

Buying into communities

Jobs, skills training and business opportunities from council contracts





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Foreword

On behalf of Local Partnerships, I am delighted to be a part of de-bunking some of the common myths about the European procurement regime. These guidelines are intended positively to help local councils achieve their ambitions for growth and economic success in the communities which they represent and serve; and to explore the extent to which, whilst delivering fair and open competition, EU procurement rules can facilitate rather than hinder the delivery of social objectives.

Councils, with their economic development role, take responsibility for generating economic growth in local communities. The private firms and businesses that are so important to local and regional economies need to view council contracts in a positive way and want to do business with their local authorities. Councils, too, should better use their purchasing power to create opportunities; for jobs and training, for regeneration and to maximise value for money.

These guidelines, 'Buying into Communities', draw on a wealth of examples from the local government community. They have been put together by Local Partnerships, (which is jointly owned by the Local Government Association and HM Treasury), pooling resources and expertise with colleagues in the LGA. It is a practical route map which is aimed at elected members and senior officers in local government, rather than being targeted on those most usually involved in the detail for procurement process.

In times of general economic hardship and specific cuts in our budgets it is essential that local authorities take the lead in promoting economic development through better, more efficient and effective procurement practices and these guidelines will help them achieve those ends.

However, this is only the beginning. We aim to produce additional tools, some online, for all those involved in procurement, as well as continuing to provide expert client-side advice to authorities on complex transactions.

We hope that you find these guidelines helpful.



Councillor Edward Lord OBE, JP
Chairman, Local Partnerships
November 2011

Executive summary

The current economic outlook means that councils are working harder than ever to maximise the benefits from every taxpayer pound that is spent. That includes procurement expenditure.

Through the arrangements they make for procurement councils can open opportunities for the small businesses that play such a vital role in local economies. When they let larger contracts they can help local people access jobs and training places and enable small businesses to find sub-contracting roles.

Each council will choose its own approach in line with its objectives. These guidelines advocate a **strategic approach** led by councillors and outline the capabilities that councils need to develop to deliver it.

The EU public procurement rules can be confusing and are sometimes held up as a reason for not doing more. Many of the supposed obstacles are myths – although there are clearly some legal obligations that councils must observe. Councils up and down the country have already demonstrated what can be achieved.

Under the EU rules councils are largely free to decide **what** they buy to meet their needs (in the business case). But they face constraints on the procurement strategy (**how** they buy it). The guidelines outline the legal constraints and the opportunities.

There is most room for manoeuvre in the case of lower value procurement and so-called Part B services. When it comes to larger contracts that must be advertised EU-wide there are fewer constraints than is often believed. In particular there are four persistent myths that need to be dispelled -

1. The EU rules prevent large requirements being sub-divided to make them small business-friendly.

On the contrary, the 'European Code of Best Practices' (EU guidance) specifically mentions sub-division into 'lots' as a way of opening access to small firms. Value for money is the chief consideration here.

2. 'Social clauses' cannot be drafted into contracts.

There are, in fact, two types of clauses that can be used to open up jobs, skills training and business opportunities: contract performance conditions and 'social' specifications. As 'Buying Social' (the latest EU guidance) explains, social clauses relevant to what the council is buying can be included in contracts.

3. Councils may not examine the track record of prospective bidders in this area.

This can be done through the pre-qualification questionnaire (PQQ). Specifically, where this helps demonstrate capability to perform the contract, prospective bidders can be asked to supplement information on completed contracts by identifying what they have achieved in terms of jobs, skills and business opportunities.

4. 'Social' contract award criteria are not allowed. This has been considered by the European Court and it is clear in 'Buying Social' that relevant social award criteria can be applied if the requirements have been written into contract specifications. This enables bidders' jobs, skills and supply chain proposals to be considered when deciding which tender is the 'most economically advantageous' from the council perspective.



Introduction

Councils are prime drivers of local economic growth and prosperity. That includes the development of essential local infrastructure. They have enjoyed wide powers in this area including the power to promote 'community well-being' and through the Localism Act 2011 have acquired an even broader 'general power of competence'¹. But the current economic outlook means many local communities are under pressure and councils face a very considerable challenge.

Through the Localism Act² councils - often working together and through Local Economic Partnerships - will be able to take on new functions that will equip them better in this task. But budgets, including capital programmes, are tighter than many can remember. So councils must work harder than ever to get the maximum benefit into their communities from every taxpayer pound that is spent.

Procurement accounts for more than half of all council expenditure (revenue and capital combined). Each year councils in England spend over £56 billion buying everything from stationery to adult social care³. On top

of that they spend some £17 billion on capital projects⁴. Clearly, spending on that scale creates significant opportunities for jobs, skills training and business from which local communities can benefit⁵. Leading councils are demonstrating what can be done to capture those benefits and exemplary local initiatives are referred to throughout these guidelines.

However, this is not an easy path to follow because public procurement is highly regulated by the EU. Over the years the European procurement rules have become more and more complicated (see **Annex 3**). And the problem has been exacerbated by a continuous stream of European Court cases. The consequence: widespread uncertainty. Therefore, one of main aims of these guidelines is to dispel certain 'myths' that have arisen about the EU procurement rules (while acknowledging that there are some obligations that cannot be avoided).

The Government, Local Government Association (LGA) and civil society umbrella bodies (among others) are all lobbying Brussels for a radical reform of the EU procurement rules. The early signs are that this is having an effect and in due course it should further lighten the regulatory load on both councils and their suppliers. However, the changes will not come quickly and in the meantime a great deal can be achieved within the existing rules.

1 Note that EU obligations including those in the procurement field (Annex 3) take precedence over these powers and duties.

2 The Act received Royal Assent on 15 November 2011 and its provisions are being brought into force gradually (see Annex 1).

3 Local Government Finance Statistics (LGFS), Department for Communities and Local Government (DCLG), 2011. £56 billion is 2009-10 total current expenditure on procurement excluding police and fire and rescue and internal trading organisations. 'Procurement' is defined broadly in the LGFS. However, Housing Revenue Account (HRA) housing procurement expenditure is not identified in the statistics and is therefore excluded from this figure. (It is nonetheless significant. For example, some £1.7bn is spent on HRA repairs and maintenance alone).

4 Total 2009-10 expenditure on fixed assets (excluding police and fire and rescue) per LGFS 2011.

5 The term 'community benefits', or sometimes 'social benefits' or 'public benefit', may be used in this connection.

Given the current economic climate, the focus of these guidelines is on how to build 'social' considerations into procurement (the EU term which includes benefits of an 'economic' nature as well as purely social ones). Much of what is said applies equally to environmental considerations but that is a topic in its own right which falls outside the scope of the present guidelines⁶.

Note: While every effort has been made to ensure the accuracy of the information provided in these guidelines, councils must of course take their own legal advice before taking any action.

The guidelines begin by looking at the importance of taking a strategic approach – with councillors at the helm providing leadership.

In the sections that follow the guidelines look first at how councils, through the arrangements that they make for procurement, can open opportunities for small businesses, including social enterprises and voluntary and community organisations, and then at how opportunities for jobs and skills training and business opportunities can be generated through larger contracts. The guidelines looks at each of the key stages of the procurement process – from the business case through to contract management – outlining the opportunities and constraints presented by the EU rules.

Numbered boxes provide practical examples in case studies from councils.

The guidelines concludes with a checklist that councillors and senior managers can use in their own organisations and a list of further information sources for those who want to delve deeper into the topic.

⁶ Other 'social' considerations, e.g. equalities matters, living wage etc are also out of scope. On these see 'Buying Social'.

Taking a strategic approach

It is for each council to decide which jobs, skills training and small business opportunities it will pursue through procurement.

Clearly, the approach must fit with the council's overall objectives. These will be set out in local strategies and associated performance management arrangements⁷. They are likely to evolve as Local Economic Partnerships (LEPs), in various stages of development, focus on priorities and seek to attract resources including from the Regional Growth Fund and Growing Places Fund.

Depending on local circumstances, procurement's contribution⁸ might include support to the creation of jobs and skills training opportunities for particular target groups⁹, for example:

- long-term unemployed
- new entrant trainees, apprentices and work experience placements.

⁷ Until recently this included the Sustainable Community Strategy (SCS), Local Area Agreement (LAA) and Local Economic Assessment (LEA). Note that the duty to prepare an SCS will soon be repealed (see Annex 1) and that LAAs have ceased to be central-local agreements on targets.

⁸ Councils are also pursuing community benefits through section 106 planning agreements. This approach may be built into the Local Development Framework (LDF).

⁹ This approach is often referred to as Targeted Recruitment and Training (TRT). Practitioner toolkits for TRT, including templates and model drafting, have been developed for use by councils in a number of English regions including the West Midlands, North East and London (as well as in Scotland, Wales and Northern Ireland). The National Improvement and Efficiency Partnership for the Built Environment (NIEP) supports wider adoption of the West Midlands toolkit. The National Skills Academy for Construction has also developed a toolkit, and the Homes and Communities Agency has developed an approach based on that. See Further reading at the back of this guide.

There might be a similar approach to the promotion of business opportunities, including participation in the supply chains for larger contracts, for enterprises in particular sectors, for example:

- small and medium-sized enterprises (SMEs)
- social enterprises
- voluntary and community organisations (VCOs).

In addition to stimulating economic growth and job creation, market-opening of this kind can bring a range of other benefits to the council including innovation and improved value for money in the delivery of public services.

The latest EU guidance ('Buying Social', see **Further reading** below) makes it plain that it is perfectly acceptable to pursue 'social' objectives of this kind through procurement provided that the rules and principles of EU law are observed (see **Annex 3** on the EU framework). The sections which follow outline the opportunities and constraints that councils need to be aware of when making their arrangements for procurement.

In the English context, there is of course an obligation on public authorities to obtain value for money in procurement and there is a specific duty on councils to make arrangements to secure 'best value' (economy, efficiency and effectiveness) in carrying out their functions. In the latter case, statutory guidance has already broadened this to include economic, social and environmental value (see **Annex 1** on the English legal framework).

Economic, social and environmental well-being of the area also needs to be taken into account when considering expressions of interest under the 'community right to challenge' introduced by the Localism Act 2011 (see **Annex 1**) and in any ensuing procurement¹⁰.

The strategic approach being taken by Birmingham City Council is outlined in **Box 1** over the page. This example – and similar initiatives around the country – suggest that a strategic approach requires the development of capability in a number of areas as shown below:

¹⁰ The Act makes it clear that this is subject to EU obligations. A private member's bill currently before Parliament (see Annex 2) would go further than the Localism Act and make consideration of these same matters mandatory for all above-threshold procurements.



Internal

Political and managerial leadership. The council's approach should be led and championed by councillors (in both executive and scrutiny roles) and driven forward by senior managers.

Strategy. There should be a 'golden thread' connecting community and corporate strategies and procurement practice on the ground. That includes targeting for jobs, skills training and business opportunities and prioritisation.

Policy. Strategic objectives need to be translated into procurement policies. That includes policy on when charters, voluntary agreements and social clauses will be used (see below).

Procedures. Necessary adjustments will need to be made to contract standing orders, financial regulations and procurement procedures including use of supplier opportunities portals, contract registers etc. Templates and standard drafting will be needed for each stage of the procurement process (a 'toolkit'). Risk management disciplines should incorporate management of the associated legal risks.

Resourcing. The strategy will need appropriate resourcing. An officer-level 'delivery champion', with the necessary know-how, is frequently recommended. For smaller councils a shared resource may be the practical option.

Training and development. There should be a programme of awareness-raising and appropriate training for all participants including councillors and senior managers. Key advisers (legal, finance, audit etc) are likely to require development as well as procurement professionals.

External

Awareness-raising. The supplier community will also need to be briefed on the council's strategy, policies and procedures.

Capacity building. This includes measures to help enterprises in target sectors to win a larger share of public contracts including training and events. Investment and contract readiness programmes are aimed particularly at voluntary and community organisations and social enterprises wanting to assume a bigger role in the delivery of public services. Encouragement to the formation of consortia for larger contracts also falls into this category.

Intermediaries. Councils can refer suppliers (e.g. the prime contractor on a construction project) to intermediaries that can help in the recruitment of personnel in target groups and in the sourcing of suitable sub-contractors and suppliers including small businesses etc. These can include not-for-profit organisations as well statutory agencies like Jobcentre Plus (although there can be no obligation to use only those services).

The remainder of this guide looks at how the strategic approach can be given effect through the arrangements councils make for procurement including the delivery of larger programmes and projects.



Box 1 Birmingham's strategic approach

Birmingham City Council (BCC) is one of a number of councils in the West Midlands to have adopted a strategic approach to jobs, skills training and business opportunities in procurement.

BCC has agreed a 'Procurement Policy Framework for Jobs and Skills' based on the West Midlands Framework (see toolkits in **Further reading**). This is in line with the BCC Sustainable Community Strategy, the Local Area Agreement and Multi-Area Agreement and the Sustainable Procurement Compact which members of Be Birmingham (the Local Strategic Partnership) have signed up to.

The Framework builds on learning from local use of social clauses, charters and voluntary agreements including Birmingham Municipal Housing, the Library of Birmingham, New Street Gateway and the Birmingham Construction Partnership, together with national experience.

The policy is to embed the approach throughout all procurement and commissioning activity. Under the policy, at every stage of the procurement process, the contractual relevance of targeted recruitment and training clauses, including apprenticeships, will be considered. Such clauses are the 'default' but as part of the framework charters and voluntary agreements are also considered where clauses are not appropriate. Exemption from the default requirement requires approval from a strategic director and Cabinet member and the decision must be reported to the Procurement Cabinet Committee.

Implementation is supported through an online BCC toolkit, including template documents, and training for both staff and contractors (through BCC Employment Access Team in the latter case). Supply-side support is coordinated by the Building Jobs in Birmingham project. The Find-it-in-Birmingham portal (which is based on a model first developed in Sandwell) enables prime contractors to find suitable local sub-contractors and suppliers.

Opening opportunities to small businesses

Through the arrangements they make for procurement councils can open opportunities for small businesses¹¹, social enterprises and voluntary and community organisations¹² both directly and as members of the supply chain for larger contracts.

This is important because small businesses, many of which operate locally or regionally, play a vital role in the economy. Among other things, they are one of the main sources of new jobs. They can also bring innovation and improved value for money to the delivery of public services.

For this reason ‘small business-friendly’ practices should be built into the council’s normal way of doing business (and reflected in its ‘Selling to the council’ guidance and the like). This includes:

- promoting opportunities (including advertising opportunities on supplier opportunity portals, publishing details of prime contractors on contract registers, meet the buyer events etc)
- removing barriers (one-time registration, online simplified PQQs, less onerous requirements relating to track record, financial standing and insurance, electronic ‘quick quotes’ for lower value orders¹³,

‘leaner’ more open procedures for other requirements, prompt payment etc)

- building capacity (training and coaching, contract and investment-readiness programmes, encouraging consortium bidding etc).

The Cabinet Office has mandated the use of a simplified form of pre-qualification questionnaire (PQQ) in central government and their aim is to eliminate PQQs altogether for procurements below £100,000. The simplified PQQ is also recommended for use by councils (see **Further reading**).

Boxes 2 and 3 illustrate how small business-friendly approaches to procurement are already being implemented by many councils - both large and small.

Councils find that a significant amount of their procurement is below- threshold meaning that EU-wide advertising is not required. Councils are also free from the need to advertise in the Official Journal of the European Union (OJEU) for ‘Part B’ services¹⁴ and so-called ‘public service concession’ contracts¹⁵.

11 Small and medium-sized enterprises (SMEs) plus sole traders and partnerships with no employees.

12 For brevity these organisations are referred to collectively as ‘small businesses’ although not all of them are small

13 A feature of some regional portals (e.g. North East) and of the new Dynamic Marketplace in central government. Systems of this kind must take account of the EU aggregation rules which, in simple terms, require the values of contracts of the same type let at the same time to be added together to determine

whether they come over the relevant EU threshold and trigger the requirement for an OJEU notice. There are exemptions from the aggregation rules for ‘small lots’.

14 Part B services include many activities in the fields of health and social care, education and sport and leisure management.

15 Contracts where the supplier gets all or a significant part of their income by charging service users directly.

An 'appropriate degree of advertising'¹⁶ is needed in these cases but there is no obligation to advertise in OJEU.

This means that councils can choose how to advertise those opportunities. Often this will be through the council website or through supplier opportunity portals that have been developed with the specific needs of small businesses, voluntary and community organisations etc. in mind (see **Box 4**).

The CompeteFor portal (examined in **Box 5**) is an early example of a portal that promotes supply chain opportunities i.e. it enables prime contractors to advertise their sub-contracting opportunities and supply contracts. Increasingly this facility is being built into the other portals too. Contract registers published locally or via the portals already enable small businesses to identify prime contractors they might want to do business with.



¹⁶ Appropriate in view of the likely cross-border interest within the Internal Market. The obligation stems from case law based on the Treaty rules and principles not from the directives themselves. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:179:0002:0007:EN:PDF>. On concessions see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000Y0429%2801%29:EN:HTML>.

Box 2 Leicestershire's SME-friendly procurement

Leicestershire County Councils (LCC) has actively pursued an SME-friendly approach to procurement.

This includes taking part in a major 'Selling to the Public Sector' project which commenced in April 2010 and is due to come to a close at the end of March 2012. This has the purpose of encouraging and supporting SMEs across Leicestershire to respond to contract and supply chain opportunities. The project involves one-to-one support for SMEs and the delivery of workshops covering, for example:

- public sector contracts: how to prepare effective PQQs & tenders
- adopting a strategic approach in selling to the public sector
- public procurement: demystifying the process
- navigating the public sector procurement maze
- writing winning bids for public sector contracts
- winning public sector business: collaboration, policy documents and PQQ & tender responses.

LCC has delivered 'How to do business with the council' presentations to SME/VCO forums.

It is now standard procedure to hold 'bidders conferences' for potential tenderers for adult social care contracts. These events are attended by LCC's Countywide Infrastructure Organisation - Voluntary Action Leicestershire (VAL) - who offer

advice on completing tenders and joint/consortia bidding.

Working with the Eastern Shires Purchasing Organisation (ESPO) and VAL, LCC recently created an SME/VCO-friendly pre-qualification questionnaire, which is a lighter version of the standard PQQ document.

LCC has also developed request for quotation (RFQ) templates for both services and goods, to be used for contracts with a total value of between £20k and £100k. These templates are lighter than those used for the formal tender process that is required for all contracts with a total value of over £100k.

Further, LCC's Financial Vetting Guidance is SME-friendly requiring sound business judgement rather than mechanistic application of formulae.

Where it affords value for money, requirements are divided into SME-friendly lots. For example, LCC's reactive maintenance requirement was packaged into discrete 'lots' within a single invitation to tender

(ITT), which invited tenders for one of the 3-6 places on the ten framework agreements (lots/trades) from air conditioning, through gas and electrical services to roofing services.

LCC publishes a list of all its contracts with a total value of over £10,000 (a contracts register), which can be used to identify sub-contracting opportunities with the county council's prime contractors.

Box 3 Welland's small business awareness programme

Many district councils are active in promoting opportunities to local businesses in order to stimulate local economic activity.

The Welland Procurement Unit (a shared service in the East Midlands) has developed an awareness-raising programme to encourage small businesses, specifically including sole traders, to bid for council work.

In collaboration with the Federation of Small Businesses the Unit has developed a workshop-based model. Local entrepreneurs are encouraged to bid for small parcels of council work, an approach which means that new entrants to the public sector market should not encounter significant barriers to bidding. This is being piloted through Blaby District Council in Leicestershire.

For larger opportunities, potential suppliers are offered pre-qualification and tender templates which exemplify the level of response expected, in order to demystify the tendering process and to encourage their participation. A key aim has been to avoid jargon and complexity which can deter small companies from seeking council work.

Even when OJEU-advertising is required, councils can adopt a small business-friendly approach.

For larger requirements, the procurement strategy (see **Developing the procurement strategy** below) might involve unbundling into smaller packages ('lots' in EU terms).

Here the chief consideration should be whether the approach affords value for money. **It is a myth that the EU rules prevent large requirements being sub-divided to make them small business-friendly.** On the contrary, the 'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts' (see **Further reading**) specifically mentions subdivision into lots as a way of opening access to small firms. (It contains much other useful advice too).

The rule, in fact, is that requirements must not be broken down to avoid the requirement to advertise in the OJEU (see **Annex 3**).

So you must look at the combined value of all the lots when deciding whether an OJEU notice is required (i.e. the threshold value is exceeded). But separate lots can be advertised nonetheless. Indeed, in the OJEU notice the council can 'flag' the suitability of the requirement for enterprises in target sectors (small businesses, social enterprises etc.). The OGC guidance in **Further reading** includes drafting for flags in OJEU notices.

Lastly, councils can take advantage of the fact that the EU rules permit contracts and frameworks to be 'reserved' (set aside) for supported factories and employment programmes (i.e. where the aim is help disabled people into the labour market). However, this is not an exemption from EU-wide advertising (an OJEU notice is still required). Contracts cannot be reserved in this way for other types of business (e.g. small businesses, charities). A level playing-field must be maintained.

Box 4 Promoting small business opportunities through supplier portals

A supplier opportunity portal is a website used by multiple buyers to advertise bidding opportunities.

Councils have collaborated to develop regional portals in many parts of the country including:

North East <https://www.qtegov.com/>

North West <https://www.thechest.nwce.gov.uk/>

Yorkshire and The Humber <https://scms.secure.alito.co.uk/>

East Midlands <http://www.sourceeastmidlands.co.uk/>

West Midlands <https://wmcoe.bravosolution.co.uk/>

South West <https://www.supplyingthesouthwest.org.uk/>

South East <https://www.businessportal.southeastiep.gov.uk/>

London <https://www.procure4london.gov.uk/>

There are also local portals, for example Find-it-in-Birmingham <http://www.finditinbirmingham.com/> and Supply Hertfordshire <http://supplyhertfordshire.g2b.info/hpf/>.

Increasingly the regional portals are being linked to Contracts Finder which is the Government portal for lower value requirements <http://www.contractsfinder.businesslink.gov.uk/>.

CompeteFor <https://www.competefor.com/> was developed specifically for the London 2012 Olympic Games (see **Box 5**).

Supply2Health advertises NHS 'Part B' contracts for clinical services <http://www.supply2health.nhs.uk/>.

Box 5 CompeteFor's supply chain opportunities

The primary purpose of the CompeteFor portal is to enable businesses to compete for opportunities linked to the London 2012 Olympic and Paralympic Games. The Greater London Authority, Transport for London, the Metropolitan Police, Crossrail and some London councils currently use it to advertise their own opportunities.

All businesses can use the portal but it is specifically designed for SMEs. Registered businesses receive automatic e-alerts when opportunities arise (more than 150,000 are registered).

An important feature of this supplier opportunity portal is that it provides a route for SMEs to access and bid for sub-contracting opportunities posted by prime contractors delivering larger projects

In addition to alerting business to contracts and sub-contracting opportunities the site facilitates access to business support. This is complemented by regional activity. For example, in the capital the London Business Network and other intermediaries run regular events focused on business opportunities and contract-readiness.

CompeteFor is not an e-procurement system (many of the regional portals are). The public and private sector buyers posting opportunities there continue to use their own systems and procedures.

By July 2011 (one year before the Games) CompeteFor had made over 9,000 opportunities available through the portal. Some 72% had gone to SMEs.

Promoting opportunities through larger contracts

Introduction

This section of the guide looks at how opportunities for jobs, skills training and business can be promoted in the context of larger OJEU-advertised contracts and framework agreements including those for major projects and programmes. Construction programmes and larger contracts for services (e.g. strategic partnerships for back office functions and adult social care contracts) have been the main testing grounds.

Agreeing the business case

In terms of the EU rules (**Annex 3**), councils are largely free to decide **what** they buy to meet their needs (but they must avoid falling foul of the rules when specifying it, see **Preparing the contract** below).

Sign-off of the business case and associated procurement strategy is authority to proceed to procurement. In the business case the council identifies and assesses the needs to be met and decides what it wants to buy to meet those needs (the 'subject-matter' of the contract in EU terminology).

The business case for a smaller requirement might consist of a few short paragraphs but for a major project (including a PPP project) the Outline Business Case (OBC) will be a substantial document¹⁷.

¹⁷ OBCs generally consider 'five cases': strategic case (strategic fit), economic case (value for money), financial case

As part of the business case for a major project, the council will evaluate a range of options and identify the preferred option. The council decides which options will be considered, the criteria against which they will be considered, and decides which option to pursue.

The HM Treasury 'Green Book'¹⁸ provides advice on the appraisal of options including how financial and non-financial, quantifiable and non-quantifiable costs and benefits can be taken into account in determining the value for money option.

In line with the new statutory Best Value guidance (see **Annex 1**) councils can make appropriate use of methodologies such as Social Return on Investment (SROI) to assess the 'social value' of the various options at this pre-procurement stage before deciding on the way forward¹⁹. This approach can also be considered when the council is assessing a 'community right to challenge' expression of interest under the Localism Act (see **Annex 1** again).

(affordability), commercial case (commercial viability) and management case (achievability). See http://www.hm-treasury.gov.uk/d/greenbook_businesscase_shortguide.pdf

¹⁸ HM Treasury, The Green Book. Appraisal and Evaluation in Central Government, updated July 2011.

¹⁹ Note that a full SROI analysis is resource-intensive. Guidelines on the method is included in Further reading.

The cost of including social clauses in contracts (see **Developing the procurement strategy** below on social clauses) compared to other approaches is a further consideration for the business case. For example, does a social clause offer better value for money than the alternative route of commissioning training through a separate contract or using grant-funding? Is it likely that the full cost of a training programme will be reflected in the bid price or can it be funded from sources external to the contract? (On this, see also the role of intermediaries in **Taking a strategic approach**).



Developing the procurement strategy

In framing the procurement strategy for a particular requirement the council will need to decide its strategy with regard to jobs, skills and business opportunities. This should be a simple matter of applying council policy (see **Taking a strategic approach** above)²⁰.

In a major project, the procurement strategy, which generally forms part of the business case, sets out the approach that will be taken to deliver the preferred option (i.e. **how** the council will buy it).

The approach may be to use a voluntary charter. As in the Leeds case (**Box 6**), charters of this kind can invite all council suppliers (current and future) to sign up to measures which help improve the community's social and economic prospects (as part of the business's commitment to corporate social responsibility).

Alternatively, a charter can relate to a particular contract (a strategic partnership) or project and describe shared commitments to job creation and training in that context.

Charters of this kind are not legally-binding and this is not something that can be taken into account when awarding a contract.

For larger frameworks and contracts, there are further options:

- voluntary agreements²¹
- contract performance conditions
- 'social' specifications.

Voluntary agreements, which are generally concluded after the award of a framework agreement or contract, contain more specific commitments than charters (e.g. the number of person-weeks of employment for apprentices on a particular construction programme). Despite being 'voluntary', agreements of this kind have been used very successfully to deliver results. **Box 7** tells the story of Manchester City Council's collaborative approach to voluntary agreements.

Voluntary agreements are binding if incorporated into the contract but that can be problematic. Under the EU rules material variations to a contract can trigger an obligation to retender.

²⁰ Blanket approaches should be avoided. Within the policy framework individual decisions should be taken on when and how to pursue jobs, skills and business opportunities through a particular contract according to their relevance to the contract.

²¹ This is the term in general use. 'Voluntary arrangement' would be a better description for non-binding arrangements of this kind.

By contrast, contract performance conditions and ‘social’ specifications’ (i.e. core social requirements incorporated into technical specifications) are intended to be contractually enforceable. They are sometimes lumped together as ‘social clauses’²² but, as **Preparing the contract** below clarifies, the EU rules apply in different ways to contract conditions and technical specifications.

When developing the procurement strategy for a major project (and as part of the wider commercial case) it is conventional to undertake ‘market sounding’. That is to say, to test the commercial viability of proposed approach with potential suppliers. EU obligations are usually addressed by publicising the exercise in a Prior Information Notice (PIN) in OJEU²³.

This pre-procurement market sounding provides an important opportunity to engage with potential suppliers on the jobs and skills training issues and supply chain opportunities²⁴.

Dialogue with the market can continue through successive stages (mapped out in the procurement strategy) including by means of information packs, briefings and Q&A sessions offered to bidders at PQQ and tender stages (see below).

Where there are intermediaries providing support to suppliers with their resourcing needs (recruitment, sub-contracting etc.) councils can refer bidders to those services (see **Taking a strategic approach** above). This might be done in the PQQ, ITT and/or through briefings. All bidders must have equal information and access to such services. And they should not be limited to using only those services.

²² Also referred to as ‘community benefit’, ‘social benefit’ or ‘public benefit’ clauses

²³ The EU directives make it clear that pre-procurement ‘technical dialogue’ is fine provided that it does not distort competition.

²⁴ Market engagement should not be confined to individual procurements. Publishing a pipeline of forthcoming contracts, as many councils do locally or through regional portals, and events around that help the supply base plan ahead



Box 6 Leeds community benefits charter

Charters take many different forms. The Leeds City Council charter (which forms part of a broader strategic approach that includes use of social clauses) is a notable example.

The LCC 'Charter for Procuring Community Benefits' is voluntary charter which encourages all current and potential council suppliers to commit to providing added benefit to the local community with a particular focus on disadvantaged parts of the city.

The emphasis is on suppliers' corporate social responsibility (and benefits such as improved staff morale and new business opportunities). This includes donations to support local community activity, payroll giving, volunteering time and other resources to help people into work, donating used equipment (e.g. IT or furniture), mentoring and team activities to support local school or community projects.

The council works with two not-for-profit intermediaries to facilitate this: Leeds Ahead (a brokerage that matches non-financial support to local projects) and the Leeds Community Foundation (which provides an easy way to channel financial support directly to local groups).



Box 7 Manchester's voluntary agreements

The Manchester People into Construction (MPiC) programme offers 3 year apprenticeships, trainee placements and work experience in construction. When first established in 2008, the programme targeted young people and specifically NEETs (youth not in education, employment or training) but was subsequently broadened to people over the age of 24.

The placements are made with contractors on framework agreements set up through the North West Construction Hub which Manchester City Council (MCC) uses to deliver its multi-million pound construction programme. The approach is now being extended across the Greater Manchester conurbation and, through the Construction Hub, to the wider region. It is also focusing further on opportunities in supply chains.

A distinguishing feature of the MCC scheme is the fact that apprentices are recruited and employed by ASPIRE (a not-for-profit intermediary) until they are offered a permanent position. Among other things, this enables the trainees to be moved within the programme when work on a particular site ends. Contractors can focus on the training rather than HR management. Placements are organised by an MCC team and support is provided by the Connexions Service and Manchester College (qualifications).

Over 4 years framework partners have delivered almost 200 apprentice opportunities - ahead of expectations.

The programme works through collaboration with framework partners to develop voluntary regeneration, employment and skills plans and corresponding method statements. The strong relationships that are developed through this process are important in overcoming challenges – including where trainees come from difficult backgrounds.



Preparing the contract

It is perhaps the greatest myth that EU rules prevent ‘social clauses’ being drafted into contracts.

There are, in fact, two types of social clauses²⁵ and, as ‘Buying Social’ explains, either or both can be included in contracts where relevant:

- ‘social’ specifications
- contract performance conditions.

The toolkits listed in **Further reading** contain examples of social clauses used by councils and other public bodies and model clauses.

In EU terms ‘technical specifications’ define the subject-matter of the contract (**what** the council wants to buy). Note that the EU rules on technical specifications must be observed for Part B services as well as those in Part A (see **Jargon buster** below).

A council can decide, where relevant, to draft ‘social’ requirements into the technical specifications complete with KPIs and targets (provided, of course, that there is compliance with the rules and principles of EU law, see **Annex 3**). That includes requirements relating to jobs, training and business opportunities (i.e. the visibility of supply chain opportunities). **Box 8** shows an example from Islington Council’s Building Schools for the Future programme.

These ‘social’ specifications can take the form of output or outcome specifications, like any others, allowing bidders scope to propose their own solutions which can be evaluated against published contract award criteria including social criteria (see **Awarding the contract** below).

Where this approach is taken, in the OJEU notice that launches the procurement the social requirements forming part of the subject-matter (e.g. recruitment services and training services) should be clearly indicated in the description of the contract or framework agreement and the corresponding code numbers should be inserted.²⁶

The KPIs and targets established for the social requirements clearly need to be measurable and both realistic and deliverable in view of the subject-matter, value and length of the contract and supply-side capacity.

In payment-by- results or incentive contracts payment can be linked directly to the KPIs. In longer-term contracts requirements can be stepped up periodically in an agreed way (continuous improvement in line with the Best Value duty).

All KPIs and targets should be set with a view to the way in which they will be monitored and measured (see **Managing the contract**).

²⁵ Examples of each type can be found in the toolkits listed in Further reading. Templates for method statements and other documents can also be found there.

²⁶ In OJEU notices all requirements must be defined by reference to Common Procurement Vocabulary (CPV) code numbers.

The bidder's proposals might take the form of a plan and/or method statement. The form for this will be set out in the invitation to tender (ITT) or similar.

In competitive dialogue and negotiated procedures there is scope to modify the KPIs, targets and delivery plans through dialogue with bidders (see the Islington example in **Box 6**) but there is no such flexibility in open and restricted procedures.

However, in open and restricted procedures it is possible for the ITT to invite 'variant' bids i.e. inviting both a conventional bid which does not address the 'social' specifications and a bid that does address those specifications. This enables comparisons, including cost comparisons, to be made.

In the official guidance, the 'social' specifications, which form part of the subject-matter of the contract, are sometimes described as being 'core' requirements. They are distinguished from 'non-core' requirements²⁷ that take the form of contract performance conditions.

'Contract performance conditions' (i.e. special contract conditions) relating to social considerations are treated differently under the EU rules. These conditions can be drafted into contract terms and conditions but not into specifications because they do not define what the council is buying (they do not define the subject-matter). These conditions must be compatible with EU law and they must relate to the performance of the contract not to other extraneous matters (e.g. the supplier's headquarters operation or activity on unrelated contracts).

The difference between the two types of social clause might seem obscure but it is important. Where the approach is to include a contract performance condition bidders can decide to withdraw if they do not wish to be bound by the condition when performing the contract but otherwise it is not possible to take the bidder's response into account at contract award stage (i.e. it is not something that can be evaluated against contract award criteria in the same way as a response to 'social' specifications).

Councils making use of contract performance conditions will need to consider what sanctions will be imposed if the conditions are breached (which in any event must be proportionate).

Contracts with prime contractors can provide, where relevant, that obligations contained in both social specifications and contract performance conditions are passed on down the supply chain through sub-contracts.

They can also encourage small business-friendly practices. For example, DWP Work Programme contracts require prime contractors to adhere to a code of practice which includes fair treatment of sub-contractors and to attain the 'Merlin Standard' for supply chain management (including third party assessment within a year). See **Further reading**.

It is obligatory to give advance notification of any contract performance conditions in the OJEU advert and it would be advisable to do the same for social specifications. The toolkits in **Further reading** provide sample wording for OJEU notices.

²⁷ Also called 'secondary' or 'additional' requirements.

Contract award criteria and the evaluation of bids are considered further below.

In the London Borough of Islington (LBI) Building Schools for the Future programme, the Strategic Partnering Agreement (SPA) includes targets for employment and training opportunities in construction, building services, facilities management and ICT. The targets are set against the KPIs for overall objectives. These were agreed through the competitive dialogue process. They include:

Collective Partnership Target	By When
<p>In construction:</p> <p>50 unskilled workers accessing construction skills training per year</p> <p>28 learners moving into apprenticeships will be provided for Phase 1 schools managed by LBI Construction Works Project (Similar targets are to be agreed for Phases 2 and 3).</p> <p>15 experienced workers to gain an NVQ3 per year</p> <p>600 unskilled workers to have access to construction skills training over the life of the project (Indicative annual target of 120 unskilled workers per year over the first 5 years of the SPA).</p> <p>500 up skilled workers gaining a qualification over the life of the project (Indicative target of 100 skilled workers per year over the first 5 years of the SPA).</p> <p>In building services:</p> <p>20 trade apprentices over the three phases of the project</p> <p>In facilities management 5 work placements per year and 12 apprenticeships over the life of the contract [...]</p> <p>Etc</p>	<p>By completion of Phase 3 unless otherwise stated.</p>

Selecting bidders

Box 8 Islington's employment and training targets

It is a myth that the EU rules do not allow councils to examine the track record of prospective bidders on jobs, skills training and business opportunities. This can be done through the pre-qualification questionnaire.

In all EU procedures the assessment of bidders is separate from the assessment of their bids. In the restricted, negotiated and competitive dialogue procedures there is an initial stage at which suppliers are assessed against council selection criteria. This is usually done with the aid of a PQQ. In the open procedure the two assessments are distinct but happen closer together in time (the PQQ comes with the bid).

Under the EU rules there are three elements to the PQQ assessment. Broadly speaking they are-

- exclusion
- financial standing
- capability.

'Accept' or 'reject' are the only courses of action on exclusion grounds (which include bribery, fraud, bankruptcy etc.). In some cases rejection is mandatory in other cases the council can exercise discretion.

The prospective bidders' responses on the other grounds may be scored (where this is the case, the scoring model must be made available to prospective bidders in accordance with transparency requirements). The council sets its own minimum standards (criteria or 'levels') but the EU rules determine what information can be sought in the PQQ.

There are exhaustive lists of information that can be sought to establish grounds for exclusion financial standing and capability. But bidders can, nonetheless, be asked to **supplement and clarify** the information in the lists.

Here the PQQ could, where relevant, ask prospective bidders to supplement the information on completed contracts by identifying those where they created jobs, skills training and business opportunities (i.e. how supply chain opportunities were made visible). Where this is taken into account in scoring PQQ responses the scoring system complete with weightings must be made available to prospective bidders with the PQQ (a transparency requirement).

Councils need to be careful not to disadvantage small businesses by considering these matters at PQQ stage.

Awarding the contract

It is another popular myth that the EU rules do not allow ‘social’ contract award criteria. That is not correct. The rules may not be explicit on the subject but it has been considered in European Court cases and it is clear in the EU guidance (‘Buying Social’).

It is up to each council to decide whether criteria of this kind will be included in the evaluation model and used to award a contract or framework agreement. This can only be done where requirements have been written into social specifications (see **Preparing the contract**).

As discussed elsewhere in this guide, there are other approaches to securing the objectives such as voluntary agreements and contract performance conditions which do not involve any consideration of a bidder’s approach at contract award stage.

If social award criteria are used, the council must choose ‘most economically advantageous tender’ from the council perspective (or ‘MEAT’) as the overall award criterion.

Award criteria within MEAT (and any sub-criteria) must relate directly to the subject-matter of the contract (what the council is buying) and that includes the social specifications.

Otherwise the criteria must comply with the Treaty rules and principles (**Annex 3**) and must not convey unrestricted freedom of choice. They should be objective, measurable and verifiable.

The social criteria, together with any weightings, must be notified in the OJEU notice and/or contract documents in the same way as any other criteria. Following prominent cases in the European Court it is clear that the whole evaluation model including any sub-criteria must be disclosed to bidders.

The European Court has also been called upon to consider whether ‘social’ criteria which are not linked to subject-matter can be taken into account when awarding contracts. The application of ‘additional criteria’ of this kind was considered in the ‘Nord Pas de Calais’ case²⁸. Based on this case, ‘Buying Social’ indicates that such additional criteria can be applied in ‘tie-break’ situations (i.e. where there is an equal score on MEAT criteria).

²⁸ This is a difficult judgment that is open to a variety of interpretations

Managing the contract

If the approach is to build social specifications into the contract then self-evidently arrangements will also need to be put in place to monitor and measure performance against the targets during the contract management phase (including the operational phase of a PPP project).

This is especially important where payment is linked directly to the KPIs (payment-by-results or incentive contracts).

Similar steps will need to be taken to monitor compliance with contract performance conditions. Although charters and voluntary agreements are not legally-binding in the same way it is equally important for the council and its suppliers to monitor delivery against the shared commitments contained there

Arrangements for the contract management phase should be considered in the procurement strategy (see above). There may be resourcing and training implications specific to the jobs, skills and business promotion elements.

It would be wrong to think that delivery of benefits in the jobs and skills area is all a matter of policing and enforcing contracts. Good results can be achieved by working collaboratively with suppliers. Managing relationships with suppliers is as important as managing contracts.

Strong relationships are especially important where voluntary agreements have been struck.

Following the award of a contract or framework agreement collaboration with prime contractors and their supply chains to secure continuous improvement (known as 'supplier relationship management' in the guidance or, in some contexts, 'partnering') can encompass jobs, skills and business development objectives even if requirements were not detailed in the contract. This is the essence of the voluntary agreement approach (see **Developing the procurement strategy**).

Intermediaries, of the kind discussed in **Taking a strategic approach** above, can play a vital role helping suppliers to develop the necessary understanding and capabilities.

Lastly, it is also important to fully debrief unsuccessful bidders so they can improve their performance when bidding for council framework agreements and contracts in the future.

Checklist

Has the council taken a strategic approach to jobs, skills training and business opportunities through procurement, appropriate to local circumstances, including:

- appointing a political champion
- adopting a strategy
- tasking senior management with delivery and identifying an officer-level delivery champion
- reviewing policies including use of charters, voluntary agreements and social clauses
- implementing best practice procedures and standard drafting (a toolkit)
- taking measures to open opportunities to small businesses etc including supply chain opportunities
- building capacity and improving contract-readiness of small businesses etc.
- running training (including senior managers and councillors as necessary) in the policies and procedures
- briefing suppliers on the requirements
- working with intermediaries to support suppliers in meeting the requirements.



Further reading

EU guidance

EU guidance is available at

http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

'Buying Social - A Guide to Taking Account of Social Considerations in Public Procurement' (2010)

'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts' (2008)

'Guide on Application of EU Rules to Services of General Economic Interest' (2010)

'Interpretative Communication on Integrating Social Considerations into Public Procurement' (2001)

UK guidance

Note: The OGC guidance listed below is under review and may not represent policy.

Guidance in force is available at

<http://cabinetoffice.gov.uk>

Archived guidance is available at

<http://webarchive.nationalarchives.gov.uk/20110601212617/http://www.ogc.gov.uk/index.asp>

'Buy and Make a Difference' (OGC, 2008)

'Flagging Your Contracts to SMEs' (OGC/BIS, 2010)

'Further Measures to Promote Small Business Procurement', Procurement Policy Information Note 05/11 (Cabinet Office, 2011)

'Levelling the Playing Field for SMEs as Sub-contractors – Procurer's Guide' (OGC/BIS, 2010)

'Mandated Use of Core Pre-qualification Questions in Central Government', Procurement Policy Action Note 20/10 (Cabinet Office, 2010)

'Promoting Skills through Public Procurement' (OGC/DIUS, 2009)

'Smaller Supplier... Better Value' (OGC/SBS, 2005)

'Social Issues in Purchasing' (OGC, 2006)

'Think Smart...Think Voluntary Sector!' (Home Office/OCG, 2004)

Toolkits

Homes and Communities Agency, Employment and Skills Guidance. Guidance and Toolkit for Registered Providers (HCA, 2009)

Inform to Involve, Can Do Toolkit. Targeted Recruitment and Training for Social Landlords, 3 vols. (i2i, 2008)

Inform to Involve/Value Wales, Can Do Toolkit 2. SME-friendly Procurement, 3 vols. (i2i/Value Wales, no date)

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Welsh Assembly Government, Community Benefits - Delivering Maximum Value for the Welsh Pound (WAG, 2010)

West Midlands Centre for Constructing Excellence, Opportunity in Austerity – A West Midlands Procurement Framework for SMEs in Construction (WMCCE, 2010)

West Midlands Economic Inclusion Panel, A Guide to the Procurement Framework for Jobs and Skills, (WMEIP, 2011)

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McCrudden, C., *Buying Social Justice* (Oxford University Press, 2007).

National Audit Office, *Successful Commissioning – How to Secure Value for Money through Better Financial Relationships with Third Sector Organisations* (NAO, 2010).

Office of the Third Sector, *A Guide to Social Return on Investment* (Cabinet Office, 2009)

Office of the Third Sector, *Social Return on Investment - and Commissioning* (Cabinet Office, 2009)

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Jargon buster

Charter	A document setting out the council's expectations of its suppliers as regards corporate social responsibility and inviting them to make a contribution to the area's social and economic development or setting out shared commitments in the context of a strategic partnership or a particular project.
Community benefits	Jobs, skills and business opportunities captured by local communities and contributing to local economic growth and prosperity.
Competitive dialogue procedure	An OJEU-advertised procurement procedure for use on an exceptional basis to award 'particularly complex contracts' (as defined in the EU rules). The purpose of the dialogue – which can take place in several stages – is to identify the solution best suited to the council's requirements.
Common Procurement Vocabulary (CPV)	An EU classification system used to assign code numbers to requirements in OJEU notices.
Contract performance condition	The EU term for a special condition included in the contract terms and conditions that imposes an obligation (which may be a social obligation) on the supplier when performing the contract. Those obligations must be compatible with EU law and must relate to the performance of the contract (not to other matters) and that includes jobs, skills training and business opportunities to be created.
Framework agreement	An agreement (which may or may not be binding) between the council and one or more suppliers establishing terms for the award of contracts over a specified period (not normally exceeding four years).
Invitation to tender (ITT)	The documents issued to bidders when inviting tenders. In a competitive negotiated procedure this is called an invitation to negotiate (ITN) and in competitive dialogue it is normally an invitation to participate in dialogue (IPD).

Key performance indicators (KPIs)	Performance indicators used to measure success against important objectives. The required level of performance is usually stated as a target (or sometimes as a 'standard').
Local Economic Assessment (LEA)	A council's statutory assessment of the economic conditions of the area.
Local Economic Partnership (LEP)	<p>A non-statutory partnership between councils and businesses in an area tasked with determining local economic priorities and undertaking activities to drive economic growth and the creation of local jobs.</p> <p>Not to be confused with the Local Education Partnership vehicles formed to deliver the Building Schools for the Future programme.</p>
Market sounding	A structured approach to pre-procurement dialogue with potential suppliers to establish the commercial viability of the council's proposed approach.
Negotiated procedure	<p>Under the EU rules there are two versions of the negotiated procurement procedure: with and without OJEU advertising.</p> <p>Direct negotiation (without advertising) can only be used in exceptional circumstances (e.g. extreme, unforeseeable urgency or monopoly of intellectual property rights).</p> <p>Competitive negotiation (with advertising) is permitted in a wider but still limited set of circumstances.</p>
Official Journal of the European Union (OJEU)	Above-threshold public contracts and framework agreements must be advertised in the supplement to this EU official gazette. The notices are reproduced in a searchable online database known as Tenders Electronic Daily (TED) which can be accessed free of charge.
Open procedure	An OJEU-advertised procurement procedure in which any prospective bidder expressing an interest must be invited to tender by the council.

Outline Business Case (OBC)	A key stage in the development of the business case for a major project. Approval of the OBC authorises the project to proceed including procurement. The Final Business Case (FBC) justifies the award of the contract.
Part B services	Services listed in Part B to Schedule 3 of the Public Contracts Regulations 2006. There is no obligation to advertise contracts for these services in OJEU (although the rules on technical specifications and contract award notices must be observed). Part A services, by contrast, are subject to the full requirements.
Partnering	A longer-term collaborative relationship between the council and a supplier based on the sharing of risks and rewards and continuous improvement (time, cost and quality). 'Strategic partnering' is a relationship that spans several projects.
Payment-by-results (PbR)	A type of incentive contract where payment is tied to the delivery of sustained outcomes. Sometimes used in conjunction with innovative financing mechanisms like Social Impact Bonds. May also be described as an 'outcome-based' contract.
Public-private partnership (PPP)	A contract or framework agreement through which the council secures third party finance as well as the design, construction and operation of an asset. Includes PFI projects.
Pre-qualification questionnaire (PQQ)	The document used to collect information from prospective bidders in order to assess their financial standing and capability to perform the contract and also to establish whether there are grounds for rejection (bribery, fraud, bankruptcy etc.).
Prior information notice (PIN)	An advance notice published in OJEU (see above) indicating the intention to award public contracts or framework agreements. The procurement in each instance is commenced by a further 'contract notice'.
Prime contractor	A supplier responsible for an entire project (or programme) including management of the rest of the supply chain (see below). Also called 'main contractor'.

Request for quotations (RFQ)	Equivalent to an invitation to tender (see above) for lower value requirements.
Restricted procedure	An OJEU-advertised procurement procedure in which only a predetermined number (or range) of prospective bidders meeting the council's criteria for financial standing and capability (and not rejected on grounds of bribery, fraud, bankruptcy etc.) are invited to tender. The initial assessment is made with the help of a pre-qualification questionnaire (see above).
Small businesses	<p>Small and medium-sized enterprises (SMEs) together with sole traders and partnerships that have no employees.</p> <p>The following definitions are used for statistical purposes:</p> <p>Micro One to nine employees</p> <p>Small Less than 50 employees</p> <p>Medium Between 50 and 250 employees</p> <p>Large More than 250 employees.</p>
Social clause	<p>An obligation included in a public contract relating to a social matter. These obligations can be included in contract terms and conditions (contract performance conditions) and specifications (social specifications) but with differing effects.</p> <p>'Community benefit clause' has a more limited meaning, generally confined to recruitment and skills issues.</p>
Social enterprise	A business with primarily social objectives whose surpluses are principally reinvested for that purpose.
Social return on investment (SROI)	A methodology which enables a proxy monetary value to be put on those social benefits which do not have a market value. It can be used in investment appraisal (the return on investment ratio) and impact analysis.
Social specifications	Social requirements defined within the technical specifications (i.e. what the council is buying). This includes specifications relating to jobs, skills training and business opportunities.

Subject-matter of the contract	What the council wants to buy as defined in the technical specifications.
Supplier opportunities portal	A website used by multiple buyers to advertise opportunities to bid for contracts. There are national, regional and local portals. TED performs this role at the EU level (see OJEU above).
Supplier relationship management (SRM)	Working collaboratively with suppliers to improve performance (time, cost and quality) and to gear up for future requirements. Also known as 'supplier development'.
Supply chain	Suppliers linked together in a 'chain' to deliver a particular requirement. Suppliers might be described as Tier 1, 2, 3 etc. according to how remote they are from the council as customer (how far down the supply chain).
Targeted recruitment and training (TRT)	The setting of targets for recruitment and training through 'social clauses' included in public contracts (and s.106 planning agreements).
Voluntary agreement	A voluntary agreement between a council and a supplier regarding jobs, skills and business opportunities usually concluded after a framework agreement or contract has been awarded.
Voluntary and community organisations (VCOs)	Registered charities and other not-for-profit organisations engaged in social action.



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Annex 1 Powers and duties of English councils

Local Government Act 2000

Up to this point, section 2 of the Local Government Act 2000 has empowered councils to do anything which they consider is likely to achieve the promotion or improvement of the **economic, social and environmental well-being of the area** (the ‘well-being power’).

Once the relevant provisions of the Localism Act 2011 come into force (see below) this power will be replaced with a broader ‘general power of competence’. The Government has also signalled its intention to repeal the allied duty under the 2000 Act to prepare a Sustainable Community Strategy. Relevant guidance has already been revoked.

Localism Act 2011

The Localism Act 2011 is a response to local government demands for greater decentralisation and devolution and forms part of the Government’s public sector reform agenda. It received Royal Assent on 15 November 2011 and its provisions are being brought into force gradually.

The Act goes beyond the ‘well-being’ power by granting councils a ‘general power of competence’ (Part 1, Chapter 1). This effectively turns the ‘ultra vires’ doctrine on its head enabling councils to do anything which is not specifically prohibited (subject to certain limitations). Schedule 1 of the Act repeals the ‘well-being power’ in England.

Further, the Act contains mechanisms for the transfer to councils (and, importantly, to economic prosperity boards and combined authorities) of other public bodies’ functions and for the delegation of functions by Ministers. The Secretary of State must consider proposals from authorities regarding the exercise of these powers (Part 1, Chapter 4). This is seen as an important enabler of local growth, particularly in major conurbations, with plans developed through Local Economic Partnerships.

The ‘community right to challenge’ (Part 5, Chapter 2) is important from the procurement perspective. Under the Act councils have a duty to consider expressions of interest in providing services submitted by relevant bodies (voluntary and community organisations, charities, parish councils and staff groups). If the council accepts an expression of interest (with or without modifications) it must conduct a procurement.

It will be mandatory for the council to consider whether acceptance of the expression of interest will promote or improve the **social, economic or environmental well-being of the area** and it must also consider how it might promote or improve well-being (in the same sense) by means of the procurement itself.

The community right to challenge is likely to be brought into force in April 2012 accompanied by regulations and guidance.

Local Democracy, Economic Development and Construction Act 2009

The 2009 Act (section 69) complemented the well-being power with a requirement on councils to undertake a Local Economic Assessment. Those assessments were carried out from April 2010 and have helped frame local economic development goals now being pursued through (non-statutory) Local Economic Partnerships.

The 2009 Act also enables the creation of economic prosperity boards and combined authorities (Part 6) facilitating joint action. See also Localism Act 2011 above which amends those provisions.

Local Government Act 1999

The Best Value duty in section 3 of the Local Government Act 1999 remains in force (despite significant amendments to the Act). This is a duty to 'make arrangements to secure continuous improvement in the way in which [the council's] functions are exercised, having regard to a combination of economy, efficiency and effectiveness'.

September 2011 statutory guidance, issued under the 1999 Act, states (paragraph 2) that under the Best Value duty 'authorities should consider overall value, **including economic, environmental and social value**, when reviewing service provision'. It goes on to explain that the concept of social value 'is about seeking to maximise the additional benefit that can be created by procuring or commissioning goods and services, above and beyond the benefit of merely the goods and services themselves'.

In paragraph 3, when discussing the related 'duty to consult', the guidance indicates that local voluntary and community organisations and small businesses should be included in the consultation and that this should apply 'at all stages of the commissioning cycle, including when considering the decommissioning of services'.

Further, authorities should be 'responsive to the benefits and needs of voluntary and community sector organisations of all sizes (honouring the commitments set out in Local Compacts) and small businesses'. The guidance concludes by setting out how councils should seek to avoid passing on disproportionate cuts.

Local Government Act 1988

Part 2 of this Act, regulating consideration of certain 'non-commercial matters' in procurement including the management of approved lists, remains in force. However, it has been modified as regards workforce matters (training and terms of conditions of employment for the contractor's staff) by the Best Value (Exclusion of Non-commercial Considerations) Order 2001 permitting consideration of those matters to the extent necessary to comply with the Best Value duty (see also the Public Services (Social Value) Bill in **Annex 2**).

Annex 2 Developments in the English legal framework

Public Services (Social Value) Bill

First introduced as a private member's bill, the focus of this Bill, following Government amendments in October 2011, is on procurement by contracting authorities (as defined in the EU rules).

If enacted, the Bill will go further than the Localism Act 2011 making it mandatory for any contracting authority, including a council, proposing to award an above-threshold contract or framework agreement for the provision of services to consider how what they are proposing to procure might **improve the economic, social and environmental well-being of the relevant area** and how, in conducting the procurement, the authority might act to secure that improvement.

It will also modify s.17 of the Local Government Act 1988 meaning that compliance by councils with the new duty will not be regarded as consideration of a 'non-commercial matter'.



Annex 3 EU procurement rules in a nutshell

There are three components to the EU public procurement rules:

- **treaty rules and principles** (currently the Treaty on the Functioning of the European Union, TFEU, and principles derived from it)
- **procurement directives** (implemented in the UK through statutory instruments, principally, for councils in England, the Public Contracts Regulations 2006)
- **case-law of the European Court** (and increasingly of the UK courts).

The Internal Market (originally the ‘Common Market’) is founded on the ‘four freedoms’ which form the core of the Treaty – the free movement of goods, labour and capital and the freedom to provide services/freedom of establishment.

EU Member States cannot obstruct the operation of the four freedoms (i.e. the Internal Market) by direct or indirect means. The Court of Justice of the European Union, in its case-law, has further derived a number of ‘general principles’ of EU law. These include:

- non-discrimination
- equal treatment
- transparency
- proportionality
- mutual recognition.

When governments and other public bodies give preference to ‘national’ suppliers over those established in other Member States, they are considered to be in breach of the Treaty rules and principles. That is why ‘Buy British’ and ‘Buy Local’ policies are not permitted and ‘local labour’ and ‘local sub-contracting’ schemes have been ruled unlawful by the Court (see, for example, the ‘Storebaelt’ case).

Procurement directives first began to be introduced in the 1970s. Their purpose is to harmonise procedures in use in the Member States to ensure that Treaty rules and principles are adhered to where there is likely to be cross-border interest (i.e. higher value contracts in particular markets) and to provide effective remedies for suppliers where they are not (in England council decisions can be challenged in the High Court and the remedies include damages and fines).

For English councils the rules are set out primarily in the Public Contracts Regulations 2006 (which implement the directives). The detailed rules contained in the regulations apply only to contracts and framework agreements exceeding certain threshold values (currently £156,442 for supplies and services and £3,972,260 for construction and engineering works). There are two categories of services – Part A and Part B. The rules only apply in full to those in Part A but there are rules for Part B services which cannot be ignored (including rules on technical specifications and contract award notices).

The main objective of the rules is to ensure that above-threshold requirements are advertised in the Official Journal of the European Union (OJEU) so that suppliers from across the EU (and beyond) are aware of the opportunity (transparency).

The remainder of the rules concern the procedures that may be used to award contracts and framework agreements with the objective that all suppliers should receive equal treatment and face no discrimination on nationality grounds. Time limits for responding to adverts (and for challenging subsequent decisions) and the information which can be sought from bidders to establish financial standing and capability are all regulated as are the criteria that may be used to award contracts. There are rules on technical specifications.

The procedures we know as the 'open', 'restricted', 'negotiated' and 'competitive dialogue' procedures are now common across the whole of Europe and the rules which we follow when selecting bidders (PQQ stage) and awarding contracts should be the same. Essentially, suppliers should be able to count on the same degree of access to all national markets (there should, in fact, be a 'Single Market').

The Public Contracts Regulations 2006 do expressly permit certain social and environmental considerations to be taken into account at the stage of selecting bidders and when evaluating bids. There is provision for special 'contract performance conditions' relating to social and environmental matters to be included in the contract terms and conditions. The recitals to the original European directive (which explain its purpose) provide examples of how and when these considerations might be taken into account and European Commission communications and guidance (particularly 'Buying Social') go into further detail.

Cases in the European Court have helped clarify what can be included in contract terms and conditions and in specifications as regards social matters and what may be taken into account at PQQ stage and when awarding contracts and framework agreements (e.g. 'Beentjes', 'Nord Pas de Calais', 'Contse'). The Court does not only consider contracts covered by the directives and the specific rules set out there. Cases are also brought on contracts that are for Part B services (in our terms), sub-threshold or exempt and on public service concessions. In all cases the Court refers to the Treaty rules and principles when arriving at a judgment.





Local Government Association

Local Government House
Smith Square
London SW1P 3HZ

Telephone 020 7664 3000

Fax 020 7664 3030

Email info@local.gov.uk

www.local.gov.uk

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For a copy in Braille, larger print or audio,
please contact us on 020 7664 3000.
We consider requests on an individual basis.