

# fresh thinking



**Delivering values and value for money through social benefits in public procurement.**

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**April 2009**



## Abstract

This thought piece is intended to provoke better thinking about how wellbeing is procured in the public arena. It assesses the difficulties in the UK with achieving social benefits in public procurement; describes various initiatives aimed at dispelling myths about good and bad practice; and speculates as to how the Green Book and other government guidance does not quite hit the mark in this area. It offers 3 steps towards embedding better value for money through embracing social, economic and environmental benefits with the aim of achieving improved outcomes for places and people in the UK.

## Introduction

These times of economic downturn accentuate the role of the State in its supporting role for businesses and individuals. A plethora of programmes is being promulgated, often in the context of global cooperation. The amount of resources being fed into public commissioning programmes with a central aim of improving public services requires, especially in these times, the delivery of efficiency and effectiveness, plus the wider range of social impacts possible for the local people affected by such services. Fortunately, there are tried and tested ways of incorporating social and economic benefits into procurement programmes, with many local authorities and other public bodies becoming adept at doing so, in ways which are lawful and reflect their responsibilities to the areas they serve. Unfortunately, many Government departments embrace the requirement of sustainable development in principle, but in practice focus on its environmental elements to the apparent exclusion of social and economic benefits. There is apparently a risk aversion which highlights perceived problems (legal, economic and wider policy) but no determination to create clear route maps for assisting contracting authorities to deliver the maximum benefits from the use of resources under their control.

There are so many White Papers and other policy documents which indicate a real desire to achieve cross-cutting benefits; assist users of public services at the point of receipt;

devolve expenditure (including rights to individual budgets); diversify the range of service delivery providers (including through “right to request” mechanisms); harness the skills and passions of frontline workforces; reinforce local accountability (e.g. through the Sustainable Communities Act); and the list goes on. The Office for Government Commerce (OGC) specifically draws attention to its guidelines on social, environmental, equality and wider policy outcomes in many of its communications – which at least indicates good intentions. In Europe there appears to be a willingness to explore Europe-wide good practice<sup>1</sup> in taking into account social considerations in procurement. So at a UK government level, is the spirit willing, but the flesh wobbling?

<sup>1</sup>The European Commission DG Employment, Social Affairs and Equal Opportunities has had a study undertaken on the social considerations in public procurement. The results will help the Commission to write a guide in this area. See: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=417>



## The evidence exists

Particular progress has been made in capital programmes in the adoption of targeted recruitment and training requirements so that unemployed or new entrant workers form a percentage of the workforce deployed in building projects and then servicing public amenities ranging from schools, highways and housing developments (with a social and public element) (usually through procurement and development agreements) to shopping centres (these usually through section 106 planning agreements). Pilots have been undertaken, tracked and reported on (see, for example, the Scottish Government publication “Community Benefits in Public Procurement”<sup>2</sup>). A toolkit to help deliver such outcomes has been launched for use by housing associations and local authorities in Wales in delivering the Welsh Housing Quality Standard.<sup>3</sup>

It is undoubtedly the case that some of the concerns about social clauses arise from instances of poor practice (using the language of “local labour”, for example). But these should not stop good practice being developed which results in outcomes that are proportionate. Nor is the creative use of public purchasing a new phenomenon in relation to social and economic outcomes. In the UK this has had to be re-discovered to a large extent after relaxation of

rules imposed by the Conservative Government to stop “non-commercial considerations” being taken into account in public procurement (for local authorities, reflected in Part II Local Government Act 1988). Christopher McCrudden’s comprehensive study “Buying Social Justice”<sup>4</sup> (which explains the long tradition of contract compliance and linkages in public procurement in many countries) highlights some turning points for local authorities:

“The Local Government Act 2000 gave local authorities general powers to promote the economic, social, and environmental ‘well-being’ of its population.<sup>5</sup> In 2002, a Joseph Rowntree Foundation report<sup>6</sup> appears to have set the ball rolling on procurement linkages. In 2003, as part of the overall strategy for local authorities procurement, the Office of the Deputy Prime Minister<sup>7</sup> highlighted how procurement could support local economic development.”

<sup>2</sup> “Community Benefits in Public Procurement: A report demonstrating the methodology for including targeted recruitment and training clauses in Public Sector Contracts” by Richard Macfarlane and Mark Cook (Crown Copyright 2008).

<sup>3</sup> The Can Do Toolkit: Targeted Recruitment and Training for Social Landlords – see [www.whq.org.uk/i2i/about/resources\\_php](http://www.whq.org.uk/i2i/about/resources_php) (Anthony Collins Solicitors LLP and Richard Macfarlane)

<sup>4</sup> “Buying Social Justice”: Equality, Government Procurement & Legal Change” (OUP 2007)

<sup>5</sup> See <http://www.opsi.gov.uk/acts/acts2000/20000022.htm>.

<sup>6</sup> R Macfarlane and M Cook, ‘Achieving community benefits through procurement’ (Joseph Rowntree Foundation, 2002). A report credits this report with triggering the ‘recent wave of interest in the potential to deliver wider social benefits through procurement’. Haringey SME Procurement Pilot: Community Benefit Clauses in Tenders and Contracts (5 April 2005)<sup>4</sup>.

<sup>7</sup> Office of the Deputy Prime Minister and the Local Government Association, ‘National Procurement Strategy for Local Government in England’ (2003).

Guidance in various reports identifies the relative benefits of 'social clauses'<sup>8</sup> as including:

- 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.

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, 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.

Appropriate use of social clauses fits well with good procurement practice offering:

- 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 Authority to ensure that they receive the service they pay for.

<sup>8</sup> See 'The Scope for using social clauses in UK Public Procurement to benefit the UK Manufacturing Sector – A report for the Manufacturing Forum' (Anthony Collins Solicitors with Richard Macfarlane and others (July 2006)) and the Scottish CBIP report (footnote 2).



- 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.

These principles can go a long way towards addressing any legitimate concerns raised by, for example, the Glover Report<sup>9</sup>:

“One barrier to engaging with SMEs, which has been consistently raised by procurers, is the pressure of incorporating a number of policy priorities within their procurement processes. Government has developed a number of policy requirements to be delivered through procurement, including economic considerations (including procuring from SMEs and voluntary sector organisations) social considerations (e.g. equality and adult skills), environmental sustainability, ethical trading, collaboration, and value for money. Many procurers told us they feel confused by the requirements to incorporate these policies within their procurement processes, and feel they have no clear priority.”

<sup>9</sup>“Accelerating the SME economic engine: through transparent, simple and strategic procurement” November (2008).

## Fudge and hot potato

All this points to the need to achieve a consensus and an agreed way forward for implementing social issues in procurement and a clear route map for doing so. Whilst considerable progress has been made at achieving clarity in the devolved administrations, there is fudge at the centre of UK Government that continues to delay progress in achieving an exciting range of positive outcomes from good public procurement practice. Yet nobody has explained clearly what it is that makes social issues in public procurement such a hot potato for so many.

Some of the concerns raised relate to the lawfulness of social clauses. There is quite a lot of fog around, which in part exists because it suits those who detract from their use. These objections are robustly addressed in a range of places. Positives identified in various reports include:

- Procurement can be used to achieve social and environmental requirements if they comply with the EU procurement rules and general EU law, which includes a duty to specify the requirements in the contract notice published in the Official Journal of the European Union (OJEU). The contracting authority must also have the legal powers to pursue the requirements;
- In particular, the principles of equal treatment and transparency must be observed. Community benefit

requirements in contracts must be objective and should not favour local suppliers or restrict employment or training to UK nationals. For example, contracting authorities must not express a preference for jobseekers from a particular locality to receive training or employment or require subcontracts to be placed with “local” SMEs. As wide a variety of suppliers as possible should be able to compete for the contract: the issue is giving local suppliers equal opportunities to bid for contracts and building their capacity<sup>10</sup>;

- Case law supporting use of social clauses and the extent of their use is available and should be observed;
- The EU legislative framework is generally more concerned with how public bodies procure, rather than what they procure, so long as value for money is attained.

In particular, there is the clear realisation that if social issues are incorporated from the outset in the policies of the contracting authority, written into the business case for the procurement and then specified, evaluated and measured, as part of the core requirement of the contracting authority, it is part of the subject matter of the contract in question. Requests for voluntary arrangements or commitments in response to “what added value can be provided” miss the point altogether and are more discriminatory than a carefully specified requirement commissioned by the contracting authority.

<sup>10</sup> See, for example, Sandwell's online network - increasing the level of business placed locally: <http://www.finditinsandwell.co.uk/>



## Making sense of the Green Book and the rainbow of Government policy guidance

Until anyone reads the Green Book<sup>11</sup>, it is easy to have the impression that it is a coherent and internally consistent document. But even a layperson, who actually reads it, discovers that this is not the case. So there is the general statement that “Wider social and environmental costs and benefits for which there is no market price also need to be brought into assessment” (paragraph 5.12). But Annex 2 of the Green Book shows clearly a direction towards inference of a price – reflecting an instinct to reduce as much as possible to mathematical formulae. But many of the factors behind well-being and other facets of social value cannot be reduced to a sum. Community engagement and capacity-building, developing relationship and trust; all these can transform the social fabric of a neighbourhood, leading in due course to savings on the public purse but more importantly better use of resources as a whole. This requires an element of trusting that outcomes will develop, putting in place a robust infrastructure for doing so and then allowing the genius to mix with the disappointing, rather than a centrally driven average of the mediocre. At the heart of this is a central-localist tension that plays out at a variety of levels: central government to local

government, local government to communities, regions to local government and communities. It is understood that the Treasury is taking a keen interest in developing its tools for social benefit measurement in its revision of the Green Book. To date there is little evidence that this work is being plugged directly into its public procurement policy guidance.

A layperson is only skimming the surface rather than exploring the depths of Government guidance – so moving it up a level to policy evaluation and analysis it is enlightening to discover the Magenta Book<sup>12</sup> (together with its supporting background papers). Wading through this makes one appreciate the intricacies of Government policymaking – indeed, it is surprising that any policy emanates from the Government if all this has to be taken into account. Some of its content is also clearly written from the desk top – see its discussion on “social experiments”. Department specific policy guidance documents create further levels of matters to take into account. Of these it is the relatively easy to see how social value relates to projects entailing spatial intervention.

‘The 3Rs guidance’ provides a methodology for understanding the impact of interventions that are spatially targeted (i.e. with an impact on

<sup>11</sup> HM Treasury's Green Book sets out the core principles on which all public sector economic assessment is based. Supplementary guidance has been produced developing further how these principles should be applied in specific areas such as managing risks, optimism bias, competition, impact assessments and taxation in PFI and the public sector comparator. More detailed departmental guidance is also available, applying the Green Book to areas such as health, the environment, transport and the shadow price of carbon.

<sup>12</sup> The Government Social Research Unit has prepared this set of guidance notes on policy evaluation and analysis to help 'intelligent customers' and 'intelligent providers' determine what constitutes high quality work in the field on policy evaluation and analysis. These

specific geographical areas), covering universal welfare programmes, relatively targeted actual programmes and explicitly area based initiatives. Developed principally at policy and programme level rather than project level, it nevertheless does describe a framework to which the connection with public procurement embracing social value can be made and developed further. For example, its guidance on “sunk costs” is helpful in formulating an approach to specifying benefits that have yet to be procured. There is an explanation of impacts which are “additional” which goes to the heart of difficulties many would have as to what is core or not core to a specification in a procurement exercise. It is clear that “the ultimate aim of 3R interventions is to achieve thriving, inclusive and sustainable communities”, having reference to the “domains of spatial sustainable development” (i.e. economic, environmental and social). So clearly a bridging point for exploring social value and its place in public procurement can be found in the developing framework for spatial intervention. In the absence of a strong enough experience-based resource within Government, it is incumbent on those on the frontline of transforming public services and transforming communities to take these links, understand them and then feed back to the Government

as to how it can deliver positive messages about delivering well-being at the heart of public expenditure.

In a climate of guidance that is predicated on risk management and lack of trust, it is no wonder that many struggle to grasp the purpose of social value in commissioning and procurement. Underlying this all is the apparent difficulty in the executive and administrative apparatus of Government to appreciate and value that which is good and beneficial – and having determined the end to be achieved, the skills required to make that all happen.

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## Creating a way forward

'So near, but yet so far' might be an apt way of describing progress to date in developing a coherent pattern of reflecting social value in public procurement. In order to take it to the next stage, perhaps we should look at three positive actions that would make a distinct difference in progressing this vital agenda.

In simple terms these 3 steps are:

- developing tailored guidance on social value in public procurement specifically geared to spatial intervention initiatives: this is entirely feasible within an EU compliant legal process because the linkages between social considerations in a procurement are easier to demonstrate in relation to beneficiaries in a defined locality;
- recognising that social value in procurement is easier to implement in devolved administrations – entailing greater expenditure at a local level, local authorities, primary care trusts and further onwards to truly community based organisations – and that therefore this is a positive reason for taking public expenditure away from the centre;
- establishing a unified “Social Capital Fund”: bearing some of the hallmarks of

the Single Regeneration Budget, but creating cash flows which are top-sliced from across Government department pots for a wider range of contexts. This fund would be made available to organisations that would bid for resources for making “additionality” affordable in the projects they implement at a local level. Relaxations introduced by the European Commission to address the recession offer an opportunity to provide a framework within which the fund can be administered effectively in circumstances where state aid might otherwise be unlawful<sup>14</sup>. The fund would not just be available for commissioners to apply to flex their budgets, but also directly to contractors (especially social enterprises) to enable them to generate greater social change on projects they are engaged to deliver.

Finally professionalism in public procurement has to be allied with mission in delivering a more equitable and happier society.

The challenge is to turn passion into strong outcomes. This requires understanding how to achieve this through purposeful guidance. This work has largely been done but it is yet to be embraced fully at the highest level in Government.

<sup>14</sup> In the summer of 2008, the Commission published the GBER (General Block Exemption Regulation) which took all of the previous, individual block exemptions, updated them, and put them into a single document. The European Commission also adopted in December 2008 the “Temporary Framework for State Aid Measures To Support Access To Finance In The Current Financial And Economic Crisis”; this was amended on 25<sup>th</sup> February 2009.

## Mark Cook



Mark Cook has considerable involvement with EU public procurement, UK tendering legislation, Best Value and State Aid. His work covers the broad interface between the public, private and third sectors especially in the delivery of new ways of providing public services. Areas covered include: major regeneration projects in neighbourhoods and districts; Academies and trust schools; social enterprise and the NHS; office accommodation and transformation of central services; leisure and public health; streetscene and community based recycling services; and tackling worklessness. Mark is nationally recognised as an expert on sustainable procurement, especially social issues/clauses e.g. targeted recruitment and training. Mark co-authored with Richard Macfarlane ([www.rmacfarlane.co.uk](http://www.rmacfarlane.co.uk)) the groundbreaking JRF Report "Achieving Community Benefits through Contracts" (published 2002), going on to collaborate in a range of initiatives to embed good practice in delivering community benefits. He is a director of the Nehemiah Foundation which works with local organisations in the supporting and training of regeneration workers to enable lasting transformation (<http://www.regenworker.com/>) and REalliance Community Interest Company which has been established to benefit third sector groups which work in waste reduction, reuse, composting and recycling and the people living in the areas that these groups serve (<http://www.realliance.org.uk/>).

## Want to know more?

If you are interested in discussing how the 3 steps outlined above could be progressed, please do get in touch with: **Mark Cook, Partner, Anthony Collins Solicitors LLP**, [mark.cook@anthonicollins.com](mailto:mark.cook@anthonicollins.com).

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