are similar in all jurisdictions.

In this Part we refer to these rules as the EU procurement rules, so as to distinguish them from rules derived from the EU Treaty. Public bodies are called “contracting authorities” in the EU procurement rules.

The EU procurement rules distinguish between contracts for works (construction activities), services and supplies (the purchase or hire of goods).

3.3 Excluded Contracts
Some types of contract are specifically excluded from the EU procurement rules, including:
- land transactions;
- employment contracts; and
- contracts for research and development services, unless the research is solely for the public body’s own benefit and paid for wholly by the public body itself.

There are special rules for contracts procured by utilities.

3.4 Concessions
There are also special rules for concessions, where a public body gives an organisation permission (in the form of a licence or right) to run a facility and retain the income from it. An example of a concession is a shop run by volunteers in a hospital where the organisation running the shop retains the income from customers but is not funded in any other way. Concessions to deliver services are excluded from the full EU procurement rules. There are special rules for concessions to carry out and exploit works requiring a different competition process but also requiring the concessionaire to apply the procurement rules to its processes.

3.5 “Part A and Part B” Services
The EU procurement rules divide services into Part A and Part B services. Part A services include:
- accounting and financial services;
- services provided by construction professionals; and
- housing and property management.
The full EU procurement rules do not apply to contracts for Part B services, which are:

- hotel and restaurant services;
- transport services;
- legal services;
- personnel placement and supply services (agency staff);
- investigation and security services (other than armoured car services);
- education and vocational health services;
- health and social services;
- recreational, cultural and sporting services; and
- other services [not listed in Part A].

The Part B services can be the sorts of services provided by social enterprises and the maximum opportunity should be taken to apply a less prescriptive tendering regime to such opportunities.

3.6 Thresholds

The full EU rules will only apply if the total value of a contract exceeds the relevant threshold. These are currently (from January 2006):

- in relation to all works, just over £3.6 million; and
- for supplies and Part A services, just under £95,000 for contracts let by Central Government bodies and £145,000 (for most other public sector bodies).

The exact amounts are expressed in euros and are benchmarked to the pound biannually on 1st January in even numbered years (see the OGC website).

Contracts must not be split artificially to keep their value below the EU threshold.

3.7 Aggregation Rules

For contracts valued below the threshold, the “aggregation” rules need to be considered. If the combined value of a contract and other contracts that are aggregated with it is over the threshold, then each contract must be procured under the EU procurement rules. They do not need to be procured together.

Contracts for services and supplies need to be aggregated with other services or supplies contracts where they are part of a:

- “single requirement” for those services or supplies; or
- “requirement over a period” for those services or supplies.

A ‘single requirement’ is a ‘one-off’ requirement at a particular time for goods or services of the ‘same type’ as those being procured under the contract.

A ‘requirement over a period’ for goods or services of the same type is intended to cover spot purchasing arrangements. Here the estimated amount payable under contracts for similar types of goods or services over a 12-month period is used.

There is no definition of ‘type’ of goods or services. Most commentators consider that goods or services are of the ‘same type’ if they are generally purchased from the same contractor.

The rules on aggregation are different for works. There is no requirement to aggregate contracts for similar types of works, but only all contracts for work to build a single new building or part of a building, such as an annex.

3.8 Small lots

A public body can choose not to follow the EU procurement rules for separate contracts where:

- a total value of all of those contracts is less than 20% of:
  - the value of the total construction cost for work to create a single building or part of a building; or
  - a total requirement for services or supplies which is being tendered under the EU procurement rules at the same time; and
- the estimated value of each of those contracts is less than just under:
  - £55,000 where they are services or supplies contracts; or
  - £650,000 if they are works contracts.

This is an EU concession intended to allow these contracts to be used to encourage small and medium-sized enterprises, including social enterprises. For example, it could be used to commission a small architect’s practice to design part of a larger development without it being tendered, where the rest of the design is commissioned at the same time through a tender under the EU procurement rules. Public bodies can use these schemes more widely particularly in terms of allowing innovative ways of working to be piloted at the same time as “traditionally” procured schemes. The contracts for the remaining 80 percent of the value of the work or the requirement for services still need to be let under the full EU procurement rules. General EU Treaty requirements still apply to contracts procured in
reliance on this exemption (i.e. transparency, non-discrimination and proportionality).

The public body can also exclude from the aggregation rules contracts let by a ‘discrete operational unit’. This is a part of the public body that acts autonomously from the rest of the public body (for example a locally managed school, where the governing body purchases separately from the local education authority).

3.9 Relevant policy and how it relates to the law

The starting point here is the law: the full EU Procurement Rules either apply or they do not. Public bodies commonly have internal policies and procedures governing which process they will use to tender a contract depending on the value. Where the full EU Procurement Rules do not apply, they may be able to waive their policies for a particular case, or could consider changing their policies.

3.10 Key findings

Public bodies should be aware of the circumstances where the full EU rules do not apply and should take full advantage of their ability not to follow them in these cases. Procuring contracts without using the full EU procurement rules gives greater opportunities to integrate wider policy objectives into their procurements, although this is subject to the general procurement rules.

Even where the full EU procurement rules apply, there is scope for commissioners to structure their procurements so they can take account of the wider public benefit outcomes that are being delivered. These wider social and public benefit outcomes should be seen as part of the case of what is being procured, not as ‘extras’ that are ‘bolted on’. Using procurement terminology, these should be developed as part of the core requirement of a commissioner (and not a secondary requirement).
Section 4: Procurement under the full EU rules

4.1 Introduction
Intelligent commissioning requires commissioners to embed wider policy objectives, including social outcomes, into their procurement processes. Procurements should be used to deliver improved service outcomes and wider public benefit strategies.

4.2 Legal Framework
The full EU procurement rules set out a process which public bodies have to follow when letting contracts covered by those rules. For most contracts the usual process is the restricted procedure under which:

- a notice is inserted in the Official Journal of the European Union (OJEU) advertising the contract;
- bidders fill in a prequalification questionnaire (PQQ) which the public body uses to ensure that they meet its minimum requirements for technical ability and financial security;
- the public body selects which bidders will be invited to tender for the contract from amongst those who pre-qualify and issues an invitation to tender to those bidders;
- tenders are returned, clarified and evaluated; and
- the contract is awarded, unsuccessful bidders debriefed and the contract signed.

The process can vary as follows:

- the open procedure omits the pre-qualification and selection stage, with all contractors tendering;
- the negotiated procedure is similar to the restricted procedure except that the public authority can negotiate with bidders after the tendering stage. Because of this it can be used only in very limited circumstances; and
- the competitive dialogue procedure inserts an additional stage between the pre-qualification and final tendering stage during which the project is discussed and developed with a number of bidders.

4.3 Business Case and Specification
Commissioners should refer to Part One of this Guide, which illustrates how commissioning and procurement practices should reflect corporate objectives. When considering the commissioning strategy, public bodies should focus on the whole impact of what they are proposing to commission. They need to think strategically about how procurement can be used to secure wider corporate objectives, rather than focusing on the asset or service they may have procured previously. This requires those officers engaged in procurement to engage in grasping what their whole organisation is seeking to achieve and not just the part they work in: this is a cultural shift consistent with the public service reform agenda of the UK Government. There are a number of councils who are cross-referring their procurement strategy to their community strategy. For this good practice to be embedded in other parts of the public sector requires wider ownership of responsibilities to local communities and that connection is not made strongly enough outside Local Government.

The specification sets out the detailed requirements for the contract, including any social outcomes that are envisaged within corporate objectives. It says what is to be provided under the contract. All specifications should be challenged against their delivery of corporate objectives, i.e. how they create public value.

Where public value outcomes are capable of being expressed in terms of economic value to the public body conducting the procurement they can be included in the specification as part of what is being procured. This is an extension of the principle of
whole life costing to “whole benefit costing”. At this stage the public body is able to carry out soft market testing to identify what the market is able to provide. This establishes whether there are suppliers who are able to deliver the specification, particularly in terms of these wider public objectives, so as to see which of them it is realistic to seek to procure. This soft market testing must not favour particular suppliers or types of suppliers. All potential suppliers should be given an opportunity to participate. The results can then be used to inform the specification.

Example

A public body wished to build a community centre. It also wanted the contractor to engage and train a number of long-term unemployed people on its construction.

Had the contract been drafted solely as a contract to build the community centre, this would not have been relevant to the value for money of that contract. The number of unemployed people engaged should not have affected the quality of the community centre and could have increased the construction costs.

Instead, the core purpose of the contract was drafted as both the construction of the community centre and the provision of training and job opportunities for previously unemployed people. This meant that the employment and training was relevant to value for money. It also allowed the public body to assess the quality of the training.

Preparation of the business case creates an opportunity to ensure the procurement reflects the full value of what can be achieved. A considerable amount of work has been done to demonstrate social returns on investment, especially in the public sector (for example, by the New Economics Foundation). Tools are now available to help organisations identify the added value they offer in service delivery and express it in terms meaningful to commissioners to strengthen opportunities for service delivery by social enterprises. An example is Selling Added Value by the Social Enterprise Support Centre. Commissioners can also use these tools to help them make the link on a case by case basis between their strategic documents and their commissioning. This will help to move what has been perceived as “added value” into the core of the requirement of the commissioners.

4.4 Contract Packaging and “Lots”

Public bodies have considerable flexibility over how they package contracts together, as long as they do not artificially break up larger contracts to avoid the EU procurement rules.

There is a growing trend to package contracts into larger and larger units with the intention of achieving economies of scale and save on transaction costs. This process is also reflected in the growing use of buying clubs. Packaging contracts together in this way can make it harder for smaller organisations to bid.

It is possible for a public body to procure the contract as a series of “lots”. These are separate contracts to deliver a part of what is being procured within, for example, separate areas.

Bidders can be given the opportunity to bid for one lot, a number of lots or the whole procurement. Bids for each lot can then be evaluated separately. The public body should have a method for comparing the benefits of any economies of scale offered by organisations bidding for more than one lot.

Procuring the contract by separate lots gives smaller organisations the opportunity to bid for it on their own without having to seek to form a consortium with other bidders.

When putting contracts together a public body should consider precisely what it wants to procure.

Example

A local authority leases a leisure centre to a social enterprise to operate. Responsibility for the structure of the centre remains with the local authority which engages its own contractors on whole life cycle works, while the social enterprise is responsible for day to day maintenance.

4.5 OJEU and Advertising

All contracts procured under the full EU procurement regime require an OJEU notice. Where the public body is seeking to procure social or environmental outcomes the OJEU advert should state this. An OJEU notice can state that bids are welcome from a range of potential providers, including social enterprises, provided that no reference is made to locality.

Social enterprises can only respond to OJEU notices of which they are aware. Some smaller social enterprises do not have the resources necessary to monitor OJEU adverts.
It is possible for public bodies to advertise a procurement in places other than the OJEU, and this is often very effective, subject to two requirements:

- the advertisement must not be placed anywhere else before it has been sent to the OJEU; and
- the advertisement elsewhere may not contain any more information than in the OJEU notice (although it can contain less).

This advertisement can be on the public body’s website or on a portal website. Many public bodies now have a “supplying to the authority” section of their website. Alternatively there are portal websites such as Source East Midlands www.sourceeastmidlands.co.uk/DefaultRegion.aspx in the East Midlands and nearbyyou www.nearbuyou.co.uk specifically targeted at the social enterprise sector, (nearbuyou is a national trading network for social enterprises and those that wish to trade with them).

Contacting organisations to check that they have seen an OJEU notice as part of a strategy to stimulate a wide range of bids, and not to favour particular bidders, is entirely acceptable. However, the public body must scrupulously ensure that those conversations do not lead to information being given to a social enterprise (or indeed any other potential bidder) that could favour them over any other bidder.

Example

A local authority regularly targets a range of bidders including social enterprises by advertising contract opportunities in newsletters circulated in the local third sector.

It is possible to supplement the information in the OJEU notice by supplying a Prospectus or Information Memorandum with the prequalification questionnaire as long as this is sent to all bidders who express an interest. This can give more information about the scope of the procurement and where it fits within the public body’s corporate strategies.

4.6 Pre-qualification

There are two issues in relation to prequalification – the thresholds set and the types of questions that can be asked.

The purpose of the prequalification process is twofold. The first stage involves ensuring that bidders invited to tender are not ineligible and meet the public body’s minimum requirements for technical or professional ability and economic or financial standing. The second stage involves selecting those bidders who are invited to bid from all those who do meet these minimum thresholds.

Minimum thresholds for pre-qualification should be set to reflect the reasonable requirements for the contract, but not be inappropriately higher. Standard pre-qualification questionnaires should be amended to reflect the public body’s reasonable requirements in relation to the contract being procured. This will ensure that social enterprises and other SMEs are not excluded from tendering for the contract. These criteria were helpfully explored in “Think Smart: Think Voluntary Sector”. Commissioners should think carefully as to their requirements in relation to:

- the number of years of accounts required;
- the appropriate balance sheet requirements, particularly in relation to smaller contracts; and
- financial strength.

If there is a valid reason why a social enterprise cannot provide the financial information requested in the PQQ, the public authority can accept other appropriate information instead.

An increasing number of local authorities are setting thresholds for financial capacity which match the type of provider they are seeking to attract. This good practice is to be encouraged.

Although there is no equivalent provision in relation to demonstrating the bidder’s technical or professional ability to deliver the contract, public authorities are given a wide discretion over the information they can consider. A failure to provide non-financial information may not be fatal if the social enterprise can demonstrate in another way that they have the ability to deliver the contract.

When assessing a bidder’s technical capacity and ability, the specification should cover all the public outcomes required to be provided under the contract, so that relevant questions can be asked at the prequalification stage. Those questions must then relate to the bidder’s experience, capability and capacity, and management structures available to deliver the entirety of what is being procured under the contract as set out in the specification. For example, if the specification requires the contractor to assist people who are unemployed to move into positions where they are more employable as well as the construction of a building, capacity and track record questions can be asked about this as much as in relation to the construction works.
The selection of contractors to be invited to tender at the second stage must also be based on their technical ability and/or financial strength. When deciding how to specify the selection criteria, commissioners should consider whether it is an advantage to have a contractor that is financially stronger, as long as its minimum financial strength requirements have been met. If there is no advantage, the selection could be based just on technical ability. Including financial strength in the criteria could disadvantage smaller social enterprises, so this should only be done where this is justified.

4.7 Contract Conditions

Contract conditions are the terms and conditions governing how the contract is delivered. There is clearly some overlap between the specification and the contract and some terms could go in either place.

It is possible to include social and environmental requirements in a contract as long as they are consistent with the EU Treaty requirements and are highlighted in the OJEU notice, or Invitation to Tender or documents that accompany it. Such clauses are now expressly contemplated by the EU procurement rules.

Public bodies should approach contract conditions on the basis that they should be sufficient to protect their position under the contract but should not be so onerous that they put off bidders. Where a contract is likely to be bid for by, particularly smaller, social enterprises, public bodies should consider creative ways in which that contract can be tailored to make it attractive to those social enterprises. This could include provisions such as, for example, payment in advance, or providing for the public body to take out relevant insurances rather than the contractor.

Example

A local authority has put in place arrangements under its financial regulations for payments in advance so long as in relation to a single contractor these do not exceed £10,000 at any time. This flexibility is designed to assist smaller contractors including many social enterprises.

4.8 Tendering Processes

There are a number of ways in which public bodies can make the tendering process helpful to social enterprises. Clearly drafted procurement documentation, adequate tendering periods and flexible interview dates all help social enterprises participate.

For an example on work done to reflect community benefits in specification writing see the free online learning course: www.specification-writing.info/welcome.aspx

A number of local authorities are facilitating training for social enterprises to help them bid for contracts. Some are grouping together with other commissioners in their region to provide mentoring to social enterprises bidding for contracts in neighbouring authorities or adjacent services.

Case Study

The Birmingham Disability Resource Centre (BDRC) recently tendered for and won a contract from Birmingham City Council to provide disability equality training to prospective taxi drivers. BDRC found the tender process a positive experience. The process was very well administered and they were given approximately 6 weeks to respond. The 4-person interview panel came out to BDRC’s premises for the interview, which gave them a feel for the organisation and what they do. BDRC was given plenty of notice to reschedule any prior arrangements they had for the date set for the interview.

More information on the BDRC’s work can be obtained from their website at: www.disability.co.uk

4.9 Contract Award Criteria

Contracts can be awarded on the basis of either lower price or ‘most economically advantageous tender’. This again illustrates the importance of the specification covering all the outcomes to be delivered through the contract. Where specifications have been written to achieve wider public outcomes the award criteria must be devised to assess which bid is best placed to deliver them. The criteria used to determine the ‘most economically advantageous tender’ must:

- be relevant to the subject of the contract (including the delivery of any wider public outcomes);
• give a benefit to the contracting authority which has some economic value; and
• be consistent with EU Treaty principles.

The award criteria must choose the most economically advantageous tender to deliver the specification. The process must assess objectively whether there is an economic advantage for the contracting authority from one bid compared to another.

Public bodies should consider carefully how to set and describe award criteria which measure which bidder is best able to deliver the social outcomes, or wider public benefit, the contract requires.

4.10 Contract Award and Debrief

Unsuccessful bidders are entitled to be told of the name of the successful bidder, the criteria used to award the contract and (where a scoring method was used) their score and that of the successful bidder. After providing this information this public body must wait 10 days before signing the contract.

If a bidder so requests within two working days of that notice being sent, the public authority must explain to the unsuccessful bidder why the successful bid was better than theirs. These are useful tools for social enterprises to gain feedback on their tenders and improve them for the future.

There are similar rights for bidders who were unsuccessful at earlier stages in the procurement process to ask for an explanation why. Here the period for response is 15 days.

4.11 Contract Management

Whilst strictly there is little point in specifying outcomes in a contract that will not be monitored and verified, this should not stop both commissioners and service providers describing their aspirations as a basis for common achievement especially in parallel partnering documentation.

Monitoring refers to the supply of information on performance. Verification involves the contracting authority checking the monitoring information.

The decision about what social outcomes to include in the specification should determine the systems and resources available for the monitoring and verification. Outcomes should be specific and measurable; contrary to some perceptions, social outcomes can be secured most effectively against targets which are not overly sophisticated.

Commissioning departments should look within the wider authority for expertise in monitoring the delivery of outcomes outside their field of expertise. Where they do not have the necessary experience themselves, it may be found in another part of the public body.

4.12 Key Findings

It is not always necessary for a public sector commissioning body to follow the EU procurement rules for every contract it lets.

The requirements of the EU Treaty also apply where the full EU procurement rules apply.

Where the full EU procurement rules do apply, steps can be taken to encourage participation by social enterprises and to stimulate the market by widening the range of potential service providers. These include:

• ensuring the specification covers all the requirements for outcomes that are both useful to the contracting body and deliverable by potential suppliers;
• using lots and contract packaging to create opportunities for smaller bidders;
• advertising the procurement so social enterprises who do not regularly study the OJEU are aware of it;
• setting appropriate pre-qualification thresholds and ensuring that each bidder’s technical ability to deliver the social outcomes is assessed;
• selecting tenderers just on the basis of technical and professional ability, where appropriate;
• using contract conditions which are sufficient to protect the public authority but are not unduly onerous;
• adopting procurement processes which do not make it unduly difficult for social enterprises to participate;
• ensuring unsuccessful social enterprises are properly debriefed as required by the EU procurement rules; and
• ensuring social outcomes required are properly monitored and verified.
Section 5: Procurement when the full EU procurement regime is not relevant

5.1 Introduction
A number of legal rules apply to all procurements, whether or not subject to the full EU procurement rules. Some of these rules are derived from the EU Treaty but some of them also reflect the general legal environment within which public bodies have to operate (as to which see Part 1).

Public bodies must also comply with their internal procedures including decision-making processes and standing orders. Standing orders can sometimes be waived as long as this is done for good reason. They can of course also be changed.

5.2 EU Treaty
The EU Treaty includes a number of rules derived from the free market objectives set out in the EU Treaty, which apply to all contracts let by a public body. These require a public body:

- not to discriminate between businesses because of the EU Member State in which they are based or from which they provide services. This includes accepting products and services from businesses in other EU Member States if they meet the public body’s legitimate requirements for the contract;
- not to include contract terms that are disproportionate to the contract or inhibit the freedom of movement of workers, goods and businesses. A public body may not ask for evidence of technical capability, professional status or economic strength that is way beyond that needed to deliver the contract. The public body must accept technical specifications and qualifications if they are equivalent to the national specifications and qualifications the public body has specified; and
- to adopt transparent and objective procurement processes so as to demonstrate that the public body has complied with the other EU Treaty requirements.

5.3 Advertising requirements in the EU Treaty
Case law has expanded the obligation to adopt transparent and objective procurement processes into a requirement to advertise certain contracts. The European Commission, in the Interpretative Communication on contracts not covered by the full EU rules, requires commissioning bodies to make a judgement about whether the contract is ‘likely to be of interest’ to contractors based in other parts of the European Union, and advertise accordingly.

Where advertising is required, it must be “adequate” and accessible across the EU. The greater the likely interest from contractors in other EU countries, the wider the advertising coverage should be. Possible advertising methods include:

- using the public body’s own website;
- using a portal website; or
- inserting a notice in the Official Journal of the EU on a voluntary basis.

The advertisement must contain sufficient information to enable a contractor to decide whether or not to bid.

The precise scope of the transparency requirement is not clear where the requirement to advertise does not apply. It is likely to be interpreted as a requirement to use objective and justifiable criteria to select the organisation to deliver the contract. Compliance with the public body’s standing orders can help demonstrate this.

Public bodies generally have the power to waive their standing orders as long as this is done on proper grounds, such as value for money considerations. This should be supported by appropriate decision-making which sets out an audit trail for doing so.
Part Two: EU Procurement

Case Study

Helping To Break Down The Barriers
Nottingham City Council’s Adult Services Housing and Health (NCC-ASHH) currently procure, home care services from two social enterprises. Nottingham City Council recognises the value of working with Social Enterprises as they are able to provide local services that have an ‘added value’, from a social or public perspective, which supports the Council’s own local agendas. Nottingham City Council has to meet the diverse needs of a diverse community and, through its procurement strategy, has sought to increase its procurement activities with Small and Medium Enterprises.

Along the way a number of barriers to purchasing from social enterprises have been identified, including:

- the lack of understanding of social enterprises amongst procurers, many of whom presume that social enterprises are simply ‘not for profit’ organisations like charities;
- conflicts between various agendas, i.e. efficiency agenda v. full cost recovery and sustainable procurement;
- risk management – risks can appear to be minimised with larger, well established organisations;
- start up social enterprises finding it difficult to ‘get through the door’, often because of local authorities require potential providers to meet quite rigid, pre-set specifications; and
- local authorities fearing that contracting with social enterprises will lead to more work for them in terms of supporting them.

Despite these barriers NCC-ASHH has, at times, ‘nurtured’ social enterprises. It has held regular meetings to resolve operational issues and has, on occasion, paid in advance for services to avoid cash flow problems. It has offered free training and support to, amongst others, employees of social enterprises, i.e. Adult Protection, Grievance, Disciplinary and Employment Law, Dementia Awareness, Management Development etc.

One of the two social enterprises currently working with the City Council was originally awarded a contract following a rigorous procurement exercise. This organisation is now one of the largest Home Care providers in the City. The other is one of the City Council’s smallest providers. Both are unique organisations and are equally valued by the City Council.

5.4 Key Findings
There are a number of general principles that apply to how public bodies must let contracts, whether or not the full EU procurement rules apply.

Beyond this public bodies have considerable discretion over how they let contracts that are not subject to the full EU procurement rules or commission activities other than through contracts. The only constraints on this other than the EU Treaty and any specific requirements applying to the public body are the general requirements of reasonableness (including financial reasonableness) and the need for other public bodies to follow their own internal procedures. Much more can be done to take full advantage of this discretion, by opening up markets to suitable partner organisations.
Part Three:
Issues for the Public Sector
Section 6:
Social and Environmental considerations

6.1 Introduction
The subjects of community benefits and sustainable procurement suffer from the lack of a shared vocabulary. The following hierarchy may be helpful in understanding this emerging field of policy and activity:

- a requirement such as targeted recruitment and training (TR&T), rather than the term “local labour” which is discriminatory, is one element in a wider range of community benefits;
- community benefits is one element in a wider range of ‘social issues’;
- ‘social issues’ are part of a still wider concern - ‘sustainable procurement’;
- sustainable procurement is a way of delivering an over-arching Government objective - sustainable development.

‘Community benefits’ include not only TR&T, but also equal opportunities, access to services in deprived areas, training for the existing workforce, supply-chain initiatives, community consultation, ‘considerate contractor’ schemes, contributions to education, the promotion of social enterprises, and resources for community initiatives.

‘Social issues’ includes core labour standards1, disabled access, disability, gender and race equality, employment and training issues, fair trade, and support for SMEs including social enterprises, black and ethnic minority enterprises and women and disabled-owned businesses.

‘Sustainable procurement’ has primarily been concerned with environmental issues, but there is now acceptance of the need to extend this to social and local economy issues. The Sustainable Procurement Task Force's definition of sustainable procurement is:

*a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits to society and the economy, whilst minimising damage to the environment”.

To gain the full benefit of social and environmental requirements in a procurement, these should be described clearly within the subject matter of the contract, ideally with references back to the relevant policies adopted by the commissioner. It is best to see these as part of the “core requirement” of the commissioner rather than to use terms such as “added value” which can suggest that they are only secondary requirements of the authority.

As awareness grows of the importance of sustainability, so organisations in the public sector and social enterprises are increasingly delivering their activities in ways that are sustainable. In particular, there is a growing movement to:

- source and supply goods and services to maximise local economic benefits;
- use purchasing power to combat social disadvantage and provide opportunities for a range of people, including those with a disability;
- use “fair trade” products; and
- source organic products, particularly in relation to food supplies.

Many social enterprises are able to respond to these developments as they already provide goods and services and aim to work in a way that minimises damage to the environment, encourages the use of environmentally friendly and organic products and promotes fair trade. These are significant issues to be addressed when looking at long term outcomes from contract performance.

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1 as established by the International Labour Organisation (ILO).
6.2 General Principles

There are three stages in a procurement process when social and environmental outcomes should be considered:

- when prequalifying contractors, in terms of assessing their technical and professional ability to deliver those outcomes;
- as contractual requirements in the specification or contract conditions which the successful bidder is required to deliver under the contract; or
- as part of the contract award criteria.

The UK Regulations now specifically permit the second of these as long as the requirements are:

- compatible with EU law (including the EU Treaty); and
- referred to in the OJEU notice or Invitation to Tender.

In order for requirements to be “compatible with EU law” they must not breach any of the EU Treaty requirements and must be “relevant to the subject-matter of the contract”.

Any requirements that are specified must relate to the service or product and not the way a contractor runs its own business. For example, a public body can require that a building completed under a public works contract is accessible to people with a disability, but not insist that the contractor’s own head office conforms to such standards. This requirement prevents a public body from specifying that a contract must be delivered by a social enterprise. The European Commission does not regard the ownership structure of the enterprise as relevant to what the public body is procuring under the contract, notwithstanding the differences in service delivery which many believe may arise from different ownership structures.

Both the European Commission and the OGC have issued guidance on the kinds of social and environmental issues that can be taken into consideration and how this can be done. The OGC Guidance on Social Issues in Purchasing, issued jointly with DEFRA, covers matters such as labour standards, workforce skills and training and equal opportunities. It encourages contracting authorities to consider these at the start of the procurement rather than seeking to add them in later.

The BEST Procurement partnership, through one of its European networks, surveyed the attitudes to using social issues in procurement and assessed the extent to which member states were using the freedoms that the law allows (see BEST procurement section of SEEM website www.seem.uk.net).

Requirements can only be included if compliance with them is independently verifiable. A condition requiring the contractor to source a proportion of its energy from renewable sources (beyond that required for the serviced offices the contract was procuring) was not allowed, on the basis that it was neither linked to the subject matter of the contract nor independently verifiable. The condition would have been acceptable if it had been limited to the electricity supplies for those offices included in the specification, and had been verifiable: in the UK this should now be possible.

This would allow public bodies to specify things such as:

- vehicles with low emissions;
- the use of recycled materials in the delivery of services or products; and
- the requirement to recycle materials produced as part of the contract.

6.3 Locality

Public bodies cannot specify locality in any contract nor can they consider issues of locality in a tender evaluation. Clauses requiring local labour, or requiring priority to be given to local subcontractors are contrary to the EU Treaty requirement not to impose barriers on the free movement of workers. Conditions requiring contractors to source a percentage of their supplies from local firms or to increase their use of national products and labour have been declared unlawful (See section 6.4).

A clause requiring a contractor to have a local office at the time of bidding is not allowed, although a requirement to open and maintain a local office is legitimate as long as it is a genuine and necessary requirement.

There is some scope for public sector organisations to shape contract requirements in ways that may make it easier for local applicants, as long as this is a genuine requirement.
Case Study:

‘Buying Local’ – can it be done?

East Ayrshire Council set up a pilot project to see if it could “establish a local, fresh school meals service using a proportion of organic food”.

The evaluation of the pilot concluded that “the Council was not permitted when awarding contracts to take into account the distance food will travel”. Nevertheless, it also ended up with “almost all” of the suppliers to the 11 schools in the pilot being suppliers based in Ayrshire.

So, how did East Ayrshire Council end up with almost all local suppliers without breaching the EU Rules on locality?

The Council advertised the contract in the OJEU under the restricted procedure as a contract for fresh / organic foodstuffs. It was also advertised in the local and regional press. The contract was divided into 9 lots covering different food-types (such as ‘cheese’ and ‘poultry’). There were 22 expressions of interest, of which 13 submitted PQQs and were invited to tender.

The requirement for the food to be fresh could be justified since the food was needed to supply school meals. Importantly, the approach was also backed up by policy (here the Scottish Executive’s ‘Hungry for Success’ initiative). That initiative also interestingly looks at shared policy objectives. One recommendation was for a best value review to look at “the role of the school meal service as part of the education and health strategies”.

The evaluation concluded not only that there were a series of benefits (such as reduced ‘food-miles’ and less waste packaging) but also that the scheme was capable of being replicated.

6.4 Targeting Social Disadvantage

Public authorities have plenty of scope to specify services so that they positively tackle social disadvantage in the areas in which the public authorities are based as well as within the remit of the services for which those public bodies are responsible. Two essential steps are: first, adopting the appropriate policies and, secondly, writing requirements that are capable of being verified and monitored. Verifiable requirements include access to services for excluded groups, opportunities for community participation, voluntary engagement of users in the development of services for themselves, the provision of training and employment opportunities, and involving users in the ways in which service delivery can be improved (of which tenant consultation is an example).

A good example is contract clauses requiring a number of training places to be created or a percentage of those training places or jobs to be made available for long term unemployed people. This is perfectly legitimate, as long as the successful contractor can source the trainees or unemployed people to fill those places from anywhere.

There seems to be no reason why, once the contract has been awarded, the public body should not assist the contractor to meet this requirement by facilitating contact with local training providers or job centres, particularly where this is something included in its community plan.

6.5 Fair Trade

The OGC Guidance on Social Issues in Purchasing takes the following stance in relation to fair trade:

“Contracting authorities ... cannot specify only fair trade coffee because this relates to the standard of life of the coffee growers, not the quality of the coffee being required.”

All that the OGC says is possible is to say that the public body would welcome bids specifying fairly traded produce.

However, turning the argument around, if a fair trade policy were to be developed for the purpose of scrutinising any suppliers within the province of wellbeing functions it would then have to be applied to foreign suppliers equally as to UK suppliers on the basis of equal treatment principles under the EU treaty. More thinking can be developed here!
6.6 Organic Food and Products

In relation to organic foods, the view of the OGC is that:

“contracting authorities can specify organic coffee because the production process relates to the coffee itself, in terms of the way it is grown and the chemical content.”

Organic can therefore be required, because it is a different product from non-organic and public authorities can legitimately form the view that that is what they want to purchase.

The OGC Guidance on Social Issues in Purchasing seems to suggest that the reason you can specify organic is because it is better (or at least different). Organic products have different characteristics from non-organic ones. However, this reasoning does not apply to, for example, requiring timber to be sourced from managed forests. This is no different in terms of its intrinsic characteristics from timber where no replanting takes place. The only thing that makes it sustainable is the replanting. However, the Joint OGC/DEFRA Guidance on Environmental Issues in Purchasing says that sustainable timber can legitimately be specified.

6.7 Environmental issues

Contracting authorities are free to define the subject matter of the contract in a way that they consider to be the most environmentally sound, even through the use of variants. Furthermore, contracting authorities can either prescribe the solution chosen, or avoid prescribing requirements which would lead the tenderers to offer products whose production process would damage the environment. They could, for example, require recycled paper which is not bleached.

Contracting authorities are advised to take account of the whole life costs of a contract, which would include considerations into the costs of treatment of waste or recycling and the energy consumption of a building.

This is borne out in guidance both by the European Commission and the UK Treasury.

Explicit clearance of the inclusion of environmental factors in public procurement is now reflected in various parts of the Public Contracts Regulations 2006.

6.8 Disability and Sheltered Workshops

Public authorities can reserve any contracts they wish for delivery by “supported businesses” (referred to as “sheltered workshops” by the European Union) which are defined as schemes where most of the employees have a disability. Not all supported businesses are social enterprises but those that are should refer to the OGC Guidance on Supported Factories and Businesses.

Disability here is defined in accordance with the Disability Discrimination Act 1995 as applying to “someone with a physical or mental impairment which has a substantial and long-term adverse impact on their ability to carry out normal day-to-day activities”. People do not need to be registered as disabled to satisfy this test.

The Disability Rights Commission has produced Guidance on the definition in the 1995 Act.

Contracts are advertised in the normal way but businesses that do not meet this requirement are excluded. The OGC Guidance highlights a website giving details of the goods and services that are available from supported businesses.

6.9 Equality and Diversity

The Commission for Racial Equality has produced Guidance on Race Equality and Public Procurement. The same principles will apply to other equality issues (gender, disability etc). This recommends ensuring that equal opportunities service delivery requirements are included as core parts of the contract. For example, where the contract involves interfacing with the public body’s residents or service users, it is a key service delivery requirement that staff delivering the service have an understanding of cultural and equality and diversity issues. The guidance also explains how equality of opportunity in the workforce can be relevant to quality.
6.10 Health and safety

Health and safety law is principally driven by the European Union and therefore EU standards should be capable of being applied across Europe. The wider issue of the extent to which such health and safety thresholds can be required for products coming outside the EU is more problematic. The public sector does not have the resources to investigate such practices and until these can be verified it is more difficult to incorporate such requirements in relation to imports. There needs to be more done to protect the “reputation risk” of the public sector, interfacing with the concerns of DFID.

6.11 Relevant Policy - and how it relates to the Law

There is plenty of policy encouragement to include social and environmental outcomes in procurements. However, the lack of clarity in some areas over what can be included, and the conflicting guidance, makes this a difficult area.

Environmental and social issues are viewed inconsistently. There remains a gap between what may be permissible legally and the desired policy aim of promoting fair trade goods and increasing environmental sustainability by using local suppliers. It is clear that this is an area where there is room for the law to “catch up” with a growing policy consensus.

Where a public body wishes to procure social outcomes the specification should include:

- a reference to the policy or legal underpinning for the requirements;
- measurable performance indicators relating to:
  - the required outputs, and/or
  - a process that has to be followed (e.g. for recruitment);
- monitoring and performance review requirements; and
- a disclaimer to protect the client from ‘claims’ relating to any supply-side support they provide to the service provider.

As with any elements of the specification, care should be taken to determine what specific social outcomes are appropriate and deliverable. These need to be drafted into clauses that are unambiguous and/or expressed in the contract scope in a way which provides a ‘level playing field’ in the tendering process for bidders.

6.12 Key Findings

Many public sector commissioners and social enterprises wish to promote local suppliers, fair trade and organic goods, environmental sustainability and equality of opportunity and seek to overcome social deprivation. This can raise a number of legal complications, particularly in relation to local suppliers, local employment and fair trade.

There is room for the legislation in this area to be developed and clarified to reflect a growing public consensus. This will only be possible to the extent that both the EU and the UK Government embraces these issues. A useful start would be for Part II Local Government Act 1988 (“non-commercial considerations”) to be repealed altogether in England in the same way as it is already done for Wales. Authorities should be trusted to follow good procurement practice without archaic artificial constraints.

As to matters such as health and safety and fair trade, ultimately, this can only be achieved through the adoption of international standards- until then social enterprises can still make a big difference to the delivery of public services on the ground through the development of “core specifications” setting wide social outcomes for delivery.
Section 7: Partnerships and Joint Working

7.1 Introduction

The development of “partnership working” or joint working is an alternative way for public bodies to achieve their objectives, by working with other organisations.

There is a difference over how the term “partnership” is used. In a technical legal sense partnership means being in business together for profit. In a colloquial sense, it is generally used to mean any arrangement involving working with another organisation to achieve joint objectives. To avoid confusion “joint working” is the term used in this guidance.

Joint working can take a number of forms:

- an informal protocol, or memorandum of understanding that is not legally binding;
- letting a contract for services, which is based on “partnering” principles;
- a formal joint venture agreement; or
- the formation of a joint venture company.

A “special purpose vehicle” or “SPV” is simply a joint venture organisation set up with a single defined purpose.

A joint working approach may suit many situations where a social enterprise engages with the public sector in developing new ways of delivering services, meeting social and financial objectives concurrently.

7.2 Legal Framework

It is clear that local authorities have the power to form and participate in companies under the well-being power where doing so promotes the economic, social or environmental wellbeing of their area.

There is less clarity around the powers of NHS bodies to form companies. There is a specific power of the Secretary of State for Health to form companies under public private partnerships which can be delegated to PCTs. Anyone contemplating NHS participation in a social enterprise should consider the ambit of this power. In addition, PCTs have a general power which allows them to do anything “necessary or expedient” in relation to their functions. They also have a specific power to enter into contracts. If a PCT can show that forming a company is “expedient” for taking forward its core functions in relation to the health of those living in its area, then arguably this power is sufficient. It may also be possible to rely on the power to enter into contracts since the Memorandum and Articles of a limited company are, technically, a contract (between the various members). However there is some room for doubt and the creation of a specific power or the clarification of the existing power would be helpful.

Public bodies cannot delegate their statutory duty either to joint organisations or other third parties, unless they have specific statutory authority to do so. This is usually given through orders made under the Regulatory Reform Act 2001 or the Deregulation and Contracting Out Act 1994. There are specific provisions in other legislation (such as section 27 of the Housing Act 1985), which allow another organisation to be appointed as the agent of the statutory body to deliver services. Where no such powers exist, the public body can obtain services from external organisations as long as it is the public body itself that takes any decisions that involve the exercise of a discretion.

Examples of functions which local authorities can delegate under the Delegation and Contracting Out Act 1994 to contractors include certain management functions in relation to community homes; tax billing, collection and enforcement functions; allocation of housing and homelessness; and highways.
Where the joint working involves payments being made or support being given by a public body to an external organisation, this can only be by way of a grant or a contract to provide goods or services. If it is a contract for goods or services, it must be procured in all cases under the EU procurement rules, where they apply, and the EU Treaty requirements. The only exception to this relies on EU case law in the case of “Teckal”. This exempts contracts from having to be tendered where the public body exercises control over the external organisation delivering the contract “similar to that which it exercises over its own departments” and the external organisation “carries out the substantial part of its activities with the public body”.

### 7.3 Relevant Policy - and how it relates to the Law

There is broad policy encouragement for the public sector in general to find innovative ways of working with other organisations.

Setting up a joint venture is sometimes used as a halfway house en route to externalisation. The public body can retain some influence over the joint venture to protect service delivery but the new venture will still benefit from some of the flexibility that is not available to public bodies.

Where a service is fully self-funding it can simply be transferred to a joint venture without the need for any tender process; for example, if it relies only on income from third parties including those using benefits to pay for the service. Most housing large-scale voluntary transfers have been to a form of joint venture organisation where the board is comprised equally of local authority representatives, tenants and independents. These organisations have involved the transfer of local authority assets (houses) and staff to the new organisation.

Whenever any form of joint working is involved it is important to be clear about the responsibilities of each participant in the joint arrangements. Where individuals sit on more than one body, they will need to be clear about their responsibilities. Clear procedures need to be put in place for the declaration and management of any conflicts of interest: all directors of a social enterprise owe their principal duties in that capacity to the members of that organisation, where they have been nominated by a public body.

### 7.4 Key Findings

Public sector bodies have a range of powers to enable joint working with other organisations. The process of joint working can create opportunities for innovation.

A joint venture organisation may not discharge statutory duties of the public body without express statutory authority to do so, although they can provide services to assist the public body to discharge those duties.

If a service is fully self-financing it can be transferred without any need for a tender process. However, where ongoing financial support is required from the public body the rules applying to contracts or grants will generally apply.
Section 8: Pilots and Innovation

8.1 Introduction

Pilots are often seen by the public sector as a way of stimulating the market by creating new ways of providing a service.

Government has recognised social enterprises as a potential vehicle for pilot development. Sometimes significant investment is made by social enterprises in such initiatives. Pilots can be great opportunities for social enterprises to demonstrate innovation, build up a track record and to prove their worth.

Pilots are not the only way for social enterprises to demonstrate innovation. They can be proactive in suggesting solutions and innovative service delivery options to public bodies to be incorporated into commissioning programmes.

Pilots reduce risk involved in larger programmes and can enable comparison and assessment of a range of service or product options. Proper funding is required for research into pilots and procuring the successful elements in their continuing delivery.

Public bodies should consider how to recognise the investment and intellectual property developed by a social enterprise during a pilot period.

8.2 Legal complexities

At the outset of any pilot both the commissioner and the social enterprise should agree how the pilot will work and whether a social enterprise can have any guarantees about what happens once the pilot has finished. In terms of innovation, how can hard work and creativity be protected?

Difficulties can arise if the pilot programme is particularly successful and the public sector organisation concerned wishes to expand the pilot into a mainstream programme. In these circumstances, public sector bodies have often had to use open competition for the contract in question, and social enterprises have not always been successful in bidding for a larger contract.

Unless all parties are clear that this will happen at the outset of a tender process, putting a follow-on project from a successful pilot out to tender can damage the relationship between the social enterprise and the public body.

Pilots can be undertaken in a number of different ways, using a variety of legal tools. A pilot project could be undertaken:

- under a grant funding arrangement;
- through joint working (with each party funding their own activities); or
- through a contract for services, where the size or nature of the contract means that it does not need to be competitively tendered under the EU procurement rules or advertised under the EU Treaty.

8.3 Research and development contracts

Research and development contracts are excluded contracts under the EU procurement rules unless the research is solely for the benefit of the public body and 100% funded by the public body. The intention of the EU procurement rules here is to exclude research funded for the general public benefit from the full EU rules.

Whether a contract is for research and development and whether it is for general public benefit or for the benefit of the public body concerned will depend on the subject matter of the contract and how it is drafted. If a challenge is made, the court will use a common-sense interpretation of what the contract is to provide. It is not advisable, for example, simply to label a contract as a research contract to avoid the EU
procurement rules. The court would simply regard this as a sham and a breach of the rules.

If a pilot is inconclusive and further research is required, the pilot could be extended without further tendering under the EU procurement rules, as long as the extension continues genuinely to be a contract for “research and development services”.

8.4 Follow-on contracts without tendering

The EU procurement rules allow certain follow-on contracts to be let without further tendering. However, these apply only where the original contract was let under the EU procurement rules and the need for the follow-on work was either not foreseeable at the time of the original procurement or was advertised in the original OJEU notice.

The EU procurement rules also allow contracts to be awarded without full tendering where “for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular contractor”. This exception to the full tendering rules is construed very restrictively.

8.5 Small lots

There is also scope to use the “small lots” provision allowing up to 20% of the overall value of a single requirement for works or services to be exempted from the EU tendering rules.

8.6 Part B services

The greatest scope for extensions of contracts after successful pilots lies with Part B services where there is no appetite from other parts of the European Union to tender. Here the letting of the contract without competition is principally determined by waiver of any internal standing orders requiring competition. Health and education may be particularly suitable for this approach.

8.7 Intellectual property protection

Where social enterprises develop new processes or products through the pilot, they should protect their intellectual property in them as far as possible. In some cases, although these are likely to be limited in practice, this could give them the opportunity to argue that this makes them the only possible service provider. Where this is genuinely the case for technical or artistic reasons or because of intellectual property rights, the public body can award the contract to them under the negotiated procedure without other competition or an OJEU notice.

8.8 The manner in which the competition is held

If a follow-on contract arising out of a successful pilot scheme is to be competitively tendered, the specification, pre-qualification thresholds and tenderer selection criteria and contract award criteria should give the social enterprise the opportunity to demonstrate the experience and expertise it developed from the pilot. A social enterprise that has successfully delivered the pilot should be well placed, because of that experience, to win the larger contract when it is let through open competition.

8.9 Competitions for pilots

Where a pilot is set up, the public authority has a choice. It can opt to wait until the end of the pilot period and then assess its options, or it can look ahead to the possibility of the pilot being extended into a larger project. With the first option there is no guarantee for a social enterprise, even if the pilot is successful.

With the second option, the public authority could advertise a contract for both the pilot and contract together through open competition under the EU procurement rules. The public authority can include a “break clause” that allows them not to continue with the project if the pilot is unsuccessful. This approach gives additional incentive to the social enterprise to complete a successful pilot and yet gives the public authority flexibility too.

If the public authority wanted flexibility to vary the service in the main project after the pilot is over, it should include this in the terms of the contract. However, it would not be possible to make “substantial” changes to the service provision without conducting a new open competition under the EU procurement rules.

8.10 Framework agreements

Alternatively, the project could be let under a framework agreement with a single supplier. A framework is an agreement that sets the price and terms for purchases by the public body but does not commit the public body to make any purchases. The
framework agreement must be tendered under the EU procurement rules. The individual contracts “called off” under it do not need to be where the framework is with a single provider, although tendered, they must be “within the limits of the terms laid down in the framework agreement”. The pilot would then be the first contract called off under the framework. This means the social enterprise would have to compete for the pilot, but then the public body could award the follow-on project to it without further tendering.

**Case study**

**Sunderland Home Care Associates**

The 2006 winner of the Social Enterprise Coalition’s ‘Enterprising Solutions Award’, Sunderland Home Care Associates is one of social enterprise’s ‘high-fliers’. With its roots as far back as 1976 (with the Little Women Co-operative), the organisation has grown now to more than 200 employees.

One of the key features of Sunderland Home Care Associates is that the business is owned by its employees. Starting out as a worker’s co-operative, the business model now sees its staff owning the business. Chief Executive Margaret Elliott sees several advantages to this way of working: staff have an extra motivation for doing a good job and seeing the company do well, and staff turnover is very low. Staff give a better quality of service and are in control of their jobs ("democratising home care!", as Margaret puts it).

“We wanted to get bigger,” Margaret says, and this desire for growth has not only seen work including now supporting disabled students at university or college, but also several replications of the original business. As well as Sunderland Home Care Associates, which covers Sunderland and South Tyneside, there is Newcastle, North Tyneside, and Manchester. There is also interest in Hull and Scotland. This growth comes with its own challenges, for instance that each local authority has its own variation of the tender process and puts the emphasis on slightly different things, and Sunderland Home Care Associates has to adapt to each new tender.

Sunderland Home Care Associates have clearly used their core strength in providing good quality care for those who need it as a spring-board. It has led to a demonstration that employee-owned businesses can work, and to further growth and replication with the potential for more to come.

**8.11 Key Findings**

Pilot schemes can be a useful way of testing innovation. Contracts for research and development for the wider public benefit can be let without being tendered under the EU procurement rules.

In *Scaling New Heights*, the Government recognises this side to social enterprises:

“They are also a valuable source of innovation – including for services they do not deliver directly. Public services learn from the problem-solving spirit of social enterprises, which can help improve the quality of public services by shaping service design and by pioneering new approaches that can influence the way services are delivered by the public sector.”

Given this there needs to be established a commonly accepted process for innovation to be trialled and then developed in circumstances that enable the partnering service provider to be able to implement the project on conclusion of successful piloting, especially in response to proactive approaches from the marketplace.

Pilots can give social enterprises a track record, helping them to win any follow-on contracts. When procuring those follow-on contracts, public bodies should look for practical experience of delivering the service and having “learned the lessons” of the pilot. Social enterprises developing new products and processes should consider whether their intellectual property in them could be protected.

In appropriate cases it may be possible for the public authority to procure both the pilot and the subsequent contract together. Social enterprises would then have to compete for the pilot but the public body could then award the follow-on contract to them without further tendering.

The greatest scope for extending contracts beyond successful pilots lies with “Part B contracts”, where there is no appetite for those sorts of contract from other parts of Europe.

The recommended process to be followed requires a consensus to be developed - any route map will entail consideration of the different circumstances when the full EU procurement rules do not apply plus an agreed method for determining value for money which embraces “whole well-being” issues.
Jesmond Swimming Pool
www.jesmondpool.co.uk
Section 9: Externalisations

9.1 Introduction

Externalisation is a term applied to the process of an in-house service being transferred to either an existing or a newly formed organisation that is legally separate from the public body. Here we look at situations where a new social enterprise is formed to carry on the service.

This is a complex process and brings with it a number of legal and practical complications including:

- employee related issues such as TUPE and pensions;
- whether any assets or land will transfer;
- the future relationship between the public body and the externalised body; and
- whether any financial support will be State Aid.

Although frequently driven by the externalising body rather than by a social enterprise, legal constraints are often interpreted as requiring the public body to proceed as though it were negotiating with an arm’s length organisation rather than sponsoring the set up of a new body.

There are numerous reasons for externalisations. These can include:

- a best value review;
- the reconfiguring of specific services;
- flexibilities arising from independent operations to complex services;
- a desire for competition in service provision;
- the ability of independent organisations to access funds not available for the public sector or without it being within the public sector borrowing requirement (as with housing stock transfers);
- the availability of rate relief, which is not available to the authority;
- protection of services to safeguard the service from cuts;
- the ability to be flexible to respond quickly to changing market conditions; and
- the ability to join up services currently provided by more than one public body.

Externalisation to a new enterprise is generally instigated by the public authority and needs internal champions to drive and support its creation. The culture of the new enterprise is dependent on the support provided by the public body throughout the development of the proposals, the strategic staff appointments, the transfer process and early trading. The social enterprise also needs appropriate independent advice and resources to help set up its independent identity, the management of culture change and establishment of “corporate functions” not part of the transferred service.

From the point of view of ensuring effective service delivery it is important that as much support is provided by the originating public sector body as possible, both financial and in kind. Where there is no specific power, for local authorities this can be justified by reference to the well-being power.

Social enterprises need clarity over employee, land, funding or service delivery issues so they know what they are “taking on”.

9.2 Legal Framework

Externalisation raises a number of legal issues:

- the public body must ensure it has the power to form and participate constitutionally (if that is what is intended) in any new organisation it sets up;
- both pre-transfer and post-transfer conflicts of interest must be handled;
- if funding is required from the public body under an ongoing contract this may need to be tendered under the full EU procurement rules; and
any financial support may be subject to the State Aid rules.

The public body’s powers to participate in new organisations are the same as for joint ventures and are discussed in paragraph 6 above.

9.3 Conflicts of interest

Where local authority staff transfer to the new social enterprise, care should be taken to ensure there are no conflicts of interest for them. Staff who are to transfer should not take part in negotiating the terms of the transfer on behalf of the public body or be involved in assessing any bids from that body for any ongoing contracts.

After the transfer, conflicts of interest between representatives of the public body who sit on the board of the externalised organisation need to be declared and managed in accordance with the rules of both the public body and the externalised organisation.

One of the issues for the public body in relation to any ongoing arrangements between the public body and the new social enterprise is that the public body is fulfilling two roles. As the promoters of the new social enterprise they will wish to see it succeed not least because they will want service delivery to continue. However, they will be unable to favour that social enterprise in any tender process in the event that it has to compete for ongoing contracts.

It is important therefore to agree a protocol right at the beginning of the process as to which staff within the authority are to work on the “commissioning” side and which are to work on the “enterprise” side. Clear terms of reference should be established for staff dedicated to establishing the enterprise. Many local authorities have policies on adopting “Chinese walls” and identifying lines of accountability which must be followed in these circumstances.

9.4 VAT

VAT registration and VAT liabilities should be considered at an early stage of business case preparation. From a VAT perspective the separate enterprise is likely to be providing services to the public or Government body. The most likely scenario is that the enterprise will need to register for VAT independently and to charge VAT on the services it will be deemed to be rendering to the public body.

The only exception to this would be if the enterprise is actually considered to be part of the public body and any future transactions will therefore be ‘internal’ within the public body. It should be possible as a question of fact to determine whether the enterprise is a separate legal entity for VAT purposes.

Transfers may change the VAT status of an activity. Transfer has the potential to bring into taxation activities which, when undertaken by a public body, have been free of tax. Early recognition of this potential problem and obtaining advice is essential.

9.5 Contracts and tendering processes

Contracts with the new organisation will be subject to the EU procurement rules in which case the extent of competition will depend on the type of services provided and the relationship between the authority and whether the authority controls the enterprise (which, invariably, will not be the case).

As soon as the public body commences a tendering process it must treat all bidders or potential bidders equally. When a tender process commences it will be a question of fact, but it is likely to be well before any OJEU notice is issued.

Since the new social enterprise will be a new body it will not have a track record. Public bodies should therefore accept information on the track record of the service whilst delivered by the authority as “appropriate” and accept alternative information to the provision of accounts in any situation where there is a competition.

9.6 Information

Any group of public sector employees contemplating taking on the delivery of a public service by setting up a social enterprise should ensure that it carries out an appropriate due diligence exercise. The new social enterprise should ensure that the public body gives a warranty in the transfer document that the information provided is complete and accurate. The new social enterprise should seek other specific warranties, particularly in relation to employees. If there is anything less than full disclosure then the new social enterprise should consider the risks it may face as a result and put in place agreements to deal with changes in circumstances arising from poor information being provided.
9.7 Relevant Policy - and how it relates to the Law

As the social enterprise sector continues to grow and as Government pressure continues on public sector organisations to seek a diverse supply market, it is likely that there will be further externalisations. This appears particularly likely in the context of the NHS, which has already seen a number of such bodies formed, and may also occur within the National Offender Management Service.

As most NHS services are Part B services, ongoing arrangements are not necessarily subject to formal tendering under the full EU Regulations.

**Case Study**

A London Borough was considering the externalisation of part of its housing department, which employed a number of people with a disability in the manufacture of windows and kitchen units. The Borough was planning to set the new company up as a company limited by guarantee with the Borough as the sole member in order to let a contract for ongoing supply without competition under the Teckal case. However, the externalisation failed because it depended on the payment of an interest free loan or grant of £500,000 from the Borough to the new enterprise. The State Aid rules prevented such a payment being made because the new organisation was operating in a commercial market.

9.8 Key Findings

Externalisations to social enterprises are likely to become more common as the policy demand for a wider supply base grows. The NHS may be the place to look for the latest developments.

Externalisation is a legally complex option. A number of issues have to be thought through in order to protect both the public sector body and the body to which the externalisation takes place, particularly if it is a new social enterprise. These include:

- the public body’s legal powers to form and participate in the new social enterprise;
- transfer related issues;
- conflicts of interest;
- difficulties over securing ongoing contracts from the public body; and
- State Aid issues in relation to any ongoing support from the public body.
Part Three: Issues for the Public Sector

Section 10:
Developing the Social Enterprise sector – Supply Side

10.1 Introduction
There is much that the public sector can do to promote social enterprises and to work with them generally for the good of the sector. Ways of providing better understanding and support include:

• learning about social enterprises in your area and making links with the regional and sub regional social enterprise networks;
• including social enterprises or representative bodies in strategy planning, including the Regional Economic Strategy and local Sustainable Community Strategies;
• engaging in service planning and service development reviews;
• engaging in commissioning models development;
• putting in place polices and practice that enable social enterprise to participate in procurement processes;
• providing training on understanding public sector commissioning, procurement processes etc;
• preparing a “How to do business with us” guide and arranging “meet the buyer” events;
• making tender opportunities information easily accessible and specifically inviting the social enterprise sector to tender;
• providing named link persons for points of first contact on general enquiries from the sector;
• making use of your powers to encourage growth of the sector;
• providing ongoing grants to relevant support organisations;
• providing appropriate business support and training;
• providing “incubator” facilities such as shared workspaces and services facilities; and
• transferring capital assets (including land and buildings) or capital funding to enable social enterprises to develop services.

Most of this support has to take place outside a tendering situation. The general principle is that when tendering for contracts, particularly when this is under the EU procurement rules, all bidders must be treated equally.

Many local authorities recognise social enterprises as potential partners in service development and delivery alongside all other providers. They can facilitate social enterprises participating in relevant service sector forums and networks, consultation processes and provider events.

Case study
London Borough of Tower Hamlets

London Borough of Tower Hamlets has been involved in a number of social enterprise-related “partnerships”.

Nick Walker, Interim Service Head of Procurement and Programme Management at Tower Hamlets Council describes increased engagement with social enterprises and other third sector organisations as one of the ambitions of the Council. In a borough boasting 1300 community and voluntary sector organisations, there is certainly plenty of scope for ‘partnership working’. In addition to operating numerous contractual relationships, the Council has a grant relationship with 450 of these organisations and a £3.5 million annual mainstream grant budget.

The Council has a keen interest in capacity building and works to assist social enterprises to provide services that benefit the community. It runs a supplier accreditation policy and allows social enterprises to register for free. The Council also attempts to remove, within the bounds of the EU procurement...
rules, any barriers to local third sector organisations bidding for Council contracts.

The Council’s relationship with Greenwich Leisure Limited is an example of a partnering approach to the provision of services. Greenwich Leisure Limited manages and develops the day to day running of leisure facilities in the borough but any upgrade to the services is addressed on a joint basis. Greenwich Leisure has succeeded in opening up leisure services to a diverse local population with 49% of local people of Bangladeshi origin and 27% of the population under 19 years old.

However, the Council is working to move its relationship with the third sector to a more contractual footing. The Council hopes that this will assist social enterprises in becoming more robust. Nick emphasises that whilst the Council is keen to increase engagement with the third sector, this is no ‘soft deal’ and organisations are expected to deliver in the same way as any commercial organisation.

10.2 General principles
This guidance outlines the constructive ways in which local authorities are beginning to use the “wellbeing” power to support and encourage social enterprise (see above).

Central Government departments and NHS bodies do not have the same general power and must therefore be satisfied that any steps taken to support or promote social enterprises will meet their own core aims. In many cases this should not be a problem and Part One of this guidance outlines some of the relevant general powers available.

Public bodies need to be aware of any particular limitations that apply to the kind of support that can be provided.

10.3 Consents required
(particularly for Land Disposals)
For local authorities the Secretary of State’s consent is usually required to dispose of land for less than the “best consideration reasonably obtainable”.

There is a General Disposal Consent to dispose of non-housing land by a long lease at up to £2million below its full value. Disposals of housing land always need consent (even at full value) although there are also specific General Housing Consents covering some disposals.

Specific consent is also needed for any financial support in connection with rented housing other than Council housing (whatever powers are relied on).

For Government departments, any disposal at less than the best consideration reasonably obtainable must be accounted for as a gift. The Sustainable Development in Government Report 2005 says that, when disposing of assets (including land), departments must,

“achieve overall value for money for the taxpayer and in line with other Government policies and documents regarding the disposal of assets.”

In England, NHS bodies have powers under the National Health Service Act 2006 to dispose of assets, but again (according to the Estatecode) must show why disposal was selected over other options. Individual trusts are free to make their own decisions on disposal at an undervalue but will have to account for any perceived loss in value.

10.4 State Aid
The State Aid rules are a key constraint on the extent to which support may be provided to social enterprises operating in a commercial environment. These rules do not apply to all social enterprises, but only those where support to them may inhibit fair competition with other businesses. Particular areas to watch out for are grants or loans at preferential rates of interest or those relating to the transfer of assets (including land) at an undervalue. The State Aid rules only apply where a public body is providing support to other organisations, not to activities it carries out itself.

Under the EU Treaty, subject to certain exceptions, aid from public resources that distorts competition is unlawful and may have to be reclaimed by the State. There are four tests for whether aid will be “State Aid”:

- Is it granted by the State (including public bodies) or through State resources (including local authority resources)?
- Does it favour certain undertakings (for example, social enterprises generally or a particular social enterprise) or the production of certain types of goods?
- Could the activity affect trade between Member States? and
- Does it distort or have the potential to distort competition?
There have been a number of European cases applying these four tests. Aid granted to the operator of a German swimming pool was found not to be ‘State Aid’ because there was no effect on trade between Member States: the pool was only used by local German people and there was no international competitive market for public swimming. A similar decision was reached in relation to financial support for the reconstruction of Brighton Pier.

There are a series of “block exemptions” from the State Aid rules. These allow certain types of aid to be provided without the need to pre-notify that aid to the European Commission. Some of those most relevant to social enterprises are:

- training aid;
- job creation; and
- aid to small or medium sized enterprises (SMEs).

In addition SMEs are allowed a higher level of aid than large businesses.

When relying on an exemption, the terms of the exemption need to be checked carefully.

There is also a de minimis provision, which allows for aid of up to 200,000 euros (around £130k) to be provided to most enterprises (with the exception of agriculture and transport or directly export related activities) regardless of size, over a rolling period of three years.

Aid which is exempted can be aggregated so, for example, an organisation which received €110,000 of de minimis aid and £30,000 as aid which falls into one of the block exemptions would not breach the rules.

If there is a risk that any aid might be unlawful State Aid, the public body or EU Member State giving the aid has a duty to notify the European Commission. The European Commission will then form a view as to whether such aid would be unlawful under the State Aid rules.

There is a very good reason to take the requirements of State Aid seriously and seek advice as early as possible. The European Commission can insist, and has done so in the past, that aid be halted or reclaimed if it is not permitted or was not properly notified in advance. Aggrieved competitors can also bring an action in the national court challenging an aid which has not been notified or which has been paid without obtaining any necessary approval from the Commission.

The Department of Business, Enterprise and Regulatory Reform (BERR) administer State Aid. There is further guidance on the BERR website. Help and advice is also available from the State Aid Branch at BERR.

Often, especially with smaller concerns, the de minimis amounts of aid may be sufficient to enable a social enterprise to commence activities.
10.5 Relevant Policy – and how it relates to the Law

Encouraging and developing social enterprises is a good way for public bodies to create a mixed economy of service provision. This can range from “soft” assistance, e.g. meeting initiatives or facilitating clusters of social enterprises to handing over assets to them (consistent with the recent Quirk review).

Having a building or land can be a key asset for a social enterprise, especially where it provides a regular rental income from other occupants. In addition, the asset can be used to lever in finance from elsewhere which can be used to improve the building itself, or for other purposes linked to developing the social enterprise. This is, of course, subject to any covenants limiting the use of that building to specified purposes. Covenants to be particularly aware of are those preventing use other than as hospitals or schools, although there are now statutory provisions that allow these to be overridden in certain cases. Local authorities can also use planning powers to override restrictive covenants before land is transferred to a social enterprise.

Case Study
The Lenton Centre: bringing benefit from asset transfer

After Nottingham City Council closed down the Lenton leisure centre, local residents set up a company to purchase the freehold of the community and leisure centre from the Council for £10. This was subject to the condition that the centre would be used to provide leisure and community services. The Council also reserved the right to buy back the building if Lenton Leisure Limited ever proposed changing its use.

The company has now re-opened the leisure centre: the gym is up and running and it is hoped that the swimming pool will be open in the near future. The community centre is hired out to local groups and what used to be the manager’s flat has been converted into office space that is available for rental.

If the building had not been purchased the leisure centre part of it may have become derelict and attracted vandalism. Lenton Leisure Limited now provides a community service at no cost to Nottingham City Council, although the Council does provide support where it can.

Whilst the road ahead for Lenton Leisure Limited is unlikely to be easy, the asset transfer has nevertheless provided a springboard to local residents in terms of leisure facilities and created opportunities for them that would not otherwise have been there.

In Scotland the Community Right to Buy provides the opportunity for community bodies representing rural areas in Scotland to buy land when it comes to be sold. It applies only when land is put on the market and full value must be paid. The community body must demonstrate that at least 10% of the community support the proposals and a new community organisation must usually be formed to own the land.

The Quirk Review acknowledges the importance of the public sector managing the risks associated with asset transfer and suggests a number of practical steps to address this.

10.6 Key findings

Supporting the development of social enterprises is currently promoted by Government as a means of improving public sector service delivery. Public bodies and social enterprises need to be aware of the limits of the powers relied on and the need for any Government minister’s consents. Where consents are required, any application for them can be supported by reference to Government statements encouraging the development of the sector.

Any support to social enterprises that compete with commercial organisations is subject to the State Aid Rules. The de minimis provision and the block exemptions give opportunities to provide financial assistance to social enterprises where they apply.
Part Three: Issues for the Public Sector
Section 11: Grants to contracts

11.1 Introduction
A number of issues arise where a local authority wishes to move from grant funding an organisation to funding it under a contract.

Social enterprises provide services under different types of funding arrangements. The general shift from grants to contracts in funding the third sector affects some social enterprises. Good planning and realistic timescales and budgets are essential in this process.

This move can be difficult for new social enterprises and raises a number of important issues including those around service delivery risk, VAT and EU procurement.

11.2 Powers to give grants
Grants can only be given where there is a power to do so.

Local authorities may grant fund organisations under the well-being power. Central Government is also able to provide grant funding in instances where there are express powers. Though the NHS does not tend to give grants as such, NHS Trusts and PCTs could do so if they wished to, provided the giving of a grant supported their main purposes.

A public body cannot automatically award a contract to an organisation that it has previously grant funded. The usual rules will apply as to how a contract must be procured.

11.3 Distinction between grants and contracts
The distinction between a grant and a contract for services is often blurred, especially as grants are increasingly being given subject to conditions requiring the achievement of specific outcomes. The characteristics of a contract are:

- an obligation to deliver something to the paying public body which is for the benefit of that public body;
- the requirement to charge VAT on the supply of those works, services or goods to the paying public body; and
- the ability of the paying public body to recover from the recipient organisation financial losses it suffers as a result of a failure of that recipient organisation to deliver the works, services or goods it is contractually required to provide.

The characteristics of a grant are:

- that it is given to enable the grant recipient to provide works, services or goods to third parties rather than to the public body;
- the ability for the grant recipient simply to hand back the grant without there being an obligation on it to deliver the works, services or goods which it was given to enable it to provide;
- VAT not being payable on the grant; and
- the financial obligation of the grant recipient being limited to paying back all or part of the grant on clawback, rather than compensating the paying public body for losses it has incurred as a result of the non-delivery or failed delivery by the recipient organisation.

There is no single deciding factor that determines whether particular arrangements are a grant or contract. If the arrangements are challenged in court, the court will analyse each of these factors and decide whether the arrangements collectively amount to either a contract or a grant. It is helpful if the documentation is drafted so as to encourage the court to come to the desired conclusion, since the way the arrangements are expressed by the parties is very important in a borderline situation.
The term “service level agreement” is often used. Technically this refers to a protocol between different parts of the same organisation that is not legally binding. However, the term is also used in relation to grant conditions and contracts for services, and so really has no specific legal status.

11.4 VAT
Grant funding by a public body or Government department is not generally seen to be payment for services provided by way of business. HMRC generally take the view that such payments are outside the scope of VAT and social enterprises cannot usually charge VAT on these payments.

A public body can generally recover the VAT it pays on contracts for services and supplies purchased to carry out its statutory functions. It is usually financially advantageous to supply services under a contract, on which VAT is charged, rather than with the benefit of a grant. With a contract it can recover a greater part of the VAT it pays on purchases of materials or third party services it buys in to deliver the contract.

Where a social enterprise makes supplies that are taxable, exempt and/or non-business, it is required to apportion VAT on indirect costs between the taxable business activity, exempt business activity and non-business activity. VAT is only recoverable on costs which relate to the taxable business activities unless certain de minimis provisions are satisfied. Essentially VAT which relates to exempt business activities must be less than £7,500 pa and 50% of all VAT incurred in order to be recoverable.

11.5 Annual funding
Historically it has been accepted that there is a general principle of Local Government law that grants are determined on an annual basis. Deciding to give a grant for a longer period has often been regarded (at least by auditors) as a limit on the authority’s discretion to determine grants annually based on the grant applications they have received at the time. There is still uncertainty over the extent to which authorities can enter into long-term grant funding agreements. The Compact on relations between the Government and Voluntary and Community Sector encourages public bodies to adopt a strategic approach to funding. It refers to 3-year settlements from Central Government to encourage this. The only commitment it gives in relation to the length of grant funding agreements, though, is to recommend a 3-month notice period before grant funding is stopped (other than in cases where grant conditions have been breached). With contracts there is no equivalent concern over how long they can last.
11.6 Key Findings

The issues arising when moving from grant to contract funding mean that the decision to do so should not be taken lightly. Grants and contracts should each be used in appropriate circumstances.

The distinction between contracts and grants can often be borderline. It is important that the documentation reflects the label the parties want to put on the relationship and that the appropriate rules are applied.

Case Study

Moving On From Grants: Taking The Bull By The Horns

Heartlands RSO has two main aims: improving the environment and developing people. They achieve this by activities such as removing graffiti, landscaping, gardening, cleaning, and general building and environmental maintenance.

The company started when a tenant management organisation (“TMO”) was set up in 2002 in the local area. Residents saw environmental services were being provided by the public sector or by the private sector. The TMO also saw that their area had around 80% unemployment and that something needed to be done. They recognised an opportunity to do something about it themselves and got initial funding for set up from Priority Estates Project (PEP) Ltd.

When Steve Dewar, Executive Manager, joined in September 2006, he saw that whilst the organisation was doing well and had established a good reputation, there was a danger in Heartlands RSO having quite a few of its ‘eggs in one basket’. A lot of the work was funded by Neighbourhood Renewal Fund money and was from one local authority in particular. Being aware of the way that funding streams can quickly change, he wanted Heartlands RSO to have a better spread of services and customers.

It’s a case of striking the right balance. Whilst looking at new opportunities and areas of work, “we need to keep doing what we do, and do it well”, he says. Steve took a hard look at the skills Heartlands RSO had, and also took a note of the gaps. He then looked at opportunities in new, but related, markets and started getting in touch with potential partners. They could help Heartlands RSO fill their gaps, and Heartlands could help the partners too.

“He prepared to do the leg-work yourself”, Steve advises. He recognised that, if Heartlands RSO was to win a greater variety of work, there was no substitute for him rolling up his sleeves and getting on with it. Of 10 new contacts, 6 or 7 might come to nothing but the other 3 or 4 can pay dividends.

He notes that Heartlands RSO is still in the process of moving from what was essentially grant dependency to self-sufficiency in contracts, and that there is some hard work still to come. “Don’t give up”, he says, it can be difficult sometimes but, “when it goes right, it’s brilliant!”

Any handy hints, tips, or words of advice for social enterprises wanting to do business with the public sector?

“Build up some reserves. Although local authorities won’t go bust, and in that way are pretty safe customers, they can be slow to pay. Although you can build this into your cashflow, you need to make sure that you have enough in the bank to cover at least a month’s wages, preferably 3-6 if you can.”

Another tip is to make best use of the media, newspapers, websites, etc. Get your name out there and make it known as to what you’re doing. Shout about it: don’t be shy!
Part Three: Issues for the Public Sector

Stroud Community Agriculture
www.stroudcommunityagriculture.org
Section 12: Supply Chain Development

12.1 Introduction
Social enterprises should be given the opportunity to tender for all contracts that they are interested in, even if they are unable to act as main contractor. Local authorities and other public bodies should build on what they already do to encourage or require a main contractor to set up a diverse supply chain, with a view to achieving robust service delivery. Supporting opportunities for social enterprises as subcontractors in the procurement process is to be encouraged, although clearly any social enterprise should consider carefully the risks and responsibilities they take on as a consequence.

12.2 Nominating subcontractors
Contractors can be asked to specify the extent of any contract they are planning to subcontract and the identity of the proposed subcontractor. However, the purpose for which this question can be asked in the context of the EU procurement rules is unclear. The case law suggests that the only legitimate reason a public body can retain any control over subcontracting is to ensure that subcontractors have the necessary technical and professional ability to deliver their part of the contract and financial and economic standing to secure that they do not become insolvent part way through it. In demonstrating this it can be argued that authorities can test whether contractors have fully considered the diversity of their supply chain including SMEs and social enterprises.

The EU procurement rules on contract specification make it clear that a public body cannot specify that contractors must purchase specific makes or manufacturers of goods when delivering contracts. This rule also applies to Part B contracts. Instead, goods to be delivered by main contractors should be described in functional terms. The same principle applies to particular suppliers or subcontractors. On a similar basis, public bodies cannot legally specify that part of the contract must be subcontracted to a social enterprise. This would be a breach of both the EU procurement rules and the EU Treaty provisions preventing the creation of barriers to the free movement of businesses: there is no positive promotion of one model of enterprise over another by the European Commission. However, it is known that a number of authorities do stipulate that a proportion of the contract should be sub-contracted to ensure continuity of service and in doing so have requested that the contractor identify additional enterprises to those in their usual supply chain to demonstrate competitiveness in the outputs being procured - this is justified on the basis of tackling barriers to trade.

Much can still be done to provide a climate within which main contractors can be encouraged to create opportunities for the SME sector to participate in delivering the contract and to include this as part of the prequalification, selection and award criteria.

12.3 Framework Agreements
Participating in a multi-supplier framework agreement can also be a way for social enterprises to participate in delivering public services. Such an agreement sets the terms and price for any subsequent contracts (“call offs”) that are let, but does not commit the public body to make any purchases. Although a framework agreement itself is not a public contract, the EU procurement rules treat it as one.

For the public sector, framework agreements are often used with a view to achieving savings, however, they can also involve some complex legal issues. There is a maximum duration of 4 years for framework agreements, which can only be exceeded “in exceptional circumstances.” The framework
agreement itself must be tendered under the EU procurement rules. Called off contracts are let under it without further tendering under those rules, although the specific rules for call-offs under a framework must be followed.

Framework agreements are used extensively by “central purchasing bodies” (buying clubs). By their very nature there is a risk of excluding smaller suppliers and social enterprises, because they are often designed with economies of scale in mind.

Some public bodies have set up framework agreements with a range of suppliers or service providers. Contracts called off under the framework can be let on the basis of the size of the contract, with a particular social enterprise that has secured a place on the framework being awarded contracts of the size that it is appropriate for it to deliver. Where framework agreements are used this can a positive way to involve social enterprises in delivering them.

12.4 Developing consortia

Public bodies can assist the formation of these consortia as long as they do this in a way that does not create unfair advantages for particular bidders. The principle is that all bidders must be treated equally.

One way of encouraging this is to encourage any interested contractors to meet for a briefing by the Council as to its requirements prior to submission of pre-qualification responses. This enables consortia to be created, allowing for complimentary skills to be joined together by bidders.

12.5 Relevant Policy – and how it relates to the Law

There are some policy contexts where larger contracts, developed at regional or even national level, are pursued. This is not always undesirable from the point of view of social enterprises because the subject matter of these contracts may not always be of great interest and greater efficiency in purchasing commodities could free up commissioning time to take an intelligent approach to work they might be more interested in. On the other hand where outcomes are more complex, larger contracts may difficult to specify adequately.

In the case where larger contracts are really necessary and desirable, developing sub-contracting opportunities, supporting consortia development and improving framework contracts in a particular way can all be used to increase opportunities that smaller social enterprises could participate in as long as certain principles are adhered to.

Contractors can be encouraged informally to consider sub-contracting to social enterprises. If a core purpose of the contract is to stimulate the creation of small and medium enterprises contractors can also be asked to demonstrate their relevant track record in working with such organisations and this can be part of the contract award criteria.

The Home Office/OGC guidance “Think smart: think voluntary sector” provides some policy basis for this point by suggesting that “you can ask prime suppliers during pre-qualification to demonstrate their track record of achieving value for money through effective use of the supply chain: including for example through sub-contracts or partnerships with VCOs or SMEs”. However, this is directed at demonstrating how value for money is secured, not how social enterprises are encouraged.

12.6 Key Findings

Contract conditions cannot be used to require subcontracting to social enterprises. However, stimulating the creation of SMEs could be made a core purpose of the contract or contractors can be encouraged informally.

Multi-supplier framework agreements can give an opportunity for smaller social enterprises to participate in delivering smaller contracts, but the use of framework agreements can also limit opportunities for social enterprises.

Public bodies can help organisations broker consortia to bid for public contracts as long as they do so in a way that does not discriminate in favour of or against particular bidders.
Part Four:

Issues for Social Enterprises

There are a number of key things that social enterprises need to know about contracting with the public sector. This Part is not a complete guide to contracting with the public sector: instead it concentrates on legal issues (with mention of VAT where relevant). It is only a brief summary of the key points of what are often complicated areas of law. Legal and / or accountancy advice should generally be taken on specific contracts, particularly if they involve staff, premises or significant financial sums.

For each issue this Part addresses the same important questions:

- What is the issue?
- Why is it relevant to social enterprises?
- When might the issue arise in the process?
- What can we (social enterprises) do about it? and / or where can we find out more?
Section 13: Contracts

13.1 What is the issue?
This section explains what a contract is and how an individual or organisation could enter into a contract without realising it. It also highlights that some terms are implied into contracts by law.

In law, a contract is formed when:
• there are at least two separate parties (for example, one local authority department cannot contract with another since they are both part of the same organisation);
• an ‘offer’ by one party is ‘accepted’ by the other; and
• both the offer and the terms on which it is accepted are of economic value (in money or money’s worth) to the other.

An offer must be sufficiently clear (what is being offered, by whom, and under what circumstances?). Acceptance has to be unqualified, so a letter of acceptance which changes in some way a part of the offer is not an ‘acceptance’ but is instead another ‘offer’.

A contract can be made over the telephone, in a face-to-face conversation or by starting to deliver services. The fact that there is no written agreement does not mean there is no contract. However, it is easier to prove the terms of a written contract than an oral one, so written agreements should generally be used.

Some terms are implied into the contract by law, even if they are never discussed or written down. The most important of these are terms implied by the Supply of Goods and Services Act 1982. This Act implies:
• into a contract to supply goods - terms that the goods belong to the seller and are of satisfactory quality; and
• into a contract to supply services - terms that the supplier will provide the service with reasonable skill and care.

13.2 Why is it relevant?
Entering into a contract, even one that is not written down, has the following implications:
• each party is treated as having agreed to do what it has said it will do in the contract;
• if it is disputed whether this has been done, the words of the contract will be used to decide the dispute;
• negotiations and other commitments given by a commissioning authority are generally not relevant or valid unless they are written into the contract;
• if a party to the contract suffers loss because the other party does not do what they say they will do, the defaulting party may have to pay ‘damages’ to compensate them for that loss; and
• this compensation can include the extra cost of someone else doing the work instead.

When assessing the obligations a social enterprise is prepared to undertake, implied terms need to be considered as well as the written terms of the contract. Social enterprises should also ensure that their contracts include all commitments given by the commissioning authority.

13.3 When might it arise?
When you respond to an invitation to tender for work, your bid will generally be an “offer” to carry out the work. The commissioning authority can accept this offer without further reference to you. You will then be bound by the terms set out in the invitation to tender and your bid.

There may be some room to clarify or supplement your bid, but this does not mean that you don’t have a contract. This is the case even before you sign the actual contract document itself. When the formal legal agreement is signed, this generally replaces the terms of the oral contract.
In other circumstances, you may even have a contract when only the key terms have been agreed. This means that, although some parts of the contract have not been finalised, there could be a contract binding in law.

A party that discovers that the other has breached an obligation under the contract has up to 6 years to bring a claim in the courts. This means that you may still be liable for something that you have done for a long time after the contract itself has been completed. If the contract is executed as a deed the 6 year period is extended to 12 years. Execution as a deed is a way of signing a contract: any contract executed in this way should say “executed as a deed”.

13.4 What can social enterprises do about it?

You should read any invitation to tender carefully to see what it says about when a contract will come into existence.

If there are things in the invitation to tender which you are not prepared to accept, your bid should make this clear. If you are planning to do this, it is good practice to discuss this with the commissioning authority early in the tender period. If you do not do so, there is a risk that your bid could be rejected because it does not meet the tendering requirements.

Even when you are not in a tendering situation, be aware of when you might enter into a contract, even by accident, and the consequences that this will have. To help prevent this, mark any letters about the terms of any contract that has not yet been concluded or drafts of any legal agreement with the words “subject to contract”.

Section 14:  Property law issues

14.1 What is the issue?

If you will be occupying premises to help you work with the public sector, then there are a few property law issues that you need to be aware of.

If you buy premises, you will need to carry out searches and investigate title. These searches will usually cost several hundred pounds. You also need to consider how you will meet the purchase costs. Will the commissioning authority pay them or will you meet them from the revenue payments from the authority? If the authority meets the cost they will often require clawback provisions to compensate them if you cease service delivery early.

If you lease premises, you will need to read the terms of the lease carefully before signing it. There will be little or no room for negotiation where you are taking over an existing lease (an assignment). This is because, instead of agreeing a new lease, you will be taking over from the previous tenant. If you are making a capital payment (a ‘premium’) you will need to investigate title in the same way as for a purchase.

If you are simply “occupying premises” provided by the authority you need to consider the basis on which you occupy them. If you have “exclusive occupation” of separate premises you could be treated as having a lease of them. If you share premises with the authority this will generally be under a “licence”.

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If you are simply “occupying premises” provided by the authority you need to consider the basis on which you occupy them. If you have “exclusive occupation” of separate premises you could be treated as having a lease of them. If you share premises with the authority this will generally be under a “licence”.
Unless there is a written licence document which sets out a longer notice period a licence can usually be terminated by a short notice period.

You should consider how far the premises comply with legislative requirements, for example concerning access for people with disabilities or on asbestos assessments. In certain circumstances, you could be liable for the costs of cleaning up any environmental contamination on the site.

14.2 Why is it relevant?
There are financial and risk implications of buying premises or entering into a lease. You will need to be aware of these issues. If you buy or lease premises you will need advice to ensure you have a full picture of the land you are buying and the risks attaching to it. This includes an assessment of how far the premises meet legislative requirements. The main requirements to look out for are those relating to planning permission and building regulations consent, but there may be others such as health and safety.

14.3 When might it arise?
Property issues will arise before you purchase or lease premises. However they can also arise throughout the time that you occupy them. In relation to environmental contamination, the main principle is ‘polluter pays’ and so (especially in an industrial context) you may be liable after you have moved on.

14.4 What can social enterprises do about it?
Make sure you have assessed any premises you take on. Identify any areas where they fall short of current legislative requirements. Identify whether this needs to be remedied before you use the premises, before beginning service delivery from them or whether it can be left.

Take a proper look over the legal documentation you are signing up to. Ensure that if you are making a capital payment it represents good value for money. If you intend to recover the costs through the contract, make sure it is long enough to cover the costs. Also ensure it cannot be terminated prematurely by the authority without paying you compensation which covers those costs.

Look carefully at the terms of any clawback agreement or legal charge. Factor the possibility of any clawback into your business plan.

For a lease, the key terms of the lease will be the amount of rent and level of service charges payable. You should also look at responsibilities for internal and external maintenance and the ‘term’ (length) of the lease. Ideally, you will want to get a good balance between security (you know that you will be in the premises for a long period and can base your business there) and flexibility (what happens if a contract or grant falls through and you can’t pay the rent?).

When you are simply ‘occupying premises’ ensure this is governed by a licence agreement setting out the terms of occupation.

Use your understanding of what you are signing up to in order to manage your financial liabilities and assess other risks.
15.1 What is it?
Tort is the third main branch of ‘civil law’ (as opposed to ‘criminal law’), where contract and property law are the other two. Tort is very wide-ranging and includes negligence, defamation and breach of statutory duty.

Tort law imposes a duty to avoid harming people who are owed a ‘duty of care’. In the context of negligence, this is a duty to take reasonable care to avoid harming people where it is reasonably foreseeable that they could be harmed. The duty is imposed through law rather than through a contract or property relationship. For example, the courts have held that car-drivers have a duty of care to drive safely taking account of pedestrians and other road users. This is the case even though drivers do not sign a contract promising to avoid driving badly.

15.2 Why is it relevant?
In the context of social enterprises contracting with the public sector, tort is most likely to be relevant in the context of negligence. Negligence is essentially not taking the appropriate amount of care or skill when doing something, or not doing something that should have been done. The ‘care and skill’ test in tort applies even if the implied contractual term (referred to in part 1 of this Part) does not apply.

If a court finds that a person has committed a tort then, depending on the kind of tort, it will often order either that the person stops doing what they are doing (an injunction) or award damages. Damages are assessed with a view to putting things back the way they were if the tort had not been committed.

15.3 When might it arise?
The law of tort can arise at any stage of work for a public sector body. The first stage is to carry out a risk assessment. This will involve identifying all possible risks, quantifying them in terms of both likelihood and impact and then deciding how best to manage them. This could include taking out insurance, in which case you will need to decide the type of insurance and the level of cover.

Practical illustrations of torts include a van driver working for a social enterprise driving their vehicle into another one, or where (in a landscaping social enterprise) a large hole is left in the ground and a child falls into it and gets injured.

However, torts might be wider-ranging than this. Have you taken the proper amount of skill and care when choosing who works for your organisation, and who they will be working with? For instance, offering employment to a person who has been convicted of offences against children might be viable where the job has no involvement or contact with children whatsoever, but wholly inappropriate where it does.

A particular area of risk the commissioning authority will be concerned about is in relation to service delivery. Service providers are usually required to indemnify (agree to compensate) the authority for service delivery risks that occur. This usually also involves maintaining insurance the authority considers satisfactory.

15.4 What can social enterprises do about it?
There are basically two things. One is to avoid, so far as is possible, any members of your staff committing a tort whilst working for you. You should conduct risk assessments on working practices and take appropriate steps to mitigate those risks, for example by ensuring that staff receive any necessary training.
A starting point for a risk assessment is to ask the following questions:

- If I do (or don’t do) ‘x’, who will be affected, and how?
- Do I owe a responsibility (a ‘duty of care’) to that person (or people)?
- Do I need to change what I planned to do (or not do), and if so, how?

There is plenty of information around on risk assessments but for a starting point see (for instance) the Health & Safety Executive’s website www.hse.gov.uk/msd/risk.htm

The other is to ensure that you have adequate insurance cover. From a practical point of view, work for the public sector will generally require insurance cover up to a specified limit, and so you are likely to have insurance cover in place anyway. However, you should not just take out the minimum level of insurance cover the authority requires. Instead you should make your own assessment of whether that is adequate, and insure for a higher amount if it is not.

Relating to this, you need to look at any issues that run through the work you do and identify any specific regulations or rules that apply. Where your work involves vulnerable adults or children in any way, or the preparation and serving of food, there are plenty of additional things that you need to be aware and take account of. You will need to check out any sector-specific law or policy.

Section 16:

TUPE

16.1 What is the issue?

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) protect the rights of employees by ensuring that where a business transfers, or a service provider changes, the employees of the business, or those who were primarily engaged in providing that service, also transfer to the new business or service provider.

TUPE operates to transfer all rights, powers, duties and liabilities relating to staff contracts to the new employer.

TUPE also protects the rights of the transferring employees by preventing the new employer from making changes to transferring employees’ terms and conditions of employment and by restricting the new employer’s ability to dismiss those employees fairly, in particular:

- any unfavourable changes (from the employee’s point of view) made to the contracts of the transferring employees, that are made because of the transfer will be void;
- any unfavourable changes for a reason related to the transfer will also be void, unless there is an “economic, technical or organisational reason entailing a change in the workforce”; and
- any dismissal made because of the transfer will be unfair (for the purposes of making a claim for unfair dismissal). This is unless it is for “an organisational, technical or economic reason entailing a change in the workforce”.

However, changes to terms and conditions and dismissals that are not transfer related; changes that are beneficial (from the employee’s point of view); or dismissals resulting from genuine redundancies or re-structures can validly be made, subject to the usual provisions of employment law.
There is a statutory ‘Workforce Matters’ Code of Practice intended to prevent a “two-tier” workforce. It applies to service provision transfers from 2003 onwards that involve staff transferring from the public sector. This requires the authority to ensure (through the contract) that any new joiners who work alongside former public sector employees are not employed on worse terms and conditions than those former public sector employees.

16.2 Why is it relevant?
TUPE transfers occur in a range of situations that might affect social enterprises. In particular, a transfer might occur on a business merger, an asset sale of a business, where services are contracted out, the service provider changes, or where a contract for services is brought back ‘in house’.

This means that if you enter into a contract for services with a public body where similar services have previously been provided by another party, you are likely to find yourself subject to the provisions of TUPE. If so, you will inherit the workforce that was previously engaged in providing that service. In practice, it will be very difficult for you to dismiss those employees or make detrimental changes to their contracts. You may find it difficult to ‘harmonise’ the terms and conditions of employment for the transferring staff with those of any existing staff and this may give rise to concerns about equal pay claims.

TUPE also imposes a duty on both the old and new employer to inform and, where appropriate, consult the affected employees prior to the transfer. If it is established that TUPE will apply, you will need to identify which employees are likely to be affected and devise a suitable programme for informing and consulting those employees. There are detailed provisions for consulting with affected employees, which may involve electing employee representatives. Again, it is recommended that you take advice on this process. Since consultation must be carried out long enough before the transfer to enable meaningful consultation to take place, it is prudent to obtain advice as soon as a relevant transfer is proposed.

You should also be aware that, as the new employer, you will be responsible for dealing with any employment law claims brought, not only by the transferring employees, but also by staff who were employed immediately before the transfer and who were dismissed because of the transfer.

Claims for failing to comply with TUPE provisions can be brought in the Employment Tribunal and can be costly.

16.3 When might the issue arise?
Whenever a contract that involves the provision of service is proposed or you bid for a contract, you should check whether or not TUPE will apply. If in doubt, it is recommended that you take legal advice on this.

16.4 What can social enterprises do about it?
If TUPE applies, there is no way of avoiding its requirements and implications.

You should therefore carefully consider, when thinking about entering into any contract to which TUPE will apply, whether the nature of any employee liabilities you are inheriting will make the proposed contract so complicated or expensive so as not to be worthwhile for you.

When entering into the contract, you should ensure that it contains suitable warranties and indemnities to limit the extent of any liability inherited.

Further information on TUPE can be found in, “A Guide to the 2006 TUPE Regulations for Employees, Employers And Representatives”, produced by the DTI (now the Department for Business, Enterprise and Regulatory Reform”).

However, TUPE is a notoriously complex issue and, if there is any possibility of TUPE applying you should take advice from a specialist legal adviser.
Section 17: Transfer of Pension Rights

17.1 What is it?
Slightly different rules apply in respect of the transfer of pension rights. In general, pension rights are not transferred under TUPE. However, if employees previously had access to an occupational pension scheme and the previous employer made contributions, then the new employer must offer a scheme and make contributions of up to 6%.

There is a Code of Practice that governs staff transfers from the public sector. This requires a public body transferring staff to a service provider to ensure that, as part of the service specification, the new employer provides a ‘broadly comparable’ pension scheme to the employees that transfer. In practice, the costs of having to provide such pensions benefits could be substantial.

It is much easier for social enterprises to be admitted to the Local Government Pension Scheme than other public service pension arrangements. This is because there are specific provisions for not-for-profit organisations with aims similar to their sponsoring local authority to become admitted bodies. The position in the NHS is less straightforward.

17.2 Why is it relevant?
Pension right transfer has been commonly raised as an issue in relation to social enterprise and the public sector. For example, where staff are currently employed by the NHS, or by some part of it, and an opportunity comes to for them to transfer to a social enterprise operating within the health sector, many staff will wish to remain in the NHS pension scheme.

Such a transfer may come as a result of a formal TUPE transfer or simply an opportunity to move to a social enterprise.

17.3 When might it arise?
Pensions issues are likely to crop up in any proposed transfer to a social enterprise in the health sector. However, there are ways round such issues given time to explore the options.

17.4 What can social enterprises do about it?
It is possible in certain circumstances for those not employed by the NHS to be part of the NHS pension scheme. For instance, GPs and their staff are entitled to join the scheme even though the GPs are self-employed and their staff are employed by them. Not all organisational structures permit access to the NHS Pension Scheme. Even if the organisation in question is able to offer access to the NHS Pension Scheme, the benefits are not exactly the same as those that would be available to an employee of a PCT. Therefore related benefits concerning injury, early payment, extra service on redundancy, and voluntary early retirement with employer’s consent are not available.

An organisation is able to gain access to the NHS pensions scheme in one of two ways. The first is if the organisation is able to run a GMS (General Medical Services) or PMS (Personal Medical Services) contract. There are particular rules about which organisations can or cannot hold such contracts. It is important to note that the organisation need not actually hold a contract, but must be able to hold a contract. In essence eligibility is determined by a two stage test: the right sort of constitution and the capacity to deliver the services: non-profit distributing organisations do not pass the “constitution test”. The second way is where the organisation is given permission to join the scheme by way of a special direction from the Secretary of State. An organisation successful in such an application is known as a ‘Direction employer’.
Section 18: Freedom of Information

18.1 What is it?
This legislation gives any member of the public or organisation the right to ask whether information about a particular topic is held by or on behalf of a public authority and to be provided with a copy of that information. In England, Wales, and Northern Ireland, the legislation is the Freedom of Information Act 2000. In Scotland the equivalent Act is the Freedom of Information (Scotland) Act 2002.

There are exceptions to what information can obtained (such as matters relating to security or crime or personal data about individuals).

18.2 Why is it relevant?
You can ask for information from the public authority that might be useful to you. For instance, if you are a social enterprise in the health sector, you may want to find out information about a particular service you wish to explore taking over. You could ask the relevant Primary Care Trust (PCT) or NHS trust to release this information. Unless one of the exemptions applies, the information will be released to you.

In terms of cost, the Department for Constitutional Affairs’ website www.foi.gov.uk says that ‘most requests are free. You might be asked to pay a small amount for making photocopies or postage. If the public authority thinks that it will cost them more than £450 (or £600 for a request to Central Government) to find the information and prepare it for release, then they can turn down your request.’

Just as a social enterprise can request publicly held information about others, others may be able to get information about you from the authority. This could include information you consider to be commercial. The risk of this cannot be eliminated, other than in relation to information where you are able to impose a legally binding obligation of confidentiality on the authority. For information which is simply “commercially sensitive” the authority decides whether the public interest in keeping that information confidential is greater than the public interest in disclosing it.

Although it is fairly unlikely, depending on how a social enterprise is set up it could itself be a ‘public authority’. In this case, you may have to deal with requests for information. If this is the case, you must make yourself aware of the rules as there are set time limits for responding and only limited reasons for refusing an application.

Similarly, if you have a contract with the public sector it may be that the public authority is asked to disclose information that it needs your help to provide. You may therefore be asked to assist the public authority in providing its response to the request for information. If you think that it will be particularly time-consuming or costly to comply with such requests, you should ensure that your contract with the public authority requires them to reimburse your costs of this.

18.3 When might it arise?
You can make a Freedom of Information Act request at any time. As mentioned above, you may wish to make one or more requests as part of your preparation for scoping or bidding for new work.

Similarly others can make requests at any time. You should consider the issue when signing any contract or entering into any relationship under which you either provide information to a public authority or you hold information on behalf of a public authority.
18.4 What can social enterprises do about it?

Contracts and other arrangements with public sector organisations should have provisions dealing specifically with freedom of information. They should contain:

- details of how confidential information is identified (usually by marking it clearly as such);
- obligations on the authority not to disclose your confidential information, to tell you about requests for your information, to consider any comments you want to make on them, and to tell you if they are planning to disclose information the disclosure of which you have objected to; and
- provision for reimbursement of your costs of helping the authority deal with information requests.

The Information Commissioner is responsible for ensuring that public authorities comply with the Freedom of Information Act. There is a lot of useful information on the website [www.ico.gov.uk](http://www.ico.gov.uk). There is a separate commissioner for Scotland: [www.itspublicknowledge.info](http://www.itspublicknowledge.info).
Section 19: Challenging public authority decisions

19.1 What is it?
This section deals with two scenarios where a social enterprise may wish to challenge a public authority’s decision.

Where a social enterprise considers there has been a breach of the EU procurement rules there is a special process to challenge that decision under the Public Contracts Regulations 2006. The challenge must be brought “as soon as possible and in any event within 3 months unless there is good reason to extend that period”. You should not wait until the procurement has been completed before making a challenge. The challenger has to show that the procurement process was not completed in accordance with the EU procurement rules. If the challenge is successful and the contract has not been signed, the court is able to set aside the contract award. In this case the authority will have to start the procurement process again from the beginning. If the contract has been signed, the court can only award damages (which may be small consolation to the aggrieved social enterprise).

In order to give an opportunity to challenge the award of a contract there must be a period of ten days between unsuccessful bidders being told of the award of the contract and when it is signed. This is sometimes called the ‘Alcatel standstill period’, based on a case in the European Courts, and has effect in the UK under the Public Contracts Regulations 2006 and the Public Contracts (Scotland) Regulations 2006. There are proposals to increase the 10-day period to a 15-day period but this will not apply in the UK until 2008.

The way to challenge a public authority decision that does not involve a breach of the EU procurement rules is by judicial review. The timescale for the challenge is the same as under the EU rules; as soon as possible and in any event within 3 months unless there is good reason to extend the period. In a judicial review the court will never decide whether the actual decision was right or wrong, but will only rule on whether the process by which the decision was made was right or wrong. A successful claim for judicial review will mean that the court orders the authority to take the decision again. Therefore, the authority may end up making the same decision (albeit by a different process) that it did in the first place.

19.2 Why is it relevant?
In the particular context of doing business with the public sector, social enterprises may want to challenge the award (or proposed award) of a contract to another organisation.

In a wider context, you may wish to challenge other public sector decisions that affect you.

19.3 When might it arise?
If you have been unsuccessful (or think you may be) and intend to challenge the award of a contract you should take legal advice as soon as you consider that you have a basis for doing so. Given the short timescales under both judicial review and the EU procurement rules, there is little time to waste. As with any legal action, you will need to take advice on the risks (particularly financial) against the chances of success.

The same advice applies to any local authority decision you wish to challenge.
19.4 What can social enterprises do about it?

If you are considering challenging the award of a contract (or the process pre-award) or a local authority decision you must act quickly and will need legal advice. The first step in any such challenge is to write to the public authority in question immediately. The letter should:

- set out the facts (such as dates of any relevant correspondence);
- make requests for any relevant information (for example, scoring methodologies and scores/ranking);
- request the reasoning behind decisions made;

- cite the relevant provisions of the Public Contracts Regulations 2006 (or other statute under which the decision has been taken) and any deadlines for response; and
- specify a time limit after which you intend to commence proceedings.

For more information on judicial review, see (for example) ‘Judicial Review: a short guide to claims in the Administrative Court’ (House of Commons Library research paper)

www.parliament.uk/commons/lib/research/rp2006/rp06-044.pdf

Section 20:

Undertaking statutory duties

20.1 What is it?

Since a statutory body has only the powers given to it by statute, express powers are needed to authorise any delegation by that public body. Any arrangements under which a separate organisation exercises powers on behalf of the statutory body need to be backed up by express powers for the body to delegate its powers to the outside body. This is generally done by orders under the Regulatory Reform Act or specific provisions enabling the public body to enter into agency arrangements. (as to which see Part 3).

20.2 Why is it relevant?

If decisions are taken on behalf of a public body without specific authority to do so, those decisions can be challenged.

20.3 When might it arise?

The issue is relevant where a social enterprise is being asked to provide a service, which involves some element of discretion on the part of the public authority that the authority wishes the enterprise to exercise on its behalf.

20.4 What can social enterprises do about it?

For any contract which involves a discretion (for example, over which service users are supported) the statutory basis for the public body to pass this discretion to the service delivery organisation will need to be identified and checked. This is likely to require legal advice, although the issue will be equally important to the public authority. The authority’s legal advisers should therefore investigate the issue for themselves and may be prepared to share their conclusions with the social enterprise’s legal advisers.
21.1 What is it?
When bidding for contracts or grants, social enterprises will generally want to secure payment for the full costs in their bid for any contract, including a share of central costs (overheads). This is known as full costs recovery.

21.2 Why is it relevant?
Although it is possible for social enterprises and any other supplier to subsidise service delivery, doing so in the long term can lead to issues with financial viability and may also not be in the interests of the public sector.

21.3 When might it arise?
The issue can arise both when applying for grants and when tendering for contracts.
Social enterprises should be aware there is nothing to prevent the other bidders from submitting “loss leader” bids but arguably, as part of the process of ensuring genuine value for money across the lifetime of a particular service, the public sector should ensure that all bids can be delivered on a stable and on-going basis.

21.4 What can social enterprises do about it?
The Audit Commission have drawn attention to the principles of full costs recovery in their recent publication “Hearts and Minds: Commissioning from the Voluntary Sector”. They define full cost recovery as “recovering or funding the full costs of a project or service. In addition to the costs directly associated with the project, such as staff and equipment, projects will also draw on the rest of the organisation. The full cost of any project therefore includes an element of each type of overhead costs, which should be allocated on a comprehensive, robust, and defensible basis.” The Audit Commission note that the Treasury first endorsed the principle of full cost recovery in 2002 when it recognised that relevant elements of overhead costs could legitimately be included in the costs estimates for providing a given service.
This was reinforced in further guidance on funding practice in 2006 when the Treasury noted that “a third sector organisation unwittingly subsidising a public service is unlikely to represent good value for money, particularly in the long term”. The Audit Commission notes that despite this, understanding of full costs recovery and its application remains very patchy within Local Government and also within the third sector.
Commissioning bodies can reject “artificially low tenders” and should be encouraged to do so in appropriate circumstances.
Section 22:
Social Enterprises as Public Bodies

22.1 What’s the issue?
In certain circumstances social enterprises themselves may be classed as public bodies. Unfortunately the test of what is a “public body” is different for different purposes.

22.2 Why is it relevant?
Being a public body can have significant implications so it is important for enterprises to know when this applies.

22.3 When might it arise?
(a) EU Procurement
A social enterprise could itself be a “contracting authority” and have to follow the EU procurement rules and/or EU Treaty requirements. This would be the case where the social enterprise is:

“a corporation established, or a group of individuals appointed to act together, for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

(i) financed wholly or mainly by another contracting authority;
(ii) subject to management supervision by another contracting authority; or
(iii) more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, are appointed by another contracting authority”.

“Non profit distributing” social enterprises will be regarded as having been established for the purpose of “meeting needs in the general interest” and would not be regarded as having an “industrial or commercial character”. It is only if they operate in the same way as other commercial bodies and seek to optimise profit that they will be treated as being outside this test.

The second part of the test is whether the organisation in question is financed “wholly or mainly” by a body in the public sector. This would include grant funding, but there is case law to suggest that it does not apply to payments under a contract for services delivered to the public sector. It also includes the situation where such an organisation is “subject to management supervision” by a public sector organisation. “Management supervision” could be given through constitutional or contractual provisions the public bodies impose to secure any stake that a public sector body has in the ownership of a particular enterprise or to ensure continued service delivery in a way which is acceptable to the public body. A good example is the way in which the Housing Corporation regulates housing associations, resulting in RSLs being categorised as contracting authorities under this definition.

(b) VAT
The test of what is a public body is identical in the VAT legislation and the EU procurement rules. However, there is case law that a public body under the EU procurement rules cannot take advantage of the ability to recover VAT on its new head office that would apply if it was also a public body under the VAT rules. Any social enterprise should take specialist advice before seeking to claim that it is a public body for the purposes of VAT recovery.

A public body is a local authority and other boards authorised by Treasury Order. Public bodies have special dispensation to recover VAT attributable to their non-business activities and in most cases their exempt business activities. VAT is unlikely to be a cost to a public body.

A social enterprise should consider the benefits of entering into a contract for services with a local authority. Providing the social enterprise is acting in a business capacity the sale of goods and services to the local authority will be subject to VAT (unless VAT
exemption applies) and the local authority will be able to recover the VAT. This may well be beneficial to the social enterprise because it will be able to recover all the VAT it incurs on expenditure. If a social enterprise does not wish to become involved in VAT it should seek to fund its activities by grant rather than entering into business contracts for services.

(c) Human Rights Act
Organisations can be challenged under the Human Rights Act 1998 if they are public bodies or exercise functions “of a public nature”.

Case law on this has tended to focus on the position of residents in residential care funded by a local authority. Whilst most social enterprises are not directly established to carry out public functions, it is not hard to imagine a situation where a social enterprise managing a registered care home could find itself open to challenge under this legislation.

Social enterprises should check whether or not the Act applies to them and, if it does, ensure they comply with it. More information is given in the Department for Constitutional Affairs' Guide To The Human Rights Act 1998.

(d) Local Authority Companies
Although is not strictly a test of whether an organisation is a ‘public body’, there is legislation governing the relationship between local authorities and companies in which they have interests. The rules apply to all types of companies and also to industrial and provident societies.

Where a company is classified as either ‘controlled’ or ‘public sector influenced’, then it is a local authority company. A local authority company must comply with certain requirements set out in the regulations. Previously these regulations treated borrowing by and capital receipts of local authority companies as those of the local authority itself (this is now determined by accounting principles rather than legislation). Now they just amount to a number of “propriety requirements”, which cover things such as:

- specifying on letterhead that the company is controlled (or influenced) and the names of the controlling (or influencing) local authority; and
- not paying a Councillor who is a director more than they can receive as their annual allowance from the Council.

Social enterprises that are local authority companies must ensure they comply with these requirements. Note that these provisions are likely to be replaced by new legislation relating to “entities” connected with councils.
23.1 What’s the issue?
Social enterprises bidding as part of a consortium need to ensure they have protected their position in relation to the other consortium members.

23.2 When might it arise?
Social enterprises sometimes bid for contracts as part of a consortium, particularly where they do not have resources to deliver the whole contract themselves.

Where a consortium bids, the prequalification and contract award processes should be based on the resources of the consortium. The public authority generally reserves the right to require the consortium to form a joint venture organisation or SPV to act as a single point of contact for contract administration. The public authority can also require the consortium participants to provide a guarantee to the authority that they will deliver the parts of the overall contract for which they are responsible.

23.3 What can social enterprises do about it?
Social enterprises involved in consortia should ensure they have sufficient rights in the constitutional arrangements for the SPV to protect their rights to deliver the part of the contract they have bid for. They should also ensure that they are not made responsible for delivering the parts of the contract the other consortium members are to deliver.
24.1 What’s the issue?
Bonds are a way of helping to ensure that a contractor will perform what has been agreed. The contractor is required to pay over (or guarantee) a certain sum, perhaps 10% of the tender value, into a bond. If the contractor fails to fulfil what it has promised, then that sum could be forfeit. Bonds are most common in the construction industry, though can be used elsewhere.

24.2 Why is it relevant?
Few social enterprises have sufficient spare funds to pay over such bonds or to find a bank to fund one. This can be an issue when negotiating a contract.

24.3 When might it arise?
Usually at the time of negotiation of the contract: a bond may be a requirement of the public body awarding the contract.

24.4 What can social enterprises do about it?
The best thing is to seek a way to negotiate out of the bond: to try to persuade the public body to deal with any issues as and when they arise rather than in advance by way of bond. Unfortunately, there is no central body available to pay bonds on behalf of social enterprises and so, if the public body refuses to move on the point, nothing can be done by the social enterprises.
25.1 What is the issue?
An indemnity is a term in an agreement providing that a party will be responsible for another party’s loss if he fails in accordance with the obligations agreed in the contract. An indemnity clause is included in an agreement to give the party seeking to be indemnified a greater level of protection than he has under the rules for breach of contract.

25.2 Why is it relevant?
A contract with a public body may contain an indemnity clause. Some clauses may be onerous in nature and may seek to circumvent contractual issues such as causation and remoteness of damage thereby making it easier to claim against a contractor. Social enterprises may not have the funds available to meet such a claim.

25.3 When might it arise?
Usually at the time of negotiation of the contract.

25.4 What can be done?
The best advice is to seek to limit the scope of an indemnity clause so that it covers a specific and reasonable purpose: be aware that indemnity clauses are often widely drafted. Never agree to a clause which does not restrict liability to set circumstances. Social enterprises should agree a figure as a ‘cap’ on the amount that can be sought as an indemnity. It is important to be realistic when agreeing this figure. Ensure that you maintain a record of indemnities that have been agreed and review this annually.
Section 26:
Developing contract opportunities

26.1 What’s the issue?
Social enterprises sometimes lack the experience to know when and how to spot contract opportunities with the public sector.

26.2 Why is it relevant?
Social enterprises are often excellent vehicles for public services but may not have the expertise to access commissioners.

26.3 When might it arise?
It is essential if good relationships are to develop between social enterprise and the public sector.

26.4 What can social enterprise do about it?

(a) What can you do before a procurement commences?
Market awareness is not simply an exercise of waiting until a contract opportunity is advertised. Usually it’s too late by then. There is nothing to stop a social enterprise approaching a commissioner to make it aware of the services and innovations it may offer. Useful information can be garnered, for example, the commissioner’s procurement cycle. This is all about developing profile and can be enhanced if the social enterprise can offer something useful in the interim, for example, training.

There is no magic approach to developing a relationship with the organisation you are hoping to work with, which very much depends on the commissioner’s capacity and inclination to respond. You are more likely to get a positive response if you have taken the trouble to research their strategies and current service provision. In the case of public bodies, there is a considerable amount of information usually available through their own websites.

Commissioners can also be proactive in exploring service provision options through “Meet the buyer events” and, once they are considering a particular procurement, through soft market testing exercises (these gauge the interest of potential suppliers or partners in a market—there is a paucity of good practice guidance on such exercises).

A social enterprise can also assess gaps in its competences and identify how it can supplement them through the establishment of alliances or consortia with other suppliers. Do not confine your searches for partner organisations to the social enterprise world. With the private sector increasingly being encouraged to widen its sub-contractor and partner supplier base, it is often positively beneficial for contractors to be seen to be collaborating with social enterprises in delivering public services and undertaking public projects.

(b) When does a procurement commence and what can you do during it?
A procurement commences when a commissioner has formed the intention to let a contract. ‘Meet The Buyer’ events can provide a great opportunity to find out not just what’s on at the moment or in the near future but also as an early indication of procurement plans.

An early indication of procurements can often be found in prior information notices (“PINs”). Use of a PIN is not required under the EU Procurement Rules, but where used they alert the market to a forthcoming tender process. In the ‘open’ and ‘restricted’ European procurement processes, use of a
PIN reduces the minimum timescale for return of a tender after advertisement. A PIN will appear in the European Union’s Official Journal. As the name suggests, a PIN simply gives an indication that a contract may be let; it does not guarantee that it will be.

During a tender process there is no substitute for reading the relevant documentation and answering it in accordance with the accompanying guidelines. If you think the level of requirements stipulated as a response in a prequalification questionnaire are unreasonable or out of proportion, for example the insurance cover, then do not hesitate to clarify it— you won’t be the only supplier who might find it unacceptable. If the commissioner does not respond satisfactorily, you can always decline to proceed further, citing your reasons for doing so— this is critical to the authority having to address whether it is acting reasonably by setting requirements and conducting the procurement process as a whole.

Preparing for any bid will naturally be some form of balancing exercise. The social enterprise must ensure that it can meet existing obligations under contracts whilst at the same time putting aside resources for tendering.

One of the first jobs when preparing to bid is to ensure that you understand exactly what the specification is. This may seem an obvious point, but it is vital to do so: to submit a bid which does not meet the specification is unlikely to succeed, but to offer more than what is required can also present difficulties. First, since the contract will have been valued with the specification in mind, you may find that you are working harder, and on a tighter budget than you need to. Second, the commissioner will not be able to show value for money for the extras that you have offered, since this was not in the specification.

Similarly, the payment mechanism will have a bearing on the successful bidder. The social enterprise should check it carefully given that it will influence cash flow and other key elements of budget, should the social enterprise be successful.

(c) What can you do once a contract has been let?

Negotiation after the contractor is selected is only permitted where the ‘negotiated procedure’ has been used. In other cases, bids can only be ‘clarified’ or ‘supplemented’. To avoid disputes after the event as to whether there was clarification or negotiation, it is helpful if the commissioner has a clear strategy before it starts the tender process. This strategy should be communicated as part of the process so that all parties are clear as to what will or will not be up for discussion later on.
Part Five:
Resources
Unique Scrap Store
www.uniquescrapstore.com
Section 27: VAT

27.1 General introduction to VAT

In many cases the charging of VAT between bodies engaging in business activities is entirely compensating i.e. one body charges VAT and the receiving body recovers it. In the public sector special rules and dispensations apply which in the main also allows VAT to be recoverable by the public body.

It is the responsibility of the social enterprise when providing goods or services to determine the VAT implications of the transactions. HM Revenue and Customs levy penalties for failing to register for VAT and for mis-declarations. Ignorance of the law is not a reasonable excuse and social enterprises should carefully consider their VAT obligations and take advice as appropriate.

In the comments made below on VAT, several phrases are used which need some further explanation, including ‘VAT exemption’ ‘zero-rating’, ‘business activity’ and ‘non-business activity’. Where references are made to a ‘charity’, we refer to a social enterprise which is also a registered charity (though the points apply to non-social enterprise charities too).

(a) Exemption from VAT

The supply of certain services, for example health and welfare, or education, are exempt from VAT when provided by an ‘eligible body’. Exempt services should be disregarded when considering whether a social enterprise is required to register for VAT. Exemption can be disadvantageous because it prevents VAT recovery on attributable costs. VAT exemption would be advantageous where minimal amounts of VAT are incurred on expenditure and the social enterprise is not in a position or does not wish to deal with the administrative burden of maintaining VAT records.

(b) Zero-rating

Some transactions are taxable but at a zero-rate which means VAT is not chargeable on services provided but VAT is recoverable on attributable expenditure. Certain supplies of construction services in respect of residential and community buildings are zero-rated and the provision of transport can also be zero-rated. Zero-rating is the optimum VAT position because VAT is not payable on income but is recoverable on costs.

(c) Business activities are mainly concerned with making supplies to other persons:

- for any form of payment or ‘consideration’ whether in money or otherwise;
- which have a degree of frequency and scale;
- which continue over a period of time; and
- which are within the scope of VAT and may be standard-rated (17.5%), zero-rated (0%); or exempt.

(d) Non-business activities are:

- activities carried out for no charge and no other form of consideration, including, leases granted, or the freehold sale of land and buildings, for the nominal payment of a peppercorn or a pound and where no other form of payment is involved;
- activities carried out for a charge but with no degree of frequency or scale, and without continuing over any period of time;
- outside the scope of VAT.

27.2 Education and training

Education or training when provided by an ‘eligible body’ is exempt from VAT. An ‘eligible body’ includes a school, college, university, local authority, or Government department.

In addition non-profit making bodies such as charities, professional bodies or companies limited by guarantee will also be ‘eligible bodies’ for these purposes and should be exempt from VAT for the supply of education in return for fees.
27.3 Welfare
Firstly consider whether the following is relevant:
If the social enterprise is operating in the course of business, the provision of welfare services in return for payment is exempt from VAT when provided by a:
- charity;
- state regulated private welfare institution e.g. a residential care home;
- state regulated private welfare agency e.g. domiciliary care agency, fostering agency, nursing agency.

The provision of accommodation or catering is also exempt from VAT providing it is ancillary to the provision of care, treatment or instruction.

Welfare services are services directly connected with the provision of care treatment or instruction designed to promote the physical or mental welfare of elderly, sick, distressed or disabled persons. HMRC accept care or treatment includes protection, control or guidance of an individual when this is provided to meet medical, physical, personal or domestic needs. VAT exemption would therefore apply to personal or nursing care, assistance and support with everyday tasks, certain routine domestic tasks providing the recipient has been assessed in respect of their medical needs and the recipient is unable to carry out the tasks safely. VAT exemption is mandatory when provided by a qualifying body. If VAT exemption is to be avoided the services would need to be provided by a non-qualifying body e.g. a subsidiary company of a charity.

27.4 Aids for the disabled
The supply to a charity of certain goods that the charity will donate to an eligible body, such as a UK health authority, a hospital, a research institution or certain other charitable institutions, can be zero-rated.

Supplies to charities of certain goods and services which the charities make available to disabled people for their personal or domestic use are zero-rated.

Social enterprises providing aids for the disabled to a relevant charity or to a charitable institution providing care or medical treatment can zero-rate certain goods and services. Zero-rating would apply to medical and surgical appliances, equipment designed solely for use by a disabled person and specific goods e.g. a lift, alarm system or the services of constructing ramps or widening doorways or adapting a bathroom, washroom or lavatory.

27.5 Construction
The construction of buildings, and certain works to protected buildings, intended to be used for solely non-business purposes or as a village hall or similar can be zero-rated subject to certain criteria being met.

In certain circumstances a charity can also benefit from zero-rating for the construction of a ramp, widening a doorway or passage, or providing, extending or adapting a washroom or lavatory.

The installation of energy-saving materials, such as central heating and insulation, in residential accommodation or in a building used solely for relevant charitable purposes (which means used for non-business purposes or as a village hall or similarly) is liable to VAT at the reduced-rate.

27.6 Supply chain / range of providers
Each business within a supply chain should determine the VAT implications of the services it is providing. The VAT treatment can be dependant on the status of the body providing the services rather than the nature of the services. If a provider changes it should not be assumed the VAT treatment will be the same as the previous provider.

27.7 Government departments
Government departments include National Health Service Trusts, NHS Foundation trusts, a Primary Care Trust and a Local Health Board.

Where a Government department supplies goods or services which do not amount to the carrying on of a business but it appears to the Treasury that similar supplies are, or might be, supplied by other non-Government departments, then the Treasury may direct that the supplies by that department are treated as supplies in the course or furtherance of a business carried on by it. Government departments are subject to the normal VAT registration requirements.

Such bodies can recover VAT chargeable by social enterprises providing the body uses the goods or services for its non-business activities e.g. the national health service. VAT is recoverable by an NHS body on ‘contracted out’ services. In circumstances where the social enterprise is acting in a private capacity VAT will in the main be recoverable by the Government department. Social enterprises should therefore consider their VAT position and the potential benefits of VAT registration, that is recovering VAT on costs if acting in a private capacity when providing services to relevant Government departments.

The direction currently lists 75 different types of services as ‘Headings’, in respect of which VAT may be recovered. The Treasury publishes the full list through the London Gazette www.gazettes-online.co.uk. Two
Particular situations are included under headings 45 and 53 and are the 'Composite Trade' and 'NHS LIFT' PFI arrangements. These state:

**Heading 45**
Operation of hospitals, health care establishments and health care facilities and the provision of any related services.

**Heading 53**
Provision under a PFI agreement of accommodation for office or other Government use, together with management or other services in connection with that accommodation.

Both headings are concerned with PFI and PPP arrangements for buildings, which involve the transfer of risk to bodies outside Government.

### 27.8 Transport

The provision of transport in vehicles specifically adapted for a wheelchair is zero-rated. Zero-rating also applies to the transport of persons in any vehicle providing it is designed to carry 10 or more persons. In other cases the provision of transport would be subject to VAT.

### 27.9 Volunteer expenses

Social enterprises cannot normally recover VAT on volunteer expenses. In order to recover VAT the expense must be incurred by the VAT registered organisation. It is acceptable for volunteers to obtain tax invoices in the name of the social enterprise in order for the social enterprise to recover VAT. A social enterprise must pay for the expenditure.

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**Section 28:**

**Developments to look out for**

The social enterprise sector is always moving on, with new policies and documents being produced, new opportunities to comment or shape the sector, and new issues to discuss and resolve. In this Part of the document, we have listed a number of the key developments that we are aware of, and which pick up on other issues raised in this guidance.

#### 28.1 Sustainable Procurement

Central Government departments have already responded to the Simms Report (the report of the Sustainable Procurement Taskforce) in March 2007. Consultation on the response of local authorities and the NHS has now closed, and their responses are expected in the early Autumn.

#### 28.2 Participatory Budgets

In July 2007, Secretary of State (CLG) Hazel Blears announced a pilot scheme in England for 'participatory budget setting’. Based on a model first developed in Brazil, where local people have the opportunity to decide priorities for spending public money, the pilots are said (by the Government News Network) to be part of a plan for every neighbourhood to have control of a community kitty within the next 5 years. Locations for the pilots include Bradford, Southampton, Birmingham, Newcastle and Bassetlaw.

#### 28.3 European Survey on Social Issues in Procurement

The BEST Procurement development partnership is one of five European partnerships involved in a survey. The survey looked at the extent to which Member States were taking up the freedoms they have to include social and environmental considerations in public procurement (subject to the points made elsewhere in this document). The report will be made available at www.seem.uk.net in the Autumn.
Section 29:
Internet and other resources

28.4 Move from CPA to CAA
The Audit Commission is part way through its consultation on the move from the current arrangements for assessing local authorities to a new process outlined in the Local Government White Paper. Currently, authorities are checked by way of the CPA (Comprehensive Performance Assessment). By April 2009, there will be the CAA (Comprehensive Area Assessment), with transitional arrangements to come between now and then. The CAA will cover all local public services, not just local authorities. For more information, please see the Audit Commission’s website www.audit-commission.gov.uk.

28.5 Revised EU Procurement Thresholds
The thresholds are revised every two years so as to benchmark them to the euro. They were last changed in January 2006 and will change again on 1st January 2008. Check the OGC website at the time for details of the new rate: www.ogc.gov.uk.

Achieving community benefits through contracts: law, policy and practice
www.jrf.org.uk/Knowledge/findings/housing/d12.asp

Better Business: A Strategy And Action Plan For Social Enterprise In Scotland
Scottish Executive / Scottish Enterprise / Highlands and Islands Enterprise,
March 2007

Charities and Public Service Delivery: An Introduction and Overview
Charity Commission, February 2007:
Although written for charities, many of the issues for social enterprises contracting with the public sector are identical.
www.charitycommission.gov.uk/publications/ccpubs3.asp

Central Procurement Directorate homepage
Relates to procurement policy in Northern Ireland
www.cpdni.gov.uk
Commission For Racial Equality resources
Resources for Local Government, public authorities and suppliers on how the procurement process can be used to promote race equality
www.cre.gov.uk/duty/procurement.html

Commissioning Framework for Health and Wellbeing
Department of Health, for consultation, March 2007

Community Strategies
Local authorities are required to produce a strategy under Part I of the Local Government Act 2000. This is Government guidance on how to produce one:
www.communities.gov.uk/documents/localgovernment/pdf/156672

The Compact
“The agreement between Government and the voluntary and community sector to improve their relationship for mutual advantage and community gain”
www.thecompact.org.uk

The Consolidated Directive
This is the European Directive on procurement which was brought into effect under English Law in the Public Contracts Regulations 2006 and the Public Contracts (Scotland) Regulations 2006.

Department of Health – Social Enterprise Unit

Disability Rights Commission
Includes guidance on the meaning of a ‘disabled person’ in the Disability Discrimination Act 1995
www.drc-gb.org/the_law.aspx

East Midlands Centre of Excellence
Various standard useful documents relating to procurement, including a PQQ and an Invitation to Tender
www.emce.gov.uk/standard_docs.htm

Energy Saving Trust homepage
www.energysavingtrust.org.uk

The Estatecode
Department of Health and NHS Estates, 2003
Advises NHS bodies on property and land transactions

Fair and Ethical Trading guidance
OGC

Forum For The Future homepage
Includes information on sustainable procurement tool.
www.forumforthefuture.org.uk
General Disposal Consents
The consents for local authorities to dispose of land at less than best consideration.

a) Circular 06/03: “Local Government Act 1972 general disposal consent (England) 2003 disposal of land for less than the best consideration that can reasonably be obtained” (non-housing land)
   www.communities.gov.uk/documents/planningandbuilding/pdf/462483

b) Housing land
   www.communities.gov.uk/documents/housing/pdf/138859

Government Accounting 2000
HM Treasury’s online handbook.
www.government-accounting.gov.uk

Guide To The EU Procurement Rules, 2nd edition
A clear English explanation of the EU Procurement Rules. Although written particularly for housing associations, much of the guide is relevant to other sectors. It includes a chapter on the options for challenging procurement processes by housing associations and other public bodies.

Published by the National Housing Federation, June 2007. Cost £65 plus p&p

Hearts and Minds: Commissioning from the Voluntary Sector
Audit Commission, July 2007
www.audit-commission.gov.uk/reports

Independent Review of Public Sector Efficiency
(also known as ‘Releasing Resources for the Frontline’ and ‘The Gershon Review’)
Sir Peter Gershon / HM Treasury, July 2004
http://www.hm-treasury.gov.uk/spendin_review/spend_sr04/associated_documents/spending_sr04_efficiency.cfm

Interpretative Communication on Social Considerations
‘Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement’, 2001.
http://ec.europa.eu/internal_market/publicprocurement/key-docs_en.htm

Interpretative Communication on Environmental Considerations
Commission ‘interpretative communication on the Community law applicable to public procurement’ and the possibilities for integrating environmental considerations into public procurement, 2001.
http://ec.europa.eu/internal_market/publicprocurement/key-docs_en.htm

Interpretative Communication on procurement rules derived from the EU Treaty
The ‘interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives’.
http://ec.europa.eu/internal_market/publicprocurement/key-docs_en.htm
Joint Note on Environmental Issues in Purchasing
OGC / DEFRA, October 2003

Local Strategic Partnerships and Local Area Agreements
Communities and Local Government department
www.communities.gov.uk/localgovernment/performanceframeworkpartnerships/

National Procurement Concordat for Small and Medium-sized Enterprises
Communities and Local Government
Useful for SMEs where local authorities sign up to this.
www.communities.gov.uk/localgovernment/efficiencybetter/nationalprocurementprogramme/nationalprocurementstrategy/

National Procurement Strategy for Local Government
Communities and Local Government
www.communities.gov.uk/localgovernment/efficiencybetter/nationalprocurementprogramme/nationalprocurementstrategy/

New Economics Foundation
Useful resources including ‘Measuring real value: A DIY guide to Social Return on Investment’, July 2007
www.neweconomics.org/gen

OGC Buying Solutions
OGC website “where you can find information about the products [and] services ... available via framework agreements, that are available to the public sector, NDPB’s, utility companies and charities.”
There is also information for potential suppliers on how to get onto the frameworks and when they are expected to be open for tendering.
http://online.ogcbuyingsolutions.gov.uk

PASA
The NHS’ Purchasing and Supply Agency
www.pasa.nhs.uk

Proactive Procurement
A guide to “achieving quality services and implementing policy objectives by procurement from social enterprises”
www.cooperatives-uk.coop/live/cme477.htm or http://resources.socialfirms.co.uk/resources.php?cat=7&r_id=232

ProCure21
NHS’ framework agreement for construction procurement in the NHS
www.nhs-procure21.gov.uk
www.cre.gov.uk/publs/cat_duty.html

The Quirk Review
a) Making Assets Work: the Quirk review of community management and ownership of public assets’
www.communities.gov.uk/documents/communities/pdf/321083
b) ‘Opening the Transfer Window: the Government response to the Quirk Review’
www.communities.gov.uk/documents/communities/pdf/322579
Royal College of General Practitioners Information leaflet
Royal College of General Practitioners, 2004
A useful document showing the structure of the NHS in England, Scotland, Wales, and Northern Ireland
www.rcgp.org.uk/pdf/ISS_INFO_08_NOV04.pdf

Scottish Procurement Directorate
Responsible for Scottish procurement policy
www.scotland.gov.uk/Topics/Government/Procurement

Selling Added Value
www.sellingaddedvalue.co.uk/index.php

Social clauses
"The scope for using social clauses in public procurement to benefit UK manufacturing" - Final Report July 2006

Social Enterprise: A Strategy For Success
Government strategy. DTI, 2002
www.cabinetoffice.gov.uk/third_sector/social_enterprise/action_plan

Social Enterprise Action Plan: Scaling New Heights
Government strategy. Cabinet Office, November 2006
www.cabinetoffice.gov.uk/third_sector/social_enterprise/action_plan

Social Enterprise Strategy For Wales
Welsh Assembly Government’s “three year strategy to encourage, develop, and sustain social enterprises at all stages in their development”.
Welsh Assembly Government, June 2005

Social Issues in Purchasing
OGC, February 2006
www.ogc.gov.uk/sustainability_social_issues_in_purchasing.asp

SIMAP
“Background information, links and automatic exchange tools to public purchasers and businesses interested in embracing public procurement opportunities in Europe”
http://simap.eu.int/

Specification writing for community benefits
Northamptonshire County Council, South Kesteven District Council, BEST Procurement, Social Enterprise East Midlands
A handy guide for local authorities
www.specification-writing.info/welcome.aspx

State Aid guidance
EU guidance on the State Aid rules.
http://ec.europa.eu/comm/competition/state_aid/overview/index_en.cfm
Supply to Government
Website for public authorities to advertise below threshold procurements. There is a subscription fee for suppliers to join.
www.supply2.gov.uk

Sustainable Development website
More information on sustainable development principles
www.sustainable-development.gov.uk

Sustainable Development Commission’s homepage
www.sd-commission.org.uk

Sustainable Procurement: Making It Happen
WRAP, IDeA, SOLACE, 2003
www.idea.gov.uk/idk/aio/69979

Sustainable Procurement Taskforce’s homepage
Includes ‘Procuring The Future: The Sustainable Procurement Action Plan’, also referred to as ‘the Simms Report’
www.sustainable-development.gov.uk/government/task-forces/procurement/index.htm

Think Smart...Think Voluntary Sector
OGC and the Home Office, June 2004

Using Public Procurement to Drive Skills and Innovation
A report for the DTI by James Binks (Local Futures), March 2006

Value Wales
The body that provides procurement support to the public sector in Wales
www.buy4wales.co.uk/UsefulResources/valuewalesp.html

VAT
HM Revenue and Customs’ VAT library.
www.hmrc.gov.uk

Well-being Power guidance
Government guidance (from 2001) on use of the well-being power to promote or improve economic, social, or environmental well-being.
www.communities.gov.uk/documents/localgovernment/pdf/155514
Glossary

Aggregation
The rules which decide when the value of one contract must be added to the value of one or more others. The aggregation rules are used to decide whether or not the full EU Procurement Rules apply to the letting of a contract.

ALMO
Arms length management organisation - an organisation specifically set up to manage (but not own) local authority housing.

Best value
The requirement for local authorities to make arrangements to secure continuous improvements to services and value for money.

CLG
The Communities and Local Government Department.

Commissioning
The actions of a public authority to achieve one or more of its aims through organisations other than the authority itself.

Contracting Authority
Those bodies listed (in England, Wales, and Northern Ireland) in section 3 of the Public Contracts Regulations 2006 and (in Scotland) in section 3 of the Public Contracts (Scotland) Regulations 2006. These bodies have to follow the EU Procurement Rules. Examples include Central and Local Government departments and registered social landlords.

Externalisation
Where a service that has been run ‘in-house’ by a public sector body is separated from that body to be run independently. See also Part [2F] on externalisations.

Fetter
To restrict. This is used in the context of a public sector body ‘fettering’ its ability to make a choice that it is in the best interests of those it serves, particularly by way of an agreement made to decide (or not decide) something in a particular way.

Framework Agreement
An agreement between a contracting authority and one or more contractors. It specifies the terms and conditions (including price) under which specific purchases (sometimes called ‘call-offs’) can be made but does not commit the contracting authority to make any purchases.

IDeA
The Improvement and Development Agency works to improve Local Government.

Improper Purposes
There is no standard definition covering which purposes are ‘proper’ and which are ‘improper’, and so in the event of a dispute, it will be for a court to decide, in the circumstances, whether or not the purposes were ‘improper’. The phrase has been a matter of debate recently in the context of the Companies Act 2006, which refers to a “proper purpose”. In this context, the Institute for Chartered Secretaries and Administrators (ICSA) has recently published its guidance note on ‘Proper Purpose’.
Legitimate Expectation
As with Improper Purposes, the meaning is really defined by case-law in the courts. Briefly, though, it relates to whether a person or organisation can expect that a public authority will act (or will not act) in a particular way. In other words, it is to do with the extent to which a public authority has freedom to depart from its previous policies or any other things that it has said or done.

NDPB
Non-departmental public bodies. Whilst not an integral part of a Government department and at “arm’s length” from a minister, they still carry out public duties. See http://www.civilservice.gov.uk/other/agencies for more information.

OGC
The Office of Government Commerce – the NDPB set up to support Government procurement activity.

PASA
The NHS Purchasing and Supply Agency – the buying club for the NHS.

PBC
Practice-based commissioning. Part of the commissioning strategy in the NHS. Some decisions (and related budgets) are devolved from the PCT to one GP practice, or to more than one working together. ‘Commissioning’ in PBC really relates to health services for the patient rather than the wider sense of the word (as defined in this glossary).

PCT
Primary Care Trust. Part of the NHS. Its functions are to plan and commission health services for their local population. They must also work to integrate health and social care so that patients get a good service.

PQQ
Pre-qualification questionnaire. An early stages in the procurement process to help choose which organisations will formally be invited to tender.

Procurement
The process of a public sector body obtaining goods, works, or services though a contract.

SHA
Strategic Health Authority. Its role is to locally manage the National Health Service and to be a link between the Department of Health and the rest of the health service. The SHAs develop strategies, work to ensure high-quality performance, and help to build capacity in the health service.

Sustainable procurement
Applying the principles of sustainable development to procurement. See Part [2C] for more information.

State Aid
European rules based on Article 87 of the EC Treaty. They generally prohibit any ‘aid’ granted by a ‘Member State’ which distorts or threatens to distort competition, where this affects trade between Member States. For more information, please see (for example) http://ec.europa.eu/comm/competition/state_aid/overview/index_en.cfm

TUPE
The Transfer of Undertakings (Protection of Employment) Regulations 2006. Please see Part 3 for more details.

Ultra Vires
Outside the legal powers of an organisation. Organisations can only act within the powers that they have and therefore anything which is done outside those powers (ultra vires) can generally be challenged.
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Forum for the Future

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The Guild
Leicester CAN
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Northamptonshire County Council
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