

**The Scope for Using Social Clauses
in UK Public Procurement
to Benefit the UK Manufacturing Sector**

A Report for the Manufacturing Forum

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Whilst every effort has been made to ensure the accuracy of the contents of this report at the time of completion (May 2006), advice should be taken before action is implemented or refrained from in specific cases.

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EXECUTIVE SUMMARY

The Brief - Can social clauses be used in procurement contracts to benefit UK manufacturing?

- The value of public procurement stands at approximately £125 billion each year, with manufacturing accounting for about a third of this total.
- Interest in the incorporation of social or community benefit clauses in public procurement has grown considerably over recent years. An increasing number of local authorities, health authorities and others are developing – or are interested in developing – new approaches to public procurement that include the use of clauses to achieve social and environmental benefits.
- The Manufacturing Forum – which is looking into the public procurement area – commissioned a research project to examine the scope for using social clauses to help benefit UK manufacturing, for example through helping industry to improve its skills base. The specification for this research aimed to ensure a balanced approach that would assess both the benefits and costs of social clauses.

Chapter 1 - Introduction

- Social requirements provide a method of including social and economic matters into contracts for the supply of goods, services or works that do not conventionally have these requirements as defined or measured outcomes.
- The inclusion of social requirements in public contracts in a way that is compatible with good practice and the EU procurement framework provides a widely available and enforceable means through which public bodies can:
 - implement legislation and Government guidance;
 - achieve specific duties and policy goals.
- The impact on cost and affordability is best determined on a case-by-case basis. Where the social requirements are part of the subject of the contract they may form part of the Value for Money assessment.

Chapter 2 – Legal and Policy Framework

- The potential to use social requirements in public procurement is set out in the following documents:
 - The European Commission Interpretative Communications and Single Procurement Directive
 - The National Procurement Strategy for Local Government
 - The OGC’s Note on Social Issues in Purchasing
 - A Joseph Rowntree Foundation Study
- A key determining factor in the use of social requirements in the procurement life cycle is the identification of appropriate powers and policies within the contracting authority.
- There are Government precedents for introducing social issues into the procurement. These include:
 - The Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) and two-tier workforce matters;
 - Equal Opportunities legislation;
 - Fair Employment and Affirmative Action in Northern Ireland;
 - Common Minimum Standards for Construction;
 - Core labour standards under International Labour Organisation (ILO) Conventions.
- A key strand of public procurement policy relates to the opportunities provided for small and medium sized enterprises (SMEs).

Chapter 3 – Introducing the Case Studies

- To meet the timetable case studies were limited to those that could be accessed by the research team from their existing contacts.
- The case studies cover the following areas:
 - manufacturing: catalytic traps and low sulphur fuels (Transport for London);
 - construction training (Glasgow, Stirling, Manchester);
 - other training (Transport for London and Dundee);
 - community involvement in design (Manchester);
 - fresh food procurement (East Ayrshire);
 - recruitment of long-term unemployed (Denmark and Germany);
 - opportunities for SMEs (Haringey).

Chapter 4 – Key Findings from the Case Studies

- The case studies suggest that purchasers are including social requirements in their procurement as part of an established policy response that relates to their responsibilities. Each case has a different history and mix of ‘drivers’, but some shared elements are:
 - ensuring effective delivery of legislative requirements;
 - implementing core values and policies;
 - implementing a new social policy;
 - achieving better quality and ensuring Best Value;
 - addressing labour market issues.
- Three different approaches to arriving at the social requirements in the contracts were identified:
 - utilising external expertise to set requirements;
 - utilising internal expertise to set requirements;
 - not setting measurable requirements.
- In relation to affordability, four patterns have emerged from the case studies:
 - cost savings – social requirements are introduced and savings obtained;
 - a cost-neutral approach –the provider obtains grants from other sources to cover any additional costs;
 - budget-uplift approach - extra costs are covered by the purchaser, perhaps by obtaining grants from other sources;
 - the requirements were not clearly defined and no additional costs were identified.
- Specialist knowledge was important where the social / environmental requirements were not within the core knowledge of the procuring body. This could be provided by other public agencies, potential suppliers or consultants.
- In relation to cost-benefit analysis the case studies provide examples where:
 - reduced costs and improved social outcomes were obtained (e.g. Haringey);
 - higher costs were incurred but higher social value obtained (e.g. East Ayrshire);
 - initial higher costs for higher environmental benefits reduced over time (TfL);
 - additional social outcomes were obtained at no higher cost to the purchaser (e.g. Stirling, Glasgow, Denmark);

- no added cost but no added social value (e.g. Manchester construction training);
 - the higher costs for the social benefits were not considered VfM (Germany).
- The inclusion of social requirements in public sector contracts creates niche markets. There was no apparent shortage of bidders in these niche markets apart from the TfL (lowering emissions) example where action to develop the supply side was taken.
- Key lessons for purchasers are:
 - consult potential suppliers and other specialists before drafting the social requirements;
 - set clear, measurable and realistic targets;
 - Identify additional resources (e.g. from other public bodies) to cover additional costs arising from the social requirements;
 - Provide facilitation to help providers innovate.
 - Key lessons for providers are:
 - work with partner contractors or develop in-house skills in order to develop the capacity to deliver the new requirements;
 - develop relationships with other public bodies that can help with delivery and resources;
 - make sure that management and supervisory staff understand the social requirements;
 - when recruiting people from disadvantaged communities select the most motivated and provide good mentoring and support.

Chapter 5 – Application of Social Requirements to Manufactured Supplies

- There appears to be little action in the manufacturing sector in terms of incorporating social requirements into procurement. There should be no reason why social requirements should be less applicable to manufacturing than to works or services contracts, but there may be some resistance in the private sector to some forms of social clauses in supply of goods contracts (especially where they are seen to intervene in markets rather than assist opening them up). Evidence from TfL and the private sector shows that social requirements can be included, and they can be monitored and verified.
- Public sector procurement can be used to stimulate innovation in UK manufacturers that can result in increased national and international competitiveness (e.g. TfL / Eminox).
- The barriers to the use of public sector procurement to achieve social and environmental innovations are not related to the

relevant legal frameworks – many bodies could do more within their powers and policies provided that they followed good procurement procedures – but are to do with motivation and affordability. The critical difference between the public and some parts of the private sector in this regard is motivation and affordability.

- Should Government choose to adopt a comprehensive sustainability agenda for public procurement, such as the recommendations of the Sustainable Procurement Task Force, it would be of benefit for them to do so taking into account a process of negotiation with key stakeholders.

Chapter 6 – Conclusions

- There is greater and better use of social requirements where procurement officers are able to access clear guidance, there are good models to follow, and benchmarks are provided by authoritative ‘champions’.
- Purchasers wishing to innovate in the use of social requirements will need to develop new relationships within or between organisations, a new allocation of resources, and a different weighting of award criteria.
- ‘Gearing-up’ for the changing market is also a key requirement for companies that want to enter or retain a share of the changing market.
- When social requirements are first used purchasers should consider whether there are sufficient firms able to supply the ‘new market’ or whether steps need to be taken to encourage the market to respond.
- For both purchasers and suppliers a key need is that existing management and procurement / tendering teams become aware of the possibility that social requirements can be addressed in the procurement life-cycle, and that there is good practice that can be followed in relation to setting or responding to these requirements.
- Increased use of social requirements in the Government market place will create increased opportunities for growth for firms that embrace the new requirements and ‘gear-up’ to deliver them. This will be at the cost of market-share for firms that resist the new requirements and fail to adjust to the changing market.

CHAPTER 1 INTRODUCTION

Key Points

- Social requirements provide a method of including social and economic matters into contracts for the supply of goods, services or works that do not conventionally have these requirements as defined or measured outcomes.
- The Manufacturing Forum has commissioned this project to examine the scope for using social requirements to help benefit UK manufacturing, construction, transport and other business.
- The inclusion of social requirements in public contracts in a way that is compatible with good practice and the EU procurement framework provides a widely available and enforceable means through which public bodies can:
 - implement legislation and Government guidance;
 - achieve specific duties and policy goals.
- The impact on cost and affordability is best determined on a case-by-case basis. Where the social requirements are part of the subject of the contract they may form part of the Value for Money assessment.

1.1 THE BRIEF

This report has been produced in response to a brief developed by the Department of Trade and Industry (DTI) on behalf of the Manufacturing Forum, a body jointly led by industry and Government bringing together key stakeholders to support the UK manufacturing sector. The specification required an examination of:

... the scope for using clauses in UK public procurement contracts which reflect wider social, economic and environmental policy aims and will improve the performance of UK manufacturing ...

The research was to investigate the costs and benefits of using such 'social clauses' and identify where other approaches (e.g. policy and legislative interventions and fiscal/monetary incentives) are more effective.

Analysis of the specification suggests that there are two concerns that need to be addressed:

- the effectiveness of social clauses as a means of achieving the social, economic and environmental policy goals of the public procurement body – relative to other means e.g. legislation;
- the implications of the inclusion of social clauses in public contracts for UK companies, with particular reference to those engaged in the manufacturing industries.

The first of these is principally of concern to the purchaser and Government spending watchdogs like the Treasury, the Office of Government Commerce and individual Departments. The second is principally of concern to companies and organisations representing company interests, including the Manufacturing Forum, that have expressed particular interest in the positive impacts that social clauses could have on innovation and competitiveness.

An element of the brief that should be clarified is the reference to 'clauses'. This could be interpreted narrowly to refer to the inclusion of 'social clauses' as contract conditions. With the agreement of the Forum the brief has been interpreted more widely: to consider how social issues can be incorporated in each stage of the procurement life cycle. However, to avoid confusion with the conventional use of the term 'clause' to refer to a contract condition, the general term 'social requirement' will be used to refer to the text that introduces social issues into any stage of the procurement life cycle.

The relatively tight timetable for this project conditioned the approach to the work, especially in the selection of the case studies, since it was necessary to use the existing contacts of the research team to obtain access within the timetable. There was not the time to undertake a wider mapping of current activity and then select suitable case studies, an approach that may have identified more examples appertaining to the procurement of goods, as well as services and works. In this context, the case studies represent an over-representation of works and services contracts and an under-representation of manufacturing. However, many of the lessons from the case studies can be used to identify the scope for using social clauses in contracts relating to manufactured supplies, and additional research on this issue has been done with (for example) the NHS Purchasing and Supply Agency (PASA).

The commission also asked for examples from other EU countries. This has been delivered through two case studies, but the report has not sought to review the approach to achieving 'wider social policy aims' from procurement activity across the range of EU countries.

Immediately prior to the finalisation of this report the Sustainable Procurement Task Force launched its 'Procuring the Future' Action Plan in an effort to help position the UK as an EU leader on sustainable procurement by 2009 (12th June 2006). 'Procuring the Future' provides considerable direction and evidence which complements the content of this report; for example, the evidence provided in conjunction with how the UK measures against other European countries. This report seeks to explore some of the areas less developed in 'Procuring the Future'. It is noteworthy that the Action Plan makes the following commendation (pages 18-19):

"Since the Task Force's remit was sustainable (not just environmental) procurement, we urge that public sector organisations begin to understand and address social issues in their supply chains.

The Task Force urges Government to build on recent activity such as that led by DTI's Manufacturing Forum on the development of social clauses. The long awaited OGC guidance on Social Issues in Procurement is very welcome. But the Task Force recommends that government makes resources available so that public procurers can be made aware of emerging issues in their supply chains and the actions required to address them.

For example, the Task Force believes that the public sector should urgently examine its supply chain for uniforms, clothing and other textiles, which is a category of spend representing a major source of social concern. UK could usefully work with and learn from the approach being developed in the Netherlands where social issues in textiles supply chains are being addressed. Relevant government departments will consider the results of a test case on the Netherlands' approach to the procurement of military uniforms (which makes specific reference to specific International Labour Organisations (ILO) conventions)."

1.2 SUSTAINABLE PROCUREMENT

The reference in the brief to “*social, economic and environmental policy aims*” alludes to the Government’s over-arching policy of sustainable development.¹ This includes four elements:

- social progress which recognises the needs of everyone;
- effective protection of the environment;
- the prudent use of natural resources;
- the maintenance of high and stable levels of economic growth and employment.

In relation to public procurement in the UK it would appear that most attention has been given to the environmental elements of sustainable development – the second and third of the bullet points above. For example, the Treasury and the then DETR published a note on *Environmental Issues in Purchasing* in the late 1990s. This was updated by a *Joint Note on Environmental Issues in Purchasing* by the OGC and DEFRA in October 2003 (the ‘Joint Note’).

The latter includes the first specific guidance on social issues in procurement (in Chapter 9 of the Joint Note). Although this includes the statement “... *there will be cases where social issues can legitimately be taken into account*”, it is nevertheless cautious:

the scope to take social issues into account during the procurement process will be more limited than that for environmental issues because, by virtue of their nature, they are less likely to be clearly related to the subject of the contract

frequently there will be other more efficient and effective means of achieving social outcomes than through their consideration in the procurement process.

From the above it would be reasonable to infer that the OGC and DEFRA could see fewer opportunities where it would be appropriate to take social issues – as distinct from environmental issues – into account in the public procurement process. This view has been further addressed by the publication of the OGC’s guidance note *Social Issues in Purchasing*, in which the legal and policy framework for incorporating social issues in the procurement process is set out. There are some strong parallels between the introduction of environmental issues into procurement and the introduction of social issues:

¹ *A Better Quality of Life – A Strategy for Sustainable Development for the UK*. CM4345. May 1999.

- the requirements are innovative, requiring new knowledge from the procurement team and making additional demands on budgets;
- some impacts from the requirements may accrue to the purchasing body (e.g. in cost reductions), but often the beneficiaries are in the community served by the procuring agency rather than the agency itself e.g. low emissions from buses and reduced unemployment and associated deprivation;²
- there is a lack of clarity about how social policy aims can be adopted and then incorporated into the core requirements of a procurement.

Because of the dearth of information in relation to social issues in purchasing, relative to environmental issues, it has been agreed that this study will focus on the social and economic elements of ‘sustainable development’. However, material related to environmental issues has been used where appropriate.

1.3 TERMINOLOGY

The discussion of the word ‘clause’ illustrates the way that a lack of a shared terminology is a barrier to discourse in emerging fields of activity. This has been a problem with the inclusion of social issues in public procurement.

In their *Social Issues in Purchasing* note³ (the ‘Social Note’) the OGC has not defined social issues, but their list includes:

- core labour standards;
- disability, gender and race equality;
- employment and training issues;
- fair trade;
- issues relating to small and medium sized enterprises (SMEs), including social enterprises, black and ethnic minority enterprises, women- and disabled-owned businesses;
- workforce skills.

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*”. From this and the earlier OGC/DEFRA Joint Note some useful shared terminology can be identified:

- Sustainable procurement – this seeks to achieve all elements of sustainable development through the procurement process;
- Environmental issues in procurement – seeks to achieve the environmental aspects of sustainable development through procurement;

² In this case the benefit to the procuring entity is through the achievement of its policies – a part of the ‘quality and fitness for purpose’ that it wishes to obtain from the procurement.

³ *Social Issues in Purchasing* OGC. London. February 2006. – Available from www.ogc.gov.uk -only available via the web.

- Social issues in procurement – seeks to achieve the social elements of sustainable development through procurement, including those that will be obtained by directly impacting on the local economy (e.g. support for SMEs);

However, this terminology is still not adequate in helping to understand the dynamics of seeking to introduce social issues in procurement. It misses out a critical element, which is innovation.

For example, the procurement of training by a Learning and Skills Council (say from a college or private training provider) may be a 'social issue' but is not contentious because it is part of what a LSC conventionally purchases. On the other hand the purchase of the same training outcomes by a local authority as part of a housing renewal programme in a regeneration area would be considered an example of seeking 'social issues in procurement', and could be contentious – both within and outside of the local authority.

So a key distinguishing feature of social issues and social requirements is innovation. The following definition may be useful:

Social requirements provide a method of including social and economic matters into contracts for the supply of goods, services or works that do not conventionally have these requirements as defined or measured outcomes.

1.4 THE PROBLEM OF SOCIAL CLAUSES

The problem of including social requirements in the procurement process can be understood as a product of two common-place elements: innovation and centre-periphery tensions. The latter is related to the distribution of power and decision-making both within and between organisations.

In relation to innovation the problems can be disaggregated into:

- those related to pursuit of new requirements e.g. disabled access to public buildings or new environmental standards; and/or
- those related to the context in which the social requirements are being introduced e.g. vocational training being included in a works contract.

However, this is not a sufficient explanation for the resistance to some social issue innovations. A second explanation is centre-periphery tensions. These can operate between central and local procurement bodies, and at each level within procurement bodies. They can involve:

- resistance by agency or departmental procurers to social requirements that are being promoted from the centre of the organisation;
- resistance by the centre to social requirements that procurers at the periphery want to include.

In the UK tensions around innovation arise because - as will be seen below - the procurement framework delegates the interpretation and implementation of procurement

policy to the periphery – albeit that ‘the periphery’ may be a centralised purchasing department of a Government department, or the purchasing officers of a single department within a local authority that is a long way removed from the heart of Government. Policy and good practice information (e.g. in relation to the Gateway process) aims to ensure compliance with core values and objectives, but given the range and number of procuring entities this is not easily enforced from the centre.

1.5 THE ROLE OF SOCIAL REQUIREMENTS IN CONTRACTS

1.5.1 A Flexible Approach

Legitimation of the use of social requirements in public procurement may lead to the question of when they are best used. What are the benefits of and constraints on using social requirements in procurement, relative to other means of achieving social policy objectives?

Table 1.1 below helps to identify the relative benefits of ‘social clauses’:

- they are available to a wide range of public bodies as a means of assisting in the delivery of their social, economic and environmental duties and priorities;
- they are flexible: they can be designed for specific contracts in specific contexts without the need for the complex rules that can be a feature of legislative and fiscal approaches;
- they are more capable of being enforced than other means that are available to many public sector purchasers;
- they can provide durability in a context where public sector contracts may last for many years (e.g. PFI and facilities management) but organisations, personnel, and tax and grant regimes change regularly.

It should be noted that social clauses can be used in tandem with other approaches e.g.:

- to include measurable requirements in a specific contract as a means of implementing legislation or Government guidance;
- to include requirements for outcomes that could largely be paid for by the provider accessing grants from other bodies.

As will be seen from the case studies, social clauses are often used by purchasers to translate broad policy or legislative commitments into specific deliverables for a contract. The policy commitments may relate to disabled access, reducing harmful vehicle emissions, promoting SMEs or reducing social exclusion, and the legislative requirements could include equal opportunities e.g. the requirements of the Race Relations (Amendment) Act 2000.

It should not be assumed that each public body will have the same attitude or policy in relation to the range of matters which are covered by social clauses. Some social issues can be identified as being related to opening up access to markets e.g. encouragement of SMEs; training and recruitment requirements; disability, gender and race equality; whereas others could be said to be based upon shaping and intervening in markets, e.g. Fair Trade; adherence to the ILO Conventions and the two-tier workforce code. There seems to be a range of ‘comfort levels’ in the public sector in relation to these different areas, possibly

requiring a clearer policy lead to be taken by the Government, through an identified sponsor department (consonant with recommendations of the Sustainable Procurement Task Force). A key issue which has to be decided is the extent to which the description of 'Leadership' in Sustainable Procurement by the Sustainable Procurement Task Force is actually mandated as a matter of Government policy (reference: pages 24-25, "Procuring the Future").

TABLE 1.1: TYPOLOGY OF APPROACHES TO ACHIEVING SOCIAL BENEFITS (IN THE PUBLIC SECTOR)

Approach	Who Can Use	Constraints
Legislation	Mainly Central and Devolved Government	Wide application makes it difficult to enforce. Difficult to determine appropriate outcomes and monitor these on a case-by-case basis.
Social clauses in contracts	Any purchaser that has appropriate powers and policies	Availability of appropriate powers and policies. Business case assessment, especially affordability. Lack of experience in use by purchaser and provider.
Tax incentives	Mainly HM Treasury	Very limited availability: most purchasers cannot implement this. Durability: contracts may last many years but tax regimes change annually.
Guidance	Any public body	Only applies to procurements within their influence. Impact depends on weight given by subsidiary bodies/officers.
Grants	Any public body with appropriate powers and funds.	EU State Aid rules limit the sums that can be given to private companies. Durability: contracts may last many years but grant regimes change frequently.
Voluntary Codes and Agreements	Any public body	Not enforceable. Monitoring information is also voluntary so outcome may not be known. Inappropriate use can lead to poor procurement practice.
Corporate social responsibility	Any public body can promote this	Provider determines priorities, actions and targets. Not enforceable.

1.5.2 More Red Tape?

One objective within the business community and the DTI is to reduce regulation that is felt to add unnecessary cost to business activity and erect additional barriers for new start businesses. What is the position of social requirements in relation to this activity?

In principle, social requirements that are 'core considerations' should not be seen as 'regulation'. While legislation and regulation are used to impose requirements that Government consider to be for the common good, they are rarely specific to individual contract circumstances. Regulations that are designed to set out specific requirements for a range of different circumstances necessarily become long and complex, and a severe barrier to entry for new businesses. Social requirements that are included in the procurement can be designed for their particular context. They are what the client needs in exchange for the public resources they are proposing to expend through the contract: a part of their value for money (VFM). Because they are contract-specific they can be made more appropriate in scope and scale. This remains the case even where the social requirement is used to supplement legislation and regulation.

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

1.5.3 Compliance with Good Procurement Practice

An additional benefit of social clauses - relative to other approaches that are available to a wide range of public bodies like grants, voluntary agreements and corporate social responsibility - is that they can fit well with good procurement practice. They offer:

- consistency and transparency: the opportunity for the purchaser to identify need and convert this into a specification that each bidder has to deliver;
- the opportunity to focus on measurable outputs rather than the delivery process;
- an approach that can be the subject of comparative evaluation which will help secure value for money;
- the opportunity to include monitoring information as a part of the specification, which will enable the purchaser to ensure that they receive the service they pay for.

Voluntary agreements and commitments to corporate social responsibility very much depend on the goodwill of particular contractors and the business drivers which make such arrangements imperative for them. Grants, of course, tend to support the core activities of the recipient organisation, which may or may not coincide with the objectives of the procuring authority. If purchasers are encouraged to go further by linking their procurement with grants, voluntary agreements and commitments to corporate social responsibility,⁴ a legitimate concern is that the award process could become contaminated as there is less of a level playing field for the selection of bidders which have a track record in delivering social

⁴ As, for example in the OGC/DEFRA *Joint Note on Environmental Issues in Purchasing* (October 2003) Page 16, or the ODPM *National Procurement Strategy for Local Government* (2003) pp49 & 50.

benefits, or which make informal promises to deliver social outcomes when these are not part of the subject of the contract – the ‘core requirements’.

1.5.4 State Aid

It has been proposed that the social policy objectives of the public sector could be better achieved by the provision of grants to the private sector contractors.⁵ In practice it is difficult to see how this would provide any certainty to the purchasers since, to avoid contaminating the procurement process, the desire for social benefits and the availability of a grant to achieve these should not be raised until after the award of the contract, and at that point the provider could simply refuse the additional requirement and the grant.

However, a second key issue is that grants to private organisations are tightly circumscribed by the EU rules on State aid to companies. This could limit the ability to provide grants to the successful bidder, especially since the capacity of a firm to accept grants depends on what they have received already. So different bidders would have different capacities when it came to receiving public sector grants.

So an additional advantage of contracts that contain social requirements is that bidders can be paid for the delivery of these requirements. Payments under commercial contracts which are competitively tendered are not treated as grants for State aid purposes.

1.5.5 Strengths and Weaknesses of Social Requirements

From the above it can be seen that the inclusion of social requirements in public contracts – in a way that is compatible with good practice and the EU procurement framework – provides a widely available and enforceable means through which a wide range of public bodies can:

- implement legislation and Government guidance;
- achieve their specific duties and policy goals;
- comply with good procurement practice.

One weakness in the use of social requirements to achieve social policy objectives arises from the lack of experience, both within the client body and within the marketplace. This will be examined later in the report but is likely to fit within the general description of ‘problems of innovation’. As with most innovation the lack of experience can only be overcome through increased use, and then the analysis of good practice.

A second perceived weakness in the use of social clauses is the impact on cost and affordability. Again, this will be examined later in the report but it is important to note that this is a matter that is best determined on a case-by-case basis – through the Gateway process or the Business Case appraisal.

The following broad observation is made by the Sustainable Procurement Task Force in “Procuring the Future” (page 35):

⁵ OGC *Social Issues in Purchasing* 2006. Page 7

Using public procurement may not always be the most cost-effective policy solution, though the Task Force did not identify any areas in which this was obviously the case. However, there is a need to focus on outcome delivery – the public sector needs to be able to articulate and measure these outcomes in order to demonstrate value for money.

CHAPTER 2 LEGAL AND POLICY FRAMEWORK

Key Points

- The potential to use social requirements in public procurement is set out in the following documents:
 - The European Commission Interpretative Communications and Single Procurement Directive
 - The National Procurement Strategy for Local Government
 - The OGC's Note on Social Issues in Purchasing
 - A Joseph Rowntree Foundation Study
- A key determining factor in the use of social requirements in the procurement life cycle is the identification of appropriate powers and policies within the contracting authority.
- There are Government precedents for introducing social issues into the procurement. These include:
 - The Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) and two-tier workforce matters;
 - Equal Opportunities legislation;
 - Fair Employment and Affirmative Action in Northern Ireland;
 - Common Minimum Standards for Construction;
 - Core labour standards under International Labour Organisation (ILO) Conventions.
- A key strand of public procurement policy relates to the opportunities provided for small and medium sized enterprises (SMEs).

2.1 REVIEW OF RECENT POLICY DEVELOPMENTS

2.1.1 A Containment Approach?

One reason why the scope to use social requirements in public procurement in the UK has been little developed is because the Government has not found it easy to develop a clear and consistent approach.

The Government's policy at the turn of the century is perhaps characterised by the following response to a House of Commons Education and Employment Committee Report recommending that:

*... the Government should issue guidance to local authorities encouraging them to incorporate local labour clauses in contracts and setting out how this might most effectively be achieved.*⁶

The Government's response was:

*Local authorities' scope to use local labour clauses is limited by the Local Government Act 1988 as well as by the EC Treaty and the European Directives for Public Procurement ... To bring local labour considerations into the contracting process may well conflict with these wider requirements...*⁷

This statement is not inaccurate but it did not answer the request being made, which was to issue guidance on the scope that did exist. The Government could for example have issued advice that the use of local labour would risk challenge because it could disadvantage non-local contractors who would be assumed to have less knowledge of the local labour market, but that requirements to recruit trainees, long-term unemployed people or other target communities would not be discriminatory, provided that it was accepted that the contractor was not obliged to recruit these locally. Increased local recruitment could be encouraged by targeted pre-recruitment training and the provision of job-matching services.

As will be seen below there were already significant examples of the Government introducing social issues into procurement at the time this advice was given, so one way of interpreting the above response is that the Government was uneasy about the use of social issues in procurement to proliferate beyond circumstances that they could directly control and where the Government were not aware of specific evidence of the proportionate benefits of this approach.

However, the first years of the twenty-first century have seen a considerable change in attitude to the incorporation of social requirements into public procurement. This can be seen as a response to a more supportive policy being driven by the 'social agenda' in Europe, although the constraints imposed by the Local Government Act 1988 also decreased as a result of the introduction of the local authority best value framework in the Local Government Act 1999.

2.1.2 The European Commission Interpretative Communication

In October 2001 the European Commission published an Interpretative Communication *on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement* (the 'Social Communication').⁸ This was three months after a similar document relating to environmental considerations.

This publication was announced as part of the Social Policy Agenda adopted by the European Council at Nice in December 2000 that is described as:

⁶ House of Commons Education & Employment Committee Fifth Special Report *Employability and Jobs: Is there a jobs gap?* The Stationery Office. London. April 2000.

⁷ Government's Response to the Fourth Report from the Committee Session 1999-2000 *Employability and Jobs: Is there a jobs gap?* Section 26. June 2000.

⁸ *Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement*, Commission of the European Communities. Brussels. COM(2001) 566 final.

*Part of an integrated European approach ... whose goal is economic and social renewal. It seeks in particular to provide a dynamic and positive interaction between economic, social and employment policies that mutually reinforce one another.*⁹

The above Social Communication followed shortly after a decision by the Commission to modify the public procurement directives (May 2000) where:

*Specific mention is made of the possibility to use contractual conditions regarding the execution of the contract that have as their goal the promotion of employment of disadvantaged or excluded persons, or the combating of unemployment.*¹⁰

This process resulted in the new single Directive that was brought into UK law from the 31st January 2006. This consolidated Directive includes a statement that contract performance conditions relating to social issues are compatible with the Directive provided that they are not discriminatory and are included in the contract notice and contract documents:

*(contract performance conditions) ... 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.*¹¹

It can be argued that the Social Communication fails to address a critical issue. It is clear that where a social requirement is merely a condition relating to the delivery of the contract then it should not be a consideration in the selection of the tender list and the award of the contract. Where a social requirement is not core to the procurement it perhaps may be taken into account as a consideration in choosing between two equal tenders at the award stage.¹² Based on case law the paper asserts:

*A criterion relating to the employment of long-term unemployed persons [is] not relevant either to the checking of a candidate's economic and financial suitability or of the candidate's technical knowledge and ability, or to the award criteria listed in the relevant directive.*¹³

However, this statement sits uneasily with earlier sections of the Social Communication that are based on the principle that:

*... any contracting authority is free, when defining the goods or services it intends to buy, to choose goods, services or works which correspond to its concerns as regards social policy ... provided that such choice does not result in restricted access to the contract ... to the detriment of tenderers from other Member States.*¹⁴

⁹ Ibid page 4

¹⁰ Ibid page 7.

¹¹ Article 33, Directive 2004/18

¹² Ibid page 15/16

¹³ Ibid

¹⁴ Ibid page 8

This section of the Social Communication continues by making clear that where the social requirements are part of the subject of the contract and have been included in the list of award criteria in contract notices, they may be used in the selection of the tenderers and the award of the contract:

If the contract requires specific know-how in the “social field”, specific experience may be used as a criterion as regards technical capability and knowledge in proving the suitability of the candidate¹⁵

Criteria involving social considerations may be used to determine the most economically advantageous tender where they provide an economic advantage for the contracting authority which is linked to the product or service which is the subject-matter of the contract¹⁶

The confusion between these two positions can be reconciled by clear differentiation between three situations:

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

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

2.1.3 The Joseph Rowntree Foundation (JRF) Study

The Joseph Rowntree Foundation is a charitable social research body that is highly active in addressing issues of poverty, social exclusion, social housing and regeneration. It began looking at the potential contribution that public procurement could make to social inclusion and the reduction in poverty through a scoping study commissioned in 1997. This was presented to the Cabinet Office in 1998, but no response was received.

It was assumed that the lack of action within Government was related to the conventional wisdom, at that time, that the inclusion of social requirements in public sector contracts conflicted with the UK policy on VfM and the EC Treaties and procurement Directives. However, the legal and policy basis for this position was not explicit, and JRF therefore

¹⁵ Ibid page 13

¹⁶ Ibid page 15

commissioned a more detailed study of the subject, and obtained the cooperation of officials from HM Treasury and the Office of Government Commerce.

The above study was published by The Policy Press at Bristol University in 2002 as *Achieving Community Benefits Through Contracts: law, policy and practice*.¹⁷ It was carried out by Mark Cook, a public sector commercial lawyer from Anthony Collins Solicitors and Richard Macfarlane, an 'action researcher' who had been working on relevant policy and delivery matters for 20 years and had undertaken the JRF scoping study.

The JRF study identified the potential and importance of incorporating the social requirements in the subject of the contract and then in the whole procurement life cycle, rather than merely as conditions relating to the execution of the contract. This took forward the position set out in the Commission's Social Communication, but also identified how local authorities could use a 2001 Order that eased constraints on the use of labour market issues in the award of contracts that are imposed by Section 17(5) of the Local Government Act 1988. Under the Order they could include labour force matters in their requirements where these are necessary to achieve 'best value'.

Achieving Community Benefits Through Contracts remains a core text on the use of social issues in procurement taking into account comments from the OGC and the Treasury Solicitors.

2.1.4 Scottish Executive Pilot Projects and the NAPP Network

Following the publication of the JRF research there were two important developments. First, the JRF research team established a network of local authorities and urban regeneration companies from England that were interested in implementing the 'new approach to public procurement' (NAPP) that had been identified in the research. This was in the context where there was no Government agency in England that appeared interested in piloting, promoting or utilising the approach.

The ten NAPP bodies jointly funded a programme of workshops based around legal analysis and draft legal documentation that was prepared by Anthony Collins Solicitors. The workshops were hosted by the DTI's Social Enterprise Unit. The NAPP network ran for 15 months and collectively funded the NAPP Toolkit – a summary of relevant legal and policy frameworks and model social requirements that the participants could adapt for use within their own authorities. The Toolkit was updated through a follow-up workshop in May 2005.

The NAPP work was taken forward through a number of sub-regional and single-city development programmes that have included the drafting of social requirements for a range of works contracts.

The second key development was the establishment of the Community Benefits in Procurement (CBIP) Pilot Programme by the Scottish Executive (now managed by the Scottish Procurement Directorate). This involved:

¹⁷ *Achieving Community Benefits Through Contracts: law, policy and practice* by Richard Macfarlane and Mark Cook. (ISBN 1 86134 424 4). The Policy Press. Available from Marston Book Services, PO Box 269, Abingdon, Oxon OX14 4YN Tel 01235 465500. Fax 01235 465556. E-mail direct.orders@marston.co.uk Price £13.95 + £2.75 p&p.

- a number of workshops based on the NAPP approach;
- the provision of a CBIP Toolkit that was based on the NAPP Toolkit;
- support with four case studies (three local authorities and one housing stock-transfer association) with the procurement process and social requirements agreed by the Executive.

Originally envisaged to be a two-year programme (2002-2004) the CBIP pilot programme has yet to be completed since key pilot projects have been slower than expected to complete the contracting process. The delays were not related to the CBIP element, but it has meant that the outcomes from the pilot programme have not been available. Three of the four pilots are included as case studies for this research.

Finally, it has been acknowledged that JRF work underpinned three pilots developed by the Welsh Procurement Initiative.

The NAPP and CBIP programmes, plus individual work with local authorities in England and the Welsh pilots, have resulted in the development of good practice in the use of social requirements in public procurement. However, development has been slow. There are several factors that may have contributed to this:

- the long gestation period for many procurements;
- the pressure on public officials arising from many new initiatives (e.g. arising from the Gershon review) and increased capital investment in the public sector;
- a low level of interest in the inclusion of social issues in procurement, especially by the 'professional gatekeepers' - procurement officers and their legal advisers;
- the lack of clear direction from Government Departments in England when compared with the initiative and leadership provided by DEFRA in relation to environmental matters.

2.1.5 The National Procurement Strategy for Local Government

An example of mixed messages being given is provided by the ODPM's *National Procurement Strategy for Local Government*.¹⁸ This includes a statement making it clear that councils have the power to seek social issues through their procurement:

*Under the Local Government Act 2000, councils are required to prepare a ... Community Strategy ... and have powers to promote the economic, social and environmental well-being of their communities. Provided that there is compliance with EC public procurement regulations and Best Value, councils can work with suppliers to realise 'community benefits' of this kind through their procurement activities.*¹⁹

¹⁸ *National Procurement Strategy for Local Government*, Office of the Deputy Prime Minister and the Local Government Association, 2003.

¹⁹ *Ibid.*, page 48

Local authorities were accordingly required to address the incorporation of community benefits into their procurement strategies.

However, this clear message is then confused by encouraging councils to:

*Invite bidders for partnerships to include in their offers optional, priced proposals relating to the delivery of specific community benefits (economic, social and environmental) that are relevant to the contract and that add value to the council's community plan. This might include employment, training and enterprise opportunities in the locality and local multiplier effects...*²⁰

This statement seems to envisage the use of social requirements as optional, secondary, matters rather than as core requirements. If they are optional presumably they do not form part of the selection and award procedures, neither are they a condition relating to the delivery of the contract. In relation to good procurement practice the optional requirements should not be introduced until after the award of the contract, in which case they have no role in the procurement life cycle or contract. They are presumably, therefore, unenforceable voluntary commitments.

This message from the ODPM is especially important because of their pivotal role in housing and urban regeneration, where social inclusion through targeted recruitment and training in local works and services contracts could make a key contribution to the holistic regeneration of the neighbourhoods where development is being undertaken.

2.1.6 The OGC's Social Issues in Purchasing Note²¹

This Social Note has been produced in response to a request from the Government's Sustainable Procurement Group. It still contains some encouragement to consider other ways of achieving social issues (as in the 2003 OGC/DEFRA Joint Note) but primarily sets out how social issues can be incorporated in each stage of the procurement life cycle. The approach recommended in the Social Note is incorporated below.

2.2 UK PROCUREMENT POLICY FRAMEWORKS

Appendix 1 includes a fuller text on the legal and policy issues that need to be considered if social requirements (as defined in 1.3 above) are to be included in public procurement. The key elements of this are set out below.

²⁰ Ibid., page 50.

²¹ *Social Issues in Purchasing*, Office of Government Commerce, February 2006.

2.2.1 The User Requirement

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

The Government's policy of achieving value for money – defined as the optimum combination of whole life cost and quality (fitness for purpose) to meet the user's requirement – applies to the award stage of the procurement process. In the context of its overall objectives a Department should decide what to buy and set the specification accordingly, and ensure that its requirement is subject to the normal public procurement expenditure tests of need, affordability and cost-effectiveness. It is at this earlier stage that there is most scope to consider social issues.²²

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

It is therefore for the individual procurement team to consider what social issues they wish to achieve through the procurement pursuant to the policy framework adopted by that authority: what social issues will help them achieve their objectives, including wider social policies (e.g. sustainable development, or for a local authority the delivery of a community strategy). It is this delegated responsibility that contributes to centre-periphery tensions around the inclusion of social requirements in the procurement process.

The above quotation also identifies the importance of considering social issues very early in the process of deciding what to buy. They should be subject to the same tests of need, affordability and cost-effectiveness as other elements of the procurement. This is where tensions around 'innovation' can be played out.

2.2.2 Core Requirements

Appendix 1 below sets out the legal framework for public procurement in the UK and makes clear that any social issue that is part of what is being purchased – the 'subject of the contract' - should be within the powers of the procuring entity to buy, and have policy support. The latter is necessary to avoid arbitrariness that would not be compatible with the requirements for *propriety* and *regularity*. They should also comply with the EU public procurement regulatory framework, which can usually be accommodated in the procurement procedure and contract documentation.²³ However, within these broad parameters there is nothing to prevent a relevant social issue being included in the basket of goods, services or works that the procuring entity decides to buy.

²² *Social Issues in Purchasing*. OGC, London, February 2006. Page 3

²³ See Appendix 1.

In relation to the OGC's Social Note the elements that form the 'subject of the contract' are described as the 'core requirements':

A core requirement can be defined as an essential part of the contract, and this should be reflected in the specifications and the conditions of contract. ... It is possible for a social issue to be a core requirement provided that it is central to the subject of a procurement...

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

2.2.3 Secondary or Additional Requirements

Social issues that a procurer wishes to see delivered but which are not part of the core requirements have been termed 'secondary' or 'additional' requirements.²⁴ These should not influence the award of the contract and therefore should not be included in the selection of bidders or the specification. However, they can be introduced as contract conditions provided that:

They ... [are] ... able to be met by whoever wins the tender, from the time at which the contract starts.²⁵

Circumstances where a procurer might choose to include social issues as secondary or additional matters include:

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

As will be seen in Appendix 1 the European case law and EU guidance is largely directed at the introduction of social issues as secondary or additional requirements i.e. as contract conditions. However, as the OGC's Social Note makes clear it is possible, and perhaps preferable, for social issues to be a core requirement.

²⁴ *Social Issues in Purchasing*. OGC, London, February 2006, page 15.

²⁵ *Ibid.*, page 28

2.2.4 Contract Award

The core/secondary decision has important implications for the assessment of value for money (VfM), which is the basis on which contract award decisions must be made. VfM is based on the core requirements alone. So if social issues are core requirements they can be given a weighting in the assessment of VfM, and in the award of the contract.

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

Secondary or additional requirements should not be a consideration in the award process.

2.2.5 Summary

As the above sections show, there is broad scope for public bodies to include social requirements at all stages of the procurement life cycle provided that this is within their powers and policies and there is relevance to what they are purchasing. This position is summarised in the flowchart below:

What is the organisation's power?



E.g. Has a local authority considered the interface between its well-being power and other relevant functions?



²⁶Has the organisation adopted a policy of incorporating social considerations into its procurements? How is this reflected in the business case for the project in practice? How is this reflected in the demonstration of value for money for the project?



E.g. If a local authority in England, does it consider that these matters facilitate and comply with its best value duty? Has a local authority reflected this in its best value performance plan and community strategy?



Is the organisation a contracting authority for EU procurement purposes? If yes, it must ensure it adheres to the points below.



Is the social clause mentioned in the contract notice, specifications and contract conditions? ECJ case law and the Commission require that tenderers must have all the facts concerning a project from the outset.



Does the social or environmental consideration require locally based products or relate to the way in which a tenderer must run its own organisation?



If yes, the consideration will be discriminatory or generally not enforceable.

²⁶ This stage could be the new "Gateway – 1 process" promoted in "Procuring the Future" (page 55)



Does the consideration require the recruitment of long-term unemployed persons or other social benefits defined without reference to locality, e.g. 'healthy food'?



If yes, following ECJ case law this is acceptable.



Does the procurement require the selection of the most economically advantageous tender?



If yes, of the award criteria chosen, each criterion must be linked to the subject matter of the contract or the way in which it is to be performed and should generate an economic advantage for the contracting authority.



Are secondary / additional criteria which do not relate to the core requirements of the contract to be used?



If yes, following EU case law, they can only be used in the event that two or more tenderers have proved economically equivalent.

2.3 IDENTIFYING RELEVANT POLICIES

From the above it can be seen that a key determining factor in the use of social requirements in the procurement life cycle is the existence of appropriate powers and policies within the procuring entity. This needs to be examined on a case-by-case basis. This is usefully illustrated by the following examples.

2.3.1 NHS Powers and Policies

The powers of NHS Bodies to engage in social and environmental issues in their procurements are set out in Appendix 1. However, up until 2004 a NHS body seeking to use these powers to include targeted recruitment and training (as an example of a social issue) in their procurement would have had to develop their own policy justification. The Department of Health's 2004 White Paper *Choosing Health: making healthy choice easier*²⁷ established

²⁷ *Choosing Health: making healthy choice easier*, Department of Health. London. November 2004.

the link between unemployment and social exclusion and ill health: between poverty and demands on NHS services.

*Work, and the rewards it brings ... leads to better health, particularly mental health. On the other hand being out of work leads to poorer health and a shorter life.*²⁸

*It is in all our interests to take forward action to support people into employment...*²⁹

Improvements in ... the skills of the workforce (and) the strength of the local economy ... contribute to the well-being and hence the health of local people.

*These are not just local authority priorities. From today they become priorities that the NHS shares.*³⁰

So *Choosing Health* provides the policy rationale that the NHS should use its resources to maximise the employment and training opportunities for people that are recovering from illness or at risk of illness due to poverty and social exclusion. However, to make its policy basis more explicit one Strategic Health Authority developed the following specific policy:

*The NHS is one of the country's major procurement agencies... If this purchasing power was used to achieve specific social aims in terms of regeneration as part of best value, then a huge impact on the health of communities could be achieved. Thus actions such as insisting that contractor's sign up to fair recruitment policies emphasising local employment, training of staff and ethnic employment targets, can make a radical impact on local disadvantaged communities.*³¹

This devolved policy clearly supplements the national strategy outlined in *Choosing Health* and provides an explicit policy basis for NHS bodies in northeast London including targeted recruitment and training requirements in their contracts. Clearly the policy of promoting local employment should be implemented in a non-discriminatory manner.

2.3.2 NHS Sustainable Development Policies

Both the NHS Purchasing and Supply Agency (PASA) and NHS Estates have adopted a policy of sustainable development. PASA has a vision statement that includes the following:

The Agency recognises that through its interactions with stakeholders, and by considering what it purchases and how it purchases, progress can be made towards achieving greater social inclusion and equity, as well as improving the health of the community it serves. Purchasing has direct social, environmental and economic impacts, and presents an ideal opportunity to reduce the risk of

²⁸ *Choosing Health*, Page 153.

²⁹ Ibid page 171

³⁰ Ibid page 204

³¹ North East London Strategic Health Authority *Draft Regeneration Strategy* December 2004. Page 4.

health inequalities which can come with a degraded environment, unemployment, poverty and social exclusion.

Sustainable development is a key objective within our corporate plan. Our vision and strategy supports the NHS Plan which recognises that good health is dependant upon social, environmental and economic factors.³²

From this it is clear that PASA will consider the social impact that arises from its procurement activities and liaise with contractors to improve their social performance e.g. in health and safety, payment of fair wages, working conditions and equal opportunities. There is also a recognition of the potential role of social enterprises to deliver both VfM and community benefits.

The Government's definition of sustainable development has also been used by NHS Estates, which has adopted a policy basis for implementing a sustainable development approach.³³ This is carried forward through specific proposals in a chapter on Design and Construction that notes the contribution that building work can have to the local economy:

Ways of maximising the benefits of construction for local communities include:

- *employing local people to work on site and providing them with training opportunities...;*
- *using local suppliers for non-specialist services.³⁴*

In this text it is noted that arrangements for achieving local employment and supply need to ensure the delivery of VfM and comply with public procurement rules. Clearly the policy of promoting local employment should be implemented in a non-discriminatory manner.

The sustainable development policies of PASA and NHS Estates provide a basis for taking action to achieve additional recruitment and training opportunities for people in disadvantaged communities. However, both agencies will have to ensure that such opportunities are delivered through procurement in a manner which is non-discriminatory and compliant with EU procurement law.

2.3.3 Local Authority Policies

As will be seen from Appendix 1, under section 2 of the Local Government Act 2000 a local authority in England has the express power to do anything it considers likely to achieve the economic, social and/or environmental well-being of its area or any locality or person within its area, except those things that it is prohibited from doing as a result of other legislation. There are some limitations to this (which will be examined later) that mean that a local authority in England must have a 'best value' justification for including workforce matters in a procurement contract, where 'best value' means to 'make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to combination of economy, efficiency and effectiveness'. Different arrangements apply in Scotland and Wales.

³² *Towards Sustainability: Report 2002/03* NHS Purchasing and Supply Agency 'Vision and Strategy'. page 1 <http://www.pasa.nhs.uk/sustainabledevelopment/2003/>

³³ *Sustainable Development in the NHS*, NHS Estates, HMSO, 2001

³⁴ *Ibid.*, section 6.456 – 6.47

There is still on the statute book a list of “non-commercial considerations” which a local authority may not take into account at all (see Appendix 1).

There are a number of ways in which a local authority can determine best value including reference to its policy statements including the Community Strategy, the Corporate Strategy and the Procurement Strategy. The following examples of internal policy statements that can provide a best value justification for including (in this case) targeted recruitment and training requirements in the local authority’s procurement are drawn from Leicester City Council (LCC):

- *The Council’s Corporate Plan 2003-2006 includes the following as one of nine priorities:*

Promote prosperity and new jobs.

- *The Leicester Community Strategy includes the following commitments:*
 - *Target the disadvantaged groups in the labour market to increase their employability prospects e.g. members of ethnic minority communities, the long-term unemployed, those without appropriate skills...;*
 - *Develop a city-wide approach to the intermediate labour market;*
 - *Develop a city-wide approach to employment and training in Leicester that involves the public, private, voluntary and community sectors...;*³⁵
- *The LCC Corporate Procurement Group have agreed a draft Procurement Strategy that includes the following text:*

Economic Sustainability

All major Procurement should recognise the impact on the social and economic well being of the City and the local environment. Wherever possible consideration shall be given to carrying out Procurement in such a way as to maximise the benefit to the local economy taking account the impact of the whole supply chain and where appropriate the promotion of community and social benefits.

These policy statements make clear the commitment of the Council to promoting prosperity and targeted job opportunities and taking other actions to achieve social and economic well-being. In this context the Council may take the view that ‘best value’ includes the achievement of these objectives, and that there is a best value justification for setting aside the ‘non-commercial considerations’ requirements of the Local Government Act 1988 in relation to jobs and training.

³⁵ Leicester Community Strategy 2003. Jobs and Regeneration.

2.4 SUBSIDIARITY

In principle and in practice the arrangements for public procurement in the UK are an example of subsidiarity - decision making on what to purchase and what represents VfM (or best value for a local authority) is delegated to the part of the system or organisation that is best able to assess what is needed and in what volumes, what resources are available, and how the contract is best managed. This is necessarily at the periphery rather than the centre of the public services system – although it may be at the centre of a peripheral part of the system e.g. a local authority or NHS Trust.

Under the prevailing arrangements it is for the purchasing body to consider how far its powers and policies support the procurement that incorporates social issues. As can be seen above there are Government-wide policies that can be used to support action (e.g. sustainable development) as well as more localised policies (e.g. local authority Community Strategies and Procurement Strategies). In this context the scope for public bodies to incorporate social issues in their procurement has perhaps been greater than most procurement practitioners have recognised.

2.5 GOVERNMENT PRECEDENTS

In 2.1 above the Government's policy on social issues in procurement was characterised as 'containment'. One reason for this was that the government was itself introducing social issues into the procurement life cycle in selected circumstances. As will be seen below, some of these are very invasive in relation to the operations of the private sector contractors and suppliers. This links back to the issue of centre-periphery tensions about the use of social requirements in procurement: who has the right to determine when and how social requirements should be included?

2.5.1 TUPE and Two-Tier Workforces

The Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) are intended to implement the Acquired Rights Directive (Directive 77/187/EC), and protect employees' terms and conditions of employment when a business or undertaking is transferred from one employer to another.

When an undertaking changes hands, employees automatically become employees of the new employers on the same terms and conditions as those with the previous employer (except for certain occupational pension rights). The new employer takes over all rights and obligations arising from those contracts of employment, and any collective agreements made on behalf of the employees. Neither the new employer nor the previous one can fairly dismiss an employee because of the transfer, unless there is an economic, technical or organisational reason which entails changes in the workforce. As a general rule, the new employer may not unilaterally worsen an employee's terms and conditions.

The TUPE Regulations apply when an undertaking, or part of an undertaking, is transferred from one employer to another. TUPE has been found to apply to:

- mergers
- sales of businesses by a sale of assets
- a change of licensee or franchisee

- the gift of a business via a will
- contracting out of services

The Regulations will not apply to:

- transfer by way of share takeover (as the same company remains the employer)
- transfer of assets only (for example, a transfer of equipment alone)
- transfer of a contract to provide goods or services where this does not involve the transfer of a business
- transfers of undertakings situated outside the UK

One of the key concerns identified by workforce representatives and trade unions concerning the contracting out of services is the potential for the emergence of a 'two-tier' workforce. While TUPE gives consideration to the protection of transferred staff, no protection is given to staff recruited after a transfer, who can be recruited on substantially poorer terms than transferees.

The Cabinet Office *Code of Practice on Workforce Matters in Public Sector Service Contracts and Statement of Practice on Staff Transfers in the Public Sector* (the 'Code of Practice'), updated by the Cabinet Office in March 2005:

sets out an approach to workforce matters in public sector service contracts which involve a transfer of staff from [a] public sector organisation to [a] service provider, or in which staff originally transferred out from [a] public sector organisation as a result of an outsourcing are TUPE transferred to a new provider under a retender of a contract.

It is intended to prevent the emergence of a two-tier workforce in cases where public sector employees are contracted out to a service provider, ensuring that new recruits can expect to be offered terms and conditions that are 'no less favourable' than those given to the staff originally transferred.

The Code of Practice stipulates that:

[t]he intention of the public sector organisation is ... to select only those providers who offer staff a package of terms and conditions which will secure high quality service delivery throughout the life of the contract. These must be sufficient to recruit and motivate high quality staff to work on the contract and designed to prevent the emergence of a 'two-tier workforce', dividing transferees and new joiners working beside each other on the same contracts.

The Code of Practice provides for the treatment of new joiners to an outsourced workforce:

where the service provider recruits new staff to work on a public service contract alongside staff transferred from the public sector organisation, it will offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees.

When contracting out services, public sector organisations are expected to apply the principles set out in the Cabinet Office Code of Practice. In particular, the intention of this statement is that TUPE will apply to staff transfers, and that, even where TUPE does not apply in a strictly legal sense, the same principles should be followed, and “*the staff involved should be treated no less favourably than had the Regulations applied*”.

2.5.2 Equal Opportunities

Under the Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000, public authorities not only have a duty to avoid discrimination, but a positive duty to promote racial equality. Section 71 of the Act illustrates this duty:

- 71(1) *Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need –*
- (a) to eliminate unlawful racial discrimination; and*
 - (b) to promote equality of opportunity and good relations between persons of different racial groups.*

This is as relevant to procurement as it is to any other public authority activity. Guidance published by the Commission for Racial Equality (CRE)³⁶ highlights the positive responsibility of authorities under the Act to eliminate discrimination and to promote equality of opportunity and good race relations in all their activities. The CRE guidance states that “*compliance with this duty is compatible with [a local authority’s] obligations under EC rules, best value, value for money, and with other national policies and strategies and those of a public authority*”.³⁷ Race equality can be a core requirement of a contract.

The recommendations contained in the CRE guidance are based on four guiding principles:

- **Obligation:** It is obligatory for all local authorities listed in Schedule A to the Act to promote race equality. This means making race equality a central part of local authority functions.
- **Complement:** There are three distinct parts to the general duty to promote race equality:
 - The elimination of unlawful racial discrimination
 - The promotion of equality of opportunity
 - The promotion of good relations between people of different racial groups.

Each element of the duty to promote racial equality is complementary, and they are all necessary to meet the entire duty.

- **Relevance:** The duty must be met by authorities in all its functions where the duty is relevant. Authorities are expected to assess for themselves where race equality is relevant to their functions, but it is clear that it will be more relevant to some of their functions than to others.

³⁶ *The Statutory Code of Practice on the Duty to Promote Race Equality*, Commission for Racial Equality, May 2002, and *Race Equality and Procurement in Local Government – A Guide for Authorities and Contractors*, Commission for Racial Equality, July 2003

³⁷ *Race Equality and Procurement in Local Government – A Guide for Authorities and Contractors*, Commission for Racial Equality, July 2003, p19

- **Proportionality:** The weighting that is given to the consideration of race equality should be proportionate to its relevance in the context of a particular function. Race equality may require greater consideration in the context of some functions than in others.³⁸

Additional key principles that apply to the procurement functions of a local authority include: accountability; transparency; mainstreaming; appropriateness; compliance with the law; and risk assessment.³⁹ The CRE's guidance gives a useful indication of when race equality can usefully be considered as part of the procurement cycle:

- Incorporation into the core requirement of the contract;
- Specifications and contract conditions;
- Selection;
- Invitation to Tender;
- Evaluation and Award;
- Following the award of the contract;
- Monitoring of the contract;
- Review.⁴⁰

Race equality can be a core requirement of a contract – in particular, where a local authority provides services directly to the public, the authority must consider how best to meet the needs of the population, taking into account the diversity of race, culture and faith that might be present. Employment is another function of a local authority where race equality will be a core consideration. The Transfer of Undertakings (Protection of Employment) Regulations 1981 (“TUPE”) are relevant in this respect. The competence of a supplier as an employer should be considered when choosing a tenderer - TUPE considerations should include transferred staff receiving the same or equivalent race equality terms, and new recruits receiving no less favourable terms. A contracting authority needs to be confident that anybody they contract with will provide their service in a way which is consistent with their duty, and therefore will need the same commitment to race equality in their contractors as they themselves have to meet, where race equality is relevant to the successful delivery of a particular contract.

Where race equality is not a core requirement of a contract, it can still be considered as an added value element which is not inconsistent with a contracting authority's VfM or Best Value duty. Therefore a social consideration of race equality could be incorporated into a contract (for example a contractor undertaking to provide training for people from racial groups that are under-represented among people doing certain jobs) either as a condition of the contract, an ‘additional criterion’, or as a separate voluntary agreement post-award.

2.5.3 Fair Employment and Affirmative Action in Northern Ireland

³⁸ See *The Statutory Code of Practice on the Duty to Promote Race Equality*, Commission for Racial Equality, May 2002, chapter 3

³⁹ See *Race Equality and Procurement in Local Government – A Guide for Authorities and Contractors*, Commission for Racial Equality, July 2003, chapter 1

⁴⁰ *Ibid*, chapter 2

The Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998 No 3162 [N.I.21]) was introduced under Schedule 1 of the Northern Ireland Act 1974.

The SI requires concerns with more than ten staff employed in Northern Ireland to register with the Equality Commission and then provide annual monitoring returns containing information on their employees, applicants for jobs, and leavers from employment for the period. The information to be provided aims to establish the community to which the employee, prospective employee or leaver belongs to or is treated as belonging to in accordance with prescribed methods, plus information on gender. The information may be required by standard occupational classification.⁴¹

In addition each registered concern is required to undertake a review of the composition of their workforce at least once every three years and introduce affirmative action where they conclude that members of a particular community are not enjoying fair participation in the employment of the concern.⁴²

A concern that is required to register with the Equality Commission is in default in any of the following circumstances:

- they have not registered within the allowed time;
- they fail to submit monitoring returns in the time allowed;
- they are convicted of offences relating to registration or the failure to provide a monitoring return.

Firms that are in default are termed an 'unqualified person'.⁴³ Section 64 of the SI:

- prohibits public authorities from entering into a contract with an 'unqualified person' that has been convicted of offences relating to the Order, and
- requires them to take steps to ensure that no work is executed or goods or services supplied under an existing contract.

Under section 65 the Equalities Commission can apply to the High Court for an injunction to require any public body to take action to comply with section 64, or to avoid taking action that would contravene section 64.

This example indicates that in appropriate circumstances the Government is willing to use legislation relating to public sector procurement activity to achieve its social objectives. Effectively, registration with the Equality Commission (and not being an unqualified person) is a social pre-qualification requirement for the award of a public contract, and becoming an 'unqualified person' is grounds for the termination or delaying of an existing contract. This applies to goods, works and services, but does not apply to firms with less than 11 employees – including both local micro-enterprises and larger firms that do not have a NI workforce.

2.5.4 Common Minimum Standards (CMS)

⁴¹ *Fair Employment and Treatment (Northern Ireland) Order 1998* (SI 1998 No 3162 [N.I.21]). Section 53.

⁴² *Ibid* Section 55.

⁴³ *Ibid* S.62(2)

Where a business case for a new programme or project includes a construction element, departments should ensure that this is undertaken with full reference to CMS

The Office of Government Commerce (OGC) has produced a list of minimum procurement standards for construction that, in the view of Ministers and after consultation with Departments and construction industry bodies, are accepted as a benchmark for VfM and cost-effectiveness for construction projects.⁴⁴

The standards are mandatory across central government in England and are expected to be applied to bodies that have devolved decision-making (e.g. local authorities and NHS Trusts) and also to private developers operating through Public Private Partnerships and the Private Finance Initiative. The practical operation of the standards is delegated to individual procurers but they are expected to comply with the standards unless they can be shown to be not practical, achievable or value for money.

The common minimum standards include the following social issues:

... constructors to be registered with a suitable site management / good neighbour scheme such as the Considerate Contractor Scheme and to comply with the scheme's Code of Considerate Practice.

Clients are to include a contract clause requiring that all members of their supply teams who are workers on or regular visitors to a construction site are registered on the Construction Skills Certification Scheme (CSCS)...

Project and programme procurement strategies will take full account of the Government's commitment to sustainable development and of the economic, environmental and social impacts of its decisions...

It is clear from the above that the social requirements of the CMS should be pursued through the procurement process and that they are considered to be part of a cost-effective approach to procurement of construction works. This suggests that they should be part of the VfM calculation. These requirements have the weight of guidance: they are mandatory across the public sector in England unless a case can be made why they should not be applied in a particular procurement or project.

2.5.5 International Labour Organisation (ILO) Conventions

The International Labour Organisation is the UN agency that seeks to promote social justice and internationally recognised human and labour rights and standards. Their international labour standards take the form of both Conventions (treaties ratified by individual member states) and Recommendations (non-binding instruments, which often cover the same topics as conventions and set out guidelines for national policy).

⁴⁴ OGC. *Common Minimum Standards for the Procurement of Built Environments in the Public Sector.*

The following eight ILO Conventions have been identified as being fundamental to the rights of human beings at work, irrespective of the varying levels of development of individual member states:

- Forced Labour Convention, 1930 (No. 29)
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Equal Remuneration Convention, 1951 (No. 100)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)

The ILO describes these conventions as *“a precondition for all the others in that they provide for the necessary implements to strive freely for the improvement of individual and collective conditions of work”*. The majority of the 178 ILO member states have ratified these core conventions.

The UK was one of the first to ratify ILO Convention 94 - Labour Clauses (Public Contracts) - which stipulated that public contracts should include clauses ensuring the workers concerned had wages and other conditions *“no less favourable than those established for work of the same character”*. This convention was denounced by the Government in 1982 and has not been ratified subsequently.

The Consolidated Directive (Directive 2004/18/EC) acknowledges the place of the ILO Conventions in public contracts. Express provision for this is made in Recital 33, which states:

(33) 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.... 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 ...

The OGC's Social Note states that:

*(ILO) ... Conventions and recommendations ... set minimum standards of basic labour rights that are legally binding on those countries that ratify them.*⁴⁵

The note sets out ways that the Core Labour Standards set down in the ILO conventions can be used in the procurement process.⁴⁶

There is little evidence that core labour standards are incorporated into the requirements of UK contracting authorities in their procurements. In part this may be because there is a lack of understanding of the measures which can be taken to verify compliance with derived standards e.g. in connection with the use of child labour. It is known that the Scandinavian countries are more prescriptive in this arena. Perhaps a way forward would be for there to be a single sustainability accreditation body which has the resources to verify compliance with core labour standards and other social issues and whose resources would be available to all contracting authorities should they decide to pursue broader social aims in any procurement of theirs.

2.5.6 Issues arising from the Precedents

The precedents given above include:

- Government regulations that are binding on procuring entities (e.g. TUPE);
- Government Guidance relating to the use of regulations in procurement (two-tier workforces);
- Government guidance that seeks to impose minimum standards that are not based on legislation or regulation (CMS in construction);
- Guidance from a non-governmental departmental body on the application of legislation to the procurement process (race relations);
- Legislation that uses public purchasing as a penalty for non-compliance (Fair Employment in Northern Ireland);
- Advice that binding commitments made by Government can be implemented through public procurement (ILO Conventions).

These examples illustrate that a key issue about the use of social requirements in public purchasing is centre-periphery decision-making. The Government is willing to encourage the use of procurement to achieve its social policy goals where it has made this decision. Some of the resulting impacts are very invasive for their suppliers – e.g. the guidance on the terms and conditions of staff recruited to work alongside TUPE staff. These social requirements will have significant impacts on the cost of the supplies, services or works provided to the public purchaser, and to the operating requirements of the supplier companies.

The precedents illustrate that – provided that the relevant procurement rules are followed – the UK Government does not have an 'in principle' objection to the use of social requirements in public procurement. It does not 'in principle' consider that this damages competitiveness or threatens VfM. If there is an objection it is related to concern that

⁴⁵ OGC *Social Issues in Purchasing*. February 2006 page 46

⁴⁶ Ibid page 34/35

proliferation of the use of social requirements beyond these centrally determined circumstances will lead to poor procurement practice damaging competitiveness or threatening VfM.

2.6 SMALL BUSINESSES AND PUBLIC PROCUREMENT

A key strand of public procurement policy relates to the opportunities provided for small and medium sized businesses (SMEs). These are generally thought of as those with fewer than 50 employees and 250 employees respectively and, despite accounting for over 50% of all employment and turnover in the UK, are often perceived as being at a disadvantage in the public sector marketplace.

In the report *Smaller Supplier ... Better Value?*, the OGC explain that the following reasons are given for small and medium sized enterprises (SMEs) being discouraged from tendering for public sector contracts:

- Not being able to find out about opportunities
- Believing that the processes involved in bidding are unnecessarily complex and costly
- Current trends in public sector procurement towards larger and longer contracts, and rationalising the number of suppliers, meaning that smaller businesses often find the resulting contracts too large for them.
- Believing that public sector procurers perceive a risk of contracting with diverse forms of business, like social enterprise, where their value can be misunderstood and overlooked.⁴⁷

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

1. **The procurement process** – contracting authorities are encouraged to:
 - (a) use a standardised pre-qualification questionnaire for low-value requirements, as supplied by the OGC.
 - (b) Ensure the process is appropriate to the size and complexity of the requirement
 - (c) Keep tender documents concise and jargon-free
 - (d) Avoid abortive procurements or delays, by ensuring that procurements are based on sound business cases and have been fully approved
 - (e) Set realistic timetables and keep tenderers informed
 - (f) Take into account the time that companies new to the public sector will need to respond to requests for information
2. **Where to find opportunities** – contracting authorities are encouraged to:
 - (a) Publicise opportunities widely, using the relevant trade press, as well as publicising in the obligatory places (i.e. OJEU notices for larger contracts); use organisations such as Business Links and Euro Info Centres to publicise opportunities

⁴⁷ *Smaller Supplier ... Better Value?*, Office of Government Commerce and Small Business Service, Updated 2005

- (b) Make OJEU advertisements clear and concise, giving as full a description as possible of the goods / services / works required
 - (c) Refresh supplier lists regularly, and make it easier for new suppliers to become listed.
 - (d) Use their own website as constructively as possible.
3. **Contract size** – contracting authorities are encouraged to:
- (a) Consider the advantages of dividing a contract into lots
 - (b) Be open to the possibility of supply chains, allowing SMEs to work as sub-contractor where they are not able to bid for a complete contract.

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

1. Procurement strategy

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

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

2. Access to contract opportunities

Local authorities commit to publishing on their websites:

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

3. Details of key suppliers

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

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

4. Fair tender processes

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

- Ensuring that all tenderers have equal access to information
- Keeping the tender process simple to minimise the cost to suppliers

- Using an authority-wide pre-qualification questionnaire containing common core questions.
- Assessing potential suppliers against published pre-qualification and tender evaluation criteria.

Within this framework there is the opportunity to assist SMEs in responding to specifications that include social and environmental requirements. SMEs will differ in their ability to respond to such requirements: some (including social enterprises) are in a good position to respond innovatively and others less so, in no different a way than larger enterprises. Smaller procurements should have attached to them social requirements which are proportionate to the value of the contract and the resource allocated to monitor its delivery, but the principles for incorporating social requirements should reflect the principles discussed above, which are already promulgated by the Government. The duty of contracting authorities to assist in identifying resources from which social requirements can be met (for example funding 'supply side' for training / recruitment requirements; training on how to respond) will as in the case of all procurement have a marked influence on the likelihood of suppliers (including SMEs) responding favourably.

2.7 COMPETITIVE NEUTRALITY

All of this can be seen within the wider imperative of demonstrating competitive neutrality in procurement; suppliers who are given an equal opportunity to deliver 'social capital' in their supplies, works and services will be enabled to play their role of delivering effectively to the social cohesion of society.

CHAPTER 3 INTRODUCING THE CASE STUDIES

Key Points

- To meet the timetable case studies were limited to those that could be accessed by the research team from their existing contacts.
- The case studies cover the following areas:
 - manufacturing: catalytic traps and low sulphur fuels (Transport for London);
 - construction training (Glasgow, Stirling, Manchester);
 - other training (Transport for London and Dundee);
 - community involvement in design (Manchester);
 - fresh food procurement (East Ayrshire);
 - recruitment of long-term unemployed (Denmark and Germany);
 - opportunities for SMEs (Haringey).

3.1 SELECTING THE CASE STUDIES

The brief for the research set out a number of priorities for the case studies:

- the focus of the commissioning body is manufacturing, which indicates the procurement of supplies;
- there was reference in the brief to the construction and transport sectors;
- there was mention in the brief of small and medium sized enterprises and social enterprises;
- there is a requirement to include examples from other EU countries.

The contract for the work is based on a proposal for ten case studies of which two would be from other EU countries. To meet the timetable it was proposed that the case studies would be limited to those that could be accessed by the research team from their existing contacts. By using this existing 'goodwill' it was anticipated that the support of the parties involved in the case study procurements would be more easily obtained.

As will be seen from the brief descriptions below it has been possible to obtain access to case studies that cover most of the above priorities. The area that has been most problematic within the timetable has been manufactured supplies, and here it has been necessary to follow up an environment/transport example rather than a social requirement.

3.2 THE CASE STUDIES

The case studies are provided as Part II of this report. They have been used to inform the discussion and conclusions that follow in Chapter 5.

The recommendations and conclusions will clearly be generalisations drawn from a small number of the case studies and the experience of the research team. The resulting information should be treated as indicative. It provides a basis for the discussion of a range of issues but does not provide a statistically sound basis for drawing conclusions on matters like cost-benefit analysis. The latter would require a much larger sample within each type of activity and it is unlikely that a suitable sample could be identified from the very small amount of 'social requirements' activity that has taken place to date.

To put discussion of relevant issues in context a short pen portrait of each case study is set out below.

3.2.1 Raploch URC and Stirling Council Roads Maintenance - Stirling Western Access Road

Raploch is an area with high unemployment, low quality community and educational facilities, poor housing and low economic activity. The wider Stirling area has witnessed a significant increase in economic activity and prosperity in recent years. The area of Raploch, however, has not shared in this prosperity, and has become an increasingly excluded community; the gap between it and the rest of Stirling is conspicuous. A proposal for a regeneration programme has been developed in conjunction with local people.

In 1995, Stirling Council began the construction of the Stirling Western Access Road as a bypass route. However, a portion of the road had remained incomplete. The A84 trunk road that runs through Raploch is subject to very heavy traffic levels that have had the effect of dissecting and fragmenting the local community. A high quality public space is being created in Raploch, including a newly formed village square. An important part of making this new centre a success is reducing the impact of the traffic travelling through Raploch, which is largely being dealt with by the completion of the Stirling Western Access Road.

Stirling Council was one of five local authorities that formed part of a Scottish Executive pilot investigating community benefits in procurement. Raploch Urban Regeneration Company (Raploch URC) is one of three Scottish Executive 'pathfinder' urban regeneration companies, responsible for implementing the regeneration of the Raploch area. Its role is to engage with the community, co-ordinate priorities and spending in the area, secure funding, procure private sector partners and, where necessary, lead on the delivery of key projects. Stirling Council Roads Maintenance (SCRM), the contractor, is a direct services division of Stirling Council.

Part of the wider regeneration of Raploch, this £1m six-month project included the upgrading / improvement of an existing road, forming part of the completion of the Stirling Western Access Road redirecting traffic around the area. As part of the contract, the contractor was required to take on a minimum of four long-term unemployed people, who would be given accredited training over a thirteen-week period, with the possibility of a job with SCRM at the end of that period. Funding for the trainees was found from outside sources. This requirement was voluntarily repeated later in the contract with a further four trainees.

The contract was seen as an ideal opportunity to act as a test or pilot of a community benefit clause, with the intention that the same or similar provisions could be used in later projects. An upcoming larger project will incorporate a community benefit clause with three strands, including training provisions and a guaranteed number of jobs made available for school

leavers and the long-term unemployed, as well as provisions in relation to small businesses and community enterprise.

Monthly review meetings were held between SCRM, Raploch URC and the trainees to ensure that the employees were supported over the 13 weeks of their training, and to ensure generally that the contractors were meeting the requirements.

The initial group of four trainees were all offered employment by SCRM at the end of their training, while one trainee from the second group of four was retained. Two further trainees from the second group secured employment with another contractor, meaning that seven out of the eight trainees secured full time employment within the sector. There was potential for the use of a reserve list for those trainees that SCRM had not been able to offer a position at the end of their training.

3.2.2 Transport for London

Two case studies in three transport-based areas have been compiled in connection with Transport for London (and their predecessor London Transport Buses), focussing on the procurement of bus services in London. These are included as one document as they arise from the same procurement and innovation approach.

Over time a number of social and environmental issues have been taken into consideration by Transport for London, which they consider to be an investment in the quality of their vehicles and staff. These case studies investigate the use of requirements including driver training, employee gender and ethnicity monitoring, low-access or ramp-equipped vehicles, and low emission vehicles. The first case study looks at the introduction of low-emission requirements by London Transport Buses and Transport for London. Although this is an 'environmental requirement' rather than a 'social requirement', it is included here because it provides an excellent manufacturing example, and because the methodology has been applied to improve driver training, as a means of improving the safety and quality of services to the public. The training issues form the focus of the second case study that was examined through a social enterprise contractor to Transport for London.

The various requirements have been included at different points in the procurement process. Those that affected bus design and construction were formally specified and tendered for accordingly. Those involving staff have not formed part of the formal specification or tender process, although some are referred to in the PQQ.

TfL has been willing to step outside the marketplace in order to make progress on issues that might in the future become legal or Transport for London-stipulated requirements. Where a Transport for London requirement has been pre-commercial or required significant change from current practice, Transport for London has been able to use its resources to encourage those changes it wishes to make mandatory in later contracts.

The different aspects of Transport for London's work on social requirements are considered below:

Hackney Community Transport / CT Plus – Driver Training and Gender / Ethnicity Monitoring

Hackney Community Transport are a social enterprise with a contract to run the number 153 bus service in London through CT Plus, its trading subsidiary. The contract includes the provision of employee gender and ethnicity monitoring information, although this requirement was not included in the contract award procedure. As part of the master contract arrangements with Transport for London, CT Plus are required to submit a quarterly gender and ethnicity monitoring return.

Hackney Community Transport have also participated in research into women in the bus industry, and have established a training programme for women wishing to become bus drivers. This training programme is funded by the Learning Skills Council and JobCentrePlus, utilising European Social Fund (ESF) funding. The training programme is managed with the cooperation of two larger bus companies. It is helping bus operators to increase the participation of women in the bus industry. This is a response to the monitoring of social impacts in a context where the contract specification does not require action. There is no immediate benefit to the public transport operations of Hackney Community Transport because it cannot use its granted-funded training activities to benefits its commercial contracts.

CT Plus's contract with Transport for London also required that, in their tender, potential contractors detailed the training that bus drivers would receive should they be given the contract.

Transport for London wished to introduce compulsory driver training, in order to improve customer care, increase driver awareness of disabled people's needs, and generally to improve the quality of the service drivers offered. To facilitate this, they identified the relevant course they desired, and paid for the first batch of drivers to complete it outwith existing contractual arrangements. This had the effect of speeding up the innovation in the marketplace; had the change been introduced as bus routes were re-tendered, Transport for London would have had to wait a considerable time to see any changes.

Until recently, the driver training aspects were entirely voluntary and unenforceable. BTEC driver training is now a requirement of the contract, including disability awareness training, and training in using the low-access boarding ramp.

Hackney Community Transport / CT Plus – Low Access Vehicles

A deadline for the introduction of low-floor bus designs is contained in the Public Service Vehicle Regulations 2000, which were created under the Disability Discrimination Act 1995. These Regulations provide for buses to comply with accessibility standards, mandatory for all new buses from 2001, and mandatory for all single-deck buses from 2016, and double-deck buses from 2017, including those already in existence. In the case of pre-existing vehicles, this will either require their replacement with new vehicles or the fitting of ramps to enable the vehicles to comply with new standards.

Where these requirements were mandatory (i.e. in new buses) Transport for London effectively paid for these through the contract price. However, they also paid for the retro-fitting of ramps to existing vehicles, with the intention that 100% of the fleet would be wheelchair accessible and low floor as soon as possible, something that was achieved in 2005.

However, ramps had a high failure rate, and passengers complained that the ramps did not work or drivers did not know how to use them. As a result of this feedback, Transport for London added the functioning and use of bus low access ramps to its Quality Incentive Contract criteria, meaning that penalties were incurred when bus operators did not ensure that their ramps were both functioning and in use.

The case study enables an examination of the interplay between legislation and the use of social requirements in contracts. It would appear that the legislative approach set minimum engineering standards that had to be met, but the social requirements used by Transport for London ensured that the ramps were maintained, and that staff were trained in their use. The social requirements in Transport for London contracts also made the legislative requirements more effective, and meant that requirements were met within a shorter timescale than would otherwise have been the case.

Eminox – Bus tailpipe emissions – low emission fuel and related technology

Eminox is a major European manufacturer of purpose-designed stainless steel exhaust systems and emissions control devices for heavy-duty internal combustion engines. Its key markets are heavy commercial vehicles, bus / coach, rail and special equipment (plant / construction).

London Transport Buses (the precursor to Transport for London) commissioned trials in ultra-low sulphur diesel (ULSD) fuel and oxidising catalyst technology in the 1990s. In addition to this, they investigated the potential for using continuously regenerating trap (CRT) technology. Based on the success of ULSD and CRT, the majority of London's bus fleet was retro-fitted with oxidising catalyst technology, which could be upgraded to CRT once ULSD was more freely available.

In order for the correct technology to be used when purchasing new vehicles, the correct specifications were required in the tender specifications.

By the end of 2005, the particulate emissions being achieved on the London bus fleet operating Transport for London routes were below those being introduced in the Euro4 engines (mandatory on all buses from October 2006) and forthcoming Euro5 engines.

London Transport Buses, and later Transport for London, can be seen to have driven innovation and product development in this area. It was felt that the procurement route had a greater and faster impact than a legislative or regulatory route might have done.

3.2.3 Social Care Pilot Study, Dundee City Council

The Social Work Department of Dundee City Council contracted with a number of contractors, all either small, or semi-autonomous parts of large, not-for-profit organisations providing social support in the social care sector. The contracts, for a combined value of approximately £2m over the space of 3 years to March 2006, were to provide home-based live-in care for people with disabilities and / or learning difficulties.

One problem in this particular area of Scotland is that there is a growing difficulty in finding social care staff. There is a finite pool of people available, so staff tend to be "poached" from organisation to organisation, while very few new people are being trained into the positions.

Dundee City Council wanted to discover whether those with disabilities could be an untapped source of care staff, whether those with disabilities were aware they could consider such work, and whether the source of staff could be further augmented by increasing training.

As part of their involvement in the Scottish Executive's Community Benefits in Procurement pilot programme, the Social Work Department of Dundee City Council chose to add a requirement that contractors should employ and train people with disabilities, including learning difficulties.

This pilot study was intended to encourage existing contractors to adopt social requirements into their working practices, rather than including these clauses into the tendering and award process. There was therefore no obligation on the contractors to comply and, even though all of them expressed a willingness to be involved and trial these processes, the outcome of the pilot was that none of the contractors were willing or able to implement them. This case study demonstrates some of the difficulties in implementing such requirements, especially if implementation is attempted after the contract is let.

The delivery of these requirements also had financial implications for the contractors, and there was no clear opportunity or mechanism for the recovery of any costs. Under a new procurement round these costs could have been incorporated by bidders into their tenders. One possible reason for piloting the approach on a voluntary basis with existing contractors was so that the latter would be in a better position to advise on likely increases in cost prior to the next bidding round.

A number of factors have been identified which appeared to conspire in the failure of this pilot:

1. *The pilot was intended to involve organisations providing a different sort of social care – it is possible that the particular contracts within which this process was trialled were ill suited to this type of requirement.*
2. *In this particular context the work of the contractor organisations was apparently not suited to the constant change in staff implied by a training demands.*
3. *Dundee City Council started the Dundee Social Care Academy at the same time as this pilot. This partnership between Dundee City Council, Dundee College and the independent social care sector included the same contractors, and this meant that there were two different projects both trying to achieve similar ends simultaneously.*
4. *There was a belief that the requirement to provide 33% training was impractical.*
5. *There was also a perception on the part of the contractors that the costs of implementing these requirements would have been high.*
6. *The requirement to employ care staff with disabilities in general, and specific disabilities in particular, created a concern for the contractors in that they believed that the service would suffer.*

3.2.4 Manchester City Council: Schools Construction Framework Agreement

This framework agreement involved the design and construction of works on education premises in the three years to December 2006. The contract value is £36m. Three contractors were appointed and two of these have provided information for the case study, together with a Manchester City Council Framework Manager.

The primary objectives of the framework contracts included involving key stakeholders in the design process and improved training as a contribution to neighbourhood renewal. The case study examines how these two requirements were included in the procurement life cycle and in contract delivery.

The framework approach was new to Manchester City Council. It was the first in a series of framework agreements that Manchester City Council have since set up to procure on a primarily quality basis; as such many aspects of the approach were new to them. The key driver for Manchester to procure services in this way was the belief that the establishment of partnerships with industry is a critical link in the process of regenerating communities and raising standards to improve the quality of life. This view is reflected in the primary objectives included in the framework agreement. These objectives - including wider stakeholder consultation and providing training as part of neighbourhood renewal - were informed by Manchester City Council policy and strategy but developed with stakeholders (the educational client, teachers, parent groups, etc).

The social requirements were part of the subject of the contract as they were in the framework agreement / contract. However, no specific targets were set; instead general goals were set out as framework objectives. The social requirements were part of the tender award, and were evaluated as part of the 'quality' of the submission. The procurement process sought to identify contractors whose culture/quality/experience was such that community benefits would be delivered on the projects without necessarily specifying them precisely.

The contractors accepted the social requirements as legitimate, but considered that the requirements were voluntary, and that outcomes would be based on best endeavours. Outcomes were measured and reported informally.

There was no standardised approach or methodology to consulting stakeholders: it took place on all projects but it differed slightly in each case depending on the circumstances, the neighbourhood, and other related projects taking place in the area.

The outcomes of the consultation exercises were not measured, but were reported in the sense that stakeholders' views were fed into the design brief. Other 'added value' activities were reported informally / verbally. No specific monies were paid to partners for these activities and it was unclear what costs were incurred. The impact on value for money was not considered.

It was felt that the framework arrangement was important to the delivery of any community benefits, and the commitment the contractors were prepared to make and of the ongoing relationship and promise of future work were emphasised.

It appears that through Manchester City Council's procurement process, based on a predominantly quality assessment, they sought to select partners to work on projects that would deliver some social benefits without having to specify exactly what or how many these should be. The outcome of this has appeared to vary between the contractors, most notably with the delivery of trainees by one contractor but not by the other, perhaps explained by the fact that they have a training centre and established process for this and directly employed the majority of their tradespeople.

The inclusion of the social requirements in the framework objectives and in the award process has been very effective in achieving the 'stakeholder consultation in design' requirements, but largely ineffective in generating employment and training opportunities for the neighbourhoods where the development was taking place.

3.2.5 East Ayrshire Council Onsite Services: Fresh and Organic Food Procurement

The Scottish Executive introduced an initiative, *Hungry for Success*, to encourage healthier eating within schools throughout Scotland. East Ayrshire Onsite Services decided to pilot an extension to this initiative to include fresh/organic food to one school. As this was a success, it was decided to extend the supply and delivery of the fresh/organic food to a further 11 schools for a minimum of one year. To better facilitate fresh delivery the required foodstuffs were procured through eight competitive contracts with a combined value of £120,000. This brought them within range of local / small firms. The contract would utilise allocated funds from the Scottish Executive scheme *Hungry for Success*, and work towards meeting some of the twenty-four targets designed for improving schools and attaining nutritional standards.

Menus were developed that would make the most of local and seasonal fresh produce and avoid foods high in fat, sugar or salt. These menus were provided within the specification. Fresh/organic food has been purchased under a series of competitive contracts structured to permit participation by smaller local businesses. These foodstuffs were previously being provided through one large contract managed by the West of Scotland Local Authorities Buying Consortium.

From the outset of the procurement process the issues of sustainability and health were prominent. The advert placed in the OJEU and the local press specifically stated that fresh/organic foodstuffs were the subject matter of the contract. Tenderers were asked to price both organic and non-organic foodstuffs. The contract is under way and is working successfully.

Organic vegetables often do not look like "standard class A" vegetables found in supermarkets and can therefore be less attractive to children. A "whole school" approach has been advocated and work is under way with the Soil Association to increase food and diet issues on the curriculum. Some of the suppliers have also been invited to speak with the teachers and children. In terms of costs there is estimated to be a 20% increase (as compared to the previous contract). This is seen as best value as there are many other benefits to the contract.

In February 2005 the Scottish Parliament commended East Ayrshire Onsite Services for the imagination it has shown. The Scottish Executive's Department of Environmental and Rural Affairs (SEERAD) agreed to commission an independent evaluation of the eleven-school pilot phase with a view to producing an 'evidence-based best practice model' for others to follow. Significantly, this research will not just consider cost criteria but will also include survey work to examine and quantify the less tangible benefits to children and parents that arise from healthier school meals.

3.2.6 Glasgow Housing Association (GHA) Works Contracts

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

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

To date eleven contracts have been procured for housing refurbishment work. There are a number of contractors delivering works for GHA in relation to the refurbishment works but for this case study one contractor was interviewed. Lovell's has been selected as a preferred contractor in three refurbishment work areas: roofing and cladding, kitchens and bathrooms and T84 improvements.

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

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

The principle recruitment and training requirements are:

- The submission of a targeted recruitment and training method statement with the tender, using a standard format;
- All vacancies, including those with subcontractors, to be notified to Construction Glasgow;
- 10% of the person-weeks required to deliver the contract to be provided by new-entrant trainees;

- the equivalent of up to 5% of the person-weeks required to deliver the contract to be made available for unwaged work experience on site by trainees (although this has subsequently been dropped);
- the provision of monitoring information.

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

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

3.2.7 London Borough of Haringey –Temporary Staff Supply Services

The London Borough of Haringey, North London, is an area of vast diversity, with areas of economic prosperity in the west, and areas of severe deprivation in the east, and a corresponding polarisation of skills levels. A large section of the population is classified as being economically inactive. The majority of businesses based within the area are SMEs and most are micro-enterprises (less than 10 employees). At least half of the SMEs in the locality are Black and Minority Ethnic (BME) businesses.

Haringey Council is a unitary local authority delivering statutory services to around 225,000 people. The Council is, along with the health service, by far the largest local employer. Of the Council's 6,000 staff, half are local residents. The Council and local health service also manage the largest supply chains in the borough.

In past years, Haringey Council has recruited temporary agency staff from agencies on a list of approved suppliers. They experienced a considerable amount of 'rogue' recruitment using agencies with whom the Council had no formal agreements and who were charging high add-on charges. Council spending on temporary staff was found to be almost £20m in 2004/5. Consideration was given to structuring new contractual arrangements that would:

- provide the Council with a responsive recruitment system;
- allow savings to be made by achieving efficiencies of scope and scale;
- include control mechanisms meaning that all officers had to use it;
- offer the range of staff required by the Council;
- advance the aims and objectives of the Community Strategy.

Haringey Council tendered for a vendor-neutral managing agent (not supplying any temporary workers directly) whose responsibilities were to include:

- providing a Recruitment Resource Centre

- entering into contracts with a supply base of temporary worker agencies.
- negotiating charges and undertaking routine monitoring of these agencies;
- provision of an electronic enquiry, booking and management reporting system for the supply of staff to Council departments.

The social requirements of the contract were as follows:

- contribution to delivery of Council's Community Strategy.
- management of Council supply chains for temporary agency workers so that potential suppliers have a free and fair opportunity to compete for places in them;
- equal opportunities in the workplace, over and above current legal obligations.

Implementation of the Council's Community Strategy and Procurement Strategy commitments to supporting SMEs and BMEs is being achieved by developing and implementing procurement development projects, and activity that works on both the supply and demand-sides.

The success of this procurement will be measured by how well the contract is delivered, but early indications are positive. In particular, the potential supply chain seems content that they will have a free and fair opportunity to compete, and there is satisfaction at officer and political level that local people will have a genuine opportunity to find out about and compete for Council jobs. The Council is already making significant savings on its temporary staff costs – indicating that efficiency savings and social considerations are compatible, and often boil down to delivering a service well and with an open mind.

3.2.8 Municipality of Aarhus – Denmark

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

It was felt that the demand for social clauses could only be made an absolute requirement and cannot be used as an award criteria and hence as a competition criteria. It is essential to show in the contract when and how the social clauses should be implemented. The social clauses applied in this case study are thus contract clauses.

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

There is a strong financial incentive for local authorities to pursue these clauses as there is a direct advantage to the local authority in reducing the number of people on employment or disability benefits, as these are paid for by the local authority. Any reduction in the number of

individuals that require such benefits has a direct beneficial impact on the local authority's financial situation.

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

The Danish social clauses referred to in this case study have been drafted carefully, with the support of legal experts at national and local level to ensure they are in conformity with EU procurement regulations and would stand up to legal challenges.

The financial implications of the contract clauses themselves appear to be marginal, and those costs that do arise are saved in any case through the reduction of direct support to the individuals employed. The case studies do not provide a full costing which includes training need, potential mentoring, support by colleagues etc, but this to an extent is perhaps a reflection of the Danish approach to inclusivity accepting that such costs are part of life.

3.2.9 Vergabe ABM – Germany

This case study relates to measures that used public works to provide much needed job opportunities for unemployed people of various categories. The persistent and large structural unemployment in Germany, particularly in the Eastern Regions, has resulted in a wide range of support measures for unemployed people; at the same time, the entire social security and unemployment benefits system has been radically changed and amalgamated through the measures known as Hartz II to IV. This case study focuses on a measure known as Vergabe ABM⁴⁸, which practically ceased to operate by the end of 2004, although it still appears to be on the statute books.

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

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

- the scope and type of work to be done by ABM participants;
- the number of ABM people involved and their qualifications;
- pay detail and other employment conditions;

⁴⁸ ABM = **A**rbeits**B**eschaffungs**M**assnahme = Labour creation measure

- documentation required of them for calculation of ABM subsidies.

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

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

The ABM measures were seen as an essential part of mitigating severe unemployment. In this sense they are not dissimilar from labour creation programmes undertaken in the UK, for example by the Manpower Services Commission in the 1980s. The debate about the effectiveness of these measures eventually resulted in the measure being abandoned in practice as it was seen to be ineffective, not meeting its objective, expensive to administer and costly in terms of management and overheads. The scheme as devised also appeared to be unable to lead to new permanent jobs. The contracts set down the terms and conditions for the employment of the beneficiaries. These reflected the social protection that was provided for non-employed people in Germany, but ultimately made the approach poor value for money, which led to it being discontinued.

3.3 THE QUESTIONNAIRES

The UK case studies are based on interviews with both purchasers and providers. The non-UK case studies are based on existing studies, supplemented with interviews with programme staff as necessary.

For purchasers the interview questions covered the following topics:

- what was being purchased, including both social requirements and other requirements;
- the policy and business case basis for including the social requirements;
- how the social requirements were used in the procurement life-cycle;
- the impact and outcomes arising from the inclusion of the social requirements, including monitoring arrangements and costs;
- good practice: what had been learnt from the inclusion of social requirements in procurement to date.

Providers were asked a similar range of questions (apart from the policy and business case) although the focus was often different. For example:

- information was sought on any relevant legislative obligations and fiscal incentives that influenced their social practices;
- the information they received about the social requirements and what contractual weight they perceived these as having;
- how they costed the social requirements;

- how they organised the delivery of the social requirements;
- whether the requirements have led to changes in the way the business is organised or operates.

CHAPTER 4 KEY FINDINGS

Key Points

- The case studies suggest that purchasers are including social requirements in their procurement as part of an established policy response that relates to their responsibilities. Each case has a different history and mix of 'drivers', but some shared elements are:
 - ensuring effective delivery of legislative requirements;
 - implementing core values and policies;
 - implementing a new social policy;
 - achieving better quality and ensuring Best Value;
 - addressing labour market issues.
- Three different approaches to arriving at the social requirements in the contracts were identified:
 - utilising external expertise to set requirements;
 - utilising internal expertise to set requirements;
 - not setting measurable requirements.
- In relation to affordability, four patterns have emerged from the case studies:
 - cost savings – social requirements are introduced and savings obtained;
 - a cost-neutral approach –the provider obtains grants from other sources to cover any additional costs;
 - budget-uplift approach - extra costs are covered by the purchaser, perhaps by obtaining grants from other sources;
 - the requirements were not clearly defined and no additional costs were identified.
- Specialist knowledge was important where the social / environmental requirements were not within the core knowledge of the procuring body. This could be provided by other public agencies, potential suppliers or consultants.
- In relation to cost-benefit analysis the case studies provide examples where:
 - reduced costs and improved social outcomes were obtained (e.g. Haringey);
 - higher costs were incurred but higher social value obtained (e.g. East Ayrshire);
 - initial higher costs for higher environmental benefits reduced over time (TfL);

- additional social outcomes were obtained at no higher cost to the purchaser (e.g. Stirling, Glasgow, Denmark);
 - no added cost but no added social value (e.g. Manchester construction training);
 - the higher costs for the social benefits were not considered VfM (Germany).
- The inclusion of social requirements in public sector contracts creates niche markets. There was no apparent shortage of bidders in these niche markets apart from the TfL (lowering emissions) example where action to develop the supply side was taken.
- Key lessons for purchasers are:
 - consult potential suppliers and other specialists before drafting the social requirements;
 - set clear, measurable and realistic targets;
 - Identify additional resources (e.g. from other public bodies) to cover additional costs arising from the social requirements;
 - Provide facilitation to help providers innovate.
 - Key lessons for providers are:
 - work with partner contractors or develop in-house skills in order to develop the capacity to deliver the new requirements;
 - develop relationships with other public bodies that can help with delivery and resources;
 - make sure that management and supervisory staff understand the social requirements;
 - when recruiting people from disadvantaged communities select the most motivated and provide good mentoring and support.

4.1 DRIVERS FOR ACTION

The case studies suggest that purchasers are including social requirements in their procurement as part of an established policy response that relates to their responsibilities. Each case has a different history and mix of 'drivers', but some shared elements are set out below.

4.1.1 Implementing core values and policies

Organisations like Glasgow Housing Association and Raploch Pathfinder Urban Regeneration Company have been established through a high-profile process that has included making commitments to their intended beneficiaries in relation to (for example) targeting the jobs and training outcomes from their local investment. These become part of the policy framework for the organisations and the focus for officers that are employed to ensure delivery of these outcomes.

(GHA will) ...build added value into... (its) ... investment programme – creating job opportunities for local people, improving neighbourhood environments and contributing towards health improvement. Glasgow Housing Association Neighbourhood Renewal Strategy 2005/07.

In both the GHA and Raploch case studies the decision to use social requirements in the contract as a means of achieving this outcome is a judgement by the procurement officers and their neighbourhood renewal colleagues about the most appropriate way of delivering this policy. This will be influenced by a desire to improve on past experience e.g. using voluntary approaches.

In Dundee the basis for action was the council's anti-poverty strategy, but the social requirements were also seen as a way of ensuring that existing investment in education and training achieved better outcomes and therefore better value for money:

As a part of its Anti-poverty Strategy Dundee City Council has made a commitment to use its social investment to develop measures which reduce social exclusion and tackle poverty. Within the social care service a key target group for anti-poverty action is people with a disability, including those with learning difficulties. These citizens face particular disadvantage in achieving both the income and the self-esteem that comes from engagement in the labour market. These barriers can mean that social investment in education and training is not leading to employment and an improved quality of life. The Council is therefore intending to ensure that all its providers of care services generate some employment opportunities for people with a disability. (Pre-ambule to the Councils draft clauses for training and recruitment).

In Haringey the basis for action was the strong commitment made to providing opportunities for SMEs and BMEs that was set out in the Council's Community Strategy and its Procurement Strategy.

4.1.2 Implementing a New Social Policy

The East Ayrshire case study provides an example of new social requirements – healthy food for school meals – being incorporated in the procurement process. In this case the requirements were part of a Scottish Executive health and education initiative – *Hungry for Success* – but with the 'procurement route' chosen because officers believed that this would be the most effective way of achieving the desired outcomes.

To some extent the GHA, Raploch and Dundee case studies can also be seen as a means of piloting a new approach to procurement under the Scottish Executive's *Community Benefits in Procurement Pilot Programme*.

The TfL case study dealing with the introduction of low-emission fuels and catalytic traps provides an example of how new environmental requirements were implemented through engineering and generated a demand for low-sulphur fuel manufacture. It can be argued that this innovation led to widespread use of the new technologies and the introduction of new fuels that are now available across Britain.

4.1.3 Achieving Quality and Ensuring Best Value⁴⁹

The Manchester City Council case study provides an example where the quality and ‘best value’ requirements of the programme were considered to be best achieved through the introduction of social requirements relating to the delivery of the contract. These were consultation with stakeholders – including crucially the users of the school buildings – in a design and build framework contract, and the provision of construction training opportunities. This approach may have been new to the procuring team, but it has good antecedents in (for example) the ‘Planning for Real’ approach to housing estate redesign and the successful piloting work done by the Government-funded INTEGER programme ‘building classrooms for the future’.

The TfL training case study provides another example of a public body seeking to improve the quality of its services through the introduction of social requirements.

4.1.4 Addressing Labour Market Issues

The GHA and Danish case studies provide examples where the social requirements were introduced to help address labour market concerns that were already impacting, or were expected to impact, on the operation of the procuring body through higher costs and skill shortage. For ‘best value’ authorities in the UK this is of particular importance because of their duty to achieve continuous improvement in services: how will this be achieved in the context of skill shortages and associated rising costs?

4.1.5 Why use social requirements in contracts?

With the possible exception of labour market concerns, each of the above rationales has existed for many years. So why has there been increasing use of social requirements in contracts to address the issues? This question pre-supposes that there is now increased use of social requirements, when our experience is that there is still very little use of the approach. However, if there is increased use of social requirements this appears to arise from:

- officers seeking ways of achieving more of their policy and organisational objectives;
- the availability of information on how to integrate social clauses into contracts in a way that is compatible with UK law and policy and the EU public procurement framework.

4.2 SETTING MEASURABLE REQUIREMENTS

There were four different approaches to arriving at the social requirements in the contracts. These are described below.

⁴⁹ Best value authorities must ... *make arrangements to secure continuous improvement in the way its functions are exercised, having regard to combination of economy, efficiency and effectiveness*

4.2.1 External Expertise

In East Ayrshire an external benchmark was provided by The Soil Association's *Food for Life* approach. The purchaser then developed a range of menus with the help of a nutritionist and used these in the tendering process. The authority piloted the approach in one school before widening the pilot to eleven schools, and they invited a number of potential suppliers to discuss the tender requirements before the tender was advertised. The contract was then advertised via an OJEU notice and the local press.

Both GHA and Raploch used expertise coming through the Scottish Executive's CBIP pilot programme. This was used to:

- identify issues that they needed to consider in setting measurable social requirements for the procurement process;
- introduce information from other bodies that had implemented similar approaches;
- work with the procurement team – including the surveyors that understood the proposed building programme – to help them set appropriate targets and procurement procedures;
- draft initial sets of requirements as a basis for the procurement team to develop their bespoke arrangements.

LB Haringey felt able to develop their innovative approach to procurement – and protect the welfare of an SME supply-chain – because they had already obtained a clear understanding of the relevant legal frameworks from a specialist solicitor.

Another way of accessing external expertise is to work with the supply-chain (or potential supply-chain) prior to the start of the procurement process. Examples of this include LT Buses and LB Haringey.

4.2.2 Internal Expertise

As indicated above, the inputs of external consultants is typically adapted and tuned by internal staff. Ultimate responsibility for the social requirements remains with the procuring entities.

In the Danish case study the social requirements appear to have been set internally, with the contracting department setting the percentage of the contract delivery staff that had to be recruited from people disadvantaged in the labour market but a central officer providing a standard form of contract into which these requirements were inserted.

4.2.3 No Measurable Targets

The Manchester City Council case study provides an example where measurable social requirements were not set by the procurers: the latter considered the requirements to be qualitative in nature and not capable of specification. The social requirements were referred to in the Framework Contract documents in general terms but not used in the award of the contract or in monitoring delivery.

One of the social requirements related to targeted recruitment and training, a matter where measurable social requirements were (at the same time) being included in the GHA contract. There appears to be relatively little delivery of training and targeted recruitment by the contractors delivering the MCC works because they interpreted the requirement as voluntary or best endeavours, rather than a contract condition. It is interesting to note that the Raploch approach (which included measurable targets) was more successful than the Manchester approach, and it would be interesting to see whether the GHA contract, on an equivalent scale to that at Manchester, and which also includes measurable targets, will equally be successful.

4.2.4 Inappropriate Targets

The Dundee case study provides an example of inconsistency that resulted in inappropriate targets being set.

As part of the CBIP pilot programme the requirements and targets for the social care contracts were discussed with a CBIP consultant. These were then used to draft the proposed social requirement for inclusion in forthcoming tenders. However, the Council then decided to pilot the approach on existing contracts in a different area of social care (home care rather than the residential care for which the requirements had been designed). The pilot failed because it was not considered deliverable by the existing contractors, and was not covered by their budgets. This may have led to the approach being discredited within the Council.

This case study demonstrates the importance of consistency in identifying need, and then identifying appropriate social requirements that will address this need within the intended procurement context.

4.3 AFFORDABILITY

Four patterns have emerged from the case studies.

4.3.1 Cost Savings

The LB Haringey example demonstrates how social requirements can be introduced and savings obtained. Their experience has been that the best overall bidders for contracts that include social requirements often bring forward the most appropriate and innovative response to the achievement of the social requirements. This may help achieve both the new social requirements and value for money.

4.3.2 A cost-neutral approach

In UK construction case studies the social requirements have been included as contract conditions that were not specifically costed as part of the tender. In the GHA case it was made clear that the contractor was expected to obtain whatever additional resources they

required to deliver the social requirements from other public agencies, and information on a range of such resource-suppliers was provided to bidders.⁵⁰

One major contractor to GHA has made the point that there are additional management costs associated with delivery of the training requirements which they cover as a part of the company overheads. Bidders would be able to increase their overhead charge as a part of their tender, but this would of course make them less competitive. In both GHA and Manchester there are contractors delivering the social requirements that already had a significant construction training infrastructure within the company and so no additional overhead cost was necessary.

This context would also apply to the Raploch case study where the trainees were provided 'free on site' to the contractor. They were part of a Government-funded training programme so all subsistence and training costs were already met.

In these cases the cost-neutral approach to affordability is possible where there are external resource-providers and delivery of the social requirements is included in the contract notices and early briefings. Bidders can then be qualified because they have a track record in delivering the social requirements and, implicit in this, the management and technical infrastructure to do so. Any additional management costs related to their company values and way of operating are already included in their overhead costs. However, the TfL case studies demonstrate a process where the higher initial investment by the purchaser (a budget-uplift approach) leads in time to lower cost or cost-neutral outcomes as the market adjusts to the new requirements.

4.3.3 Budget-uplift approach

The East Ayrshire case study provides an example where the social requirements added significantly to the cost of the contract (20%), but this additional cost was met by additional external funding, in this case a grant from the Scottish Executive's *Hungry for Success* programme. This means that the impact of introducing the social requirements was cost-neutral to the procuring entity.

The Scottish Executive's additional funding is committed for three years and at the end of this the Council will need to consider whether it can continue the approach.

Although the cost and sources of income figures are not explicit it appears that this approach was also used in the Danish and German case studies. In Denmark there were additional costs related to the supervision of the new entrants to the labour market, but the wages and employment costs of the new workers were mostly covered – for a period of at least six months anyway – by grants from Government. There was also a cost saving to the local authority because they were responsible for paying 'benefits' to non-employed workers.

The German example can be compared with 'intermediate labour market' (ILM) approaches in the UK. The works carried out were additional, so they would not have been provided to the community without 'the project', and 'the project' would not have been commissioned without public funding specifically for the ILM approach being agreed. In this context it is not

⁵⁰ Resources could be cash, but they could also be access to free services. Cash funding from private businesses is severely limited by the State Aid rules.

appropriate to compare the cost of the Vergabe ABM approach with delivering the works alone through a conventional contract.

However, it is important to note that the high cost of the approach, which was related to the social specification and the high levels of management input required, was one factor in the demise of the approach. It was an expensive way of providing community facilities and (because of falling demand in the labour market) was not resulting in the participants entering the labour market.

4.3.4 Unspecified Framework Values

The Manchester case study provides an example where the social requirements were unspecified and were effectively values relating to the delivery of the contract: there were no identifiable additional costs and therefore no affordability issues.

But was there a hidden additional cost?

Because they were unspecified each bidder would need to decide what additional action they would undertake to deliver the values, and what this would cost. This would need to be covered by the bidders' overhead charges.

The two successful contractors that were interviewed for the case study put forward the following propositions regarding the cost of delivering the two values sought by the client:

- in relation to stakeholder consultation this would be covered by the normal schedule of rates for design: the requirement resulted in a different process requiring a different mix of skills but no additional costs;
- in relation to targeted training one contractor took the view that since they were a managing contractor with very few direct employees this 'voluntary requirement' did not apply to them; the other contractor already had a training infrastructure in their overhead costs and had access to external funding for training, so there were no additional costs.

One of the contractors made it clear that in relation to both design and training they would not do more than what they had allowed for at the bidding stage, and no additional sums had been added in to achieve the social requirements of the purchaser.

The other contractor took the view that because of their background in contracting with social landlords they routinely delivered a higher level of stakeholder consultation and vocational training, so the social requirements of the purchaser could be met within their normal cost structure.

It appears that the purchaser is content that an appropriate level of stakeholder content has been carried out and that this is reflected in the designs that have been produced. The purchaser appears to have paid little attention to the low level of achievement of their training requirements.

4.4 IMPLEMENTATION THROUGH THE PROCUREMENT LIFE-CYCLE

4.4.1 Understanding of the legal framework

The case studies reveal different understandings of the legal framework for the procurement of social requirements.

The Scottish case studies all operated on the basis that their social requirements could be included in all stages of the procurement life cycle, and three of the four used social requirements in this way. The fourth, Dundee, decided to pilot the approach on existing contracts on a voluntary basis prior to including the social requirements in the next tendering round. A similar approach was adopted by LB Haringey.

The Danish interpretation of the legal framework is that the social requirements can be a condition relating to the delivery of the contract, but not an award criteria. This may arise from a narrow interpretation of the EU position as set out in the *Social Communication* (see 2.1.2 above). The social requirements were treated as secondary considerations.

Manchester City Council appears to have accepted the principle that the social requirements can be included in all stages of the procurement. However, they took the view that the social requirements were not capable of being specified because they were qualitative in nature and (in relation to their training requirements) the inclusion of local training requirements would be unacceptable under the EU procurement Directives. This would be correct, but the omission of the word 'local' would have made the requirement for training acceptable.

4.4.2 Briefing the Market

Most of the case studies undertook some specific activities to ensure that bidders were aware of their social requirements. These activities included:

- prior consultation with potential bidders during the preparation of the requirements (East Ayrshire);
- reference to the requirements in the OJEU Notice (GHA);
- briefing meetings for potential bidders at which verbal and written material on the social requirements was provided and companies could ask questions (Raploch, GHA, East Ayrshire, Manchester, Denmark);
- questions relating to the social requirements were included in a pre-qualification questionnaire (Manchester, GHA);
- detailed specification of the social requirements in the Invitation to Tender (Raploch, GHA, East Ayrshire, Denmark, Germany).

4.4.3 Award Procedures

From the UK case studies it appears that the norm is to ask bidders to submit with their tender a method statement setting out how they will achieve the social requirements. This is then evaluated and scored, and this score forms part of the quality assessment (score) for

the tender. This was the method adopted by GHA, Manchester (in the form of a statement of intent), and East Ayrshire.

In Raploch the method statement was evaluated to ensure that it achieved a required 'threshold' of acceptability and a pre-requisite for the tender being evaluated as a whole. All of the tenders received were considered acceptable, so all progressed to the full tender evaluation stage.

Because of the volume of different contracts being let and therefore tenders being evaluated GHA appears to have developed the most sophisticated approach to the scoring of social requirements. The scoring was done by officers from the Neighbourhood Renewal Team using a scoring framework that identified:

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

This approach was tested by the team and then used to score each tender submitted. The resulting scores were then incorporated into the 30% 'quality' element of the overall tender evaluation, which was then combined with the 70% price element of the evaluation. The social requirements contributed 8% of the overall tender evaluation scores.

This approach used the specialist knowledge and skills of the training and employment officers within GHA to develop a robust and fair means of evaluating method statements.

In both Raploch and GHA pro-forma method statements were used to ensure that all bidders answered the same questions and provided the same core information. In Manchester statements of intent were used rather than pro-forma, in a context where no measurable targets were included in the tender documentation. This approach would be less compatible with the use of a standard scoring framework because different contractors could interpret the requirements quite differently and then submit very different statement of intent. It could be argued that this approach provides more flexibility to bidders, or it could be argued that it provides a less than level playing field, especially for bidders that have less experience of delivering the social requirements.

4.4.4 Contractual Weight

The case studies provide some evidence that the treatment of the social requirements in the procurement life cycle has an impact on the weight that the contractor gives to the requirements. In Raploch, East Ayrshire and GHA the social requirements were clearly specified and explicitly included in each stage of the procurement process. They have been honoured as contract conditions by the contractors. In Manchester the social requirements were not clearly specified – this was left to the bidders – and the award of the contract was based on statements of intent rather than method statements that set out what they would do and what the measured outcomes would be. Here the contractors have interpreted the social requirements as either voluntary or best endeavours elements of the framework contract rather than a condition of contract. The outcomes reflect this interpretation.

The benefits of an unambiguous set of social requirements and a formal 'method statement' approach to the evaluation of offers may also have an impact on the way the procurement team treat the social requirements. This may relate to:

- the lower level of involvement of 'social requirement specialists' in the procurement process;
- the procurement officers' not understanding the weight that their employer wishes to give the social requirements;
- a lower level of engagement by the procurement officers in discussion of the social requirements – e.g. in how they should be defined and measured – and therefore the lack of opportunity for them to develop their understanding of these 'new requirements';
- a lack of measurable targets and lack of clear reporting of outcomes may mean that the social requirements get less attention during the delivery phase than the 'specified' outcomes.

4.5 SPECIALIST SUPPORT

Amongst the case studies East Ayrshire and Transport for London were unusual because the social and environmental requirements were closely associated with the core knowledge of the purchasing organisation. In other cases the social requirements have introduced matters that were not within the core knowledge of the purchaser's team. For example, in Denmark the departmental officers set the recruitment targets even though they had little knowledge of the skills and needs of the proposed beneficiaries. The contractors then faced difficulties because the people they had to recruit from needed much higher levels of training and support than had been anticipated.

The GHA, Raploch and Haringey case studies provide examples where the involvement of officers with specialist knowledge of the social requirements in all stages of the procurement process was beneficial. This was especially important in:

- identifying 'need';
- developing the pro-forma method statement and appropriate monitoring and reporting requirements;
- identifying resources that could be accessed by the purchaser or the contractor to cover additional costs related to the social requirements;
- briefing bidders on the social requirements and then working with the successful contractors to help facilitate successful delivery of the social requirements.

In these cases the expertise was within the purchasing organisation but was supported with some short-term consultancy. However, for GHA and Raploch, delivery of the requirements depended on a successful relationship between the contractor and external agencies that could provide resources. In Glasgow there are major resources available through external agencies, including £25m for additional construction training through Scottish Enterprise Glasgow. A problem that can arise is that there may be a mismatch between the expenditure plans and funding policies of the external agency and the services required by contractors to deliver the contract obligations.

In this context should the external resource providers change the way they use their resources to suit the needs of the market (as determined by the purchaser and their contractor), or should the purchaser change their social requirements to suit the resources available – even if this means that there is less benefit to their ‘core purpose’?

In a relatively short-term contract (like the Western Bypass in Stirling) these problems may be minimal because resource availability can be more easily predicted. Involvement of the external resource-holders in the development of the approach and the briefings for bidders can ensure adequate commitment from the external agency over this period. Much more difficulty can arise in multi-year contracts because:

- the resources available to the external agencies may change annually;
- the priorities for the use of available resources may change frequently;
- the terms on which resources are provided may change frequently;
- the staff involved in the early discussions or delivery of the resources move on and new staff don't have the same level of knowledge or commitment;
- the external agencies may close down or be re-structured.

The above problems are critical where the purchasers are including social requirements as core requirements but requiring the contractors to cover any additional direct costs from external funding sources (as in GHA). They do not arise where the purchaser obtains the additional funding required to deliver the social requirements and then pays any additional costs through the contract.

There is clearly an additional risk to a contractor where their ability to deliver the social requirements of the contract are dependent on their accessing resources from other agencies. In this context the risk is less for a contractor that already has good knowledge of and contact with this resource supply-chain than for one that has little knowledge. For example, one of the contractors in the Manchester framework contract maintained a training infrastructure and had existing links with the required resource provider. This firm appears to be unconcerned about the training requirements within the framework contract.

A contractor's access to the resources to deliver the social requirements may be viewed as a supply-chain issue. As with other supply-chain matters, the contacts and negotiating skills of the contractor will determine the terms on which they access the resources they need. However, the supply-chain of resources from public agencies is likely to be more volatile than the supply-chain for other resource needs (e.g. materials) because there are relatively few suppliers and these are unstable.

Finally there are examples where the external support came from the existing supply chain (e.g. the extensive consultation with SMEs undertaken by LB Haringey), or the potential supply chain (by LT Buses). This fits well with Government guidance on developing innovative solutions to new social or environmental requirements.

4.6 COST-BENEFIT ANALYSIS

4.6.1 Core Requirements

The requirement for a cost-benefit analysis formed part of the Brief for the project and clearly reflects a concern that the inclusion of social requirements in contracts results in less good value for money for the public sector. This belief may underpin the view that there may be better ways of achieving a policy objective than using social requirements in procurement.⁵¹

Where the social requirement is supported by the powers and policies of the purchasing organisation and are part of the core requirements for the contract then the VfM issue is determined by the additional costs incurred relative to the social outputs achieved. On the cost side consideration would need to be given to:

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

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

On the benefit side consideration would need to be given to the outputs achieved and how these compare to what would have been achieved by other means e.g. voluntary commitments made after the award of the contract or direct funding through grants unrelated to the procurement process.

These are considerations for a purchaser at the Business Case stage of a development. Once the judgement has been made that the social requirements are core requirements in the procurement life cycle then the use of good procurement practice, followed by good contract management, should deliver VfM.

The case studies have not provided much evidence on the question of whether including core social requirements in contracts yields better VfM than other approaches – although the comparison between the voluntary approach in Manchester and the contractual approach in Raploch (given above) is notable. However, for a number of case studies the cost-benefit comparison looks promising.

In Raploch the social requirements were mainly funded outwith the contract (the trainees were free on site to the contractors and an officer with relevant facilitation skills was already part of the purchaser's staff team), and the contractor delivered 100% more than the social requirements that were included in the contract. It may be possible to compare this to a voluntary approach but the information is not yet available.

In East Ayrshire the social requirements resulted in a 20% uplift in cost, but the purchaser and the Scottish Executive are clearly delighted with the outcomes: 75% of food is made

⁵¹ See for example OGC *Social Issues in Purchasing* February 2006 page 8.

from unprocessed sources; four times the number of products resources from within 40 miles resulting in a 70% reduction in 'food-miles'; they now have a more responsive supply chain.

At GHA the cost increases are likely to be modest because the contractors have to resource the costs of the social requirements from external agencies. There is a cost (estimated at £35000 p.a.) for administering the social requirements within GHA, and there is a hidden cost that is included within the contractors' overheads – although some of this is covered by external grant regimes. It is too early to report on outcomes and there is no comparable evidence of what has been achieved on a similar type and scale of work on a voluntary basis.

The Manchester City Council approach appears to have resulted in no increase in costs (according to two of the three framework contractors) but increased attention to stakeholder involvement in the design process. This indicates better VfM – in relation to the client's requirements – on this issue. In relation to the other social requirement (increased training opportunities) the outcomes from the approach appear to have been minimal – 2 apprentice carpenters. Here the question may be whether better VfM would have been achieved if the purchaser had been more robust in setting training targets, even if this had cost more. The current outcome would probably have been achieved on a voluntary basis.

In Haringey the view of the Council is that the new temporary staff supply arrangements are delivering the cost savings they expected along with their social requirements.

4.6.2 Secondary Requirements

The Danish case study provides an example where the social requirements were treated as secondary elements of the contract. They were included as contract conditions but were not a consideration at any stage of the award process.

The cost-benefit judgement also looks quite promising here since it appears that any additional cost will be met by grants from external Government agencies. Furthermore it seems that there are savings to other budgets in the local authority since it is responsible for paying the target beneficiaries some 'state benefits'.

The position here is perhaps less good from the provider's side. It appears that they underestimated the support and training needs of people facing barriers in the labour market, and may have had to absorb extra costs – in the initial contracts at least – related to this.

It could be argued that since secondary requirements are not part of the subject of the contract they should always be, at worst, cost-neutral since VfM is based solely on the core requirements. Secondary requirements which add cost will inevitably be poor value for money.

4.6.3 VfM for providers of additional resources

The German case study provides an example where the contracting process may have resulted in VfM in relation to the subject of the contract, but it was not delivering VfM in relation to the social requirements. It appears that the latter was the result of two factors:

- rising unemployment in the construction sector which meant poor progression into work for the participants in the contracts;
- the high cost of the contracts, in part because of the terms and conditions that related to the participants in the projects.

So the approach was not providing good VfM in terms of the employment programmes that were co-funding the contracts.

4.7 THE IMPACT ON MARKETS

4.7.1 Niche Markets

The inclusion of social requirements in public sector contracts effectively creates niche markets. The case studies have provided examples of three such markets:

- construction with related vocational training (Raploch, GHA, Manchester, Germany);
- fresh and organic food supply (East Ayrshire);
- stakeholder consultation in a design and build contract (Manchester);
- low-emission fuels and catalytic traps (LT Buses / TfL).

The Danish example demonstrates the extension of the niche markets to a range of local authority services.

There is no evidence that there was a shortage of bidders in any of the niche markets. A number of factors contributed to this:

- the purchaser took steps to inform bidders of their requirements, which gives confidence to potential bidders;
- in volume construction (at least) there are sufficient companies that have already developed the capacity and track record for delivery of vocational training and stakeholder consultation (e.g. GHA and Manchester);
- where bidders lacked a track record they sought partnerships with other contractors or consultants that did have the knowledge and track record required (e.g. Raploch).

The LT Buses / TfL case study demonstrates how the introduction of new environmental requirements by a major purchaser can lead to the development of new products that enable the manufacturers to develop new export markets.

4.7.2 Small Firms

There is some concern that small firms may be less able to compete in the niche market. For example, one (large) contractor to GHA suggested that small firms would be less able to maintain the training infrastructure that would enable them to deliver the training requirements within their existing overhead costs. This view is supported by GHA that felt that small firms had performed more poorly in preparing the method statement relating to the

social requirements than larger firms, but they also performed less well in response to other elements of the core requirements. On the other hand it is understood that most apprentices in the construction industry are recruited by small businesses rather than large contractors, which suggests that they can manage trainees with the help of colleges and the CITB.

One concern is about the ability of small firms to absorb additional trainees or workers where this is a requirement of a public contract. This may be valid where the contract does not represent growth in labour requirements by the contractor. The 'let-out' clause in the Danish case study provides a way of coping with this issue, although it is not clear how this is managed in practice in Denmark:

Should the contractor otherwise have to make existing employees redundant he may use existing staff to deal with the new contract, even if this means that the requirement of employing staff with special conditions cannot be met. (Extract from Appendix 1 Use of Social Clauses in Denmark).

In practice a contractor's need to exercise the above clause would need to be well evidenced, especially in fields like construction where there is a high degree of labour turnover and sub-contracting.

In East Ayrshire the introduction of social requirements allowed the use of a new approach to procurement that was designed to enhance opportunities for local small businesses. Nevertheless it proved difficult to develop the interest of local suppliers in bidding for the contracts, with only three bidders for each contract. The key barriers were the perception of bidders about the administration involved with local authority contracts, and the willingness to meet the required quality standards. However, a more powerful example is provided by LB Haringey where the provision of opportunities for SMEs and BMEs as part of the supply-chain to their main contractor was written into all stages of the procurement process.

4.7.3 Impact on Businesses

The case studies revealed some benefits for businesses in delivering the social requirements:

- in Raploch the contractor was able to road-test potential long-term unemployed people before hiring them: as business was expanding and they needed additional workers the contract not only provided 5 new permanent workers but made them aware of a source of labour (long-term unemployed people participating in Government schemes) that they had previously discounted;
- one of the Manchester contractors said that the stakeholder consultation had not only developed positive relationships with the local community that were beneficial to the delivery of the contract, but had also affected the attitudes and culture of the business: staff now believe that contractors are there to do more than just erect buildings, they are more user-focussed and willing to consider a wider range of opinions;
- in Denmark the social requirements also gave contractors the opportunity to try out workers that they would not previously have considered, which is critical to overcoming their labour shortages.

4.8 LESSONS FOR PURCHASERS

The case studies indicate the following good practice for public purchasers:

- purchasers should set realistic, clear and measurable requirements that will achieve the desired policy outcomes in a cost-effective way;
- the targets need to be varied to reflect the size and complexity of the contract;
- utilise internal or external expertise from people with specialist knowledge of the social requirements to help design appropriate requirements;
- consult the market about likely requirements before finalising the tender requirements;
- provide information and briefing sessions for potential bidders – including small firms - prior to or early in the procurement process;
- identify additional resources that can be made available to the contractor – ideally through the contract - to cover additional costs associated with the social requirements;
- provide facilitation – either directly or through partner agencies – to help the contractors deliver the social requirements;
- obtain a clear and measurable statement of what social requirements will be delivered as a basis of monitoring and evaluating outcomes.
- make sure that all parts of the purchasing organisation are trained to implement the social requirements where appropriate.

4.9 LESSONS FOR CONTRACTORS

- it is important to develop the staff capacity to deliver new requirements: develop skills within your existing team until there are the resources to recruit specialist staff;
- work with partner contractors or consultants to develop the skills and experience of delivering the new requirements;
- develop relationships with external agencies that can help resource the social requirements, and develop knowledge of how to access the agencies' resources;
- if the requirements involve the recruitment of staff from a target community take care to select the most motivated, and provide mentoring and support for both the new recruit and their supervisors/colleagues: this will aid retention and produce better results for the employer;
- make sure that the social requirements are made known to, and fully understood by, management and supervisory staff involved in the delivery of the contract.

4.10 LESSONS FOR POLICY MAKERS

The case studies can only provide indicative information about the impact of including new social requirement in public procurement, but have helped to identify a number of points that should be considered by policy makers.

4.10.1 Good procurement practice

The UK case studies demonstrate that the inclusion of social requirements early in the procurement process is the right approach. Essentially, if procurers apply good procurement practice to the use of social requirements they are more likely to achieve VfM (in terms of their core requirements) and the delivery of the social requirements they desire.

This requires:

- early consideration of the case for including the social requirements in the procurement process, and how both the development and management costs (to the purchaser) and any additional costs to the contract will be resourced;⁵²
- a clear definition of, and measurable outcomes for, the social requirements to be delivered: this establishes a level playing field for bidders;
- clarity about how the social requirements will be utilised at different stages of the procurement life-cycle e.g. as pre-qualification requirements, award criteria, and/or contract conditions;
- the inclusion of monitoring information relating to performance indicators as a contract condition.

Although case study evidence is slim the failure to follow the above good practice in the Manchester case study – in relation to the social requirements – appears to have resulted in a lack of monitoring and, in relation to the training objectives, a low level of achievement. However, these may be matters that they can address with their partner contractors when discussing future allocations of work under the framework contract.

4.10.2 Value for Money

It would appear that most of the case study contracts are likely to provide improved value for money by including their social requirements in the procurement process. This statement is based on three factors:

- the purchasing agency had the powers and policies in place to regard the social requirements as core to the contract: so the outputs added to the achievement of their aims and public commitments;
- most of the costs of the social requirements were funded by – or are expected to be funded by – either additional special-purpose funds identified by the purchaser (as in East Ayrshire) or external resources that will be obtained by the contractor (as in Raploch, GHA and Manchester);

⁵² The word resourced is used because additional costs could be met by obtaining money or free services from other public agencies. These could be provided to the purchaser or to the supplier.

- the case study informants have already experienced improved value for money from the social or environmental innovations they have introduced.

There will be some additional management overhead costs to both the purchaser and the provider, but the case studies suggest that the organisations involved had already built this into their operating costs, so there was no additional cost to be borne by the specific contract.

On balance, in the approaches that have been adopted, the achievement of the core purpose will have been facilitated, incurring an element of additional cost.

4.10.3 Impact on competitiveness

There is no evidence that the changing market that is represented by the inclusion of social requirements in contracts is resulting in a reduction in competition. This is for three reasons:

- purchasers have recognised the risk of this and taken action to inform and reassure potential bidders prior to and during the procurement process;
- purchasers recognise that the delivery of the social requirements needs to be done through a partnership with the contractor in which either the purchaser's own staff or those from other public sector agencies work with the contractor to assist in the achievement of the outcomes;
- while some contractors are slow to adapt to a changing market others grasp new opportunities and use this to grow their business: policies that aim to limit changes in the market place will protect the businesses that are strong in this market at the expense of businesses that will grow by exploiting new markets that suit their strengths.

SMEs with strong community connections, including social enterprises, may be amongst the businesses that have the right ethos and energy to exploit the new niche markets created by the inclusion of social requirements in public contracts. However, the case studies show that some major national and regional bidders are already able to successfully bid for contracts. They have already developed the understanding and organisational capability to deliver the social requirements that their clients have been demanding.

Although most of the case studies have focussed on works and services there is no reason to believe that the suppliers of goods should be less responsive to the changing needs of their public sector clients. The TfL case study provides one example of this. The key message is that the public sector needs to clearly set out what it wishes to purchase. The supply side of the market will respond to this, albeit after a period of adjustment when additional encouragement and support for bidders, and maybe a short-term budget uplift, may be necessary.

4.10.4 Opportunities for small firms

The brief for this work required particular focus to be given to the impact of social requirements in contracts on SMEs, social enterprises and small firms led by women and people from black and ethnic minority communities. The case studies have not provided much direct evidence on this but two points can be considered:

- there is scepticism about the benefits of bidding for public sector contracts amongst small firms, that has nothing to do with social requirements but will not be eased by the addition of social requirements;
- the barriers faced by small firms in competing for large public sector contracts relate to their ability to compete on traditional award criteria which have not been adapted to reflect the particular benefits which SMEs can offer.

However, the points made in 4.10.3 above can be applied to the small firms sector. These locally based firms may well have an understanding and commitment to local communities and social issues that gives them some advantages when competing for contracts that include social requirements. They may well be the beneficiaries of a changing market that demands more of the knowledge and attitudes that they possess. This could be as direct contractors or as partners or sub-contractors to larger firms that need their knowledge of local communities and resource regimes to deliver the social requirements of the contract.

However, the LB Haringey case study provides a powerful example of how a public body can ensure that its market is made available to SMEs and BMEs. This is especially important in a context where the contracting out of large public services to a single provider – often a management provider that sub-contracts delivery – may be the chosen route for purchasers that are trying to make cost savings. Where the current services are delivered by a large number of SMEs these savings may be obtained at a very significant cost to the local economy. The Haringey example demonstrates that with thought and care the provision of opportunities for SMEs can be included as a social requirement.

CHAPTER 5 APPLICATION OF SOCIAL REQUIREMENTS TO MANUFACTURED SUPPLIES

Key Points

- There appears to be little action in the manufacturing sector in terms of incorporating social requirements into procurement. There should be no reason why social requirements should be less applicable to manufacturing than to works or services contracts, but there may be some resistance in the private sector to some forms of social clauses in supply of goods contracts (especially where they are seen to intervene in markets rather than assist opening them up). Evidence from TfL and the private sector shows that social requirements can be included, and they can be monitored and verified.
- Public sector procurement can be used to stimulate innovation in UK manufacturers that can result in increased national and international competitiveness (e.g. TfL / Eminox).
- The barriers to the use of public sector procurement to achieve social and environmental innovations are not related to the relevant legal frameworks – many bodies could do more within their powers and policies provided that they followed good procurement procedures – but are to do with motivation and affordability. The critical difference between the public and some parts of the private sector in this regard is motivation and affordability.
- Should Government choose to adopt a comprehensive sustainability agenda for public procurement, such as the recommendations of the Sustainable Procurement Task Force, it would be of benefit for them to do so taking into account a process of negotiation with key stakeholders.

5.1 THE FOCUS ON MANUFACTURED SUPPLIES

The Steering Group for the project have emphasised the interest of the Manufacturing Forum in the potential of the use of social requirements in public contracts for manufactured supplies. This came from two perspectives:

- stimulating innovation in UK manufacturing companies that will help them to become more competitive;
- the implementation of UK Government commitments, especially in relation to International Labour Organisation (ILO) standards.

The context of the research made it difficult to find case studies involving the use of social requirements in public sector procurement of manufactured supplies either in the UK or Europe, but it has been possible to examine the potential role of social requirements in such procurements by drawing on the case studies that have been done, by discussing the issue

with a key purchasing agency (NHS PASA), and through desk research. Some further examples were drawn to our attention by the Sustainable Procurement Task Force, including an example of social labelling.

5.2 LACK OF INNOVATION

It has become evident while looking for useful case studies for this report that there is very little current action in the manufacturing sector in terms of incorporating social requirements into procurement. Discussion with two of the largest bodies in public procurement, OGC Buying Solutions and NHS PASA, has identified how little this area has been explored. This may be due to a lack of resources, and while there appears to be a willingness to include environmental elements of sustainable development in manufacturing procurement, there is no innovating force in relation to the social elements of sustainable development.

However, it would appear that a further difficulty in encouraging the use of social requirements in manufacturing procurement arises in relation to the regulation or verification of requirements. Not only is it necessary further to EU case law (*EVN C-448/01 (2003)*, see Appendix 1) - at least in the case of environmental requirements and presumably, therefore, also in the case of social requirements - to be able to verify requirements, this also needs to be practicable. Lack of resources may mean that it is difficult to verify whether or not a manufacturer adheres to certain standards or requirements. Where there are standards in place that govern the use of certain terms, some requirements may be more readily verified – for example, the use of organic foods, where the use of the term ‘organic’ is governed by certain rules.

This problem is not necessarily distinct from equivalent problems encountered in works or services procurement, or other forms of supply. For example, the verification of a source of electricity is impossible where it is sourced from a grid system. The problem with verifying requirements such as adherence to ILO conventions remains one of resources rather than technical impossibility. Where the resources are unavailable verification becomes impracticable.

Furthermore, it is important that the costs of implementation and verification of social requirements are not disproportionate, as this can act as a deterrent for potential tenderers, including SMEs in particular. Where prospective tenderers are expected to carry the costs of social requirements as an overhead, a small firm may be at a disadvantage due to a reduced capacity to absorb costs. However, this may be less problematic in situations where social requirements form a priced element of the supply.

There is no obvious reason why social requirements should be less relevant or applicable to manufacturing than they are to works or services contracts. As the Transport for London case studies and the illustrations of the implementation of Ethical Trading Standards by the private sector show, social requirements can be included in the specification and they can be monitored and verified. However, the costs of delivery and of monitoring and verification can be high. Affordability – particularly in the context of competing demands – may therefore be the key barrier to use.

There appears to be a concern in some quarters (especially in the business sector) that the public sector should not use social clauses to intervene in markets, rather than opening them

up.⁵³ A concern that may be raised about the inclusion of social requirements in the procurement of manufactured supplies is their relevance to the subject of the contract. However, as has been made clear earlier in this report, it is for the purchaser to decide what is or is not relevant to the subject of the contract and what is affordable, based on the powers and policies of their organisation. There is no fixed menu, and in many procurement activities the specification is subject to continual change. For example, not many years ago it would not have been acceptable for purchasers of transport services to require providers to use vehicles with less damaging exhaust emissions.⁵⁴ Indeed, this was the subject of a case brought in the European Court (the “Finnish Buses” case – see Appendix 1). In the current climate it might be deemed irresponsible for a public body not to do so, and this change of approach is being secured through EU legislation (see the transport case studies).

It would seem that innovation in the specification of what is being procured is normal, but often contested within the purchasing body at the point of innovation. There has been considerable, although still not universal, acceptance of increased environmental standards being included in UK public procurement, and some of these may pre-date their imposition through legislation and regulation. There would appear to be increasing acceptance of some socially driven requirements, but not in others. Amongst the less-developed areas for socially driven innovation in the specifications for manufactured supplies (and indeed works and services) are those related to workforce matters, including equal opportunities, the recruitment and training of unemployed people, and the ILO conventions.

5.3 COMPARISON WITH THE PRIVATE SECTOR

One argument for suggesting that there are more possible applications of social and environmental requirements in manufacturing is the extensive evidence of social and environmental responsibility within private sector supply chain relationships. There are many examples of companies who produce goods within environmental or social boundaries - from cosmetics not tested on animals to fair trade coffee to fish caught in a sustainable fashion - some of which are imposed on their manufacturing supply chains. Some of these are examined below.

5.3.1 Consumer Pressure

In general, having a brand or corporate identity that the consumer recognises can be a strong impetus for companies/manufacturers to adopt principles of corporate social responsibility or environmentalism. Being able to apply a label to a product enables a manufacturer to make a distinction between their product and others on the market, and this becomes a feature upon which to advertise their product. Depending on the particular market, advertising your product as being organic, fair trade or environmentally friendly can be advantageous. A competitive marketplace should ensure that suppliers provide what the consumer wants, and if consumer pressure is strong enough, and their demands are realistic, then the market simply responds to this pressure as best it can. In this sense competition and an open market are natural catalysts for innovation.

⁵³ In discussion with the Confederation for Business and Industry. “Procuring the Future” (Sustainable Procurement Task Force) seems to seek a Government policy mandate which clarifies the integration of sustainability in procurement without distinguishing the types of social, economic and environmental requirements in this way.

⁵⁴ And indeed the technology for this was not available until there was demand from a major public sector purchaser.

Example from the Private Sector - Seafood

Below are the ten Principles for Sustainable Fish Procurement are used by one manufacturer of fish products:

- 1. Legality** - never knowingly purchase fish caught, landed or farmed illegally, and make efforts to investigate and ensure the legality of the supply chain.
- 2. Assess, review and revise** - fish procurement decisions are based on a formal selection criteria. Selection criteria and policy positions are reviewed on a regular basis to ensure that commercial activities are mindful of the most current information available.
- 3. Labelling** - operate a policy of openness in labelling of fish products to ensure that the consumer has sufficient information at point of sale to make informed purchasing decisions. The origins of fish are made known, and eco-labelling is used when possible.
- 4. Promotion** - active promotion of the use of certified sustainable species. All new product development is mindful of the choice and availability of species derived from certified fisheries wherever practically possible; the existing portfolio continually reviewed.
- 5. Continuous improvement** - identify and develop trading relationships with suppliers who demonstrate an active awareness of the environmental impacts of their operations. Actively encourage and work with suppliers to improve the application of best fishing and farming practices and the implementation of new technologies to progressively minimise the environmental impact of commercial fishing and fish farming on the aquatic eco-system.
- 6. Engagement** - engage openly in dialogue with relevant parties, including fishermen, fish farmers, governments, trade associations, NGO's and food retailers.
- 7. Prohibition** - clearly define and publicise prohibitions of products and practices openly condemned.
- 8. Research** - recognise the need for on-going scientific research into new and more effective technical conservation methods for fishery management. Strive to identify and become involved with such scientific research projects and use market position to encourage participation and implementation within the catching sector.
- 9. Traceability** - strive to ensure that all wild captured fish are traceable back to the catching vessel and catch area. Develop and improve traceability systems for farmed fish to ensure traceability to farm site and enable the accessibility of fish history data.
- 10. Ethics and Environment** - support the ETI Base Code of Conduct and the aims and objectives of the international standard on ethical trading, SA 8000. Not to conduct trade with companies which are not mindful of their ethical, social, environmental, financial and humanitarian responsibilities.

In the public sector there is less of a direct link between what the ultimate consumer wants and what is provided by manufacturing suppliers. While a contracting authority may have a 'consumer', be it the NHS patient, the recipient of 'meals on wheels', road users or the children who attend a school, they cannot be said to be acting in the marketplace in the same way. Their demands are filtered through policy and financial considerations.

This means that the inclusion of some social or environmental considerations is felt by some to be difficult to justify within the legal and policy framework. For example, fair trade produce might be desirable to the public, but it is difficult to show a specific value to the community served by a local authority in terms of the promotion of well-being. Moreover, the very point of fair trade produce is arguably to enhance the well-being of an entirely different community. However, other considerations can be more readily justified in terms of a contracting authority's well-being power, such as the environmental impact of public transport, or the benefit to hospital patients in offering / providing halal, kosher or vegetarian meals.

5.3.2 Ethical Trading by the Private Sector

Social or Environmental Conscience

In addition to the effects of functioning within a competitive marketplace, a private company, without the constraints of a Best Value or value for money policy, can choose to adopt social or environmental considerations into manufacturing or procurement, purely on ethical rather than commercial grounds. One obvious example of this can be seen in the policies relating to animal testing, environmental impact and community trade held by the Body Shop and applied to their products. While The Body Shop has recently been bought by L'Oreal, it is understood that the values of The Body Shop will continue to be applied throughout the organisation.^{55 56}

Example from the Private Sector – Cosmetics / Toiletries

One retailer of cosmetics and toiletries has strict social and environmental / ecological policies. They aim to act in a way that is socially, economically and ecologically sustainable.

Animal testing:

The retailer's position is that cosmetics testing on animals is unethical, unnecessary and should be banned. They do not test their products or the constituent ingredients on animals and, under a strict purchasing rule, only use suppliers who have same policy. They support the use and development of alternative testing techniques, and also use ingredients whose use has been tested naturally over time in different cultures.

Environmental policy:

The issues which this retailer believes are most relevant to its activities are: greenhouse gases; waste; impact of supply chains; and product design. Their policy is to comply with all relevant legislation, but to simultaneously attempt to go beyond this. For example, the majority of the bottles sold to customers are made partially of recycled material, and are also recyclable; customers can often either return empty bottles to a shop, or have them refilled.

⁵⁵ Customer Statement made on the Recommended Cash Offer announced for The Body Shop International plc by L'Oreal, http://www.tbsresource.com/pdfs/customer_statement_17_03_06.pdf

⁵⁶ 'Procuring the Future' (SPTF) gives the example of the Allied Domecq Ethical Trading Programme (page 48)

Community trade:

Community Trade is defined as “a targeted purchasing programme of accessories and natural ingredients from disadvantaged communities around the world”; it is their particular idea of fair trade. They believe that they get good quality products at a fair price. However, this trading comes with the proviso that the products they buy also comply with the company’s policies on animal testing and environmental protection.

This company is also a member of the Ethical Trading Initiative, and use the Base Code as the basis for their Supplier Code of Conduct, which suppliers are required to sign.

Public bodies cannot act unilaterally in quite this way, as their powers are limited to those that are given to them, and they do not have free reign over their spending. For example, while the ‘well-being’ power conferred on local authorities is a very broad power, local authorities are nevertheless limited to such actions as can be justified as promoting the well-being of the area; abstract policies which do not apply to the area or its population will not be so readily covered. An action may be laudable for its social or environmental conscience, but if it does not promote the well-being of a local authority’s area, then the authority will lack the power to act in such a way.

The Ethical Trading Initiative Base Code

To examine what might be involved in PASA or another public authority implementing the Ethical Trading Initiative Base Code, especially in relation to internationally procured manufactured supplies, desk research was undertaken on how private sector companies implement the Base Code.

The Base Code centres on nine essential characteristics of ethical trading:

1. *Employment is freely chosen*
2. *Freedom of association and the right to collective bargaining are respected*
3. *Working conditions are safe and hygienic*
4. *Child labour shall not be used*
5. *Living wages are paid*
6. *Working hours are not excessive*
7. *No discrimination is practiced*
8. *Regular employment is provided*
9. *No harsh or inhumane treatment is allowed.*⁵⁷

The Ethical Trading Initiative (ETI) has also set down a list of Principles for Implementation that require members to address critical issues relating to monitoring and verification, training and raising awareness and the requiring of corrective actions. Members are also required to take the costs of observing the base code into account when negotiating with suppliers.

⁵⁷ <http://www.ethicaltrade.org>

The ETI has a membership that is made up of private sector companies, trade unions, and non-governmental organisations. The majority of corporate members are from the food, clothing, tea and coffees industries. Members work together to identify, promote and share good practice in implementing the Base Code. This is identified through experimental projects and research.

In addition, corporate members commit to implementing the Base Code within their supply chains. Most seem to use the Base Code as a basis for a Supplier Code of Conduct or similar provision, building on the Base Code for other relevant provisions (for example, adding an element of environmental sustainability). Members are expected to report annually on their activity in implementing the Base Code and progress in improving labour standards. In addition, the ETI has procedures in place, if necessary, for the removal of members who consistently fail to meet an improvement plan.

Ethical Trading in the Private Sector – Clothing / Accessories

The following is one clothing retailer's policy on ethical trading and supply chain issues:

"[We] monitor all aspects of the supply chain including quality, working conditions and general employment practices. All suppliers are asked to commit to The ... Code of Conduct. By working together with our suppliers we aim to achieve sustained improvements where necessary and with our entire supply base to share best practice and to encourage their continued development.

We do this through a combination of independent assessments, and those conducted by our own in house specialists.

As a founder member of the Ethical Trading Initiative (ETI) we benefit from the interaction with other members who include other corporates, Non Governmental Organisations and Trade Unions. The resulting shared learning and access to specialised resources further strengthens the work with our suppliers.

[We] are continually integrating processes to review, monitor and advise suppliers as to their existing business practices. The company is committed to bringing about the change towards international standards and conditions for workers in a diverse range of factories across the globe."

While the present day company sources its ranges from across the world, the idea of ethical trading sits happily with their image and history as an organisation that sells clothes and accessories originally inspired by and sourced in Asia. Labour issues and ethical trading are a part of the organisation's history.

5.4 THE NHS PURCHASING AND SUPPLY AGENCY (PASA)

To understand how a major purchaser of manufactured supplies for the public sector views social requirements the officer responsible for sustainable procurement at the NHS Purchasing and Supply Agency (PASA) was interviewed. The NHS PASA Sustainability Report 2004/5 contains the following statement:

In 2004/5 the Good Corporate Citizen agenda remained an important policy lead for the Agency and the wider procurement agenda ... The key driver for this agenda is to use the NHS economy to tackle health inequalities and work with the community in a positive and constructive way through employment and training, procurement and capital programmes.⁵⁸

The above quote illustrates the direction in which PASA wants to travel. However, to implement an initiative 'the problem' needs to be 'heard'. This is more likely:

- where there is support and lobbying from outside of the agency;
- where there are respected external standards that can be applied.

An example of this is the increased use of 'assured' fresh produce in meals, where DEFRA and The Kings Fund (as a highly respected NGO) have been leading the way. It seems that in the 'school fruit and vegetable scheme' the following requirements form part of the contract:

Source UK produce from suppliers who are registered members of the Assured Produce Scheme or equivalent. Suppliers should maintain evidence of this. For imported produce suppliers must source from producers that are members of assurance schemes which meet the EUREP-GAP standard (in Europe) or are members of similar schemes in other countries. All sources must comply with BASE Code Ethical Trading Initiative.

Another example of 'social requirements' that have been addressed is the provision of 'ethnic meals' in hospitals: this was researched and market-tested with ethnic communities. There is also action on nurse recruitment: agencies must not actively recruit nurses from countries that are on a list produced by the Department of Health because of the risk of damage to indigenous healthcare. Also, one of the suppliers on the framework agreement for the repair of wheelchairs is REMPLOY, although this seems to be a straight commercial contract with a social enterprise, with no social requirements included.

The food initiative affects the manufacturing of meals, which are mainly supplied from within the UK. The other large area where thought has been given to the implementation of social requirements through procurement is textiles, which are mainly imported.

The likely approach on textiles will be to require suppliers to implement the Ethical Trading Initiative Base Code. It is anticipated that PASA would have problems in meeting some key elements of ETI membership. It can ask suppliers to comply but it has no effective means of

⁵⁸ Towards sustainability - Facing the Future. NHS PASA Sustainability Report 2004/5 - <http://www.pasa.nhs.uk/sustainabledevelopment/2005/>

monitoring and enforcing the Code. Although PASA buyers do sometimes visit overseas suppliers they would not be doing so to monitor the ETI Code. There may also be cost issues: although the Gershon review does not equate VfM with lower cost, the NHS is expected to achieve efficiency savings and if implementing the ETI base code resulted in higher costs these may not be affordable.

This position compares unfavourably with that of the large retailers that implement the ETI code. They are likely to have greater flexibility in their costs because they have the capacity to pass these on to their customers, and ethical trading is a good marketing tool.

From the above it would seem that PASA is committed in principle to delivering sustainable development, including being a 'good corporate citizen' at home and abroad. The latter could include 'ethical trading' that implements ILO Conventions. However, the capacity of the organisation to resource the delivery of this commitment is limited, and action is more likely where it is led by another Government agency or respected NGO and where there are established and accepted standards that can be simply incorporated into contracts.

In addition to the above, PASA's Sustainability Reports from 2004/5 and 2003/4 includes a number of examples where they have introduced social and environmental requirements into their purchasing. In this section these are summarised with a view to identifying any common elements: is there a PASA approach?

New Generation Printers

Copying and printing represent a large activity across the NHS, with approximately 500 million pages of output each month. The potential was there for the NHS to make a saving of around £25m by migrating half of the expensive output to cheaper printers and photocopiers. A national framework agreement for multi-functional products (MFPs) and photocopiers, running from March 2004 to February 2007, was awarded by OGC Buying Solutions in collaboration with PASA. Sustainability considerations were incorporated into the procurement process from the outset. Advance research identified what sustainability issues would be relevant to the framework, in particular identifying that service and management were, if anything, more important than the products themselves. The PASA case study highlights:

The specification:

- *was service rather than product focussed to encourage innovation and holistic solutions;*
- *incorporated eco-label criteria which promote eco-design, energy efficiency, use of recyclable consumables etc;*
- *included a requirement that suppliers continually improve their environmental performance, and the environmental attributes of their product ranges, for the duration of the contract.⁵⁹*

⁵⁹ http://www.pasa.doh.gov.uk/sustainabledevelopment/2004/case_studies/newgeneration.htm

The whole-life costs of tenders were evaluated, which clearly identified that the cheapest model had a far higher whole life cost than the next cheapest, and so on. This identified that purchase price can be a poor guide to actual cost.

Ethnic Meals for the NHS

PASA are in the process of developing national framework agreements for authentic meals for ethnic groups and special diets (including Halal, Kosher, Afro-Caribbean and Chinese). PASA have worked closely with relevant stakeholders, including religious / cultural leaders, dieticians and NHS catering managers, in their attempts to ensure that ethnically and culturally appropriate meals are available to NHS patients. Religious / cultural leaders were invited to be involved in the evaluation process to ensure that the products are acceptable, including tasting evaluation sessions.

The aims of the project were set before entering into the procurement process, including:

- *to achieve nutritious, authentic ethnic food products sources from accredited suppliers*
- *work towards the quality and nutritional requirements as determined by the Better Hospital Food Programme*
- *all contracted suppliers to be approved against the NHS Code of Practice*
- *to meet the once-only principle to maximise the employment of resources within the NHS*
- *to achieve greater leverage by concentrating the NHS requirements into a single agreement*
- *food safety and religious accreditation which would mean less need for friends / relatives to bring in food for patients.*⁶⁰

⁶⁰ PS (Purchasing and Supply News), 22 October 2005 - http://www.pasa.nhs.uk/ps/PS_Magazine_22_interactive.pdf

Lamps and Tubes

The renewal of an existing framework contract supplying electric lamps and fluorescent lighting tubes was taken as an opportunity to promote the costs benefits to the NHS of lighting that is energy efficient, and also to attempt to change NHS trust procurement habits. This formed part of an internal pilot of a new environmental purchasing procedure. PASA worked with suppliers to implement these changes. An environmental consultancy, BRE, developed a best practice specification for lighting products for PASA. The new national framework agreement for the supply of lamps and tubes began in July 2005.

The procurement focussed on a basket of lighting products, of which over 75% were energy efficient. Successful suppliers were required to reduce the energy intensity of the lamps and tubes they supplier over the life of the contract. Overall, the best economic solution for the NHS was sought, whilst managing to deliver environmental benefits simultaneously.

This new framework agreement also took into account the fact that “introducing energy efficient solutions in new build or refurbishment will ultimately increase the demand for replacement lamps and tubes in the future ... This area is being taken forward with the NHS Procure 21 construction project team”.⁶¹

Reducing Packaging

A packaging reduction initiative was undertaken by PASA in the computer software supply chain. PASA embarked on a programme with the largest software reseller of Microsoft products to the NHS, investigating what could be done to reduce product packaging, and to reduce the amount of paper used in the ordering process by way of license confirmations and invoices.

Targets were set of:

- 40% reduction in product packaging by March 2004
- 20% reduction in paper use by March 2004.

To this end, CDs are no longer shipped in plastic boxes (such as those which contain music CDs purchased in shops) but instead are wrapped in soft paper and sent in envelopes, resulting in a weight reduction in typical packaging of over 80% (from 600g to 100g). The supplier saves money because of the reduction of postage and packaging required, and the NHS recipients are saved the trouble and expense of disposing of the excess packaging. Paper use has been reduced by the use of email for license confirmations and electronic invoices.

⁶¹ PS (Purchasing and Supply News), 22 October 2005 - http://www.pasa.nhs.uk/ps/PS_Magazine_22_interactive.pdf

A separate project was also started, in the form of an encrypted server, which will enable software to be downloaded over the internet. This should do away with the need for posting software, and hence the packaging needed to do so.

School Fruit and Vegetable Scheme

Choosing Health and the Food and Health Action Plan have both identified that increasing consumption of fruit and vegetables is an important part of health promotion, and can help to tackle the causes of illnesses including cancer and heart disease. PASA have been working with the Department of Health to implement the School Fruit and Vegetable Scheme, described as “*the biggest programme to support children’s nutrition since the introduction of free school milk in 1946*”.⁶²

Specifications for the project were developed in collaboration with various stakeholders, including the Food Standards Agency, DEFRA, the Fresh Produce Consortium and the National Farmers Union. Around 40% of produce is sourced from within the UK. Ethical trading is promoted where products cannot or are not sourced within the UK. The PASA case study explains that “*UK sourcing also has a strong regional focus, and a strong seasonal focus which supports UK farming industry seasons ... this project is tackling health inequalities not only through improving diets, but also through employment*”.⁶³

The School Fruit and Vegetable Scheme is described as “*the practical implementation of a Choosing Health priority, showing how public procurement can implement policy to bring direct health benefits both to the users and the wider community*”.⁶⁴

5.4.1 Key Lessons

Value for Money

While procurement needs to satisfy Best Value / value for money requirements, this does not preclude the achievement of social or environmental ends. For example, energy efficient lighting can be justified in terms of value for money, making savings to the overheads of NHS trusts, while having a positive environmental impact. Perhaps the most important element of the ‘PASA approach’ is an ability to identify social and environmental requirements which are relevant to their purchasing and can be achieved, either without affecting value for money, or by actually enhancing it.

In this sense, the importance of whole-life costs to procurement should be recognised. New generation printers were seen to be an opportunity to make savings over the whole life of a

⁶² <http://www.pasa.nhs.uk/sustainabledevelopment/2005/casestudies/schoolscheme.htm>

⁶³ Ibid.

⁶⁴ Ibid.

product; it was evident that the cheapest option was not automatically the best value for money over the life of a contract.

Giving Early Thought to Social and Environmental Issues

Incorporating sustainability principles into the procurement from the earliest possible point can help to inform decision-making and more readily achieve sustainability and cost benefits. The development of a new framework agreement for new generation printers and MFPs gave PASA the opportunity to incorporate sustainability from the outset, which appears to have made the agreement more effective and appropriate, both to PASA's desire to include sustainability issues in their contracting and to their obligation to achieve value for money.

Conducting appropriate research can help to assess the potential for savings and improvements in performance, and to provide a strategy implementation plan. Drawing on the expertise of environmental consultants meant that PASA's lighting framework agreement had identified the need for flexibility in the contract (to allow room for the diverse needs of the NHS) while still encouraging and promoting energy efficiency.

Stakeholder Involvement

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

Contract Management

The area of contract management can be critical to the successful delivery of requirements. In some of the PASA case studies a focus on how suppliers delivered the contracts was important. For example, in the lighting framework agreement, *"the Agency's new estates category team will implement agreed KPIs as part of the contract management process with our suppliers"*.⁶⁵ Effective contract management can ensure that the social or environmental requirements of a contract (along with all other elements) are successfully delivered.

5.5 THE TRANSPORT FOR LONDON (TFL) APPROACH

The transport case studies have demonstrated a process that has been used by TfL in order to implement some of their social and environmental requirements.

In order to reduce harmful vehicle emissions London Transport (the forerunner to TfL) first did research to identify the best combination of technology and fuel to achieve their objectives. They then ran a trial with a UK manufacturer of catalytic traps and a specialist fuels company that imported ultra low sulphur diesel (ULSD) that was not available in the UK

⁶⁵ PS (Purchasing and Supply News), 22 October 2005 - http://www.pasa.nhs.uk/ps/PS_Magazine_22_interactive.pdf

at that time. Following the success of the pilot LT let a contract for catalyst technology traps to be fitted to all buses operating in the capital, with an 80% share of the contract going to a UK company that had participated in the trials.

The catalytic product that was used could be adapted to use ULSD when this became available in bulk. To encourage transfer to ULSD LT/TfL agreed to pay a premium of 3 pence a litre to bus operators. However, within 12 months the increased demand for the fuel had been sufficient to entice major fuel suppliers into the market and the need for the subsidy was removed by more competitive supply of ULSD.

So there is clear evidence in the case study that the LT initiative stimulated the market for the manufacture of catalytic traps by a UK engineering company that gave the manufacturer the basis to compete in a growing global market. The product has been sold in volume in Sweden, Belgium, Italy and Hong Kong.

A somewhat similar process was used by TfL when it sought to improve the quality of service to its customers – and potential customers like those requiring to use the disabled access ramps – and Londoners as a whole through improved driver training. The first step was to pay the training costs for the contracted bus operators to ensure that all of their drivers obtained BTEC accreditation. Having established this as the benchmark qualification for existing staff TfL then included this as a contract requirement: all new drivers had to be trained to this level at the company's expense.

In essence TfL has an approach with three stages:

- Recognising the problem and identifying a preferred solution;
- Enabling existing providers to adapt to the new standard, with TfL paying the costs;
- Including the new standards in the contract specification and withdrawing any specific additional funding regimes.

In each example the approach has stimulated the growth of a market for the commercial sector - engineering and fuel suppliers in relation to lowering harmful exhaust emissions, and training companies in relation to improving customer services.

5.6 AN ALTERNATIVE APPROACH

One example of an alternative approach to the use of public procurement is the use of social labelling which has been attempted in Belgium. The social label was launched in January 2003, with the intention of encouraging respect for basic rights within Belgium but also within other countries, where goods might have been produced. To this end the label is awarded where it can be demonstrated that the eight fundamental ILO Conventions have been adhered to along the entire production / supply chain of a product.

The label is given to products, rather than organisations; as such an organisation can achieve the social label for one of its products even where it cannot guarantee or demonstrate compliance with the requirements for other goods it produces. The social label can be awarded even where the country in which a product is manufactured has not ratified the ILO Conventions, as it is product and organisations specific – the manufacturer of that product will need to illustrate adherence to the Conventions, even where the country it works

within has not ratified them. However, this also means a potentially higher standard of monitoring and verification, making the achievement of the social label more difficult.

It was hoped that the Belgian social label would put public authorities *“right back at the centre of things, at a time when the trend is often more towards diminishing the role of the state”*,⁶⁶ by allowing greater regulation by public authorities of the recognition of the ILO Conventions.

At the current time, this social label has been awarded to a total of only five products. The label has been understandably difficult to achieve; in particular, it is difficult to control and certify adherence to the ILO Conventions along the length of a production chain.

5.7 CONCLUSIONS

Although there has been little opportunity to collect case study material relating to manufacturing supplies as a part of this study the material in this chapter suggests that there should be nothing in principle different about including social requirements in public procurement relating to manufacturing supplies. The material suggests that:

- there are social and environmental matters that can be included in contracts for manufactured supplies;
- as with all innovations it is good practice to work with the supply chain to develop appropriate innovations;
- where the innovations are of significant size they will lead to an adjustment in the supply chain, including attracting new providers and innovations amongst existing providers, and over time this may reduce initial higher costs;
- the innovations in the supply chain can lead to those suppliers becoming more competitive.

The material suggests that public sector procurement can be used to stimulate innovation in UK manufacturers that can result in increased national and international competitiveness. It also suggests that public procurement could be used to ensure that manufacturers are implementing ILO and Ethical Trading standards: although there is no evidence of this in the public sector, it is being achieved by the private sector.

However, the suggestion that public purchasers in the UK could use their procurement to achieve these additional benefits does not mean that they will. The critical difference between the public and the private sectors in this regard is motivation and affordability. Private sector organisations can choose to use their procurement to achieve social or environmental innovations – either in the UK or elsewhere – because this can translate into commercial benefits. Their customers may be willing to pay higher prices, or the stakeholders can decide to absorb higher costs and a lower profit margin. The private sector may have the motivation and the ability to pay. This is the key difference between, for example, NHS PASA and, say, Allied Domecq.

⁶⁶ Human.Rights@Work, the monthly newsletter of ACTRAV (The Bureau for Worker’s Activities), International Labour Office, January 2003 - <http://www.ilo.org/public/english/dialogue/actrav/new/newsletter/jan03.htm#Feature>

In the public sector both motivation and ability to pay may be absent or weak. And even where the motivation is high there may be budget constraints. The TfL example is perhaps unusual because of the influence of the purchaser on the market, but also because of their commitment to the social and environmental innovations. They were willing and able to pay to achieve these innovations, and the available information suggests that this commitment has been rewarded by a significantly improved service from their supply chain at no greater cost.

At a smaller scale this appears to be mirrored in the East Ayrshire school meals case study, although the scale of this initiative and its focus on small suppliers may mean that it doesn't achieve the reduced costs for the 'new service' that TfL has achieved once their supply chain adjusts to their requirements.

More typical perhaps is the Glasgow Housing Association approach. With £200m per year expenditure they are a significant purchaser of construction services in the West of Scotland, and they are committed to targeted recruitment and training as a part of a Wider Action Policy. However, they did not feel they could invest their own resources – other than a marginal £35,000 per year on facilitation – in the recruitment and training initiatives. These had to be cost-neutral. Providers will have access to resources from other public sector agencies in Glasgow, but it remains to be seen whether these resources are provided in a way that enables the contractors to achieve the GHA training targets. As with TfL, the right investment in the social innovation (i.e. training) could have longer term cost and quality benefits for the Association.

The message from this chapter, as elsewhere in the report, is that the barriers to the use of public sector procurement to achieve social and environmental innovations are not related to the relevant legal frameworks - many bodies could do more within their powers and policies provided that they followed good procurement procedures - but are more to do with motivation and affordability. This relates to manufacturing supplies, as well as works and services.

In connection with its recommendation to “raise the bar” in “Procuring the Future”, the SPTF provides the following strong signal:

*“This approach will deliver a clear and consistent signal to the market. It will ensure that the public sector values the sustainable offer. It will help the public sector to ratchet up supplier and product performance over time and to identify potential savings. It will put the UK amongst the leaders on sustainable procurement. The public sector will benefit from increased security in the supply chain resulting from reduced risk and reputation exposure created by dealing with suppliers with poor social and ethical practices. Government will be able to demonstrate that its own ethical performance is as good as that of leaders in the private sector”.*⁶⁷

The Task Force's argument about securing the supply chain is based on a risk analysis approach which is reflected in the examples given in this report. If, however, this approach is accepted and then mandated through the Government adopting such a comprehensive sustainability agenda for public procurement, it would represent an intervention in the marketplace to which some businesses will necessarily respond more readily than others.

⁶⁷ *Procuring the Future: Sustainable Procurement National Action Plan: Recommendations from the Sustainable Procurement Task Force*, DEFRA, 2006, page 44

Such an intervention would be no greater, however, than the adoption of the Two-Tier Workforce Code for public / private partnerships, the detail of which was agreed between representatives of public sector employers, private contractors and trade unions. Perhaps a similar process of dialogue and negotiation between key stakeholders in the procurement and development arena for the public sector would be a valuable exercise in getting 'ownership' on all sides.

CHAPTER 6 RECOMMENDATIONS

Key Points

- There is greater and better use of social requirements where procurement officers are able to access clear guidance, there are good models to follow, and benchmarks are provided by authoritative 'champions'.
- Purchasers wishing to innovate in the use of social requirements will need to develop new relationships within or between organisations, a new allocation of resources, and a different weighting of award criteria.
- 'Gearing-up' for the changing market is also a key requirement for companies that want to enter or retain a share of the changing market.
- When social requirements are first used purchasers should consider whether there are sufficient firms able to supply the 'new market' or whether steps need to be taken to encourage the market to respond.
- For both purchasers and suppliers a key need is that existing management and procurement / tendering teams become aware of the possibility that social requirements can be addressed in the procurement life-cycle, and that there is good practice that can be followed in relation to setting or responding to these requirements.
- Increased use of social requirements in the Government market place will create increased opportunities for growth for firms that embrace the new requirements and 'gear-up' to deliver them. This will be at the cost of market-share for firms that resist the new requirements and fail to adjust to the changing market.

6.1 THE IMPORTANCE OF CLEAR GUIDANCE & MODELS

Even from a limited number of case studies there is some evidence that there will be greater and more appropriate use of social requirements in contracts where procurement officers are able to access clear guidance on what they should and should not do, and where there are good models to follow. This was provided, for example, through the Scottish Executive's CBIP programme, although it is too early to say to what extent this has been successful in delivering the required social benefits.

The OGC's Social Note will go some way towards filling the gap in guidance that has existed. However, there would be benefits in other key purchasing departments developing their own guidance, especially perhaps the ODPM, that directly or indirectly funds a large programme of expenditure that is aimed at benefiting disadvantaged communities in England. Their action on social issues relating to neighbourhood renewal can be compared unfavourably with that of DEFRA's (e.g. in relation to fresh food purchase).

The NAPP and CBIP toolkits provide examples of the provision of model documentation that can be used as a template by local procurement officers. This eases their burden of work and repeated use of similar documentation will give confidence to both purchasers and suppliers. This could be usefully taken forward by the Regional Centres of Excellence and by the Local Government Association.

6.2 THE IMPORTANCE OF BENCHMARKS & CHAMPIONS

There is evidence that benchmarks provided by authoritative organisations will assist in helping procurement officers to seek additional social requirements. The use of Soil Association standards by East Ayrshire, and the use of Commission for Racial Equality and standards by LB Haringey are examples of this.

Discussion with the NHS Purchasing and Supply Agency (PASA) has highlighted the role that NGOs have played in establishing benchmarks and lobbying for action by Government. In many areas of Government there are too many initiatives vying for scarce officer time and resources. In this context willing officers may need an external group to 'make the running'. They are then able to respond.

The NGOs can also play a key role in linking the demand and supply elements: formulating the specification in a way that meets the needs and perhaps makes maximum use of resources from outside of the procurement process, and then making sure that other organisations are geared up to help the contractor deliver the social requirements.

The availability of authoritative 'champions' varies between types of social issue. There would appear to be good champions available in relations to public sector workers' terms and conditions of employment (e.g. Trades Unions and the TUC), some equalities issues (e.g. the CRE), environmental issues and fresh food. There appear to be a lack of authoritative champions in relation to neighbourhood renewal and targeted recruitment and training, both within Government and in relation to NGOs.

The issue of benchmarks and accepted good practice needs to be addressed for the private sector contractors and suppliers also. This needs to be done by their trade organisations, but this is unlikely to occur until there is demand from the market place that contractors are required to take seriously.

6.3 A CONSIDERED APPROACH TO INNOVATION

The case studies demonstrate that social requirements should not be seen as an easy bolt-on requirement to the traditional set of purchaser requirements. This is not likely to deliver good social policy outcomes and may prove poor value, both in terms of the officer time that the purchaser organisation puts in and the 'cost per social output' demanded by the contractor/supplier.

A good approach may need a new combination of skills. The 'needs', the way of setting targets and measuring outcomes, and the supply of resources to cover the cost of the social requirements will typically come from people with knowledge and skills relating to the social needs. Their views will need to be dovetailed with the views of people that have a detailed knowledge of what is being purchased, and the whole may then have to be agreed with the procurement practitioner.

Innovations in the use of social requirements therefore need new relationships within or between organisations, a new allocation of resources, a different weighting of award criteria, and perhaps new understanding from the procurement officer servicing the client. One-off, bolt-on, sets of requirements may be useful as a pilot or demonstration of what can be achieved, but further action to 'embed' the approach within the organisation will be necessary if there is to be sustained use of the innovative approach.

'Gearing-up' for the changing market is also a key requirement for companies that want to enter or retain a share of the market. There are examples in the case studies of companies that have developed the infrastructure to deliver the social requirements – e.g. some of the construction companies that have developed stakeholder consultation arrangements and a 'training arm' in response to demands for these services from social housing clients. Other construction companies have not adjusted to this emerging market that is now spreading to other public sector construction contracts. They will need to do so or accept that they are no longer going to be competitive for some parts of the public sector construction market place.

The case studies have provided examples of how this can be achieved e.g.:

- by identifying existing employees with skills and interest in the social requirements;
- by setting up a part of the organisation that specialises in the social requirements;
- by sub-contracting or jointly contracting with a company that has more experience of implementing the social requirements;
- by engaging consultants who advise on the delivery of the social requirements and train in-house staff for future contracts.

6.4 SUPPORT FOR MARKET ADJUSTMENT

The report suggests that the inclusion of social requirements in public sector contracts creates a niche market or a changing market. Some contractors may find this difficult to adjust to, others will use it as part of their business growth strategy.

When social requirements are first used procurement teams may need to give consideration to whether there will be sufficient firms able and willing to supply the 'new market' to provide effective competition. If there is concern about this then there are steps that purchasers can take to help expand the supply side of the market. The OGC published a report on this in 2003.⁶⁸

The case studies demonstrated some good practice in introducing their social requirements to the market place. This included:

- early consultations with potential suppliers (East Ayrshire and TfL)
- early communication of the requirements (GHA and Denmark)
- on-going support with implementation (Stirling).

⁶⁸ OGC *Increasing Competition and Improving Long-Term Capacity Planning in the Government Market Place*. December 2003.

Essentially, the problem of 'insufficient supply' is not new for public sector procurement. It is commonplace for innovations. It must be taken seriously in relation to social requirements, but there is good practice that can be followed.

Again, trade organisations (including trade training organisations) have a key role to play in helping firms to recognise that the public sector market place is changing and in providing training and information that allows those firms that want to adjust to the new market to do so.

6.5 IMPORTANCE OF STAFF TRAINING

For both purchasers and suppliers a key requirement is that existing management and procurement/tendering teams become aware of the possibility that social requirements can be included in the procurement life cycle, and how best to do this.

A key part of the work done within the NAPP and CBIP networks has been informing clients, their procurement officers and their legal advisers of the potential for including social requirements – in a context where many have spent their whole career working within a regime where such action was either a 'non-commercial consideration' under the Local Government Act 1988, or was considered to be undeliverable under the EU Procurement Directives. It is only in February 2006 that the latter position has been clarified with the incorporation of the new Single EU Directive and the publication of the OGC's Social Note.

In local government it is clear that many procurement officers are unaware of the 2001 Order that resulted in some non-commercial considerations being set aside where this was necessary for best value. This shows that there is a need to educate and re-educate procurement professionals in the scope and good practice for the use of social issues in procurement.

In relation to bidders a key requirement is that the staff preparing tenders engage and extend their existing knowledge and apply this to the innovative social requirements. Good firms in each sector will have more knowledge than they recognise in relation to the social requirements. This may be especially the case for small firms and social enterprises that have a closer relationship with local communities, but it can clearly also apply to larger firms that have a track record in working with these communities.

For example, many large construction firms have knowledge of training, including knowledge of how to manage training funds. However, because they don't employ trades staff they only exercise their knowledge across the management and technical grades. To meet the social requirements they may need an incremental development of their existing practice to extend it to trade trainees and general operative training. This is a relatively small step that does not require them to operate outside of the industry of which they are a part. To take this step they need to recognise that it is necessary, recognise their existing knowledge base, and then put the work into the ensuring that their staff extend their knowledge. This is a matter of good management.

6.6 CONCLUSIONS

As can be seen for the above the key recommendations in relation to social requirements – for both purchasers and providers – are not unusual. They are commonplace responses to innovation.

To date, social requirements have seen little innovation in relation to procurement. They have received much less attention than the environmental aspects of sustainable development and are probably considered less legitimate. This has importance in a context where procurement is being expected to deliver better VfM and reductions in expenditure: these requirements determine priorities.

The lack of experience and attention has resulted in a lack of development of models, benchmarks and experience in relation to social requirements. DEFRA has demonstrated that the Government can take a lead on these matters – as it has on environmental matters and fresh foods. The key challenge is whether other Departments and public agencies will give more weight to the pursuit of their core social policy objectives through procurement. If they do so then procurement teams will develop the necessary skills to do it well and the market will respond. If they do not do so then the use of social requirements will remain an underdeveloped area, and a key mechanism for achieving the public sector's core values and outcomes will be wasted.

If there is increased use of social requirements in the Government market place there will be increased opportunities for growth for firms that embrace the new requirements and 'gear-up' to deliver them. This will be at the cost of market-share for firms that resist the new requirements and fail to adjust to the changing market.

APPENDIX 1 POWERS AND POLICIES FOR INCLUDING SOCIAL REQUIREMENTS IN PUBLIC PROCUREMENT

1.1 THE LEGAL FRAMEWORK FOR UK PUBLIC BODIES

1.1.1 UK Legal Parameters for Public Bodies

1.1.1.1 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 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)?

1.1.1.2 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 and the NHS.

1.1.2 Local Authorities

1.1.2.1 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. They do now have an express power to support sustainability under the Local Government Act 2000 (commonly known as the “well-being” power).

Well-being power

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

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

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

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

(Section 2(2) LGA 2000)

1.1.2.3 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 (Section 2 LGA 2000). These are the limbs of sustainability as promulgated by the Government.

1.1.2.4 The power under Section 2(1) 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.

Non-commercial considerations

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

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

- (a) *the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces;*
- (b) *whether the terms on which contractors contract with their sub-contractors constitute, in the case of contracts with individuals, contracts for the provision by them as self-employed persons of their services only;*
- (c) *any involvement of the business activities or interests of contractors with irrelevant fields of Government policy;*
- (d) *the conduct of contractors or workers in industrial disputes between them or any involvement of the business activities of contractors in industrial disputes between other persons;*
- (e) *the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors;*

- (f) *any political, industrial or sectarian affiliations or interests of contractors or their directors, partners or employees;*
- (g) *financial support or lack of financial support by contractors for any institution to or from which the authority gives or withholds support;*
- (h) *use or non-use by contractors of technical or professional services provided by the authority under the [1984 c. 55.] Building Act 1984 or the [1959 c. 24.] Building (Scotland) Act 1959.*

1.1.2.7 Relevant “functions” are:

- (a) *the inclusion of persons in or the exclusion of persons from—*
 - (i) *any list of persons approved for the purposes of public supply or works contracts with the authority, or*
 - (ii) *any list of persons from whom tenders for such contracts may be invited;*
- (b) *in relation to a proposed public supply or works contract with the authority—*
 - (i) *the inclusion of persons in or the exclusion of persons from the group of persons from whom tenders are invited,*
 - (ii) *the accepting or not accepting the submission of tenders for the contract,*
 - (iii) *the selecting the person with whom to enter into the contract, or*
 - (iv) *the giving or withholding approval for, or the selecting or nominating, persons to be sub-contractors for the purposes of the contract; and*
- (c) *in relation to a subsisting public supply or works contract with the authority—*
 - (i) *the giving or withholding approval for, or the selecting or nominating, persons to be sub-contractors for the purposes of the contract, or*
 - (ii) *the termination of the contract.*

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

1.1.2.9 The Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001⁶⁹ ameliorated the impact of Part II Local Government Act 1988 in England by providing that the matters specified in Section 17(5)(a) and the conduct of contractors or workers in industrial disputes between them as specified in section 17(5)(d) are not to be non-commercial matters:

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

⁶⁹ SI 909/2001

- (b) *for the purposes of any functions regulated by that section in relation to public supply or works contracts which involves a transfer of staff to which the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 1981 may apply.*

1.1.2.10 In Wales under the Local Government Best Value (Exclusion of Non-commercial Considerations) (Wales) Order 2002 the matters specified in section 17(5)(a) and (d) of the 1988 Act ceased to be non-commercial matters for the purposes of that section.⁷⁰

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

What is still unlawful?

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

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

- (e) *the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors”.*

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

- (c) *any involvement of the business activities or interests of contractors with irrelevant fields of Government policy”.*

Under section 17 (8) Local Government Act 1988 “Government policy” falls within “irrelevant fields” for the purposes of this section if it concerns matters of defence or foreign or Commonwealth policy and “involve”, as regards business activities and any such field of policy, includes the supply of goods or materials or services to, or the execution of works for, any authority or person having functions or carrying on business in that field and, as regards

⁷⁰ By way of contrast it is interesting that in Scotland under the Local Government in Scotland Act 2003 the matters specified in section 17(5)(a) (b) and (d) of the 1988 Act ceased to be non-commercial matters for the purposes of that section to the extent that:

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

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

business interests and any such field of policy, includes investment in any authority or person whose business activities are so involved". This is very broad wording which may inadvertently cover the support by a local authority of fair trade.

1.1.2.14 Local authorities are still subject to case law about the purposes for which they can exercise their powers (see below). Local government has also been given considerable freedoms in the way functions are exercised in recent years. With the recent volume of relevant guidance emanating from central government and also procurement focused local government organisations it may be time to re-consider whether it is necessary to have Part II Local Government Act 1988 on the statute book at all. No other contracting authority is subject to these statutory constraints and perhaps local government should be put on the same footing as the rest of the UK public sector.

Proper purposes?

1.1.2.15 This question was raised in *R v Lewisham L.B.C., ex p Shell UK*⁷¹. In that case the local authority had adopted a policy of refusing to purchase the products of Shell UK where equivalent products were available elsewhere on reasonable terms. The reason for the policy was Shell UK's membership of a multi-national group of companies with trading links with South Africa (although Shell UK itself did not trade in South Africa). The Court indicated that the policy would have been lawful had it been adopted solely from a desire to promote good race relations within the area, since under section 71 of the Race Relations Act 1976 the authority was obliged to consider the need to promote good relations between persons of different racial groups. However, the Court found that the policy had also been influenced by the desire to put pressure on Shell to cease its trading links with South Africa and this the Court held to be an "extraneous and impermissible purpose".

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

Best Value

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

1.1.2.18 In the light of the Order made in 2001, in order to show that a council has considered properly its policy on the use of social considerations in its procurement operations relating to all of its functions, it is recommended that express reference is made to such practices and how they enable a local authority to perform its functions in a way 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. A council should show how it is continuously improving the performance of its functions through the use of social and environmental considerations. Nowadays it is very easy to

⁷¹ [1998] 1 All ER 938

show this in relation to the well being power which is an express remit for pursuing sustainability. Establishing the right 'audit trail' is not difficult for councils; but it is essential that the trail be shown.

1.1.2.19 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;
- local authorities should use the best practice procurement processes applying to all public bodies (including explicit mention of social requirements in OJEU notices).

1.1.3 NHS Organisations

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

- (a) *to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by [the National Health Service Act 1977]; and*
- (b) *to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to the discharge of such a duty.*⁷²

The duties include a "primary" duty of promoting in England and Wales "a comprehensive health service designed to secure improvement-

- (a) *in the physical and mental health of the people of those countries, and*
 - (b) *the prevention, diagnosis and treatment of illness,*
- And for that purpose to provide or secure the effective provision of services in accordance with [the National Health Service Act 1977].*⁷³

Specifically the Secretary of State has to provide, to such extent as she considers necessary (and amongst other things):

*such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service.*⁷⁴

⁷² section 2 National Health Service Act 1977

⁷³ section 1 National Health Service Act 1997

⁷⁴ section 3 National Health Service Act 1977

These powers can now be read in the context of Choosing Health⁷⁵ and its argument that the NHS should use its resources to maximise the employment and training opportunities for people that are recovering from illness or at risk of illness due to poverty and social exclusion. It can also be read in the context of the threat of labour and skill shortages, and subsequent increases in NHS costs and risk to the quality of service.

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

The functions of the SHAs are prescribed by regulations made by the Secretary of State and would appear to permit the use of contracting to achieve targeted recruitment and training opportunities especially for people recovering from illness or at risk of illness because of their unemployment or poverty.

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

Specific powers include the power to:

*provide training for people employed or likely to be employed by the trust or otherwise in the provision of services under the (NHS Act 1977); and
make facilities and staff available in connection with training by a university or any other body providing training in connection with the health service.⁷⁶*

An NHS trust has a wide subsidiary power to “do anything which appears to it to be necessary or expedient for the purpose of and in connection with the discharge of its functions.⁷⁷”

1.1.3.3 Primary care trusts have equally wide powers to promote sustainability in their procurements.

1.1.3.4 Following the line of arguments set out in Choosing Health and policy documents adopted by the Department of Health it would appear that the use of procurement to achieve economic, social and environmental policies is legitimate. A bigger barrier against inclusion of such factors is perhaps the lack of awareness of those engaged in procurement for different NHS bodies potentially involved.

⁷⁵ *Choosing Health: Making healthy choice easier*, the DH White Paper published in November 2004

⁷⁶ paragraph 12 (a) National Health Service and Community Care Act 1990

⁷⁷ paragraph 16 (i) National Health Service and Community Care Act 1990

1.1.4 Other NDPBs

1.1.4.1 The scope for other NDPBs to promote environmental and social requirements will depend on their particular 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.

1.1.5 Government Departments

1.1.5.1 Equally the powers of Government departments to include social and environmental requirements in their procurements are clear. It is the process by which they establish social and environmental policies which requires further clarification. It is not a huge leap for Government departments to embrace in their procurements not only the aims of environmental sustainability but also the tackling of poverty, the alleviation of unemployment or the provision of training. The subject matter of a contract is determined by the priorities of the relevant department. [KN – The subject matter of a contract is determined by what the authority is actually buying. The extent to which social and environmental factors are part of this process will in part depend on the particular purchase, and the priorities of the relevant department.]

1.2 THE EU POLICY AND LEGAL FRAMEWORK

Much of the legislation governing the use of competitive processes by public authorities in their procurement derives from European Union law, which is intended to reflect the objectives to remove barriers to trade and create a free internal market with the member states (derived from the goal of a common market permitting the free movement of goods, services, labour and capital). These aims are balanced increasingly with other objectives including the protection of the environment, the elimination of inequality between men and women, combating social exclusion and deprivation, and consumer protection.

Within the European Union public procurement practices are affected by:

- 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;
- directives on procurement to regulate award procedures on major contracts, with, for contracting authorities in the UK, regulations by way of statutory instrument implementing EU directives relating to the procurement of works, goods and services⁷⁸ and utilities. The 'Consolidated Directive' was implemented in the UK for the deadline of 31st January 2006 under the Public Contracts Regulations 2006.

⁷⁸ *Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*

The EU procurement rules operate principally at three levels:

- requirements for the advertising across the European Union of contracts for works, goods and services;
- the encouragement of the use of technical standards and approvals which are of application across the Communities;
- requirements for objective and open criteria for evaluating tenders and selecting contractors.

1.2.1 Consolidated Directive

1.2.1.1 As stated by the Social Note *“the new 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 environmental and social and environmental considerations than its preceding directives, both in its non-binding but influential recitals and its articles which are now implemented in the Public Contracts Regulations 2006.

1.2.1.2 The Social Note itself draws attention to Recital 1 of the Consolidated Directive: *“This Directive is based on Court of Justice case-law, in particular case-law on award 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]”*.

1.2.1.3 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. In addition, there are articles which govern sheltered workshops and environmental requirements. Most specifically in the context of this report, 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.

1.2.1.4 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.”

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.

1.2.2 Case Law

1.2.2.1 There have been some important cases concerning social clauses in public contracts which have had a bearing on the new Consolidated Directive and which continue to develop the shape of the law as it is interpreted by the courts. Not all the cases are easy to reconcile with each other or with current European Commission guidance.

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

1.2.2.2 In Beentjes⁷⁹, the European Court of Justice ruled that a condition of contract performance that the successful contractor employ long-term unemployed persons could be compatible with the procurement directives if it complies with all the relevant provisions of Community law (in particular the principle of non-discrimination) and is mentioned in the contract notice. The ECJ stated that such a condition has no relation to the checking of a contractor's suitability relating to its economic and financial standing and its technical knowledge and ability.

The ECJ therefore held that a condition in a procurement contract, requiring the employment of, in this case, long-term unemployed persons, would be acceptable if it was non-discriminatory in the light of all the circumstances of the case. The court also said that it was

⁷⁹ Gebroeders Beentjes BV v The State (Netherlands) C-31/87

a matter for the national courts to assess whether the condition was directly or indirectly discriminatory.

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

1.2.2.3 The Nord-Pas-de-Calais Region Case⁸⁰ dealt with an award criterion (i.e. in relation to MEAT) relating to employment linked to a local project to combat unemployment. The French Government argued for a two tier system of firstly, award criteria which were “primary award criteria” and went to determining MEAT and secondly, criteria which were not decisive in relation to MEAT such as a local labour criterion. The ECJ held that contracting authorities could use such a criterion provided that it was consistent with the fundamental principles of Community law, in particular, the principle of non-discrimination; and it was expressly referred to in the contract notice.

However, the ECJ judgment is vague in the sense that it falls short of discussing the issue of ‘local’ requirements. Rather than referring to the criterion linked to a local project, the judgment refers more vaguely to *“the campaign against unemployment”*. It is unclear from the judgment whether this is intended to refer to the specific local project in the case, or a more general campaign to combat unemployment. As such the ECJ did not expressly say that a local labour condition was acceptable.

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

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

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

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

Article 36(1)(a) [of Directive 92/50] cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority⁸¹

⁸⁰ Commission v The French Republic (C225/98)

⁸¹ C-513/99 – Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v (1) Helsingin Kaupunki (2) HKL-Bussiliikenne (2002), para 55.

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

*In the light of ... Article 6 EC, which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender.*⁸²

The judgment sets the conditions under which such criteria may be used. Firstly, it sets out that *“the criteria adopted to determine the economically most advantageous tender must be applied in conformity with all the procedural rules laid down in Directive 92/50, in particular the rules on advertising”*.⁸³ Criteria must also comply with the fundamental principles of EU law, in particular the principle of non-discrimination. The judgment concludes that a contracting authority may take into account ecological criteria provided that:

- they are linked to the subject-matter of the contract;
- do not confer an unrestricted freedom of choice on the authority;
- are expressly mentioned in the contract documents or tender notice, and;
- comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.⁸⁴

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

1.2.2.5 In EVN the ECJ confirmed the Concordia Bus Finland case judgment, in particular the fact that *“Directive 92/50 cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must necessarily be of a purely economic nature”*. Therefore, ecological criteria could be taken into consideration under the conditions laid out in the Concordia Bus Finland case. The particular criterion used in this case, requiring that the electricity supplied under the contract be produced from renewable energy sources, was acceptable as a matter of broad principle. Provided the criteria comply with the Treaty principles, contracting authorities are free to choose both their award criteria and the weightings attached to them, provided that the weightings enable an evaluation of the most economically advantageous tender to be made.

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

⁸² Ibid., para 57

⁸³ Ibid., para 62

⁸⁴ Ibid., para 64

In the case, which concerned a procurement of electricity from sustainable sources for the regional administration's office buildings in Carinthia, points were given for the amount of excess supply - above the needs of the offices - that the suppliers could generate, supposedly with a view to ensuring reliability of supplies. The ECJ stated in its judgment that such an award criterion was not permissible because *"an award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract"*.⁸⁵ As such, the ECJ rules that award criteria which are not linked to the subject matter of the contract were not permissible.

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

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

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

The ECJ ruled that such provisions were discriminatory and were not justified by imperative requirements in the public interest. A contractual undertaking to have an office available throughout the life of the contract would not have been prejudicial in the same way. It was felt that to have those offices available at the time of the tender was disproportionate, and favoured those tenderers who were already locally established in the marketplace. Similarly, the existence of production, conditioning and bottling plants in the region would require a substantial investment on the part of any tenderer and on the court's investigation was not essential for the delivery and performance of the contract.

There is a further ruling in the judgment on a feature of the award criterion relating to annual production capacity levels, which gave more points to a tenderer depending on how high its absolute production levels were. The court rules that this criterion could not be regarded as linked to the objective of the contract, even if it was said to be necessary to guarantee reliability of supplies, because points were given for production levels way in excess of those required under the contract. On this point the judgment states *"the evaluation criteria relating, in this case, to the award of extra points for an ever-increasing production capacity, cannot be regarded as linked to the objective of the contract and even less as suitable for ensuring that it is attained"*.⁸⁶

⁸⁵ C-448/01 - (1) EVN AG (2) Wienstrom GMBH v Republic of Austria (2003), para 68

⁸⁶ C-234/03 – Contse SA v Insalud (Now Ingesa) (2005), para 70

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

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

EC Commission v Italy [1991] 2 CMLR 115

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

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

Summary

In summary, therefore:

- 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 Notice;
- 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;
- the distinction between core and secondary requirements is not satisfactorily addressed, so the best approach is to follow the process adopted in the Concordia Bus Finland case.

1.3 UK GUIDANCE – “SOCIAL ISSUES IN PURCHASING”

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

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

1.3.2 The Social Note covers a wide range of social issues, including: community benefits; core labour standards; disability and equality issues; employment and training issues; fair trade; gender equality; race equality; SMEs; workforce skills (including adult basic skills).

1.3.3 The starting point for the Social Note is the UK Sustainable Development Strategy. The Social Note is more positive than previous drafts with a number of positive actions set out for incorporating social issues into procurements at the different stages of a purchasing process, covering: strategic context; business case development; specification; selections; tender evaluation; and contract management.

1.3.4 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...”.⁸⁷ So the critical question to be answered in any procurement is when a social objective is an essential element of a contract.

1.4 PROCUREMENT PRACTICE

1.4.1 It is not within the remit of the Social Note to consider in any depth the UK derived legislative constraints on contracting authorities nor their powers and duties. The Social Note explicitly endorsed the EU procurement legislation framework highlighting many of the recitals and articles of the Consolidated Directive outlined in this report, plus a number of ECJ judgments.

1.4.2 As detailed more fully in Chapter 2 of this report, there are a number of areas in which contract compliance has been incorporated into public procurement and contract documentation. Examples include the pursuit of the Two-Tier Workforce Code (with template documentation being produced by 4Ps/IDEA); better race relations and equality issues (by the CRE); detailed template specifications produced by the Public Sector Food Procurement Initiative (DEFRA); template documentation for dealing with environmental factors from various government/other network bodies.

1.4.3 There is a range of examples of what might be viewed as unconventional requirements being relevant to the core requirements of authorities, either through Government policy (for example, Two-Tier Workforce) or standards above minimum standards in legislation (e.g. equality issues, consultation of tenants in housing projects; environmental matters).

1.4.4 There can also be areas where one set of policy initiatives can come in “conflict” with others. The Government’s commitment to improving access to public sector procurement for SMEs is the subject of a dedicated programme. A simplified national Pre-Qualification Questionnaire for sub-EU threshold procurements was launched by OGC in August 2005. The standard form PQQ includes the questions: “Does your organisation have an environmental management system?” The note to the questionnaire states: “Government policy is that environmental issues should be carefully considered in procurement” - OGC/DEFRA guidance on the issue is available at http://www.ogc.gov.uk/embedded_object.asp?docid+1004666. Once again, the importance of this section will vary widely according to the type of procurement being undertaken.

⁸⁷ Social Issues in Purchasing, Office of Government Commerce, February 2006, page 15

1.4.5 If a supplier lacks an environmental policy it may be difficult to establish whether it can provide the solution whilst minimising effects on the environment, or whether it can meet the requirements of environmental protection legislation.

1.4.6 A scoring system of 'Environmental management system present' – higher marks / 'Environmental management not specifically addressed' – lower marks, is suggested. Underlying this is the acknowledgement the procurement is shaped by policy, as, for example, acknowledged by the Report and Recommendation of the Sustainable Procurement Group (2003): "*there needs to be a clear mandate to buy green from Ministers – an expectation that green procurement should be the norm rather than the exception*" (page21).

1.4.7 There is no equivalent process for adopting specific policies which may come under the "social" banner across all Government departments: particular issues such as using legally sourced timber or the tackling of multi-tier workforces tend to be dealt with reactively rather than within a cohesive umbrella approach.

1.4.8 By contrast local government has responded to two particular incentives to encourage community benefits/social considerations into the procurement process. First, there was the modification of "non commercial" considerations relating to workforce matters in 2001. Secondly, the National Procurement Strategy for Local Government has actively encouraged community benefits to be addressed by local authorities in their procurement practices, resulting in a number of councils adopting specific policies in this area (albeit a minority). Some examples of community benefits in procurement are cited, for example, in *Suitcase studies of good practice local government procurement* by the IDeA's Procurement Team. There is a clear route map for councils to engage in this area through their community strategies and best value policy documentation, for which there is no clear equivalent in central government.

1.4.9 In this regard the business-led Sustainable Procurement Task Force was set up in May 2005, to bring about a step change in the way the UK buys its goods and services. The aim is that the UK be recognised as amongst the leaders, across EU Member States, in the field of Sustainable Procurement, by 2009. In May 2006, the Task Force will be publishing its National Action Plan with a challenging set of recommendations to Government, for action in the short, medium and long term. Within this will be covered a range of themes including: leaderships, budgeting and fixed issues, setting minimum standards, building capacity and scrutiny. There is an acknowledgement that socio-economic issues shall require further research wider than just endorsing the work of OGC on social issues. A critical development will be the rolling out of the flexible framework for benchmarking progress made by contracting authorities in embedding sustainability into procurement practice and organisational culture.

APPENDIX 2 BIDDERS' CHECKLIST

At each stage of the process there are issues you should consider, and we have outlined some of these below. Some of the advice is obvious, but we have included it because it is not always followed.

Understand your market
<p>Develop staff capacity to deliver new requirements: develop skills within your existing team until there are resources to recruit specialist staff.</p> <p>Work with partner contractors or consultants to develop the skills and experience of delivering social and environmental requirements.</p> <p>Develop relationships with external agencies that can help resource the social requirements and develop knowledge of how to access the agencies' resources.</p>



Understand the purchaser's requirements
<p>Obtain the strategic plans, corporate plans, annual reports etc., for the public agency putting out to tender the contract in which you are interested.</p> <p>Look out for the policies which underpin the public sector organisation's approach to procurement, especially its approach to social, economic and environmental well-being / sustainability. In the case of a local authority this will be its community strategy, procurement policy, and best value performance documentation.</p> <p>Attend any briefing sessions offered by the purchaser. If the purchaser is consulting the marketplace on its proposals for the package to be tendered, feedback your views on their feasibility, practicality and affordability. Check the OJEU Notice to see what it says about social and environmental requirements (usually under the heading "other information").</p>



Decide how you will meet the purchaser's requirements

Make sure that the social requirements are made known to, and fully understood by, management and supervising staff involved in the delivery of the contract.

If the requirements involve the recruitment of staff from a target community take care to select the most motivated, and provide mentoring and support for both the new recruit and their supervisors/colleagues this will aid retention and produce better results for you.

Consider how your proposals can demonstrate synergy of culture between your organisation and the purchaser.

Do not rely on your social benefits as your unique selling point in every circumstance. You have to show how the whole of your product meets the specification. You may not be as unique as you think!

Demonstrate how your approach to "equalities" meets and adds value to the requirements of the purchaser.

Explain how your proposal focuses on sustainable development with a long term view of 'whole life costs' being the basis for the contract.



Be on time

You will always be asked to provide information by specific dates. Remember that the date given is usually the last date by which the organisation needs information. It is important to make sure that information arrives promptly. You can't deliver any social benefits if you don't comply with all the requirements for the tender.



The advertisement

For most requirements there will be an advert either in the national press or the Official Journal of the European Union (OJEU) or in trade magazines. The advert is the first of a number of stages in the procurement process. If you are unsure about any aspect of the requirement please use the contact details provided in the advert. Be aware that OJEU adverts are limited to a certain number of words and you may be able to get extra information. This may be in an information memorandum supplied with any pre-qualification questionnaire. Best practice requires the OJEU advert to state that the purchaser may be seeking social or environmental requirements.



Quality Assurance

Public sector organisations may want to assess their contractors against certain quality assurance standards. If you are in an industry where external assessments are normal, or are becoming normal, and if it is appropriate to the contract, you may find this a requirement. Quality standards (environmental standards, social accounting, Investors in People, equal opportunities, ISO, etc.) are an increasing aspect of public sector procurement.

Do you have appropriate processes in place? Does the tender offer the opportunity to highlight these processes?



Pre-qualification (PQQ)

Depending on the requirement you may go through a pre-qualification stage before being asked to tender. If you have expressed an interest in the contract, you may then be asked to send in information such as evidence of your financial position, previous experience and references.

You must provide all the information you are asked for. For example, if you are asked about previous experience, you should tailor your reply to your audience and emphasise the experience that is most relevant. The information provided at these stages will be reviewed and will form the basis of deciding whether you will go to the next stage. If you are in any doubt about what is needed, ask.



Invitation to tender (ITT)

If you receive an invitation to tender, you are being invited to make an offer that may then be accepted by the buyer. You must meet essential requirements at this stage. The decision about who is chosen is based on certain criteria which are usually listed according to how important they are in the contract notice or ITT (delivery, quality, method, personnel and so on). If the environmental and social requirements are part of the core need of the purchaser, criteria relating to these may be included. Pay attention to the weighting of these criteria as set out by the purchaser.

It is important to concentrate on the most important criteria but you must make sure you provide relevant information on all criteria. Again, if you are in doubt, you should contact the buyer. Of course, you need to make sure that your offer is competitive and represents Value for Money, judged against the whole of the purchaser's requirements as set out in its specification.



Feedback

If you are unsuccessful you should ask for feedback. Under the EU directives a public sector organisation has to provide this feedback to you within 15 days of your written request. Being unsuccessful in one contract does not mean you will be unsuccessful in the future. You should use the feedback to help you improve for the future.



Contract management

The supplier and the public sector organisation manage the contract and the supplier's performance is checked and monitored by the organisation. The need for the contract will be reviewed regularly and after a set period of time the contract may be advertised again. Ensure that you reciprocate client-side plans for managing the working relationship. Ensure that lessons for future projects, including those from the adoption of social requirements, are being identified and recorded. Work with purchasers for continuous improvement and keep up to date with developments in the market generally, including ways in which social and environmental agenda are pursued.

APPENDIX 3 PUBLIC SECTOR CHECKLIST

This checklist shows the whole life span of the procurement cycle and draws from various sources including the OGC guidance note 'Social Issues in Purchasing'.

Defining the procurement strategy
<p>The public sector organisation defines its aims, decides what is needed, and then prepares the business case that includes how the procurement exercise will be carried out. It will take account of market conditions, legislation and public-sector policy, establishing:</p> <ul style="list-style-type: none">• that it has the necessary powers;• that it has adopted the policies which underpin its approach to procurement;• that it has a clear understanding of the social/environmental requirements as part of its business need;• that it is clear about how to describe the outcomes, output and (where appropriate) input to be delivered in connection with its social/environmental requirements;• that it understands how it is to verify such requirements at pre-qualification, contract award and contract management stages;• that it has considered how SMEs could respond to the requirements/how the marketplace can include SME's within the supply chain for such requirements; and• having established the practicalities of the requirements, their affordability and cost-effectiveness within the context of the procurement in question. <p>Having determined the above, the public sector organisation should ensure that specifications:</p> <ul style="list-style-type: none">• reflect fully the subject matter of the contract as it is developed having regard to the contracting authority's powers and policies;• are transparent and non-discriminatory in their content;• are sufficiently certain, clear and measurable to enable performance management and accurate payment to be made for delivery at the quality required;• contain targets that are proportionate to the size and complexity of the contract. <p>Consult the market about likely requirements before finalising the tender requirements.</p> <p>Provide information and briefing sessions for potential bidders – including small firms – prior to or early in the procurement process.</p>



Pre-qualification

As is the case in all procurements, information such as evidence of financial position, previous experience, and references should be requested. Requests should be tailored to the needs of the contracting authority as clarified through its business case processes. Consider whether, especially in the case of larger projects or framework agreements, a briefing session should be organised to help potential bidders become comfortable with the total requirement of the public sector organisation in question.



Inviting tenders/negotiations/participation in competitive dialogue?

The public-sector organisation invites suppliers to put in an offer, or tender, or engage in competitive dialogue. Only launch the invitation to negotiate/tender/competitive dialogue when the public sector organisation is really ready to do so, having regard to the factors determined under the procurement strategy. Ensure that the organisation's procurement team has the resources and leadership to take on the next stage of the procurement cycle, fully understanding the social/environmental aspects of its requirements. Confirm that funding is available for the whole project.



Invitation to tender/negotiate/participate in competitive dialogue

The decision about who is chosen is based on certain criteria that are usually listed according to how important they are in the contract notice or the invitation (delivery, quality, method, personnel and so on). As with all criteria ensure that the social award criteria relate to the subject matter of the contract developed to specifically include social requirements for that procurement, with a view to enabling the contracting authority to evaluate the bid that represents best value for money having regard to the whole core requirement.

All criteria must be consistent with fundamental principles of the EU Treaty: transparency, equal treatment and non-discrimination.

If a method statement is requested for social aspects of the procurements, consider how responses are to be measured on an equal basis. Establish and describe to bidders the weighting for the different criteria for the whole procurement.



Awarding and putting the contract in place

The organisation then awards the contract to the supplier whose bid offers best value for money. Everyone involved works together to put operations in place for the forthcoming contract.



Contracts, terms and conditions

Most Government contracts are based around model documents that may differ between each organisation. The contract cannot be completed until the supplier and the public-sector organisation agree about the terms and conditions. It is important to fully understand the responsibilities both sides have under the contract. There are many types of contracts – from one-off purchases to long-term service contracts. Contract conditions relating to social/environmental considerations should have been referred to in the OJEU Notice. Ensure that they are capable of enforcement and that the consequences of non-compliance are clear e.g. reduced payment.



Evaluating and refining tenders

The public-sector organisation then evaluates the tenders against set standards relating to value.



Managing the contract

The supplier and the public sector organisation manage the contract and the supplier's performance is checked and monitored by the organisation. The need for the contract will be reviewed regularly and after a set period of time the contract may be advertised again. Ensure that client-side plans for managing the working relationship are reciprocated on the supplier side. Ensure that lessons for future projects, including those from the adoption of social requirements, are being identified and recorded. Work with suppliers for continuous improvement and keep up to date with developments in the market generally, including ways in which social and environmental agenda are pursued.