

North East Improvement and Efficiency Partnership
Targeted Recruitment and Training (TRT)

TOOLKIT



Procurement: The Legal Framework

North East Improvement and Efficiency Partnership

Targeted Recruitment and Training (TRT)

Toolkit

Resource 2b

Procurement

The Legal Framework for UK Public Bodies

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1. Introduction

This document is part of a Toolkit that will help Local Authorities in NE England and other public bodies in NE England and other English Regions deliver sustainable development by using their procurement of works and services. The Toolkit will help ensure that suppliers maximise the recruitment and training of local people – especially those that are disadvantaged in the labour market - in construction and end-use employment. This employment may be direct or through the engagement of small and medium-sized enterprises (SMEs) that will generate and sustain local jobs.

The Toolkit is divided into three Resources, and the second of these is divided into two parts:

Resource 1- Opportunities for Action is an introduction to targeted recruitment and training (TRT) and targeted supply-chain opportunities;

Resource 2A – Procurement: Step by Step is a guide to using public procurement to achieve TRT and supply-chain opportunities;

Resource 2B – Procurement: The Legal Framework for UK Public Bodies (this document) provides more detailed information on relevant legal and policy matters.

Resource 3 – Planning and Development Control provides legal, policy and good practice information for the use of Planning Obligations to secure TRT and supply-chain opportunities.

Readers of this document should also refer to Resource 1 and Resource 2A.

Much of the existing practice in the inclusion of social requirements in procurement has related to the construction sector. However, all of the matters considered in relation to construction can be applied to activity in other economic sectors.

Whilst every effort has been made to ensure the accuracy of this Toolkit at the time of its compilation, legal advice should be taken before action is taken or refrained from in specific cases.

2. UK Legal Parameters for Public Bodies

The ability of public bodies and contracting authorities to pursue wide environmental and social requirements in their purchases depends on their policies. Whether or not they can adopt appropriate policies in turn depends on whether or not they have the powers to do so (or whether or not there are any limitations on their powers which inhibit them from so doing). Contracting authorities such as local authorities and non departmental public bodies (NDPBs) have their powers for the most part set out in statute. Government departments have a mixture of powers derived from statute and the royal prerogative (for the relevant Secretary of State).

In considering whether a contracting authority is able to promote social policy initiatives, the following issues have to be addressed:

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

Government departments generally have full scope to pursue such policies as their relevant Secretary of State chooses to adopt in support of sustainable procurement - the main concern here is the apparent lack of a clear and consistent process for adopting policies that are then implemented in procurement practice. Two major parts of the public sector are subject to a statutory framework that is worth considering in a little more detail given their respective combined purchasing strengths: local government (see Section 4 below) and the NHS (see Section 5.3 below).

3. Financial Obligations of UK Public Bodies

Definition of Value for Money	Definition of Best Value
... the optimum combination of whole-life costs and quality (or fitness for purpose) to meet the user's requirement. (OGC 1998)	... make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to combination of economy, efficiency and effectiveness (LGA 1999 s.3(1))

Value for money (VfM) is one of the core requirements of good procurement set down by Government. 'Best value' introduces an additional dynamic for local authorities: their procurement is expected to produce 'continuous improvement'.

The means of achieving VfM or best value is based on three pre-procurement decisions:

- the purchaser's objectives, including social and economic regeneration;
- how best to procure the requirements so as to achieve the 'objectives'; and then
- what should be included in the specification.

The question of whether a tender provides VfM or Best Value has to be judged against the requirements in the specification. So if community benefits are included in the contract notices and the specification because this is part of the 'quality' the purchaser is seeking, then they should form a part of the tender appraisal, even if this is given a low weighting. Conversely, if community benefit requirements are not included in the contract notice and the specification they should not form any part of the contract award process.

However, this quite straightforward position needs to be considered in the context of the HM Treasury 'Green Book' on Value for Money and a 2007 HM Treasury 'Simple guide to value for money and sustainability'. This includes the following statement:

*Government policy is that value for money must be assessed over the whole lifetime of the project ... estimating costs and benefits to society as a whole, not simply those directly relevant to the purchaser – e.g. environmental impact – as set out in the Treasury's Green Book.*¹

This statement demonstrates that VfM is not just judged on the specification as it benefits the procurer, but also the benefits to the wider society. How is this reconciled with the principle that public bodies can only take action where this is within their powers and has a policy basis?

There is an internal inconsistency in the way the Green Book addresses the treatment of social issues that cannot be overlooked. For example, there is the general statement that "*wider social and environmental costs and benefits for which there is no market price also need to be brought into*

¹ HM Treasury. Simple guide to value for money and sustainability. March 2007. http://www.hm-treasury.gov.uk/data_greenbook_money_sustainability.htm

assessment” (paragraph 5.12), which contrasts with Annex 2 of the Green Book which shows clearly a direction towards inference of a price – reflecting an instinct to reduce as much as possible to pounds and pence. But many of the factors behind well-being and other facets of social value cannot be reduced to a sum. Community engagement and capacity-building, developing relationship and trust, can transform the social fabric of a neighbourhood, leading in due course to savings on the public purse but more importantly better use of resources as a whole. It is understood that the Treasury is taking a keen interest in developing its tools for social benefit measurement in its revision of the Green Book. To date there is little evidence that this work is being plugged directly into its public procurement policy guidance.

In effect, ‘contributions to sustainable development’ can form part of the ‘whole life costing’² that should underpin all value for money and best value judgements. However, sustainable development is different in nature and perhaps the best way forward is to understand sustainable development policy as a sufficient basis for any public body to include relevant social and economic matters in the whole procurement process and, most particularly, in the specification for a contract. This makes it much easier to take into account in their procurement and in the award of the contract.

As long as award criteria are linked to the subject matter of the contract there is a broad array of criteria that contracting authorities can use when awarding a contract on the basis of the most economically advantageous tender (MEAT). These criteria include (but are not limited to) such issues as quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, and delivery date and period.³

It is clear from the criteria set out in the Public Contracts Regulations 2006 that whole life costing is core to many of the criteria envisaged by the EU procurement rules – especially the inclusion of running costs and cost effectiveness. The whole life costing exercise can be an excellent way of assessing and recognising the value (monetary or otherwise) of various elements of a contract. In addition to this, the Consolidated Directive, which forms the basis of the EU procurement rules (see Section 6 below), explicitly demonstrates the European Commission’s intention that procurement can take account of social and environmental factors. Given the guidance of the Green Book and other sources, it is clear that social issues can legitimately be taken into account in the tender and award processes.

The question of affordability needs to be distinguished from the question of value for money, (or best value for a local authority).

2 Whole life costing is defined variously as:

- “Whole life cost takes into account the cost over time, including capital, maintenance, management, operating and disposal costs” - Annex 4.4 to Managing Public Money, page 4, available from: http://www.hm-treasury.gov.uk/d/mpm_annex4.4.pdf; or
- “The full cost to an organisation of a solution to a requirement over the full period that the requirement will exist. Whole life costs will take into account running costs such as energy usage, maintenance requirements, staff training needs, and disposal costs such as recycling, as well as the initial purchase price. The life span of the product will also need to be considered” - Social Issues in Purchasing, Office of Government Commerce, 2006, page 49, available from : http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf

3 Regulation 30(2) of the Public Contracts Regulations 2006

Affordability relates to the budget that is available. Concerns are typically based on little knowledge about what the inclusion of specific community benefit requirements will add to the cost of a development – if anything - so they may represent a fear of additional cost rather than the actual additional costs. The best way to establish the cost is to include the community benefits in the core requirements of the contract and ask bidders to provide a net price for delivering this after deducting grants and other resources that can obtain to help fund these elements.

The questions of affordability and VfM (or best value) are therefore different. However, both are best addressed through an early consideration of what community benefit requirements should be included in order to meet the purchaser's policy objectives – including social and economic development policies and service improvement policies – and how these can be designed so they fit with the resources available.

4. Legal Considerations for Local Authorities

Local authorities may use only those powers conferred upon them by statute, and may use those powers only for the purposes contemplated by the statute. In England and Wales they have an express power to support sustainability under the Local Government Act 2000 (commonly known as the “well-being” power).⁴

4.1 Well-being power

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

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

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

- the whole or any part of a local authority’s area; or
- all or any persons resident or present in a local authority’s area”⁵

In other words, there is an express power for a local authority to do anything that they consider likely to achieve the economic, social and/or environmental well-being of their area or principally for the benefit of a locality or person within their area. These are the limbs of sustainability as promulgated by the Government.

The power under Section 2(1) of the Local Government Act 2000 does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made). The redefinition of “non-commercial” considerations described below means that local authorities should be able to take into account social considerations, especially those relating to employment, in their procurements.

4.2 Non-commercial considerations

Under Part II of the Local Government Act 1988 (“LGA 1988”) it is the duty of every local authority to exercise relevant “functions” without reference to non-commercial matters and to avoid the inclusion of non-commercial matters within its contract documentation. These non-commercial matters are listed in section 17(5) of LGA 1988 and include:

⁴ Under Part 3 Local Government in Scotland Act 2003 a Scottish local authority has an express power to do anything that it considers likely to achieve the well being of the whole or any part of its area and/or all or some of the persons within that area.

⁵ s2(2) Local Government Act 2000

- the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces;⁶
- whether the terms on which contractors contract with their sub-contractors constitute, in the case of contracts with individuals, contracts for the provision by them as self-employed persons of their services only;⁷ and
- financial support or lack of financial support by contractors for any institution to or from which the authority gives or withholds support.⁸

Relevant “functions” include, in relation to a proposed public supply or works contract with the authority:

- the inclusion of persons in or the exclusion of persons from the group of persons from whom tenders are invited;
- accepting or not accepting the submission of tenders for the contract;
- selecting the person with whom to enter into the contract; or
- giving or withholding approval for, or selecting or nominating, persons to be sub-contractors for the purposes of the contract.

The Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001⁹ (the “2001 Order”) ameliorated the impact of Part II LGA 1988 in England by providing that the terms and conditions of employment by contractors of their workers, etc, as specified in section 17(5)(a), are not to be non-commercial matters:

“to the extent that a best value authority considers it necessary or expedient, in order to permit or facilitate compliance with the requirements of Part I of the 1999 Act (Best Value), to exercise the functions regulated by that section in relation to its public supply or works contracts with reference to those matters”.

The matters listed in section 17(5) not dealt with by the 2001 Order remain non-commercial considerations that must be disregarded by local authorities in their procurement exercises.

4.3 Proper purposes?

This question was raised in *R v Lewisham L.B.C., ex p Shell UK*¹⁰. In that case the local authority had adopted a policy of refusing to purchase the products of Shell UK where equivalent products were available elsewhere on reasonable terms. The reason for the policy was Shell UK’s membership of a multi-national group of companies with trading links with South Africa (although Shell UK itself did not trade in South Africa). The Court indicated that the policy

6 s17(5)(a) LGA 1988

7 s17(5)(b) LGA 1988

8 s17(5)(g) LGA 1988

9 SI 909/2001

10 [1998] 1 All ER 938

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

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

4.4 Best Value

There is much misapprehension about what Best Value is about in the context of local authorities. As indicated above Under Section 3(1) Local Government Act 1999:

“a best value authority [which covers local authorities and a variety of “special purpose” authorities] must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness”.

In order to show that a local authority has considered properly its policy on the use of social considerations in its procurement operations, it is recommended that express reference is made to such practices and how they enable a local authority to perform its functions in a way which is intended to achieve continuous improvement in their delivery. Such a statement can be used, for example, in the context of an authority’s commitment to alleviating unemployment and promoting the development especially of small and medium-sized enterprises in its area. It is easy to show this in relation to the well-being power which is an express remit for pursuing sustainability. Establishing the right ‘audit trail’ is not difficult for local authorities, but it is essential that the trail be shown.

4.5 Summary of the Local Authority Position

In summary, therefore:

- local authorities now have a sustainability function encapsulated in their “well-being” power under Part I Local Government Act 2000;
- local authorities can include training, employment and workforce matters within the requirements of their procurement;
- local authorities should audit trail their policies for social issues/community benefits in their community strategies, best value plans and procurement strategies;
- local authorities do need to consider whether the social issue in question is covered by any of

- the other ‘non-commercial considerations’ still applying; and
- local authorities should use the best practice procurement processes applying to all public bodies (including explicit mention of social requirements in OJEU notices).

It should be further noted that local authorities are ‘contracting authorities’ for the purposes of the EU procurement rules (see Section 6 below).

5. Legal and Policy Considerations for Public Bodies

5.1 UK Guidance on Social Issues in Purchasing

In February 2006 the Office for Government Commerce issued its guidance *Social Issues in Purchasing*,¹¹ designed to further understanding of how such issues can be legitimately incorporated into the purchasing cycle. This is relevant for all public bodies, including Government Departments and agencies, and reinforces good practice in procurement emphasising that:

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

Social Issues in Purchasing covers a wide range of social issues, including support for SMEs, and sets out actions for incorporating social issues into procurement at the different stages of a purchasing process: strategic context; business case development; specification; selection; tender evaluation; and contract management. Noteworthy is the acceptance that:

*“A core requirement can be defined as an essential part of the contract, and this should be reflected both in the specifications and the conditions of the contract ... In this context it is possible for a social issue to be a core requirement provided it is central to the subject of a procurement and consistent with the rules ... ”*¹²

So a critical question to be answered in any procurement is when a social objective like TRT or securing opportunities for SMEs is an essential element of a contract. This is for the purchaser to decide on the basis of their powers and policies.

There have been subtle changes to this policy position. OGC has since updated their position with *Buy and Make a Difference: How to Address Social Issues in Public Procurement*.¹³ This guide is intended to complement the more detailed *Social Issues in Purchasing*. OGC's intention was to help procurers understand how to incorporate relevant social issues in their procurement activities, through this more practical guide which demonstrates, with examples, how social issues can be reflected through each stage of the procurement process.

A policy note on social issues in procurement directed at central Government departments was published in 2009 and is available on the OGC website¹⁴ as part of the OGC's 'Policy Principles' collection, and includes the following statement:

11 Social Issues in Purchasing, Office of Government Commerce, February 2006
12 Social Issues in Purchasing, Office of Government Commerce, February 2006, page 15
13 Buy and Make a Difference: How to Address Social Issues in Public Procurement, OGC 2008
14 http://www.ogc.gov.uk/documents/Policy_principles_-_Social_Issues.pdf

The Government's policy on social issues in procurement is that central Government departments and their agencies should consider and incorporate social issues in their procurements where they are relevant and proportionate to the subject matter of the contract. Social issues need to be addressed in a way that is consistent with value for money policy, procurement law, and the EU Treaty principles".¹⁵

The policy note then sets out what departments should do. In relation to community benefits the following could be relevant:

- think about social issues early in the procurement: there is more scope in the business plan, and when defining needs and the specification;
- where a particular social issue is assessed as being 'relevant to the subject matter of the individual procurement' take appropriate action at each stage of the procurement process;
- ensure that contracting opportunities are accessible to all types of business including SMEs;
- be clear about the social benefits and weigh these up against any additional costs to ensure the most effective way of achieving the social goals and value for money.¹⁶

This makes clear that it is for the purchasing department to identify relevant social issues on a case by case basis and take these into account during business planning stage and in the 'what to buy' and 'how to buy' decisions. The policy statement includes a consideration of if the requirements are 'proportionate', but this is presumably for the purchaser to decide.

5.2 Promoting Skills through Procurement

In 2009 the OGC and Department for Innovation, Universities and Skills (DIUS) issued guidance on promoting skills through public procurement¹⁷ that includes the following statement:

"With an annual expenditure of around £175 billion, public procurement provides a unique opportunity to maintain strong investment in the nation's skills base and, by doing so, to improve the quality and value for money of the goods and services that are delivered to the public sector.

This is an important responsibility for the public sector. Procurers need to consider the benefits to the wider society when deciding to spend taxpayers' money buying goods and services."¹⁸

In December 2009 the OGC published Information Note 14/09 as part of its Procurement Policy note series. This makes the Government's commitment to achieving its social goals through procurement explicit:

"... the Government announced in the PBR that it has now prioritised the key policy agendas

15 Ibid, page 1.

16 Ibid

17 Promoting Skills through public procurement, OGC 2009, available at www.ogc.gov.uk/documents/Promoting_skills_through_public_procurement.pdf.

18 Ibid page 4

to be promoted through public procurement. Supporting apprenticeships, skills and the fight against youth unemployment is one of the three 'Policy through Procurement' priorities on which Departments, Agencies and NDPBs should now focus.¹⁹

This not only establishes the current social priority for all Government Departments and agencies, but also the principle that a Department or agency can pursue its social goals and policies through its procurement.

In these policy notes the Government is recommending that skills and training requirements should be included as contract conditions rather than as part of the subject of the contract. So they are 'secondary requirements' that should not be taken into account in the award of the contract. The guidance is that the requirements – that can be set out in the specification so that bidders are aware of them when pricing their tenders - must:

- relate to the performance of the contract;
- be proportionate; and
- be consistent with value for money principles.²⁰

There is no guidance given on how the above can be met. However, in relation to 'proportionate' it might be noted that the contract conditions that are used suggests that up to 5% of the employees or employee-hours should be delivered by an employee on a formal apprenticeship programme. This is well below what is being achieved on some existing construction contracts, but the difference could be made up with employees/hours provided by trainees that are not on apprenticeship programmes.

For local authorities and other bodies that are named in the Part II of the Local Government Act 1988 the approach being put forward in these OGC policy notes may not be sufficient to set aside the non-commercial considerations issues (see 3.2 above) since 'best value' is most safely judged against the subject matter of the contract and the proposed apprenticeship requirements would not be part of this.

5.3 NHS Organisations

The extent to which other social requirements – like supply-chain actions – can be included in the procurement processes of Government Departments and agencies will depend on the particular purchase, and the priorities of the relevant department. In 2004 an examination was done of the powers of NHS bodies to include social inclusion matters in their procurements. This illustrates an approach that could be taken for other Departments and agencies.

¹⁹ Procurement Policy Note – Further guidance on embedding skills training and apprenticeships in public procurement, OGC, December 2009, available at www.ogc.gov.uk/documents/PPN_14_09_Guidance_on_embedding_skills_and_apprenticeships_in_public_procurement.pdf.

²⁰ Ibid Section 9.

The powers of many NHS bodies (especially health authorities) derive from the powers given to the Health Secretary who has power:

- to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by the National Health Service Act 2006; and
- to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to the discharge of such a duty.²¹

The duties include a “primary” duty of promoting in England:

“a comprehensive health service designed to secure improvement in:

- *the physical and mental health of the people of England, and*
- *the prevention, diagnosis and treatment of illness.*²²

*and for that purpose to provide or secure the effective provision of services in accordance with the National Health Service Act 2006.”*²³

The powers of the Health Secretary are delegated within the Department of Health to Executive Agencies like the NHS Purchasing and Supply Agency (NHS PASA) and NHS Estates, and outside the Department of Health to Strategic Health Authorities (SHAs).

5.3.1 Strategic Health Authorities

The SHAs act as a link between the Department of Health and the NHS bodies within the SHAs’ areas, and manage the NHS on a local level. The functions of the SHAs are prescribed by regulations made by the Secretary of State and, in general terms, include:

- developing plans for improving health services in their area;
- making sure local health services are of a high quality and are performing well;
- increasing the capacity of local health services so that more services can be provided;
- making sure that national priorities are integrated into local health service plans.²⁴

An SHA must exercise any functions delegated to it by the Secretary of State for the benefit of its area or to secure the effective provision of services by Primary Care Trusts (PCTs) and NHS trusts for which it is the appropriate SHA.²⁵

The SHAs’ functions and powers appear to permit the use of contracting to achieve TRT opportunities, especially for people recovering from illness or at risk of illness because of their unemployment or poverty.

21 Section 2 National Health Service Act 2006

22 s1(1) National Health Service Act 2006

23 s1(2) National Health Service Act 2006

24 <http://www.nhs.uk/NHSEngland/aboutnhs/Pages/Authoritiesandtrusts.aspx#q07>

25 Regulation 3(5) of the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administrative Arrangements) (England) Regulations 2002

5.3.2 Primary Care Trusts

PCTs are similarly granted their powers and functions by regulations by the Secretary of State, and have equally wide powers to promote sustainability in their procurements. PCTs control 80% of the NHS budget and, as local organisations; they are often best placed to understand the needs of the communities they serve.

5.3.3 NHS Trusts

NHS Trusts are established under statutory instrument for specific purposes linked to the provision and management of hospitals or other establishments or facilities.

An NHS Foundation Trust is “a public benefit corporation which is authorised ... to provide goods and services for the purposes of the health service in England”.²⁶ Foundation Trusts have been given much more financial and operational freedom than other NHS Trusts and have come to represent the government’s commitment to de-centralising the control of public services. They remain within the NHS and its performance inspection system.

5.3.4 NHS Purchasing and Supply Agency

NHS PASA is an executive agency of the Department of Health, so has the powers and functions of the Department, albeit with a particular remit given to it. Its key tasks are to:

- provide strategic guidance on procurement to the NHS where procurement is taking place at a regional or local level;
- provide practical guidance, education and training to those involved in procurement throughout the NHS;
- promote creativity from suppliers and encourage small and medium-sized enterprises (SMEs) to do business with the NHS;
- promote sustainable development within the NHS and its supply chain to reduce the negative environmental and social impacts of procurement decisions and increase the positive ones;
- encourage the introduction of beneficial, innovative products and technologies into the NHS;
- support the national priorities of the NHS.²⁷

As one of NHS PASA’s core functions is the promotion of sustainable development within the NHS and its supply chain, it is clear that social issues in procurement are at the heart of what the agency hopes to achieve. The sustainable development pages of the NHS PASA website provide invaluable guidance and advice to NHS trusts and others.²⁸

26 Section 30(1) National Health Service Act 2006

27 See <http://www.pasa.nhs.uk/PASAWeb/NHSprocurement/AboutNHSPASA/LandingPage.htm>

28 <http://www.pasa.nhs.uk/PASAWeb/NHSprocurement/Sustainabledevelopment/>

5.4 Other non departmental public bodies (NDPBs)

The scope for other NDPBs to promote environmental and social requirements will depend on their particular legal frameworks: this is very straightforward for organisations engaged in regeneration such as housing action trusts and regional development agencies. It will require specific attention for each organisation involved. Many NDPBs have broadly framed ancillary or subsidiary powers to their main functions. It is the policies they adopt which will therefore be of critical importance in setting the scope for procuring sustainability in its widest context.

6 The EU Policy and Legal Framework

6.1 Introduction to the EU Procurement Framework

Much of the legislation governing the use of competitive processes by public authorities in their procurement derives from European Union law, which is based on the fundamental principles of:

- Equal treatment and non-discrimination: giving everyone the same chance to win the contract irrespective of their nationality or whether they are familiar to the contracting authority or not;
- Transparency: stating requirements and award criteria up front and sticking to them;
- Proportionality: setting requirements with reference to the needs of the contract in question;
- Mutual Recognition: giving equal validity to qualifications and technical standards of other Member States, where appropriate.

These principles are intended to remove barriers to trade between the Member States and create a free internal market within the EU by facilitating contractors from all over the EU to bid for the same public contracts. These aims are balanced increasingly with other objectives including the protection of the environment, combating social exclusion and deprivation, providing opportunities for SMEs and consumer protection.

The EU public procurement legal framework consists of:

- certain provisions of the Community Treaties, most importantly Articles 28 (free movement of goods), 43 (freedom of establishment) and 49 (freedom to provide services) of the EC Treaty; and
- EU procurement directives which regulate award procedures with regard to contracts above a certain value. These are implemented by way of statutory instrument laying down regulations governing the procurement of works, goods and services. In particular, Directive 2004/18/EC, often referred to as the 'Consolidated Directive'²⁹ because it replaced three separate directives on works, supplies and services, was implemented in England and Wales by the Public Contracts Regulations 2006.

The EU procurement rules operate principally at three levels:

- requirements for the advertising across the European Union of contracts for works, goods and services (this is done by placing a contract notice in the Official Journal of the European Union);
- the encouragement of the use of technical standards and approvals which are of application across the EU or the recognition of technical standards and approvals in force in another

²⁹ Directive 2004/18/ EC of the European Parliament and of the Council of 31st March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

- Member State where these are of a similar standard to those in force in the UK; and
- requirements for objective and open criteria for evaluating tenders and selecting contractors.

The EU procurement rules cover a wide range of bodies and contracts. ‘Contracting authorities’, the term used in the rules, includes central government departments, local authorities and NDPBs, but also ‘bodies governed by public law’, a term which covers organisations established to meet needs in the general interest, not having an industrial or commercial character, and which are either:

- financed wholly or mainly by another contracting authority;
- subject to management supervision by another contracting authority; or
- more than half the board of directors or members of which is appointed for another contracting authority.

The rules cover all contracts over specified thresholds³⁰ except for contracts for ‘Part B’ services, which includes such things as legal services, educational services, and social services. Contracts for Part B services should still, however, be let in a manner which is transparent, fair, and does not disadvantage bidders from other EU Member States. Case law has indicated that this will generally require a need to advertise, albeit that the full EU procurement process need not be undertaken. Contracts for Part B services are also still subject to some elements of the Regulations including, for example, a need to publish a contract award notice in the OJEU where the contract is over the financial threshold for services contracts.

6.2 Consolidated Directive

As stated in the OGC’s guidance “*Social Issues in Purchasing*”, the Consolidated Directive “*makes explicit the scope to take social and environmental issues into account at the relevant phases of the procurement process*”. The Consolidated Directive says much more on the subject of social and environmental considerations than its preceding directives, both in its non-binding but influential recitals and its articles.

Recital 1 of the Consolidated Directive states:

“This Directive is based on Court of Justice case-law, in particular case-law on award

³⁰ From January 2010, for the purposes of most contracting authorities, the thresholds for EU procurement purposes are set at:

- Supplies: £156,442 (€193,000)
- Services: £156,442 (€193,000)
- Works: £3,927,260 (€4,845,000)

The thresholds are different for certain contracting authorities listed in the Public Contracts Regulations 2006 at Schedule 1 – these contracting authorities include central Government departments. See <http://www.ogc.gov.uk> for more information.

criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with [Treaty Obligations]”.

There are recitals in support of sheltered workshops, environmental requirements including eco-labels in specifications and the involvement of small and medium-sized undertakings in the public contracts procurement market. Most specifically in the context of TRT, Recital 33 states:

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

In Recital 46 there is the following acknowledgement:

“In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs - defined in the specifications of the contract - of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.”

Most specifically in the context of encouraging SMEs, Recital 32 states:

“In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.”

Also useful in the context of market engagement at pre-procurement stage is Recital 8, which states:

“Before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided, however, that such advice does not have the effect of precluding competition”

Article 26 of the Consolidated Directive has this express provision:

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

This is translated in the Public Contracts Regulations 2006 by Regulation 39 which states:

(1) A contracting authority may stipulate conditions relating to the performance of a public contract, provided that those conditions are compatible with Community law and are indicated in:

- (a) the contract notice and the contract documents; or*
- (b) the contract documents.*

(2) The conditions referred to in paragraph (1) may, in particular, include social and environmental considerations.”

This section provides the European framework, but clearly the guidance available, such as the OGC’s *Social Issues in Purchasing*, remains relevant and should be applied in the context of the UK.

6.3 Maximising community benefits within the EU procurement framework

6.3.1 Thresholds and aggregation

The full extent of the EU procurement rules only applies if the total value of a contract is over the relevant threshold. The value of a contract is usually calculated by estimating the total amount that will be paid over the duration of the contract or for four years if the contract is for more than four years or is open-ended.

Contracts need to be combined (‘aggregated’) with other contracts where they are:

- part of a ‘single requirement’ for those services (i.e. a requirement for services at a particular time or in a particular location); or
- part of a series of contracts forming a ‘requirement over a period’ for those services.

The aggregation rules therefore need to be considered for contracts that are below the relevant threshold. If the combined value of aggregated contracts is over the threshold, **each** contract must be procured under the EU procurement rules. However, they do not need to be procured

together, which means that the contracting authority can still enter into a series of smaller contracts, even though it must follow the full EU procurement rules for each contract.

6.3.2 Contracts for Part B services and contracts under threshold

The EU procurement rules divide contracts for services into two categories, known as ‘Part A’ and ‘Part B’. Contracts for Part A services, where they are above the financial threshold (see below), will be subject to the full EU procurement rules. Contracts for Part B services are not subject to the full extent of the EU procurement rules.³¹

6.3.3 Advertising contracts

Whether or not a contract must be awarded in accordance with the full EU procurement rules apply, the EU Treaty principles of openness and transparency will always apply. This means that contracting authorities should make sure that all interested parties have the opportunity to find out about the contract opportunities that are available. Though there is no explicit obligation to advertise for contracts that are not subject to EU procurement rules, advertising remains the clearest way to demonstrate openness and transparency.

When choosing to advertise a contract outside of the OJEU (either when a contract is not subject to the full EU procurement rules, or in addition to advertising in the OJEU when the contract is subject to the rules), contracting authorities can advertise in a range of ways and places, for example:

- in the relevant trade press;
- on their own website: many contracting authorities’ websites include a section dedicated to contracting opportunities;
- on a ‘portal’ website: there are national and regional portal websites listing opportunities, such as supply2.gov.uk.

Case law has extended the obligation to be transparent and objective into a need for contracting authorities to make a judgement about whether the contract is ‘likely to be of interest’ to potential suppliers based in other parts of the EU and, if so, to advertise accordingly. Contracting authorities need to consider the likely interest in a contract on a case by case basis.

Any advertisement must contain sufficient information to enable a contractor to decide whether to bid.³² Advertising outside of the OJEU, regardless of whether or not the contract is subject to the full EU procurement rules, enables a larger number of potential bidders to be made aware

³¹ There are circumstances where some of the rules apply to Part B services. Some are only of importance to commissioners and are outside the scope of this guide, such as the requirement for contracting authorities to send every year a report on the contracts it has entered into to the Office of Government Commerce (OGC). Where the rules are relevant to TSOs they are covered further in the guide.

³² See the European Commission’s ‘Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives’, available from www.ec.europa.eu/internal_market/publicprocurement/key-docs_en.htm.

of the contract opportunity, and therefore increases competition. This is clearly of benefit to the contracting authority. But there is also a clear benefit for SMEs, who are better enabled to bid for contract opportunities that they might otherwise not have been made aware of.

6.3.4 Division of a contract into lots

Contracting authorities have considerable flexibility over how they package contracts, as long as they do not artificially break up larger contracts to avoid the EU procurement rules. There appears to be a growing trend to package contracts into larger and larger units, with the intention of achieving economies of scale and saving on transaction costs. However, it is possible for a contracting authority to procure the contract as a series of 'lots'. These are separate contracts to deliver a part of what is being procured - for example, where a contracting authority is procuring responsive maintenance services for two or more areas. The contracting authority must indicate whether it is prepared to let a contract for one or more parts of its whole requirement separately from the other parts - i.e. whether bidders can bid for one lot, a number of lots or the whole procurement. Bids for each lot can then be evaluated separately. Dividing a contract into a number of lots in this way can be effective in encouraging smaller contractors to bid.

6.3.5 Small contracts that form part of a larger project ('small lots')

A contracting authority is not obliged to follow the full EU procurement rules for individual contracts where:

- the total value of **all** the 'small lots' contracts is less than 20 per cent of a total requirement for services which are being tendered under the EU procurement rules at the same time
- the estimated value of **each** of those contracts is less than £64,846.³³

This is a concession in the EU procurement rules intended to allow contracting authorities to encourage SMEs by giving them greater access to these contracts. When the small lots rule is used the contract(s) for the remaining 80 per cent of the value of the services required still need to be tendered and awarded under the EU procurement rules, and the EU Treaty principles apply to contracts using this exemption in the same way as they do to any other contract.

Contracting authorities can also choose to establish framework arrangements. The term 'framework' or 'framework agreement' is generally used to describe an agreement with one or more suppliers that establishes the general terms on which contracts are awarded over a period. A framework agreement will set the terms and price for any individual contracts (often referred to as 'call-offs') awarded, but will not commit the public body to making any purchases. Framework agreements are used extensively by buying clubs (often also described as 'central purchasing bodies'), where a group of contracting authorities uses the same procurement exercise and then the same framework, which can have one or more suppliers. If there are multiple suppliers, these are often known as lists of 'preferred suppliers'.

Within the public sector, framework agreements are often used with a view to achieving savings. By their very nature there is an inherent risk that SMEs will be excluded from framework procurements, because frameworks are often designed with economies of scale in mind. Alternatively, participating in a multi-supplier framework agreement can still be a way for SMEs to get involved in delivering public services. Some public bodies have set up framework agreements with a range of suppliers or service providers. The contracting authority can choose to let individual contracts under the framework to different providers on the basis of contract size – for example, by dividing the framework into lots (see above) which are differentiated by size. In this way, an SME that has secured a place on the framework can be awarded a contract of an appropriate size for its business. Using framework agreements like this can be a positive way to encourage SME involvement in procurement.

6.3.6 Making flexible use of various EU procurement procedures

Contracting authorities have a number of different procedures open to them when entering into their procurement. Four are perhaps considered ‘standard’:

- **Open procedure:** The contract is advertised. Any potential bidder can express an interest, ask for the contract documents and bid. The contracting authority then evaluates all the bids it receives;
- **Restricted procedure:** The contract is advertised, and a ‘prequalification’ stage is used to eliminate bidders. The contracting authority then evaluates the bids that prequalify. Once bids have been received in the open and restricted procedures, the contracting authority’s dealings with bidders are limited to ‘clarifying and supplementing’ bids;
- **Negotiated procedure:** Similar to the open and restricted procedures, but with the significant difference that the contracting authority can carry out post-bid negotiations with selected bidders. There are only limited situations in which the negotiated procedure can be used;
- **Competitive dialogue:** A procedure for complex procurements which involves one or more stages of comparing the technical solutions proposed by bidders to arrive at the best and most economically advantageous solution to meet the contracting authority’s requirements. It is available only in specific circumstances, being where the contract is ‘particularly complex’, and the contracting authority cannot objectively define either:
 - the technical means of delivering their requirements; or
 - the financial or legal make up of the project.

The constructive use of these different procedures can, in and of itself, enable contracting authorities to appeal to the broadest possible range of bidders. Use of the negotiated and competitive dialogue procedures (in appropriate circumstances) can enable contracting authorities to discover the best possible solution to a need that is available from the marketplace, rather than specifying the outputs at the start of a procurement. This can lead to more innovative solutions to particular needs.

6.3.7 The Remedies Directive

The EU Remedies Directive³⁴ has recently been implemented in England and Wales through the Public Contracts (Amendment) Regulations 2009, which amend the Public Contracts Regulations 2006.

The changes strengthen the legal review procedures that are available for breaches of the laws governing the award of public contracts, and increase the range of remedies available. The changes include, amongst other things:

- the automatic suspension of a contract award procedure whenever legal proceedings are started in respect of a contract award decision;
- changes to the standstill period such that a new obligation is imposed to release the reasons for the award decision at the start of standstill, rather than upon request (as was previously the case);
- a new obligation to allow extra time for tenderers to receive the standstill notice in situations where the notice is sent using non-electronic means;
- a new UK-specific obligation for authorities to notify participants of their elimination from a procurement exercise, which makes the previously ambiguous and arguably implied notification obligations in the Regulations clearer and explicit.³⁵

6.4 UK and EU Case Law

There have been some important cases concerning social clauses in public contracts which have had a bearing on the Consolidated Directive and which continue to develop the shape of the law as it is interpreted by the courts. These are summarised in the table below.

Not all the cases are easy to reconcile with each other or with current European Commission guidance but they do establish some important principles that are relevant to the inclusion of supply-chain and other social matters in procurement by contracting authorities, including:

- social and environmental requirements can be included in a procurement if they comply with the requirements of the EU procurement rules and general EU law, including mention in a OJEU contract notice. Environmental (and by implication) local economy requirements that address a policy objective of the purchaser are permissible: they do not need to provide an economic benefit to the purchaser;
- it is possible to include SME-friendly requirements in public procurement provided that the drafting and the process does not disadvantage non-local bidders, for example by requiring them to have local market knowledge, or a local base, or use local material.

³⁴ Council Directive 2007/66/EC

³⁵ Previously, there had been ambiguity about whether the EU Directives and the 2006 Regulations required contracting authorities to notify participants when they are eliminated from a procurement exercise before the point at which the contract award decision is made.

- It is wise not to use terms such as “local” in a procurement in connection with use of labour or sub-contractor, and it would probably be unlawful to do so because this could disadvantage non-local bidders; and
- all requirements must be capable of measurement and verification.

To date, few legal procurement challenges have reached the UK courts, so there is very little domestic case law to guide contracting authorities on the use of social clauses. The cases in the following table (several of which come from Northern Ireland), however, make some relevant points which should be kept in mind.

Table 1 Brief Guide to Relevant UK and European Procurement Case Law

Case Name	Case Reference	Key Points to Remember
Beentjes	Gebroeders Beentjes B.V. v The State (Netherlands) (C31/87)	A contract condition that the Contractor must employ long-term unemployed persons can be compatible with the rules, so long as general EU Treaty principles are adhered to.
Nord-Pas-de-Calais Region	Commission v the French Republic (C225/98)	A 'local labour' award criterion can be applied as an 'additional' criterion where the MEAT assessment of bids on a purely economic basis has revealed "two or more economically equivalent tenders". NB: This case should be treated with caution.
Finnish Buses	Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v (1) Helsingin Kaupunki (2) HKL-Bussiliikenne (2002) (C-513/99)	Contracting authorities are entitled to include environmental (and, by implication, social) considerations in their award criteria. These need not be purely economic in nature. They need to: be linked to the subject matter of the contract; not confer an unrestricted freedom of choice on the authority; be expressly mentioned in the contract documents or tender notice; and comply with all the fundamental principles of community law, in particular the principle of non-discrimination.
EVN	(1) EVN AG (2) Wienstrom GMBH v Republic of Austria (2003) (C-448/01)	The accuracy of the information sought from tenderers in relation to environmental (and, by implication, social) requirements must be capable of being verified. Award criteria that are not linked to the subject matter of the contract are not permissible.
Insalud	Contse SA v Insalud (Now Ingesa) (2005) (C-234/03)	A pre-qualification requirement for a contractor to have premises within a particular geographical area was held to be discriminatory and unjustified.
De Pont de Nemours Italiana and Laboratori Bruneau	Du Pont de Nemours Italiana SpA v Unità Sanitaria Locale No. 2 Di Carrara [1991] 3 CMLR 25 Laboratori Bruneau Srl v Unità Sanitaria Locale RM/24 De Monterotondo [1991] 1 CMLR 707	It was discriminatory to require bidders to obtain a set portion of their supplies from a specified region.
Commission v Italy	EC Commission v Italy [1991] 2 CMLR 115	It was discriminatory to require contractors be chosen from only companies in which all or a majority share of share capital was in public ownership.

Case Name	Case Reference	Key Points to Remember
Brent v Risk Management Partners	Brent London Borough Council (appellant) v Risk Management Partners (respondent) and (1) London Authorities Mutual Limited (2) Harrow London Borough Council (Interested parties) [2009] EWCA Civ 490	Participation in a mutual insurance company was not within the powers given to a local authority under section 2 of the Local Government Act 2000 (the “well-being” powers). This has been seen by some as a signal that local authorities’ well-being powers will not be considered by the courts to be as wide-ranging as they are drafted.
Federal Security Services	Federal Security Services Limited (plaintiff) v Northern Ireland Court Service (defendant) & Resource (NI) Limited (intervening party) [2009] NIQB 15	Tendering instructions and award criteria should be certain and unambiguous.
Henry Brothers	Henry Brothers (Magherafelt) Limited & Ors v Department of Education for Northern Ireland [2008] NIQB 105	At least at the primary consideration stage, it is not possible to omit criteria relating to price. Unless the cost of the relevant goods or services was fixed, it would be very difficult to reach any objective determination of what was the “most economically advantageous tender”, without an indication of price in relation to which non-price elements can be taken into account.
McLaughlin & Harvey	McLaughlin & Harvey Limited v Department of Finance and Personnel [2008] NIQB 91	Where sub-criteria are used as part of the assessment of tenders, these must be disclosed to bidders.
Letting International	Letting International Limited v Newham London Borough Council [2008] EWHC 1583 (QB)	The duty on a contracting authority to act in a transparent way include the need to sufficiently disclose contract award criteria and weightings in advance, including setting out detailed criteria and sub-criteria where these are used.