



Main Guide to the West Midlands Procurement Framework for Jobs and Skills

Harnessing public and third sector buying power

March 2010

The West Midlands
Economic Inclusion Panel
Tackling Worklessness

The West Midlands Economic Inclusion Panel

The West Midlands Economic Strategy, 'Connecting to Success' (December 2007) identified a £10 billion output gap in the region, 20% of which can be ascribed to the level of economic exclusion and Worklessness across the region. The West Midlands Economic Inclusion Panel was established in June 2008, specifically to address the challenge of Worklessness.

Funded by Advantage West Midlands, the Panel brings together leaders from across the Public and Third Sectors to identify and champion the wider and more consistent deployment of good practice in tackling Worklessness and identify and propose the means to fill crucial gaps in current employment and training provision.

IMPORTANT:

For further information on this Framework or to submit feedback about the use of the Framework, please contact John Lee, Assistant Director for Economic Inclusion, Government Office for the West Midlands, 5 St Phillip's Place, Colmore Row, Birmingham. B3 2PW
Tel: 0121 352 5244 or email: john.lee@gowm.gsi.gov.uk

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This Guide to the West Midlands Procurement Framework for Jobs and Skills is the second of three related documents. It should be used in conjunction with Document 1: 'A Summary Guide to the West Midlands Procurement Framework for Jobs and Skills' and Document 3: 'The Toolkit for Stakeholders'.

Foreword

The UK public and third sectors exercise immense 'buying power'. Each year the public sector alone spends around £220 billion on goods, services and capital assets. It is by far the largest customer in the UK market place and therefore has the power to exert significant influence over market opportunities. In the West Midlands, public and third sector buying power amounts to some £16 billion annually.

The Economic Inclusion Panel has set out an ambitious strategy for placing jobs and skills at the heart of the decision-making process that determines how this buying power is exercised. The Procurement Framework for Jobs and Skills aims to ensure that local people benefit directly from a region-wide strategy that places specific requirements on contractors to provide more training and job opportunities, as part of their contractual commitments.

Sustainable procurement - using buying power to secure social, economic and environmental objectives in ways that offer real long term benefits - is already a government policy priority. The widespread and consistent application of this Framework, across the public and third sectors, will place jobs and skills at the core of fair and open procurement and contracting procedures, not just for capital and construction projects, but for goods and services too. Doing so offers the prospect of significantly reducing the unacceptably high level of worklessness in the West Midlands, ensuring a far greater proportion of employment and training provision is linked directly to sustainable job opportunities, and is designed to deliver the skills that employers demand.

Our Commitment

We must put in place now the means to ensure that a much higher proportion of our citizens can contribute to the economy and benefit directly from the eventual economic upturn, by securing and sustaining employment.

Each member of the Economic Inclusion Panel is committed to using the Framework to achieve this ambition. We will champion its deployment within our own organisations; the networks that we operate in; across the whole of the public and third sector; to Government; and in our dealings with current and prospective contractors. Furthermore, we will demonstrate our commitment by regularly monitoring our progress in the practical implementation of this Framework. This commitment is nothing less than the best of the private sector and all our customers and citizens should expect of us. And if we, as public and third sector leaders, do not champion this approach, then who will?



Trudi Elliott
Economic Inclusion Panel Chair
Regional Director, GOWM



Mick Laverty
Chief Executive
Advantage West Midlands

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Introduction

The West Midlands Economic Inclusion Panel brings together leaders from across the public, third and private sectors to consider new ways to tackle the challenge that worklessness presents for the West Midlands economy and the well being of its citizens.

The Panel has commissioned and developed this **Procurement Framework for Jobs and Skills** as a strategic tool to be used by public and third sector organisations in the West Midlands who wish to increase access to jobs and skills opportunities for local people through the procurement exercises they undertake

The Framework consists of three linked documents:

- a **Summary Guide**, which provides an introduction to the Panel's approach to achieving its aim of embedding jobs and skills as core considerations throughout the procurement process, and the issues to be considered when doing so;
- a **Main Guide** containing information on legal and policy matters, supply-side issues and the free, public sector recruitment and training support services that are available to procurers and prospective contractors; and
- a **Toolkit for Stakeholders** containing a series of model documents, including template jobs and skills clauses, detailed legal guidance and various tools, which can be downloaded and adapted to meet the needs of individual public and third sector organisations and prospective contractors, including SMEs and social enterprises.

This Guide to the Framework is not designed to be read from cover to cover. It consists of seven 'stand-alone' chapters, each addressing a specific procurement theme.

It addresses the needs of a number of distinct target audiences, from public and third sector leaders, to procurement professionals and practitioners, as well as those who design and deliver employment and training programmes linked to employer demand and, of course, those businesses which already secure, or wish to bid for, public and third sector contracts.

It sets out the Panel's views on the ways in which all of these parties can contribute to tackling worklessness through the procurement activities they undertake¹, by:

- setting out the economic business case for placing jobs and skills 'centre-stage' in the theatre of public procurement (Chapter 1);
- securing public sector leadership commitment to making access to jobs and skills a core consideration of procurement exercises from the outset (Chapter 2);
- addressing the real and perceived legal barriers to the use of jobs and skills clauses in contract and procurement exercises (Chapter 3 & 4);
- exploring the policy tensions, organisational-culture issues and decision-making structures that can either impede or facilitate action (Chapter 5);
- identifying and, where possible, reducing or removing the barriers that may prevent more small and medium size enterprises (SMEs), social enterprises and other third sector organisations from bidding for public sector contracts (Chapter 6);
- sign-posting procurement professionals and prospective contractors to the range of free support and advice services that can help both parties deliver on jobs and skills requirements (Chapter 7).

The Panel strongly encourages public and third sector organisations to adopt the Framework, to apply its various tools and templates, and to provide feedback on the issues arising and successes achieved through its use. By doing so, we will create the evidence base for consistently applying jobs and skills clauses to the end-to-end procurement process and use this evidence as the basis for publishing a revised Framework in 2011-12.

¹The accompanying Toolkit for Stakeholders builds further on this approach and provides detailed advice and guidance, including bespoke tools and templates, to help embed a focus on jobs and skills throughout the end-to-end procurement process.

Chapter 1 Tackling Worklessness - placing jobs and skills 'centre-stage'

The Scale of the Challenge in the West Midlands

- 1.1 The West Midlands Regional Economic Strategy (2007): 'Connecting to Success' identified a £10 billion output gap in the region, 20% of which can be ascribed to economic exclusion (worklessness) - the failure to use the talent and potential of all of the people in the Region.
- 1.2 In response to this Advantage West Midlands, the West Midlands Regional Development Agency, funded the establishment of the Economic Inclusion Panel (referred to as 'the Panel' throughout this document) in June 2008. The Panel brings together leaders from across the public, third and private sectors to consider new ways to tackle this challenge. In October 2008 the Panel commissioned the West Midlands Regional Observatory to produce an Economic Inclusion Baseline Report, which was published in March 2009.
- 1.3 The Baseline Report confirmed that the worklessness rate for the West Midlands stood at 28%; 52% for those with a limiting illness or disability; 53% for those with no qualifications; and 57% for those from the Pakistani/Bangladeshi communities.
- 1.4 Since the Baseline Report was published, the impact of the recession has led to a serious deterioration in the regional position on worklessness. The West Midlands now has the second highest ILO unemployment rate of any UK Region at 9.4% with 252,000 people out of work and a Jobseekers Allowance claimant count that has risen by 37,700 to 180,300 in the 12 months to January 2010 and by 87,200 since January 2008, before the start of the recession.² These increases have been particularly felt by some communities and some groups of people. The five Parliamentary Constituencies with the highest rates of claimant unemployment in the UK are all in the West Midlands (4 in Birmingham and 1 in Wolverhampton). Young people have been badly hit. The unemployment rate for young people has risen by 7 percentage points over the last year and is now the highest of any demographic group at 20.6%. People with no qualifications have also been greatly affected by jobs losses. This group is now experiencing the second largest increase in unemployment rates of any demographic group.

Establishing a Monetary Value for Each Jobs and Skills Benefit

Net Exchequer Costs and Benefits of Employment Programmes

- 1.5 Net Benefit/Cost to the Exchequer of Employment/New Deal Programmes is defined as the difference between the cost per programme participant, and the benefits that will flow back to the Exchequer in direct and indirect welfare benefits saved and increased tax revenue, less the cost of increased Tax Credits payable to people who move into work.
- 1.6 These benefits/costs are calculated, based on the best evidence available on the average duration of jobs that people secure through Employment/New Deal Programmes and the average entry wages they are paid. Where wage evidence is not reliable, employment duration of one year and minimum wage on entry are assumed.
- 1.7 The National Audit Office report (2007) on the Net Exchequer Benefits/Costs of New Deal programmes (2006-07) indicated that all Programmes evidenced a Net Exchequer Cost with the exception of the New Deal for 50 Plus, which evidenced a Net Exchequer Benefit of £50.³
- 1.8 If this is the case, how then can it be argued that there is, in fact, a significant net benefit to the country, the economy and the community of placing access to jobs and skills for workless people at the heart of public procurement?

²Source: Labour Market Statistics 17 February 2010. Latest JSA figures are for January 2010 and unemployment and ILO figures are for the period October - December 2009.

What is the Scale of the Opportunity?

- 1.9 If the Framework is adopted widely and leads to a major shift from the current, paucity of Contracts specifying jobs and skills outcomes (probably less than 1% nationally), then we might develop the following type of measure.
- 1.10 It is estimated that in the West Midlands alone the public sector spends and invests circa £16b annually through procurement exercises⁴. Let us assume that £1m of procurement expenditure has the potential to create up to 4 jobs and/or training opportunities. If just 10% (£1.6b) of this investment was linked directly to jobs and skills requirements, this could secure access to up to 6,400 jobs and training opportunities per year. It is not so much the accuracy of the ‘multiplier’ that is key here⁵, but the scale of the opportunity to tackle worklessness that public sector procurement presents.

How Reducing Worklessness Impacts Positively on Wider Service Provision

- 1.11 Net Exchequer Cost and Benefit calculations **exclude** major indirect benefits such as the impact of higher employment on health and crime, or the likely reduction in the call on Local Authority, health or other public services
- 1.12 It is not within the scope of this report to set out the detailed research and findings that underpin the fact that significant benefits flow from affording far more workless people the opportunity to contribute to the economic and social well being of the region by helping them to develop their skills and find jobs. However, the Panel’s role in tackling Worklessness is founded on robust evidence that helping people find sustainable employment leads for example to:
- a reduction in Local Authority payments of housing and council tax benefits;
 - fewer requests for free school meals;
 - decrease demand/pressure on services required to support homeless people;
 - reduced pressures on welfare rights and debt advice services;

- fewer demands upon mental health support services and health services more generally; and
- increased spend by those in sustainable jobs to support local economies.⁶

1.13 Over and above the quantifiable and qualitative service benefits that flow from reductions in pressure on finite public services, work can also be said to provide ‘the best form of welfare’ for the vast majority of working age people, and also to:

- increase personal health and well being (note the high mortality rates linked to Worklessness);
- enhance self-esteem, leading to better engagement with family and community;
- support social cohesion, and potentially lead to a reduction in crime.

Increasing the Emphasis on Demand-led Employment Programmes

- 1.14 Recent positive developments, such as Local Employment Partnerships and the Integrated Employment and Skills Programme, evidence that the overwhelming majority of employment programmes demonstrate only generic links to demand-led, TR&T models: that is, employment and training programmes that have been designed **for and with** employers.
- 1.15 If a far greater proportion of the public sector’s annual spend on capital, goods and services (estimated at £220 billion for 2009-10) is linked directly to contractually binding jobs and skills requirements, which in turn require bidders to access services available through Jobcentre Plus, the Learning and Skills Council and via Local Authority-led employment partnerships, then it follows that this move would lead to:
- a further shift to demand-led employment and skills programmes (and sector route ways);
 - an increase in the credibility and desirability of entry to such programmes;
 - an equivalent increase in positive (job) outcomes;

³Data from NAO Report and Hearing

⁴While public expenditure is likely to reduce or at best remain static over the next few years, the public sector will undoubtedly remain a major procurer of goods, services, capital assets and construction projects.

⁵For example the West Midlands Construction Centre of Excellence (WMCCE) applies a multiplier of 1 job created for every £2m of construction expenditure.

⁶See the West Midlands Regional Economic Strategy and the regional gap in Gross Value Added (GVA) ascribed therein to economic exclusion (Worklessness)

- a concomitant reduction in programme unit costs (as job outcomes as a proportion of programme starts increased); and
- a likely shift, from marginal Net Exchequer Cost to Net Exchequer Benefits.

Whole Life Costing v Lowest Cost / Price Tendering

Some Definitions

1.16 It is, perhaps, indicative of how complex an area the issue of whole life costing is that there is no universally accepted definition of what whole life costing means. Some brief definitions are attempted below.

Lowest Cost	=	Generally, this will mean choosing the bidder who tenders the lowest price for the contract you have tendered.
Whole Life Costing	=	<p>“Whole life cost takes into account the cost over time, including capital, maintenance, management, operating and disposal costs.”⁷</p> <p>OR</p> <p>“The full cost to an organisation of a solution to a requirement over the full period that the requirement will exist. Whole life costs will take into account running costs such as energy usage, maintenance requirements, staff training needs, and disposal costs such as recycling, as well as the initial purchase price. The life span of the product will also need to be considered”⁸</p>

Introduction to Whole Life Costing

- 1.17 Whenever a public body is considering the award of a contract, they can do so either on the basis of choosing the bidder who offers them the lowest price for the goods, services or works they are procuring, or they can consider the wider concerns and opportunities that the contract represents – choosing the Most Economically Advantageous Tender (MEAT). The contracting body will often wish to consider the costs and benefits of the contract over the whole of its life. This will, of course, include a need to consider the price quoted by bidders, but will also take into account other costs and benefits – the comparative costs of maintenance of a piece of machinery, say, or the comparative costs of heating, cooling and ventilating different designs for a building – over the life of the contract or the period of use of the goods or works.
- 1.18 Given that the accepted government definition of value for money is “the optimum combination of whole life costs and quality to meet the service user requirement”,⁹ it is clear how important costing on a whole life basis should be to public contracts. That whole life costing is not seen more regularly in practice is an indication, perhaps, of how difficult it has been found to put into practice. Obviously this is a concept which can be represented easily and simply, but which in practice can be a complicated process that is difficult to navigate. How do you measure the whole life costs of, say, a contract for the purchase and maintenance of IT equipment? Perhaps even more difficult is the application of whole life costing to contracts for services.
- 1.19 It is very much a platitude that the cheapest product will not necessarily represent the best value for money. A simple consumer example would be a cheap pair of shoes which wears out after only two months of wear, as compared with a more expensive pair of shoes which would last for a year. Unless the more expensive pair of shoes cost more than six times the cost of the cheaper pair, they will nonetheless represent better value for money – and the cost spread out over the whole life of their use can actually be lower than the cheaper product.

⁷Annex 4.4 to Managing Public Money, page 4, available from: http://www.hm-treasury.gov.uk/d/mpm_annex4.4.pdf
⁸Social Issues in Purchasing, Office of Government Commerce, 2006, page 49, available from http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf
⁹This is the definition used most commonly by central government. See, for example, the OGC and Defra Joint Note on Environmental Issues in Purchasing, October 2003, page 1, available online at http://www.ogc.gov.uk/documents/environmental_issues-defra.pdf

1.20 It is very rarely the case that awarding a contract to the tenderer who tenders the lowest price will enable the contracting authority to achieve the best value for money. For this reason, the majority of contracts within the UK public sector that are let under the EU procurement rules will be let on the basis of MEAT. A side effect of this is that most contracting authorities in the UK have taken the first step towards whole life costing of their contracts – they are considering issues other than the quoted price when awarding their contracts.

1.21 As long as award criteria is linked to the subject matter of the contract (about which see the section below on the relevance of social clauses), there is a broad array of criteria that contracting authorities can use when awarding a contract on the basis of MEAT, including (but not limited to):

- quality;
- price;
- technical merit;
- aesthetic and functional characteristics;
- environmental characteristics;
- running costs;
- cost effectiveness;
- after sales service;
- technical assistance;
- delivery date and delivery period; and
- period of completion.¹⁰

1.22 Whole life costing is core to many of the criteria envisaged by the EU procurement rules. In addition to this, the Consolidated Directive, which forms the basis of the EU procurement rules, explicitly demonstrates the European Commission's intention that procurement can take account of social and environmental factors.¹¹

Why is this Important to Jobs and Skills?

1.23 Whole life costing is clearly invaluable as a tool in assessing the value for money of contracts as a whole. As part of the whole life costing exercise for any contract which contains jobs and skills elements, these elements should of course form part of that assessment. The whole life cost exercise can be an excellent way of assessing and recognising the value (monetary or otherwise) of the jobs and skills element in a contract.

Will Whole Life Costing always be the Better Option?

1.24 There will always be contracts where it is considered either not possible, or not cost effective, to consider in detail the whole life costs, rather than just price. This may particularly be the case in very short or very low value contracts, where the savings that could be made (or added benefit that could be acknowledged and valued) are less than the cost of undertaking the exercise of calculating whole life costs. However, whole life costing will usually be relevant unless the contract is for a standard product with set quality criteria across the board (such as mass-produced commodities) where price will in fact be the only criteria on which the contract is awarded. Unless this is the case, there will always be award criteria other than price, and contracting authorities will always need to balance the importance of different factors in their decision making.

1.25 Alongside achieving value for money (for which whole life costing can be an invaluable tool), most public bodies need to consider the issue of affordability. Sadly, a contract which offers outstanding value for money, if it is not affordable, will not realistically be achieved, and public bodies will always have budgets to which they must adhere. However, there are many benefits that can be achieved through contracts either for nil cost, or which can actually save the contracting body money. This is obvious from the simple example of energy saving light bulbs, and the money these can save over the life of their use. However, it is not just small items for which this can be the case. It is important to acknowledge that whole life costing is still vital when affordability becomes a concern – indeed, whole life costing can be the answer to affordability issues.

¹⁰Regulation 30(2) of the Public Contracts Regulations 2006

¹¹See recitals..

Some Examples of Whole Life Costing

- 1.26 Whole life costing is used to varying degrees in different industry sectors. Construction is one area where there are some quite sophisticated tools for measuring and calculating whole life costs. See, for example, the OGC's guidance on whole life costing and cost management, which forms part of its Achieving Excellence in Construction Procurement Guide,¹² or the work of the Whole Life Cost Forum.¹³ But equally guidance and tools are available in other arenas – for example, NHS Purchasing and Supply Agency (PASA) has developed an energy efficiency assessment tool for electrical medical devices which enables users to compare the energy efficiency (and therefore part of the whole life costs) of different models and equipment.¹⁴

Are There Sectors Better Suited Than Others to the Use of Whole Life Costing?

- 1.27 Some sectors may have more sophisticated tools for whole life costing, or be further along the road to true whole life costing. Whole life costing may seem more difficult, or less relevant, to some contracts. However, all sectors should be applying the principles of whole life costing if they are to achieve value for money. While it may be easier to see the whole life costs of some contracts than others, the importance set on value for money in the UK means that no sector should discount whole life costing as a possibility. To do so would be to work against a strategy which is core to government in its present form.
- 1.28 It can seem more difficult to apply whole life costing to contracts for services, and certainly the evidence is that whole life costing has been applied thus far in the main to the supply of goods and to works. In a contract which is purely for services, whole life costing can be useful in assessing the costs and benefits of differing levels and quality of service, or perhaps different lengths of contract. Where contracts for services are focussed on outcomes, rather than outputs, there is the greatest opportunity to calculate whole life costs. While whole life costing is relevant to services, it is perhaps more commonly used in relation to contracts which

are for a mixture of goods or works and services. Many examples of whole life costing relate to the combined costs of purchasing goods and servicing / maintaining them after purchase. This would be a contract for the supply of goods and services (the item and its maintenance). It is, in fact, the services element which is ripe for whole life costs assessment.

How Do I Get Started?

- 1.29 There is a clear need for training in how the concept of whole life cost applies to any particular type of contract. This is an area which is ripe for development. There are training courses available, but most are specific to a particular industry or sector - perhaps by necessity – or include whole life costing as part of a wider course on sustainable procurement. For example, Action Sustainability, a not for profit social enterprise, provides an IEMA¹⁵ - accredited CPD public training course offering an introduction to sustainable procurement. Similarly, Improvement and Efficiency West Midlands (IEWM – the Regional Improvement and Efficiency Partnership) has in the past offered a course on sustainable procurement which included elements on whole life costing.

¹²<http://www.ogc.gov.uk/documents/CP0067AEGuide7.pdf>

¹³<http://www.wlcf.org.uk/index.html>

¹⁴Find out more at: <http://www.pasa.nhs.uk/PASAWeb/NHSprocurement/Sustainabledevelopment/SustainabilitytoolsforTrusts/>

¹⁵Institute of Environmental Management and Assessment – see www.iema.net/

Chapter 2 Leadership - a strategic commitment to jobs and skills

Introduction

- 2.1 The Panel is seeking region-wide, public sector endorsement and deployment of the strategic approach to jobs and skills requirements set out in the Summary Guide and covered in detail in this chapter.¹⁶
- 2.2 This chapter looks in more detail at Charters, Voluntary Agreements and Contract Clauses and identifies the various steps public sector organisations may need to take to ensure their commitment to deploy the Framework is supported by robust internal systems.
- 2.3 While implementing all of the steps considered in this chapter (and graphically illustrated in Table 2 on page 16) may take time, the Panel is committed to securing the widespread support of public and third sector leaders and, already, the West Midlands Shadow Joint Strategy and Investment Board has endorsed in principle the application of the Framework to the ambitious range of infrastructure projects that now constitute the West Midlands Regional Funding Advice to Government.

The Framework

- 2.4 The four distinct approaches set out in the Framework are as follows:

Approach 1 - Charters: through which public sector organisations share their strategic priorities and goals (specifically around worklessness) with current and prospective contractors, encourage the adoption of exemplar behaviours and practices and look to develop new customer-supplier relationships.

Approach 2 - Voluntary Agreements: whereby public sector organisations work with their existing contractors to secure commitments to specific jobs and skills outcomes over a specified time period, with support provided to contractors by a range of public sector agencies. This approach can be used retrospectively with longstanding contractors and in the middle of long term contracts).¹⁷

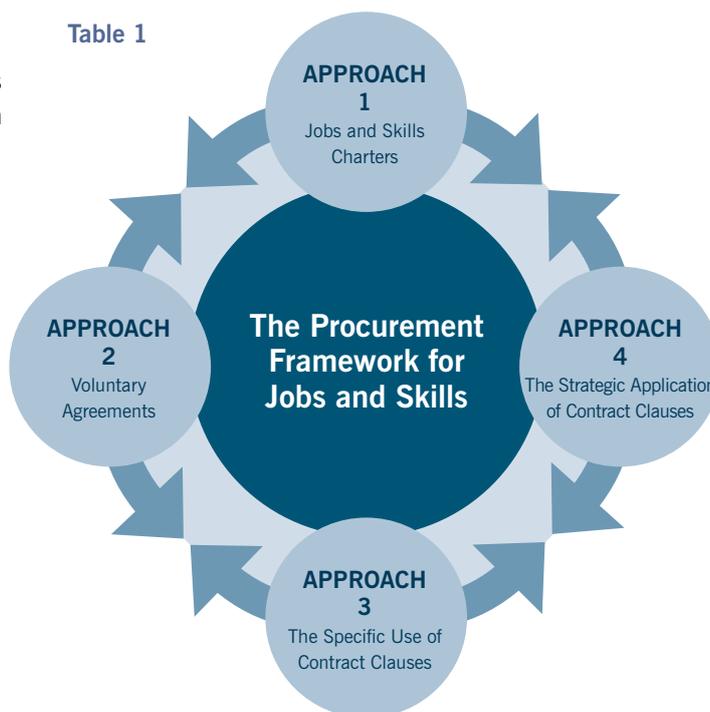
Approach 3 – The Specific Use of Contract Clauses: whereby public sector organisations include jobs and skills clauses within specific

procurement exercises leading to a contractually agreed set of outputs and outcomes.

Approach 4 - The Strategic Application of contract clauses: whereby public sector organisations deliberately adopt a ‘default’ position that requires clauses specifying jobs and skills requirements to be routinely considered for their relevance to all stages of each and every commissioning and procurement process exercise undertaken. Furthermore, such organisations commit to measure, on an ongoing basis, the percentage of contracts and the proportion of expenditure to which such clauses apply, in addition to tracking outputs and outcomes.

- 2.5 The strategic and systematic approach set out in Approach 4 ensures that jobs and skills contract clauses are **always** considered. If they are found not to be relevant to the contracts under consideration, the procuring organisation can move sequentially to consider the use of a Voluntary Agreement and then, if this is not considered appropriate, to introduce or use an existing Jobs and Skills Charter. As Table 1 illustrates, Approaches 1, 2, and 3 offer a range of appropriate responses which underpin and ‘operationalise’ the strategic approach to procurement set out in Approach 4.

Table 1



¹⁶There is equally significant scope to apply the principles of the Framework to Third Sector Compacts at both the Regional and National Level.

¹⁷This approach may commence immediately following the award of a contract or alternatively be promoted at any point prior to a formal contract review or re-contracting round and is defined here as ‘retrofitting’.

¹⁸The use of jobs and skills clauses is currently more likely to be found in relation to the procurement of Capital and Construction projects and to be championed by those within the organisation responsible for the Corporate Social Responsibility, Regeneration or Worklessness agenda. It is very unlikely that such initiatives will have directly influenced the organisation’s overall strategic approach to procurement to date.

Approach 1: Charters

- 2.6 Charters, by their very nature, are a “non-legal” approach. They create no contractual obligations – unless, of course, a public body imposes compliance with a charter on a contractor through a contract or contract framework. They are simply a way of outlining the principles, functions and organisation of the body in question and communicating these to others. So a “jobs and skills charter” would set out the public body’s policy and strategy priorities and goals in relation to jobs and skills.
- 2.7 Charters can be used as a way to convey policy drivers to other organisations, and to encourage those organisations with which the public body or bodies contract to act in accordance with those policy drivers. They do not, therefore, act as a constraint on third parties, nor will they generally mean that the public body can enforce compliance by third parties with their terms.
- 2.8 Public bodies seeking to draw up charters will need to consider whether or not they have the necessary powers to make the bold statements that charters make, and will also need to ensure that any charters they draw up accurately reflect their policies and strategies. Public bodies will therefore wish to consider the impact of their powers (see Chapter 3: The Power to Act) on their ability to determine their policies.

Approach 2: Voluntary Agreements

- 2.9 Approach 2 can be seen as a step on the road to the more formal use of contract clauses. Where a public body has existing contracts or frameworks in place, it will not generally be possible or practical to renegotiate the contract terms to include requirements on the contractor to provide additional recruitment and training benefits. Instead, public bodies may wish to consider attaching voluntary jobs and skills elements to existing contracts or frameworks on a non-contractual basis.

- 2.10 Voluntary arrangements can be useful in a number of ways:

- they can enable the public body to “trial-run” jobs and skills requirements with an existing contractor it knows and with which it has a strong relationship, before eventually using contract clauses when a contract is next re-tendered;
- they can enable the public body to “train” a contractor or sector on the types of contract clauses it will wish to use in future;
- they can be applied retrospectively to existing contractual arrangements – this is especially beneficial in longer-term contracts and frameworks where the voluntary arrangements can have a considerable impact which would otherwise not have been achieved due to the need to wait until the public body next put that contract or framework out to tender, or where the contract is not one that will be repeated.

- 2.11 Public bodies should ensure, however, that voluntary arrangements are not used in a way which jeopardises the fairness and transparency of their earlier procurement exercises, for example by effectively re-negotiating an existing contract or framework. To do so would run the risk of challenge by bidders who were unsuccessful and who could argue that they were not given the opportunity to bid for the contract or framework in its re-negotiated form.

Approach 3: The Specific Use of Contract Clauses

- 2.12 Contract clauses can represent the most “legal” of approaches to including social issues in public commissioning. This is the most highly regulated of the three **tactical** approaches set out in the Framework. It is also the approach for which there is the most guidance and documented experience and success. So long as contract clauses are used legitimately and appropriately, they will usually be the most legally enforceable of methods, but also, on many occasions, the most legally justifiable of methods.

What do we mean by Contract Clauses?

- 2.13 In referring to “contract clauses”, what is generally meant is conditions or elements of a contract or framework that are written into both the tender documentation and the final signed contract. They are requirements that either:
- form part of the subject matter of the contract or framework (and therefore can be assessed as part of the contracting authority’s decision on contract award); or
 - are essential to the contract or framework and the way in which the contract or framework will be carried out, but are not core requirements of the contract or framework (and therefore cannot be assessed when awarding the contract).¹⁹
- 2.14 For the most part, discussion of the use of contract clauses is based on the assumption that the clauses being used are “core” and relevant to the subject matter of the contract or framework, and that therefore they can be incorporated into and taken into account as part of the tendering and contract/framework award processes. If the clauses being used are not linked to the subject matter of the contract or framework, they cannot be taken into account when the contracting authority makes its’ decision over whom it will award the contract/framework.
- 2.15 While a more in-depth discussion of contract clauses can be found in Sections 1, 5 and 6 of the Toolkit for Stakeholders, some of the key factors underpinning the successful deployment of contract clauses relating to jobs and training are summarised below.
- Incorporation into tender documents: for a tenderer to be able to accurately bid for a contract, it must be clear in the tender documentation (by which we mean everything from the OJEU contract notice or any other advert through to the invitation to tender and draft contract) precisely what the tenderer is being asked to bid for. Any reference to social requirements in the contract notice should be kept as broad as possible. Either of the following standard template wordings can be appropriate to a broad range of procurements:

“Under this [procurement / project] the [contractor / developer] is required to participate actively in the economic and social regeneration of the [locality of and surrounding the place of delivery for the procurement / project] [community served by the contracting authority]. Accordingly contract performance conditions may relate in particular to social and environmental considerations. Contract conditions will be detailed in the [invitation to tender / contract documents]”

“There may be conditions relating to environmental and social requirements of the contracting authority included in this contract. Contract conditions will be detailed in the invitation to tender”

- Inclusion in prequalification stages: assessment of the ability to perform or provide specified contract requirements concerning jobs and skills will most likely fit within the “technical or professional ability” element of prequalification. Prequalification and selection criteria can include social or environmental consideration so long as these are compatible with the general EU principles of fairness, transparency, non-discrimination and proportionality.
- Market testing: contracting authorities can consider discussing their requirements with potential bidders in advance of any tendering exercise. While the contracting authority must be careful not to discriminate between bidders when doing so, so long as any consultation and discussion is open and transparent this can be a useful way of market testing the capabilities of potential bidders and formulating challenging but realistic requirements.
- Community engagement: as part of the development of specific policies, or as part of the application of general policies to specific contracts, contracting authorities can find it helpful to test the community they intend will benefit from the contract or policy. Making sure of what the community (whether the community is a particular locality or a community of interest) actually needs will help the contracting authority to focus its requirements sensibly and, ultimately, help to ensure the contract requirements are successful.

¹⁹See later in this Guide, particularly Chapter 4 and the Toolkit guidance on EU Law, for more detail as to what is core or relevant to the subject matter of the contract.

- **Contractual obligations:** contractual obligations can be very effective but will not be so if they are treated as being “up for negotiation”. However, it can be helpful to discuss proposed social clauses with the marketplace before procurement, or to use the appropriate EU procurement process to allow for negotiation with bidders during the procurement (i.e. the negotiated or competitive dialogue procedures). Clearly, it is important for a contracting authority to be able to accurately, fairly and transparently assess the bids it receives. This is made more difficult if the bidders are given a range of ‘optional’ requirements to choose from or discuss with the contracting authority, as it may not be possible to compare like with like unless the different optional requirements are very accurately weighted or valued. However, there is nothing to stop the contracting authority from specifying a combination of requirements within the contract itself.
- **Measurable outputs and effective contract monitoring:** having measurable outputs from contracts is a vital element of ensuring that the contract conditions are legitimate. Contract clauses are at their most effective and have the greatest impact in any case when they are specific, targeted and relevant. Good contract performance monitoring is clearly also key to the success of the desired requirements. If the contracting authority does not monitor the performance of the contractor or the outcomes of the contract, it will not be possible to verify the success or otherwise of the contract.
- **Support:** it will often be necessary for the contracting authority to provide its bidders, or chosen bidder, with some assistance in implementing the desired social requirements. Support can be offered in a number of ways, and this type of assistance is entirely legitimate so long as it is provided to all the interested bidders in a fair and transparent way.
- **A staggered approach:** especially in a long term contract, it may be possible to include requirements that are incremental, slowly increasing the demands placed on the contractor or the weighting given to the requirements (i.e. in any relevant KPIs).

Template Clauses

- 2.16 Contracting authorities may consider it helpful to develop a bank of clauses from which they can draw, but should be aware of the limitations of template clauses. To be taken into consideration when awarding a contract, social requirements must be “core” requirements that are relevant to the subject matter of the contract. The clauses should be drafted in the context of the particular contract in which they are to be used. This is why it can be difficult to use standardised clauses. However, this should not stop a contracting authority from taking pre-existing requirements and clauses with which it is familiar and tailoring them to a contract it has in mind. Jobs and training requirements that have been used on one contract may easily be relevant to another, similar, contract, perhaps simply by modifying the requirements to allow for the different lengths and values of the contracts and the particular community the contract is intended to benefit. Template clauses will also need to be modified or redrafted if the style and language of the wider contract demands it. Model Jobs and Skills Contract Clauses are included in Section 5 of the Toolkit for Stakeholders.

Approach 4: The Strategic Application of Contract Clauses

- 2.17 The speed with which each public sector body can move to fully embed the Framework’s strategic approach to procurement will undoubtedly be influenced in part by its nature and size, its existing procurement practices and related policies and strategies. All these will need to be taken into account when developing bespoke applications of Approach 4.
- 2.18 Table 2 sets out some of the key elements and processes that are likely to be critical to embedding jobs and skills requirements in procurement in line with Approach 4.

✓	Adoption of a strategic procurement policy to require the Procurement Department to consider the relevance of contract clauses, voluntary agreements and charters to each and every contract (within agreed parameters).
✓	Assessment of the organisation's procuring power to affect change (individual organisational autonomy, annual procurement expenditure and timetable for contract renewal and letting).
✓	Analysis of key worklessness issues and skill gaps impacting the geographical area covered by the organisation's remit. (This may be conducted by the organisation or by the relevant Local Strategic Partnership on its' behalf and can be drawn from Local Authority Worklessness Assessments and Work and Skills Plan.)
✓	Adoption of a Jobs and Skills Charter that sets out the organisation's strategic responsibilities and partnership priorities in relation to worklessness, jobs and skills. This could be specific to the organisation or be generic and developed by the Local Strategic Partnership on behalf of all public organisations locally. (See Model Jobs and Skills Charter at Section 2 of the Toolkit for Stakeholders).
✓	Estimation of specific numbers of jobs and skills outputs that could be required for each £1m per annum of procurement spend by category: Construction, Capital Assets, Goods, Services etc. (This could be conducted by the organisation or by the Local Strategic Partnership on its behalf, and other organisations locally.)
✓	Parameters set for the Procurement Department to focus upon e.g. contract length, monetary value, categories. (See the Procurement Checklist in Section 1 of Toolkit for Stakeholders).
✓	Specific Jobs and Skills requirements set out in the contract notice and, where appropriate, the Official Journal of the European Union (OJEU).
✓	Development of PQQ specific to organisation, asking for information on contractors' approach to jobs and skills (see Section 6 of the Toolkit).
✓	Analysis of existing contracts to consider retrospectively applying Approach 1: Charters and Approach 2: Voluntary Agreements (see Sections 2, 3 and 4 of the Toolkit).
✓	Development of monitoring arrangements and officer responsibilities.
✓	Annual review of the impact of the use of the Framework and adjustments made. Learning points shared with other public sector partners.

Opportunities to Apply the Framework to Strategic Regional Priorities

2.19 Clearly, public sector organisations will be making procurement decisions on a routine daily basis, as part of framework agreements, or a variety of consortia arrangements, as well as their individual purchasing processes. As noted in paragraphs 2.1 and 2.3 above, the Panel will be seeking high level public sector endorsement and deployment of the strategic approach to Jobs and Skills Contract Clauses, outlined in Table 2 above.

2.20 However, it is recognised that it may take some time for organisations to put in place each of the required steps to successfully embed this approach. Therefore, the Panel advocates that West Midlands public sector leaders work with their boards to identify opportunities where the principles of the Framework may be applied as soon as possible, particularly in respect of major procurement initiatives and infrastructure projects that are either already in train, or are soon to be contracted. The Panel considers that such early opportunities could, and should, be drawn from the Regional Funding Advice (RFA) for the West Midlands.

West Midlands Regional Funding Advice

- 2.21 The West Midlands' Regional Funding Advice (RFA)²⁰, the Region's submission to Government, sets out the Region's advice on investment priorities for transport, housing, regeneration, and economic development. It was submitted to Government in early March 2009, and covers public investment priorities amounting to over £800 million per year, over the period 2009 to 2019. The RFA identifies 20 Impact Investment Locations (IIL's) across the West Midlands, comprising over 70 individual infrastructure projects, some already underway, some that will commence before 2012, and others that will be implemented over the period to 2019.
- 2.22 The RFA was developed by the Shadow Joint Strategy & Investment Board (JSIB), which comprises members of the West Midlands Leaders Board and members of the Board of Advantage West Midlands. It has worked closely with funding agencies and the Regional Minister to develop the RFA, against the backdrop of the Regional Economic, Spatial and Housing Strategies and the Transport Action Plan; but with a very clear focus on how public funding can be used to stimulate private sector investors in the context of the economic recession, and to lay the groundwork for a more buoyant economy. The JSIB is now overseeing the implementation of the RFA programme, with regional and local partners.

RFA Impact Investment Locations

- 2.23 The range of projects to be delivered within the West Midlands RFA 20 Impact Investment Locations (IILs) include the development of housing sites and business parks, public transport improvements and highways schemes, university extensions, and town and city centre regeneration projects, chosen because of their inter-related contribution to securing investment over the next few years. Projects in each of the IILs have been scrutinised by the JSIB to ensure their deliverability (particularly those due to be delivered before 2012) and to identify opportunities to effect early and strategic investment and change for the benefit of the region's economy and its communities.
- 2.24 Through the discussions that have been held with project proposers, the RFA provides a valuable insight into the anticipated timescales for project delivery over the short term (3-4 year timescale), as well as over the RFA period up to 2019. This information provides an immediate resource for public sector leaders to explore opportunities for the deployment of appropriate components of the Procurement Framework within the context of the agreed investment priorities for the region.

²⁰The West Midlands' Regional Funding Advice to Government - West Midlands Shadow Joint Strategy and Investment Board February 2009.

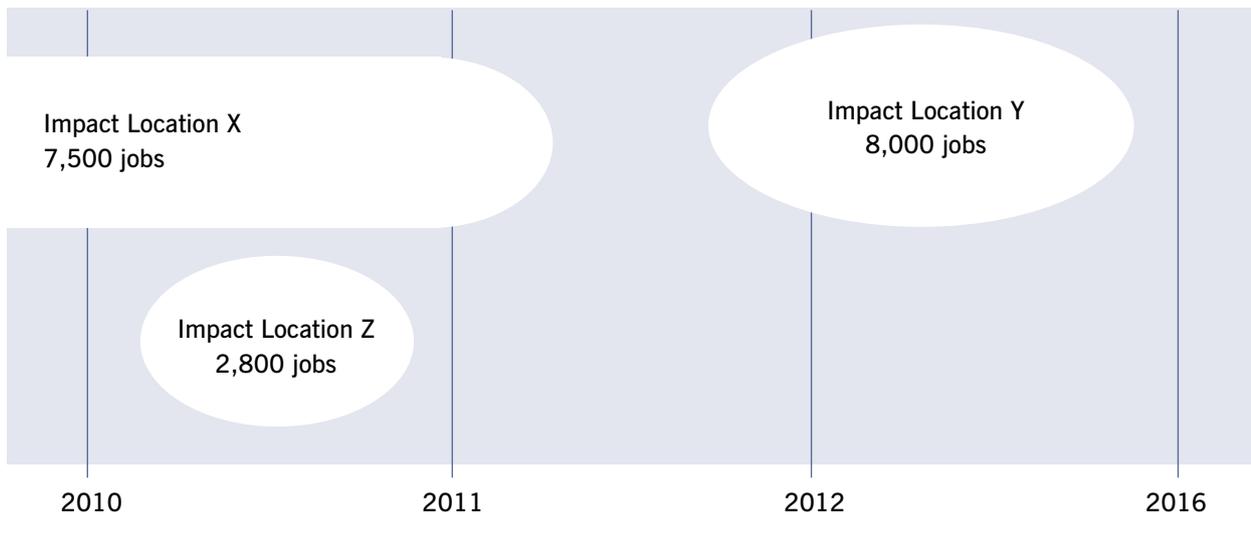
2.25 An overview of each of the RFA's IILs is given below:-

Project Description	Indicative Outputs	Timescale
<p>Ansty A 40 ha brownfield site near Coventry, which involves the development of a fully serviced site, comprising roads, on and off site infrastructure improvements and the development of a world class technology and business park.</p>	<ul style="list-style-type: none"> • 140,000m2 of B1 accommodation; Manufacturing Technology and R&D • 7,500 jobs. 	2013 - 2017
<p>BIA Runway extension /A45 Relocation The extension of the existing runway by 400m, to enable direct long haul services to be operated from the region's airport. Works to include the realignment of the A45 Birmingham- Coventry trunk road.</p>	<ul style="list-style-type: none"> • 2,770 new jobs. 	2014
<p>Bilston Urban Village Delivery of an urban village of over 40ha's providing residential, employment, education, leisure / community facilities.</p>	<ul style="list-style-type: none"> • 43ha's of land reclaimed • 900 new houses • 700 jobs. 	2010 - 2018
<p>Growth Point Development Programme Regional commitment to housing and associated economic growth and transport investments at:-</p> <ul style="list-style-type: none"> • Burton • Shrewsbury • Stafford • Worcester (New Technology Park) 	<ul style="list-style-type: none"> • 8,000 houses / 82 ha's Brownfield land • 8200 homes • 3,400 jobs and up to 3000 houses • 9,600 jobs created / safeguarded 	Current - 2026 Current - 2026 Current - 2026 2009 - 2018
<p>Camp Hill Regeneration, Nuneaton The final phase of the regeneration of the Camp Hill Estate in North West Nuneaton, with associated social and economic regeneration activities.</p>	<ul style="list-style-type: none"> • 15ha of brownfield land remediated • 840 houses • Employment support for 160 residents 	Current to 2020
<p>Coventry City Centre / North A significant programme of investment to regenerate the city, comprising city centre regeneration and urban renaissance which includes a number of significant housing developments, Coventry University expansion, and transport improvements.</p>	<ul style="list-style-type: none"> • 6,500 houses • 15ha of land reclaimed. 	2009 - 2019
<p>Dudley Town centre/Brierley Hill Developing Dudley town centre, North Priory Regeneration, the Black Country Innovation Campus and Castle Hill /Zoo.</p>	<ul style="list-style-type: none"> • 4,150 new homes • 26,000 new jobs 	2009 - 2026
<p>Eastside, Birmingham Urban regeneration project incorporating knowledge-led mixed use office, academic, residential and city park uses.</p>	<ul style="list-style-type: none"> • 400 houses. • 5,000 jobs • 16ha of brownfield land reclaimed 	Current - 2024

Project Description	Indicative Outputs	Timescale
<p>Edgar Street Grid, Hereford</p> <p>The redevelopment of underused land north of Hereford's city centre, to create a new retail quarter, urban village, office market, transport hub and a new civic centre.</p>	<ul style="list-style-type: none"> • 1,000 houses • 1250 jobs • 40ha's of brownfield land reclaimed 	Current - 2024
<p>i54</p> <p>Infrastructure works to provide a Major Investment Site and high quality business park. Land assembly, reclamation, remediation and infrastructure provision.</p>	<ul style="list-style-type: none"> • 6,000 jobs • 90 hectares of brownfield land reclaimed 	2010 - 2018
<p>Icknield Port Loop/Birmingham Sandwell Western Corridor</p> <p>Delivery of high quality mixed use developments (housing led).</p>	<ul style="list-style-type: none"> • 2,500 houses • 300 jobs 	Current - 2020
<p>Longbridge/ South West Birmingham Corridor</p> <p>Development of Regional Investment Site and new local centre for Longbridge, including associated public transport and infrastructure works, and a new college.</p>	<ul style="list-style-type: none"> • 1950 dwellings • 7,500 jobs • 25ha brownfield land reclaimed 	Current - 2030
<p>New Street Station</p> <p>The redevelopment of New Street Station, the shopping centre above and the environs to create a world class transport gateway and the civic hub for the city and region.</p>	<ul style="list-style-type: none"> • 750 jobs directly • 10,000 indirect jobs across the city-region. 	2009 - 2014
<p>North Solihull Regeneration</p> <p>A 15 year programme of regeneration, focussing on the delivery of housing, better community facilities and schools.</p>	<ul style="list-style-type: none"> • 600 permanent jobs • 18,000 construction jobs • 8,000 houses 	Current - 2023
<p>Rural Affordable Housing</p> <p>The delivery of new affordable homes in rural and market towns in the South (Worcestershire, Warwick and Stratford), West (Herefordshire and Shropshire), North (Staffordshire) and Central (North Warwickshire and southern Staffordshire authorities) Housing Market Areas.</p>	<ul style="list-style-type: none"> • 500 houses 	Current - 2011
<p>Stoke City Centre</p> <p>The regeneration of the city centre, university quarter and business district supported by a new public transport interchange, and significant housing developments.</p>	<ul style="list-style-type: none"> • 8,300 jobs 	Current - 2024

Project Description	Indicative Outputs	Timescale
Telford Town Centre A programme of capital projects to transform Telford town centre by upgrades to the infrastructure and public realm.	<ul style="list-style-type: none"> • 3,000 houses • 4,000 jobs created • 13,700 jobs safeguarded • 41ha's of land reclaimed 	2010 - 2020
Walsall Waterfront / Housing regeneration The delivery of strategic regeneration projects of commercial, housing and infrastructure and mixed use schemes will be created.	<ul style="list-style-type: none"> • 10,800 jobs • 7,320 houses • 32ha's of land reclaimed 	2010 – 2016
West Bromwich Town Centre The redevelopment of West Bromwich to create a new strategic centre focussing on new opportunities for investments, businesses, employment and homes.	<ul style="list-style-type: none"> • 5,100 jobs , • 1,250 jobs safeguarded • 330 new homes • 41Ha's of land reclaimed 	2010 – 2015
Wolverhampton City Centre Wolverhampton Interchange - Redevelopment of the bus station and railway station to provide for offices, retail, leisure and hotel.	<ul style="list-style-type: none"> • 2,100 jobs 	2009 – 2018

2.26 The following illustration shows in abstract form a representation of a small selection of the IILs, depicted in terms of their implementation timescale and the potential job opportunities associated with each IIL.



2.27 Project sponsors for the ILLs shown in the above illustrative abstract, may play into the Framework in different ways, according to their particular circumstances:-

- **Example Impact Location X:** The projects that make up this strategic priority are already contracted and in delivery, but these contracts extend over a number of further years into the future. In this example, **Approach 2 of the Framework** would be a possibility, with the procuring body seeking a voluntary agreement with the contractor, to secure additional jobs and skills benefits for the remaining period of the contract (in this case to 2011).
- **Example Impact Location Y:** A project within this example has yet to be contracted, and commencement of delivery is not anticipated until 2012. The contract will cover a number of years, and it would be feasible for the procuring organisation to apply **Approach 3 of the Framework** i.e. the application of contract clauses, which would be included in the tendering process for this project, prior to letting the contract.
- **Example Impact Location Z:** A project within this example has yet to be contracted, but is for a relatively short timespan. The procuring organisation here may chose to adopt **Approach 1 of the Framework**, a Jobs and Skills Charter, whereby the organisation shares its ambitions, around addressing worklessness, for instance, with its current and prospective contractors, including the adoption of exemplar practices, as part of developing new customer – supplier relationships.

Making the Framework Real

- 2.28 It is anticipated that the individual organisations responsible for delivering ILLs (Local Authorities, regional agencies etc) will be encouraged to review their own procurement processes, in order to identify opportunities to deploy the framework in their own particular circumstances and in their routine procurement decisions as a whole. However, given the scale of investment and indicative outputs which will be delivered through the Impact Investment Locations the Panel will look to encourage public sector organisations to commit to and demonstrate how they are prioritising their initial efforts to focus on these priority areas, reporting to the JSIB.
- 2.29 Jobcentre Plus, the LSC, Local Authority Worklessness Teams and many third sector agencies will already be considering and planning how they can respond to and support individual projects that form part of the ILLs identified in the RFA. They may be engaging directly with accountable bodies or contributing via Local Strategic Partnerships (LSPs) and their respective Regeneration or Worklessness Boards.
- 2.30 The JSIB's decision in December 2009, to endorse in principle the application of the Framework to the RFA, represents the first critical step in securing widespread public sector commitment to deploy the Framework, and holds out the prospect of placing jobs and skills requirements centre-stage in the decision-making process for all infrastructure projects.

Chapter 3 The Power to Act

Introduction

- 3.1 Chapter 3 focuses on the legal powers to act that are conferred upon different public bodies. It is important for individual public bodies to consider their particular powers and justification for action on jobs and skills, and it is hoped that the information in this chapter proves useful.
- 3.2 In many cases, the barriers that people often assume prevent the inclusion of jobs and skills requirements in procurement and contracts simply do not exist, while a number of those that do exist are not, in fact, insurmountable. Many public bodies have broader powers than they are aware of, and as a result could be more adventurous than they have been in the past. As the following chapters seek to emphasise, legal barriers are far less imposing than is often perceived. In fact, *the major barriers to including jobs and skills requirements in procurement exercises are grounded in organisational culture, structure and capacity, and the crucial issues of leadership and political will.*

Introduction to the Legal Structure for Public Bodies in England

- 3.3 The full legislative structure for public procurement and, within that, the incorporation of social requirements, is extensive, and will vary between public bodies, depending on what laws apply to them. It is not intended that the full legislative framework will be set out here, as for the most part it is set out in other guidance that is freely available. However, it is worth briefly highlighting the main factors that govern this area of public sector activity and, where possible, directing readers to external sources of information.

Government Departments

- 3.4 The powers of Government Departments to include social and environmental requirements in their procurements are relatively broad and are rooted in the Royal Prerogative. It is the process by which they establish social and environmental policies which requires further clarification. It is not a huge leap for

Government departments to embrace in their procurements not only the aims of environmental sustainability but also the tackling of poverty, the alleviation of unemployment or the provision of training. The subject matter of a contract or framework is determined by what the authority is actually buying. The extent to which social and environmental factors are a part of the procurement process will in part depend on the particular purchase, and the priorities of the relevant department.

Local Authorities

- 3.5 The local government legal framework for incorporating social clauses in procurement is perhaps the most studied. Local authorities using this framework should refer to the detailed guidance and templates contained within the Procurement Framework's Toolkit for Stakeholders. The key points that local authorities will need to consider are:

- local authorities may only use those powers conferred upon them by statute, and may use those powers only for the purposes contemplated by the statute;
- core to a Local Authority's ability to achieve social goals is the well-being power, set out in section 2(1) Local Government Act 2000, which states that local authorities:
 - "have power to do anything which they consider is likely to achieve any one or more of the following objects:
 - the promotion or improvement of the economic well-being of their area;
 - the promotion or improvement of the social well-being of their area; and
 - the promotion or improvement of the environmental well-being of their area.
 - the well-being power does not enable a Local Authority to do anything that they are unable to do by virtue of any prohibition, restriction or limitation of their powers contained elsewhere in statute i.e. it does not override any specific restriction;

²¹The Improvement and Development Agency (I&DeA) provides some excellence guidance on the best value regime, available online through the following link: www.idea.gov.uk/idk/core/page.do?pageld=5183823, and on the Comprehensive Area Assessment, available online through the following link: www.ida.gov.uk/idk/core/page.do?pageld=8811984.

- the “best value” regime remains in force for Local Authorities, and provides the statutory basis upon which Local Authorities must plan, review and manage their performance. Local Authorities should also consider the relevance of the Comprehensive Area Assessment (CAA), which has replaced the Comprehensive Performance Assessment (CPA);²¹
- under section 69 of the Local Democracy, Economic Development and Construction Act 2009, it is proposed that principal Local Authorities (which refers to county and district councils and London borough councils) must prepare assessments of the economic conditions of their area (local economic assessments). “Tackling Worklessness: A Review of the contribution and role of English Local Authorities and partnerships” (the Houghton Review) proposed that this local economic assessment should include a worklessness assessment and a work and skills plan. This local economic assessment may, therefore, prove to be extremely informative and useful to Local Authorities and their partners, in both determining and justifying policy;
- The “Total Place” programme, which aims to bring together elements of central government with local agencies within a “place” will also be relevant. The programme aims to map money flowing from central and local bodies through a place, looking at how a “whole area” approach to the provision of public services can lead to improved services at reduced costs.²² Especially for public bodies within one of the 13 pilot areas, the Total Place initiative may be relevant to the way(s) in which public bodies consider trying to achieve recruitment and training ends through their contracts and relationships.

National Health Service

- 3.6 The powers of many NHS bodies in England (especially health authorities) derive from the powers given to the Health Secretary, who has power to:
- (a) provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by [the National Health Service Act 2006]; and
 - (b) to do anything else which is calculated to facilitate, or is conducive or incidental to the discharge of such a duty.²³

The duties include a “primary” duty of promoting in England “a comprehensive health service designed to secure improvement in

- (a) the physical and mental health of the people of England, and
- (b) the prevention, diagnosis and treatment of illness.²⁴

and, for that purpose, to provide or secure the effective provision of services in accordance with [the National Health Service Act 2006].”²⁵

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

Strategic Health Authorities

- 3.8 The SHAs act as a link between the DoH and the NHS bodies within the SHAs’ area, and manage the NHS on a local level. The functions of the SHAs are prescribed by regulations made by the Secretary of State and, in general terms, include:
- developing plans for improving health services in their area;
 - making sure local health services are of a high quality and are performing well;
 - increasing the capacity of local health services so that more services can be provided;
 - making sure that national priorities are integrated into local health service plans.²⁶

²²See www.localleadership.gov.uk/totalplace/ for more information on the Total Place initiative.

²³section 2 National Health Service Act 2006

²⁴section 1(1) National Health Service Act 2006

²⁵Section 1(2) National Health Service Act 2006

- 3.9 An SHA must exercise any functions delegated to it by the Secretary of State for the benefit of its area or to secure the effective provision of services by Primary Care Trusts (PCTs) and NHS trusts for which it is the appropriate SHA.²⁷
- 3.10 The SHAs' functions and powers would appear to permit the use of contracting to achieve targeted recruitment and training opportunities, especially for people recovering from illness or at risk of illness because of their unemployment or poverty.

Primary Care Trusts

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

NHS Trusts

- 3.12 NHS trusts are established under statutory instrument for specific purposes linked to the provision and management of hospitals or other establishments or facilities.
- An NHS Foundation Trust is *“a public benefit corporation which is authorised ... to provide goods and services for the purposes of the health service in England”*.²⁸ Foundation Trusts have been given much more financial and operational freedom than other NHS trusts and have come to represent the government's commitment to de-centralising the control of public services. They remain within the NHS and its performance inspection system.

NHS Purchasing and Supply Agency

- 3.13 NHS PASA is an executive agency of the DoH, so has the powers and functions of the Department, albeit with a particular remit given to it. Its key tasks are to:
- provide strategic guidance on procurement to the NHS where procurement is taking place at a regional or local level;

- provide practical guidance, education and training to those involved in procurement throughout the NHS;
 - promote creativity from suppliers and encourage small and medium-sized enterprises (SMEs) to do business with the NHS;
 - promote sustainable development within the NHS and its supply chain to reduce the negative environmental and social impacts of procurement decisions and increase the positive ones;
 - encourage the introduction of beneficial, innovative products and technologies into the NHS;
 - support the national priorities of the NHS.²⁹
- 3.14 As one of NHS PASA's core functions is the promotion of sustainable development within the NHS and its supply chain, it is clear that social issues in procurement are at the heart of what the agency hopes to achieve. The sustainable development pages of the NHS PASA website provide invaluable guidance and advice to NHS trusts and others.³⁰

Homes and Communities Agency

- 3.15 The Homes and Communities Agency (the HCA) is the national housing and regeneration agency for England. The HCA was formed on 1 December 2008 (along with the Tenant Services Authority), through the transfer of the functions and assets of English Partnerships, the investment functions of the Housing Corporation; a number of delivery programmes from the Department for Communities and Local Government (DCLG) and the Academy for Sustainable Communities. The HCA is a non-departmental public body and its sponsor government department is DCLG.

²⁶<http://www.nhs.uk/NHSEngland/aboutnhs/Pages/Authoritiesandtrusts.aspx#q07>

²⁷Regulation 3(5) of the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administrative Arrangements) (England) Regulations 2002

- 3.16 The HCA's role was established by the Housing and Regeneration Act 2008 and is to:
- improve the supply and quality of housing in England;
 - secure the regeneration or development of land or infrastructure in England;
 - support in other ways the creation, regeneration or development of communities in England or their continued well-being;
 - contribute to the achievement of sustainable development and good design in England, with a view to meeting the needs of people living in England.³¹
- 3.17 The HCA has the power to do anything it considers appropriate for the purposes of its objects or for purposes incidental to those purposes.³² It also has a wide range of specific powers relating to:
- the provision, facilitation and acquisition (including compulsory purchase, regeneration, development of effective use of land) of housing and infrastructure;
 - establishing companies;
 - providing financial assistance;
 - providing or facilitating services for communities; and
 - undertaking advisory, training, research and information services.

The HCA is working in partnership with Jobcentre Plus to forge links between regeneration activity and the creation of local job opportunities and apprenticeships. For post-2011 programmes the HCA will require its developers, contractors, sub-contractors, Registered Social Landlords, Providers and supply chain to work with Jobcentre Plus and use recruitment initiatives including pre-employment training, work trials and recruitment subsidies. The HCA are also encouraging collective bids to the Future Jobs Fund and the creation of apprenticeships for young people. See also the HCA Case Study in Section 10 of the Toolkit for Stakeholders.

Registered Providers of Social Housing

- 3.18 The legal framework for Registered Providers of social housing (Registered Providers) will depend largely on their legal structure. As Registered Providers are not “public” bodies as such (although note the application of the EU procurement rules to Registered Providers), their powers are not set out in statute in quite the same way, and their legal structures can vary. Most often Registered Providers will be companies limited by guarantee, although some are industrial and provident societies. Many Registered Providers are also charitable. Many Registered Providers have broadly framed ancillary or subsidiary powers to their main functions. It is the policies they adopt which will therefore be of critical importance in setting the scope for procuring sustainability in its widest context.
- 3.19 Registered Providers are regarded as ‘meeting needs in the general interest’ and ‘not having an industrial or commercial character’. In 2004, the UK Government accepted that the Housing Corporation (itself a contracting authority) had sufficient power over Registered Providers to constitute ‘management supervision’. This has the effect that Registered Providers are deemed to be ‘bodies governed by public law’ and, therefore, contracting authorities. This situation has not changed with the demise of the Housing Corporation and the birth of the Homes and Communities Agency and the Tenant Services Authority.

²⁸Section 30(1) National Health Service Act 2006

²⁹See <http://www.pasa.nhs.uk/PASAWeb/NHSprocurement/AboutNHSPASA/LandingPage.htm>

³⁰<http://www.pasa.nhs.uk/PASAWeb/NHSprocurement/Sustainabledevelopment/>

³¹Housing and Regeneration Act 2008, s2

³²Housing and Regeneration Act 2008, s3

Police Authorities and Police Forces

3.20 The functions of a police authority are far narrower than those conferred upon a Local Authority, but should not necessarily preclude it from procuring in a way which incorporates social aims. The primary purpose of every police authority³³ in England and Wales is to secure the maintenance of an efficient and effective police force for its area.³⁴ For procurement purposes, police authorities are synonymous with the police forces they maintain; procurement activity will be done by the police authority on behalf of its police forces. Police authorities are enabled to do things which reasonably support the function which section 6(1) Police Act 1996 confers, although such a power is by no means open-ended. A police authority, in discharging its functions, must consider:

- any strategic priorities determined by the Secretary of State (i.e., the Home Secretary);
- any objectives determined by the authority;
- any performance targets established by the authority; and
- any local policing plan issued by the authority.³⁵

3.21 Every police authority must issue a policing plan every year setting out its objectives for the policing of its area during that year, and the proposed arrangements for the policing of that area for the next three years.³⁶ The police authority's objectives may relate to matters to which the Home Secretary's objectives for police authorities³⁷ also relate or to other matters, but in any event must be consistent with the Home Secretary's objectives. The Home Secretary's strategic priorities are currently:

- continue to increase public confidence in the police through tackling local priorities; also to reduce and prevent crime and anti-social behaviour and help tackle the problems caused by drug and alcohol misuse, and deliver an effective criminal justice response;

- work jointly with police forces and other agencies, such as SOCA and UKBA, to ensure that the capability and capacity exists across England and Wales to deliver effective protective services, including tackling serious and organised crime;
- work with and through partners and local communities to tackle terrorism and violent extremism; and
- work in all of the above to ensure the best use of resources to deliver significant cashable improvements, more effective deployment of the workforce, and to realise benefits of new technology.³⁸

3.22 As for any other public body, then, a police authority must ensure it has appropriate policies in place in order to incorporate jobs and training requirements in its procurement. These must be in line with the priorities set annually by the Home Office, and must relate to the policing of the area served by the police authority.

3.23 Police authorities are expressly named under the Public Contracts Regulations 2006 as being 'contracting authorities' for the purposes of the EU procurement rules.³⁹ They are also 'best value authorities' within the meaning of the Local Government Act 1999. Police authorities will also often be involved in their area's local strategic partnership (LSP), and sometimes sign up to the LSP's aims and objectives. [There should be a stronger link here to the first bullet point above – namely, delivering the Home Secretary's priority of increasing 'public confidence in the police through tackling local priorities']

Fire & Rescue Service

3.24 The Fire Services Act 1947 transferred fire services to Local Authority control. As a result, fire and rescue services are governed by much of the same legal framework as Local Authorities, including, for example, falling under the definition of a 'best value authority' under the Local Government Act 1999.

³³Established under section 3 Police Act 1996

³⁴Section 6(1) Police Act 1996

³⁵Section 6(2) Police Act 1996 (as amended by the Police and Justice Act 2006)

³⁶Section 6ZB Police Act 1996 (as inserted by the Police and Justice Act 2006)

³⁷These are the objectives that the Secretary of State may set under section 37A Police Act 1996 (as inserted by the Police and Justice Act 2006).

³⁸The Secretary of State's strategic policing priorities for 2009-10 are set out in a Written Ministerial Statement that is available from the Home Office website via the following link: Strategic Policing Priorities 2009-10

3.25 The National Procurement Strategy for the Fire and Rescue Service (FRS) in England 2009-12 sets out the role and contribution of the professional buying organisation for the FRS, currently Firebuy Ltd, and how this might evolve over the coming months and years. The FRS is one area of the public sector where collaborative and centralised procurement is foremost; for much of the time Fire Services will be expected to use Firebuy as their procurement route. However, the Strategy does acknowledge that there will also be regional and local procurement needs. With this in mind the Strategy, and Firebuy, focus on fire sector-specific procurement needs.⁴⁰

3.26 The Strategy also *“paves the way for exploring the contribution that the FRS can make to a broader vision for public procurement – one which recognises the potential for unlocking opportunities for promoting skills and apprenticeships through procurement, for fostering innovation and creative solutions that drive improvement and efficiency, and for using public procurement to develop and shape markets”*.⁴¹ Amongst the key procurement drivers for the FRS are

- equality, diversity and fairness;
- sustainability; and
- promoting skills through public procurement.⁴²

3.27 In relation to promoting skills through procurement, the Strategy states:

“Those managing procurements should make sure that:

- *Skills and apprenticeships are considered from the outset*
- *Skills and apprenticeship requirements addressed in procurement are relevant to the subject matter, or performance, of the contract*
- *Actions to take account of skills and apprenticeships are consistent with the Government’s value-for-money policy, taking account of whole-life costs*

- *Actions to take account of skills and apprenticeships comply with the law, in particular, the principles of the EU Treaty, and the UK Regulations implementing the EU Public Procurement Directives*
- *Any additional skills and/or apprenticeship requirements imposed are quantified and weighed against any additional costs and potential burdens on suppliers, which are likely to be passed on to the contracting authority when they price their tender*
- *The procurement is carefully planned to ensure it is accessible to a suitable variety of suppliers including bodies such as SMEs, social enterprises, black and minority ethnic enterprises, women’s and disabled owned businesses, and the voluntary and community sector (VCS)*
- *Relevant expertise is assembled for the project. Procurement specialists and end-users should be involved in addition to those responsible for skills and apprenticeships*
- *Early dialogue (i.e., before an individual procurement begins) is initiated with the supplier community including the SME sector. Care should be taken not to distort competition – this process should not give advantage to any particular supplier.”*⁴³

This is helpful guidance for the fire and rescue services, and offers a valuable steer on the contribution they can make to the jobs and skills agenda.

³⁹Regulation 3(1)(m) Public Contracts Regulations 2006

⁴⁰Appendix 2 of the National Procurement Strategy, page 24

⁴¹National Procurement Strategy for the Fire and Rescue Service in England 2009-12, Executive Summary, available on the Department for Communities and Local Government (DCLG) website via the following link: National Procurement Strategy for the Fire and Rescue Service.

⁴²See Appendix 1 of the National Procurement Strategy.

Government Offices

- 3.28 The Government Office for the West Midlands (GOWM) is part of a network of nine regional offices across England, each aiming to address the concerns and needs of its region. Each Government Office works on behalf of central Government Departments to deliver, influence and develop government programmes and initiatives in the region, by working with relevant organisations to meet local needs. The Government Offices have no specific powers of their own, but must act within the powers of the Government departments that they represent, and the powers conferred upon individual Secretaries of State by Statute or Royal prerogative.
- 3.29 Government Offices provide support to Regional Ministers and are centrally involved in managing existing regional governance structures, working alongside Regional Assemblies and Regional Development Agencies to implement the Sub-national Review.
- 3.30 The Government Office Network's Objectives are as follows:
- Transform the way central government relates to places, by working with local and regional partners in the public, private and third sectors to understand priorities and to stretch performance of local and regional public services;
 - Provide proactive support and challenge to Local Authorities, Regional Development Agencies and other sub-national partners to develop Multi Area Agreements that ensure integrated approaches to delivering outcomes, such as economic, transport, skills, social deprivation and inequality (including child poverty);
 - Challenge and support delivery partners, such as Strategic Health Authorities to develop and implement plans and strategies, and ensure that they establish appropriate linkages to achieve their outcomes, in accordance with relevant PSA and DSO delivery arrangements. Where performance fails to meet expectations the Government Office will notify and intervene as agreed.

- 3.31 GOWM acts as the ears, eyes and a local voice for Whitehall, reflecting back to central Government the West Midlands interests, concerns and successes, to inform policy development.

Regional Development Agencies

- 3.32 The Regional Development Agencies Act 1998 (the RDA Act 1998) established regional development agencies (RDAs) for each of nine regions in England.
- 3.33 A development agency established by the RDA Act 1998 may do anything that it considers expedient for its purposes or for purposes incidental thereto. RDAs were set up with the aim of promoting sustainable economic development in England.
- 3.34 An RDA has the following purposes:
- to further the economic development and regeneration of its area;
 - to promote business efficiency, investment and competitiveness in its area;
 - to promote employment in its area;
 - to enhance the development and application of skills relevant to employment in its area; and
 - to contribute to the achievement of sustainable development in England where it is relevant to do so.
- 3.35 Since targeted recruitment and training is incidental to all of the above purposes, it is clear that RDAs have the capacity to include community benefits within their contracts.
- 3.36 RDAs, other than the London Development Agency, are not governed by the best value regime. They are, however, caught by the EU procurement rules.

⁴³Appendix 1 of the National Procurement Strategy, page 22

⁴⁴<http://www.jobcentreplus.gov.uk/JCP/Aboutus/index.html>

Jobcentre Plus

3.37 Jobcentre Plus (“JCP”) is a government agency supporting people of working age from welfare into work, and helping employers to fill their vacancies. JCP is part of the Department for Work and Pensions (“DWP”).

3.38 JCP’s key objectives include:

- increasing the effective supply of labour by promoting work as the best form of welfare and helping unemployed and economically inactive people move into employment;
- working towards parity of outcomes for ethnic minority customers;
- providing high-quality and demand-led services to employers, which help fill job vacancies quickly and effectively with well-prepared and motivated employees; and
- helping people facing the greatest barriers to employment to compete effectively in the labour market and move into and remain in work⁴⁴.

3.39 On 1st April 2007 responsibility for employment programmes delivered by external providers transferred from JCP to the DWP Corporate Centre. JCP does not therefore have a procurement function separate from that of DWP.

The Learning and Skills Council

3.40 The Learning and Skills Council for England (the LSC) is a non-departmental public body, established in 2001 to take over the roles of the former Further Education Funding Council and the Training and Enterprise Councils. The main duties and powers of the LSC are to provide:

- facilities for education and training; and
- financial resources and funding.

3.41 The LSC must encourage individuals to undergo post-16 education and training,⁵¹ encourage employers to participate in the provision of post-16 education and training,⁴⁶ and encourage employers to contribute to the costs of post-16 education and training.⁴⁷

3.42 The LSC has ancillary powers which enable it to do anything which appears to it to be necessary or expedient for the purpose of or in connection with the exercise of its functions. The LSC may do anything which appears to it to be necessary or expedient for the purpose of or in connection with the exercise of its other functions.⁴⁸ In particular it may:

- acquire and dispose of land and other property;⁴⁹
- enter into contracts;⁵⁰
- invest sums not immediately needed for the purpose of exercising its other functions;⁵¹
- accept financial resources, whether as gifts or otherwise;⁵² and
- accept gifts of land and other property.⁵³

The LSC can form any type of company with the consent of the Secretary of State.⁵⁴

3.43 The LSC may secure the provision of facilities:

- for the gaining of work experience by young persons⁵⁵ receiving education;⁵⁶
- designed to form links between employers, persons who provide education or training, and persons who receive it and who have not attained the age of 19.⁵⁷

3.44 Section 6 of the Further Education and Training Act 2007 provides that the LSC, when performing its duty to secure the provision of facilities for education and training in relation to persons⁵⁵ aged 16 to 19, and 19 years and over, must act with a view to encouraging diversity in education and training, and to increasing opportunities for individuals to exercise choice.

See paragraph 3.45 for new arrangements from April 2010.

⁴⁵Learning and Skills Act 2000 s4(a)

⁴⁶Ibid s4(b)

⁴⁷Ibid s4(c)

⁴⁸Learning and Skills Act 2000 s18(1)

⁴⁹Ibid s18(2)(a)

⁵⁰Ibid s18(2)(b)

⁵¹Ibid s18(2)(c)

⁵²Ibid s18(2)(d)

⁵³Ibid s18(2)(e)

⁵⁴Further Education and Training Act 2007 s9

New Learning and Skills Arrangements

3.45 EU procurement rules will apply equally to the LSC's 'successor bodies'. As a result of the Government's 'Raising Expectations' White Paper (2007), the LSC will be succeeded from April 2010 by new arrangements that are scheduled to be in place (pending legislation) for the planning and commissioning of learning and skills in England. Local Authorities will have responsibility for commissioning 16-19 education and training, with a Regional Planning Group and a Young People's Learning Agency providing regional coherence. Adult Skills and Apprenticeships will become the responsibility of the Skills Funding Agency, incorporating the current National Apprentice Service and the Adult Advancement and Careers Service.

National Offender Management Service

3.46 The National Offender Management Service (the NOMS) is the system through which the Ministry of Justice commissions and provides correctional services and interventions. It is not a separate body in its own right, but sits within the Ministry of Justice. As such, its powers are simply those of the Ministry of Justice, albeit limited to the NOMS' sphere of interest. The Offender Management Act 2007 (the 2007 Act), however, has an impact on the delivery of probation services. Under the 2007 Act, the Secretary of State for Justice contracts with providers of probation services through regional commissioners, in the form of probation trusts set up under that Act. These newly-formed probation trusts are intended to act as both commissioners and providers of court services and offender management.

Further Education

3.47 Further education encompasses education provided to people over the compulsory school age (in effect 16) – excluding education which classifies as 'secondary' or 'higher' education. Further education is provided at a range of institutions including 'further education corporations' within the Further and Higher Education Act 1992 (FHEA 1992).

3.48 Under FHEA 1992, a further education corporation's principal powers are:

- to provide further and higher education;
- to provide secondary education for over-14s;
- to provide secondary education under the Education Act 1996;
- to participate in secondary education provision at schools; and
- to provide goods or services in connection with its education provision.⁵⁸

3.49 Further education corporations have the supplementary power to do anything which it appears to them to be necessary or expedient for or in connection with exercising their principal powers.⁵⁹ This expressly includes (amongst other things) the power to:

- acquire and dispose of land and property;
- enter into contracts, in particular contracts of employment and contracts relating to the carrying out of the further education corporation's principal activities;
- form companies or charitable incorporated organisations. This power cannot be used to form a company or CIO for the purpose of conducting an educational institution; and
- borrow and invest.⁶⁰

⁵⁸A person is a young person in the period which starts with the beginning of the year in which he attains the age of 15, and ends with the end of the year in which he attains the age of 19: Learning and Skills Act 2000 s 8(4). A year is a year beginning with 1 September: s 8(5).

⁵⁹Ibid s 8(1). In discharging its functions under s 8, the Council must have regard to the needs of persons with learning difficulties.

⁵⁷Ibid s 8(2)-(3)

⁵⁸s18 Further and Higher Education Act 1992

⁵⁹s19(1) Further and Higher Education Act 1992

⁶⁰s19(4) Further and Higher Education Act 1992

⁶¹s19(4)(f) Further and Higher Education Act 1992

3.50 Additionally, further education corporations have the power to do anything that is incidental to the conduct of a further education institution.⁶¹ It is also clear that further education corporations are limited to activity which related closely to their core functions of providing further education. Any desire to include jobs and skills requirements within a further education corporation's contracts will need to be considered in this context.

Higher Education

3.51 Higher education is defined under the Education Reform Act 1988 (ERA 1988), and includes most undergraduate degree level education, postgraduate courses and higher level professional courses. Higher education is provided at a range of institutions, including "higher education corporations", which are bodies corporate established under ERA 1988, and others, including universities established by charter. Depending on the form of the institution providing the higher education, its powers to procure, and to procure taking into account social issues, will vary. Those universities that were established by charter may have particular powers conferred upon them: these powers will need to be considered on a case by case basis. In the West Midlands, universities established under charter include Aston, Birmingham and Warwick. The rest of this section focuses on higher education corporations under ERA 1988, which will include most universities and other higher education providers.

3.52 The powers of higher education corporations are established by s124 ERA 1988. Higher education corporations may:

- provide higher education;
- provide further education;
- provide secondary education to over-14s;
- provide secondary education under the Education Act 1996;
- participate in the provision of secondary education at a school; and
- carry out research and publish the results of the research or any other material arising as it sees fit.⁶²

3.53 In addition to these core powers, and in a similar manner to further education corporations, higher education corporations may also do anything which it appears to them may be necessary or expedient for or in connection with the exercise of those core powers. This expressly includes (amongst other things):

- providing facilities necessary or expedient for or in connection with core activities;
- acquiring and disposing of land and property;
- entering into contracts (including contracts of employment and contracts relating to the carrying on of core activities);
- doing anything incidental to the conduct of core activities.

3.54 It is clear from this that, in the same way as further education corporations, while higher education corporations have wide-ranging powers, these all must be exercised in ways which further the corporations' core function of providing education. Higher education corporations will need to consider in detail where their power to stimulate jobs through procurement lies - the power to stimulate training and skills is, perhaps, easier to rationalise.

⁶²s124(1) Education Reform Act 1988.

⁶³s124(2) Education Reform Act 1988

Chapter 4 Working Within the Law to Maximise Access to Jobs and Skills Opportunities

Introduction

- 4.1 The body of this chapter focuses on the law that governs the use of social clauses in procurement, so is most relevant to Approaches 3 and 4. However, public bodies should bear in mind the law governing public procurement in all their contractual dealings, and be conscious of the possibility that the law might apply in different situations.
- 4.2 Public bodies wishing to include jobs and skills requirements in their procurements by way of contract clauses will need to do so taking into account the law that governs procurement processes discussed below. As discussed in Chapter 2, there are fewer legal restraints on charters (Approach 1) than there are on contract clauses (fewer legal remedies if things go wrong, as well). Voluntary agreements (Approach 2) should be undertaken with a degree of caution, taking into account the need of the public body to comply with procurement law and general EU law principles where appropriate.
- 4.3 The summary below provides the key elements of the EU procurement rules, and case law that has influenced the use of social clauses in procurement. A more detailed discussion of the legal requirements for using social clauses can be found in Sections 1 and 7 of the Toolkit for Stakeholders.

EU Procurement Law

- 4.4 Much of the legislation governing public procurement derives from European Union law, which is based on the fundamental principles of:
- equal treatment and non-discrimination;
 - transparency;
 - proportionality; and
 - mutual recognition.
- 4.5 These principles are intended to remove barriers to trade between EU Member States and create a free internal market by facilitating organisations from across the EU to bid for the same public contracts. These aims are balanced increasingly with other objectives, including the protection of the environment, combating social exclusion and deprivation, and consumer protection.

- 4.6 The EU procurement rules operate principally at three levels:

- a requirement to advertise across the EU certain contracts for works, goods and services (achieved by placing a contract notice in the Official Journal of the EU);
- encouraging the use of technical standards which are of application across the EU, or the recognition of standards in force in another State where these are of a similar standard to those in force in the UK; and
- requiring the use of objective and open criteria for evaluating tenders and selecting contractors.

- 4.7 The EU procurement rules cover a wide range of bodies and contracts. ‘Contracting authorities’, the term used in the rules, includes central government departments, Local Authorities and non departmental public bodies. It also includes other ‘bodies governed by public law’.

This means that any organisation (in whatever sector) which

satisfies the above criteria will be a ‘contracting authority’, and will have

to follow the EU procurement rules - this includes bodies that are funded

primarily through public sources, or that are managed by a public body.

Third sector organisations, particularly if funded by public money, will often count as contracting authorities. A good example is the New Deal for Communities partnerships. These are third sector organisations but are financed by government and are subject to supervision by government, so count as contracting authorities.

Justifying the use of Social Clauses under EU Law and Case Law

The Consolidated Directive

- 4.8 As stated in the Office of Government (OGC) guidance *“Social Issues in Purchasing”*, the Consolidated Directive *“makes explicit the scope to take social and environmental issues into account at the relevant phases of the procurement process”*. The Consolidated Directive says much more on the subject of social and environmental considerations than its preceding directives, both in its non-binding but influential recitals and in its articles. Recital 1 of the Consolidated Directive states:
- “This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with [Treaty Obligations]”*.
- 4.9 There are recitals which support other environmental and social issues, such as sheltered workshops, including eco-labels in specifications and the involvement of small and medium-sized undertakings in the public contracts procurement market. In addition, there are articles which govern sheltered workshops and environmental requirements. Most specifically in the context of this paper, Recital 33 states that *“contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements – applicable during performance of the contract – to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO)*

Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.”

- 4.10 Article 26 of the Consolidated Directive has this express provision:
- “Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.”*
- This is translated in the Public Contracts Regulations 2006 by Regulation 39, which states:
- (1) A contracting authority may stipulate conditions relating to the performance of a public contract, provided that those conditions are compatible with Community law and are indicated in:
- (a) the contract notice and the contract documents; or
- (b) the contract documents.
- (2) The conditions referred to in paragraph (1) may, in particular, include social and environmental considerations.

Lessons from Case Law

- 4.11 There have been some important European cases concerning social clauses in public contracts which have had a bearing on the Consolidated Directive and which continue to develop the shape of the law as it is interpreted by the courts. Not all the cases are easy to reconcile with each other or with current European Commission guidance, but they do establish some important principles that are relevant to the inclusion of jobs and skills elements and other social matters in procurement. A brief guide to European Procurement Case Law can be found in Section 7 of the Toolkit for Stakeholders.
- 4.12 To date, few legal procurement challenges have reached the UK courts, so there is very little domestic case law to guide contracting authorities on the use of social clauses. The cases in the following table (many of which come from Northern Ireland), however, make some relevant points which should be kept in mind.

- it is possible to include recruitment and training requirements in public procurement provided that the drafting and the process does not disadvantage non-local bidders, for example by requiring them to have knowledge of the local labour market, or a local base, or to use local material;
- environmental and (by implication) social requirements that address a policy objective of the purchaser are permissible: they do not need to provide an economic benefit to the purchaser itself;
- contracting authorities are entitled to include environmental (and, by implication, social) considerations in their award criteria and these need not be purely economic in nature. They do, however, need to be linked to the subject matter of the contract, comply with all the fundamental principles of community law, in particular the principle of non-discrimination, should not confer an unrestricted freedom of choice on the authority, and should be expressly mentioned in the contract documents or tender notice;
- where sub-criteria are used as part of the assessment of tenders, these must be disclosed to bidders. The duty on a contracting authority to act in a transparent way include the need to sufficiently disclose contract award criteria and weightings in advance, including setting out detailed criteria and sub-criteria where these are used;
- it is not possible to restrict bids by requiring that bidders have a particular legal form (such as a company limited by shares);
- unless the cost of the relevant goods or services is fixed, it would be very difficult to reach any objective determination of what is the “most economically advantageous tender”, without an indication of price in relation to which non-price elements can be taken into account;
- tendering instructions and award criteria should be certain and unambiguous; and
- all requirements must be capable of measurement and verification.

The Relevance of Social Clauses

- 4.13 Key to the use of social clauses, especially if the contracting authority wishes to assess a bidder’s ability to satisfy social requirements when awarding a contract, is that they should be relevant to the subject matter of the contract.

What is the Subject Matter of a Contract?

- 4.14 As has already been discussed elsewhere in this framework, any criteria on which a contracting authority wishes to assess bidders when deciding to whom it will award the contract must be “*linked to the subject matter of the contract*”.⁶⁴ There has been extensive discussion within the UK and more broadly across Europe over what can count as the subject matter of a contract or framework, and opinion is divided in relation to social and environmental requirements.
- 4.15 It is clear that the European Commission does not concern itself with the ‘what’ of public contracts – i.e. it is not in their remit to dictate what a contracting authority procures, only the way in which they procure it. In this sense, there is a growing and compelling argument for saying that the subject matter of a contract or framework is whatever the contracting authority determines it to be. As the contracting authority can decide for itself what it procures, surely it can therefore determine what constitutes the subject matter of its contract or framework?
- 4.16 Naturally, there is a limit to this. A social or environmental requirement cannot artificially be attached to a contract or framework to which it bears no connection, and be deemed to be part of the subject matter of the contract. But where a contracting authority uses common sense and acts reasonably and proportionately, it remains within its control what the subject matter of its contracts should be. Indeed, the decision over whether or not to procure can in itself be based on social or environmental concerns (for example, the decision to purchase recycled paper products, or the decision to purchase video conferencing facilities in an attempt to reduce travel). This is in fact the best stage at which to consider the community benefits that could be achieved from a contract – the contracting authority has the most freedom when first deciding what to procure and, therefore, what is the subject matter of its contract. The development of policy can enable the broadest and most innovative outcomes.

⁶⁴See Regulation 30(2) of the Public Contracts Regulations 2006

- 4.17 For example, a contracting authority can choose to define the subject matter of its contract or framework as ‘construction and related training and skills development’ or ‘socially sustainable construction’, rather than simply the construction of a building. It may be felt that it is the construction of the building which is the essential core to the subject matter of the contract, but linked to this is the need to target the recruitment and training elements of that construction project.
- 4.18 This means, therefore, that so long as a social clause is relevant to the subject matter of a contract or framework, the contracting authority can assess bidders’ ability to satisfy their requirements when choosing its contractor.
- 4.19 The importance of the need for a social clause to be ‘relevant’ to the subject matter of the contract or framework is, additionally, that the social clause does not need to actually be the subject matter of the contract, only relevant to it. There are limited situations in which a contracting authority would procure jobs and training without this being in the context of a wider contract for works, services or goods.

Legal Obligations and Policy Decisions

- 4.20 Broadly speaking, social requirements can be split into two categories:
- those that the contracting authority imposes as a result of a legal obligation with which it must comply (such as health and safety regulations or equalities); and
 - those that the contracting authority chooses to impose as a result of policy decisions.
- 4.21 There is an argument suggesting that requirements a contracting authority imposes as a result of its legal obligations will always be core to the subject matter of the contract, purely as a result of being core to the business of the contracting authority itself. Therefore, how can it be rational to suggest that a contracting authority is not able to impose requirements when, were a contractor not to comply with those requirements, the contractor or the contracting authority would be liable for breach of some law?

- 4.22 Where a requirement is not being included as a result of a legal obligation on the contracting authority, the contracting authority will require a policy mandate for including the requirement. This is one importance of the legislative framework for different contracting authorities discussed above; a contracting authority cannot legitimately include a TR&T requirement in a contract where they have no policy remit for doing so. Detailed guidance on the issue of relevance can be found in Section 1 of the Toolkit for Stakeholders.

Equalities Legislation

- 4.23 Equalities legislation is one context where this approach is very relevant. Public bodies have statutory duties to actively promote race, gender and disability equality, including through public procurement. They should require all companies that are paid with public money to demonstrate a commitment to fairness (and insist that they both share and help deliver equality goals). This will in turn enable them to provide higher quality (and often better value) public services tailored to the needs of diverse users and communities. A full discussion of the incorporation of a public body’s equalities duties in its procurement is, outside of the scope of this Framework, but in any case there is now excellent guidance available from other sources. In particular, the Improvement and Development Agency (I&DeA) has published up to date guidance on its website covering equality and diversity in procurement.⁶⁵ This includes legal and practical guidance on equalities at the various stages of a procurement exercise, particularly:
- planning the project⁶⁶;
 - drafting the specification for a service⁶⁷;
 - drafting contract conditions;
 - advertising the contract and deciding who to invite to tender⁶⁸;
 - selecting tenderers;
 - invitation to tender⁶⁹;
 - evaluating bids and awarding the contract⁷⁰; and
 - monitoring and managing the contract⁷¹.

4.24 This also contains a useful discussion of how the Equality Bill and the new Single Equality Duty will affect procurement policy. “A Fairer Future: The Equality Bill and other action to make equality a reality”, describes how procurement may be relevant to the achievement of the equality duty, and how the equality duty can be relevant to a public body’s procurement exercises:

“It is right that public money is spent on goods and services in a way that advances the Government’s public policy objectives on equality. We want public services to meet the needs of our diverse society. Encouraging suppliers to promote equality in their own workforces allows public service delivery to benefit from diverse skills and talents. Individuals and wider society will benefit from reductions in pay gaps and improved employment rates among currently under-represented groups.

In the past, some public bodies have been uncertain about what they can do in relation to procurement and equality.

The Bill makes it clear that public bodies can use procurement to drive equality. It enables Ministers to set out how public bodies should go about doing so.”⁷²

4.25 It is clear that the Equality Bill is intended as a mechanism by which Government and the wider public sector can achieve greater economic and social inclusion across the country. See, for example, the statement of the Government Equalities Office on its website:

The Government is committed to creating a fair society with fair chances for everyone. For society to be fair people must have the chance to live their lives freely and fulfil their potential. To achieve this we need to tackle inequality and root out discrimination.

Equality not only has benefits for individuals but for society and the economy too. A more equal workforce is a stronger workforce. A more equal society is one more at ease with itself. To help us create the equal and fair society we all want to see we will introduce an important new package of measures.⁷³

4.26 What stronger policy directive could there be than this for public bodies to incorporate issues of equality into all of their procurements?

Selection of Bidders at Prequalification Stage

4.27 The intention of the prequalification phase of a procurement exercise is twofold:

- firstly, to identify those bidders who are ineligible to bid for the contract, on the basis of a number of mandatory and discretionary criteria (i.e. there are criteria on which a contracting authority must disqualify bidders, and criteria on which they may disqualify bidders, should they choose to use these);⁷⁴
- secondly, to assess those bidders who are eligible to bid for the contract on their economic and financial standing, and their technical or professional ability to perform the contract.⁷⁵

4.28 The effect of this is that the contracting authority must select bidders on the basis of their ability to perform the contract being tendered, not on the basis of their business operations more broadly. For example, a public body can require that a building completed under a public works contract is accessible to people with a disability, and select bidders who are able to provide this, but cannot insist that the contractor’s own head office conforms to such standards. This requirement also prevents, for example, a public body from specifying that a contract must be delivered by a particular form of enterprise, such as a VCO, charity or social enterprise.

⁶⁹For more information go to: <http://www.idea.gov.uk/idk/core/page.do?pageld=9308150>

⁶⁶When a public body decides what it wants to buy, it is an opportunity to consult users, identify needs and decide the best way to meet them. The OGC has emphasised the importance of this planning stage for public authorities to consider how they will meet their legal obligations and policy commitments within the procurement process

⁶⁷Public authorities can also ensure that all contracts include general conditions to ensure good equality practice by the contractor in carrying out the contract, for example, that the contractor does not discriminate unlawfully and that its workforce is recruited and managed in ways that are consistent with the public body’s equality duties.

⁶⁸Equality issues can be considered during the advertisement stage by ensuring that contract opportunities are accessible to SMEs, particularly those owned by women or ethnic minority groups, as well as supported factories and businesses for people with disabilities.

Must Social Clauses only be Relevant to the Contract?

4.29 Public bodies may also wish to impose requirements on contractors which go beyond the scope of the contract itself (for example, as well as requiring that a contractor use energy from renewable sources within a contract, requiring that contractor to source a proportion of its wider energy needs from renewable sources). This can be difficult to justify, especially as the requirement is less clearly linked to the subject matter of the contract. Such requirements also risk contravening the general EU law principles – in particular, the goal of free trade and free movement – as they create hindrance to free trade, even where these requirements do not appear to be discriminatory. In general, the position appears to be that there is a presumption against requirements that extend beyond the contract cannot be justified.⁷⁶

4.30 For example, a condition requiring the contractor to source a proportion of its energy, over and above the energy that would be required for the performance of the contract, from renewable sources would not be allowed, on the basis that it is neither linked to the subject matter of the contract nor independently verifiable. The condition would have been acceptable if it had been limited to the electricity supplies needed for the performance of the contract, and had been verifiable: with increased abilities to choose and record where electricity supplies are sourced, in the UK this is increasingly possible to achieve.

A key element of the system is a champion for the community benefits or TR&T requirements who knows what can be expected and routinely supports the work of the procurement team, the contractors and the community benefits “supply chain” to ensure that the requirements are met.

The decision to include TR&T requirements (and what to include and at what scale) will rest with the officers of the client body. The key issue in obtaining leverage over works contracts is therefore the support of the client officers. This will take time to achieve and needs to be approached systematically, prioritising:

- the purchasers with the largest annual expenditure on appropriate works,
- the contracts and frameworks that are most suitable for trainees and new entrants;
- ‘term contracts’ since these can provide longevity; and
- contracts and frameworks that have the closest policy fit e.g. neighbourhood regeneration and housing.

It can take time to access the right person and win their support. It will be necessary to address legitimate concerns about the potential impact on cost, quality, timetables, and contract monitoring and management. It will be important for the champion to focus efforts on the most willing participants, and then use success with these partners to obtain the interest of others. Mutual benefit is an important outcome for most purchasers. This might include addressing their concerns about the availability of skills to carry out and then maintain their works, or the opportunity to achieve additional policy outcomes at no additional cost to their budgets.

⁶⁹In selecting potential suppliers to tender for the contract, a public body can take account of any findings of discrimination against a company by a court or tribunal, and, for works or services contracts, their past record on workforce equality. Where it is relevant, public authorities can also ask potential suppliers for evidence of equality policies or training and their previous record in meeting equality service requirements. Pre-qualification questionnaires (PQQs) can be used to help assess the suitability of potential suppliers to invite to tender for contracts.

⁷⁰If there are explicit equality requirements or outcomes in the contract specification, one of the criteria for the contract award can be how well tenderers are able to meet those requirements or outcomes.

⁷¹To meet its equality duties, a public body will need to monitor how well the contractor is complying with any equality requirements in the specifications and contract conditions.

⁷²page 12, A Fairer Future: The Equality Bill and other action to make equality a reality, Government Equalities Office, April 2009

⁷³http://www.equalities.gov.uk/equality_bill/introduction.aspx

⁷⁴See Regulation 23 of the Public Contracts Regulations 2006

⁷⁵See Regulations 24 and 25 of the Public Contracts Regulations 2006

⁷⁶See, in particular, the European Commission’s Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement

⁷⁷Extract from the Can Do Toolkit, Resource 2: comprehensive guide, page 35, available from http://www.whq.org.uk/i2i/about_resources.php

Chapter 5 Tug of War

Policy Aims and Justification

- 5.1 A public body wanting to use any of the four Approaches contained in the Framework will need to be clear about the outcome it is seeking to achieve: there needs to be clarity about the purpose of including 'jobs and skills' requirements in its contract and how this relates to the objectives of the procuring body. It will also need to ensure that it has the powers and adopted policies to procure the selected requirements.
- 5.2 A typology of 'jobs and skills' approaches that could be relevant to public procurement is set out below.

Best Value and Continuous Improvement

- 5.3 Increasing the skills and productivity of the workforce could lead to improving the quality of works, products or services obtained and, insofar as this reduces skill and labour shortages, it will help to restrain wage-fuelled inflation. To achieve these benefits a client may be asking contractors to:
 - provide training for their existing workforce;
 - provide new entrant opportunities (e.g. for apprentices and trainees, or individuals returning to the labour market after an absence) and provide them with training and accreditation and sufficient duration of employment to achieve good productivity;
 - ensure that some or all of the supply-chain they utilise are providing training for their workforce and/or new entrant opportunities (which is especially important where most of the contract is sub-contracted).

Social Inclusion

- 5.4 Local Authorities and a number of other public bodies will have social inclusion amongst their policy objectives. This may be explicitly expressed through commitments to reduce poverty and the numbers of people receiving state benefits - for example, as part of Local Area Agreements (LAAs), Multi Area Agreements (MAAs), Corporate Strategies and Sustainable Community Strategies. For other bodies social inclusion as a policy objective might be implicit rather than explicitly laid out, for example in holistic area-based regeneration strategies.

- 5.6 Social inclusion benefits are achieved by providing employment and training opportunities for people from target communities. These communities may be specifically identified by locality – for example in a LAA or MAA - or by circumstance (such as benefit recipients, NEETs (Not in Education, Employment or Training), ex-offenders, refugees and asylum seekers with the right to work etc.). In other cases the targets may be implied but not specifically stated. For example, a regeneration strategy may describe the low levels of 'economic activity' and the high levels of deprivation in and around the regeneration area as part of the justification for the proposed activity, but may only include job or training targets in broad terms e.g. numbers of jobs to be accommodated. Here the targeting of the opportunities at the communities suffering high levels of deprivation is implied but not stated.
- 5.7 Policies to increase economic participation rates and reduce 'benefit dependency' are also 'social inclusion' policies.

Equal Opportunities

- 5.8 In some areas there may be a correlation between the communities experiencing high levels of social exclusion and a shortfall in employment and training opportunities, and communities with particular characteristics, for example, black and minority-ethnic communities, young people, women, people with a disability, or older people. In these circumstances a public body may seek to address social exclusion by ensuring that organisations carrying out works and services on their behalf adopt equal opportunities recruitment procedures that will ensure that all communities have equal access to employment and in-service training and accreditation, and that steps are taken to address inequalities in the makeup of the workforce.
- 5.9 Actions to achieve this would not be focussed on the provision of 'new' job or training opportunities, but improved access to those that arise in the course of the delivery of a contract e.g. through the implementation of an Equalities Action Plan.

Promoting Local Business

- 5.10 Supporting the development and growth of locally-based businesses – especially SMEs – may be seen as a way of securing additional job and training opportunities for the community, and some of these could ‘trickle down’ to the socially excluded and help achieve some of the other policy objectives set out above.
- 5.11 There is also a belief that to maximise value for money and ‘best value’ over the long term it is important to sustain the creation and growth of SMEs, and to avoid the closure of these businesses, so as to maintain effective competition. This may be referred to as maintaining the efficiency of the procurement process.
- 5.12 Possible actions to achieve this objective include:
- adopting procurement strategies that enable organisations with different scales of capability to obtain some elements of the work (e.g. framework contracts with call-off contracts of various sizes);
 - enabling/requiring main contractors to offer tender/pricing opportunities to local organisations/subcontractors;
 - taking action to encourage and enable local businesses to bid for contracts. (E.g. education workshops on public sector tendering, simplifying and standardising requirements where possible, taking a risk based approach when specifying levels of public liability cover.)
- 5.13 In relation to jobs and skills this is an indirect approach – i.e. it is assumed that the growth of the business will result in increased employment in the area of interest of the procuring body. This is more likely to be the outcome in more isolated communities and less likely to be the case in urban areas and the increasing numbers of businesses that are located alongside motorways – precisely to allow for ease of commuting – because more of the new opportunities will be taken by commuters into the area.
- 5.14 There need not be a correlation between increasing the turnover of local businesses and increasing jobs and training opportunities for target communities: the increased turnover could be achieved through increased use of distant supply-chains, or by importing skilled labour from other areas (including other countries). This is, for example, the norm in the modern construction industry. So this policy approach does not necessarily generate social inclusion and local employment outcomes.
- 5.15 The promotion and stimulation of local business does, of course, always need to be approached in ways which are compatible with the public body’s duty to comply with European law, especially the need to act in transparent, non-discriminatory ways.

The Local Impact

- 5.16 The recruitment of non-employed people from within target communities, and the provision of training that will increase the value they add through their work, will increase the amount of money that is spent in the local economy. However, ‘job creation initiatives’ that do not target recruitment locally may have less impact: workers that commute to the new jobs represent ‘lost income’ to the local economy.
- 5.17 An extension of the ‘local business’ approach is to increase inter-trading between firms. This can accelerate the economic activity in the area and if the growth in this activity leads to locally-targeted recruitment and training then it can have an impact on social inclusion and unemployment. However, if the additional business is achieved by using external supply-chains or employing a workforce that commutes from outside the locality then the additional income is lost to the local economy.
- 5.18 Charters and compacts that include a commitment to promote the use of local supply-chains, and the development of registers of local businesses that will help contractors to identify local suppliers will help support this policy objective. A charter or compact that also includes a commitment from local firms to target their recruitment can also contribute to tackling social inclusion.

Policy Tensions

- 5.19 There are clear policy tensions that exist between various arms and levels of government, especially arising as a result of conflicts and contrasts between policy positions within different organisations. This is true of all areas of government policy, but when it comes to the inclusion of social issues in public procurement, these policy tensions have long been felt to be a barrier to the achievement of increased public benefit through public contracts. These policy tensions can be found wherever there are relationships between different public bodies - such as between:
- central and local government;
 - central government and regional bodies;
 - regional bodies and their local and regional partners.
- 5.20 Perhaps the most important of these tensions that need to be considered are:
- the conflict between the efficiency agenda following the Gershon Report, and the achievement of value for money (or Best Value for a Local Authority), which in a time of recession seems to be interpreted as making things cheaper or more affordable by cutting services and reducing 'optional extras';
 - the push by government for public bodies to utilise centralised, larger scale contracts and frameworks (including, in particular, BuyingSolutions, (established in 2001 as a result of the Gershon Report), rather than entering into individual contracts.
 - the desire to encourage the use of small businesses and the third sector, and the (apparently) conflicting desire to enter into more collaborative procurement and commissioning with similar organisations to achieve economies of scale, thereby creating bigger contracts. Collaboration and the development of consortia by small businesses or third sector organisations can help mitigate these factors.

- 5.21 These tensions are discussed in more detail below, and readers should also consider the guidance and discussion contained in the introductory section on whole life costing v lowest price tendering.

The Efficiency Agenda

- 5.22 Many public bodies have an excellent reputation for providing efficient services that represent value for money. But public bodies face an ever-increasing challenge as a result of continually trying to both achieve value for money and make efficiency savings. This is especially the case now, when budgets are being stretched and belts tightened across the public and private sectors alike. There is, generally, a squeeze on the public purse and staff across all sectors are finding their budgets being cut. So, while there has always been a tension between the twin policies of efficiency and value for money, many currently feel that the balance has shifted. A cultural change is perhaps taking place, and public bodies will need to decide if this is something they wish to resist or accept.
- 5.23 Policy has not specifically changed as a result of the recession; it remains government policy that public bodies should aim to achieve value for money at all possible times. And the Office of Government Commerce (OGC) still maintains the view that value for money is achieved through assessing the whole life costs of a contract, rather than just price:
- "Delivering value for money in procurement means securing the best mix of quality and effectiveness for the least outlay over the whole lifetime of the goods or services, from purchase through to disposal."*⁷⁸
- 5.24 What has changed, however (or at least what has worsened with the recession), is the need to place more emphasis on affordability when making purchasing decisions. When budgets are being cut, the public body can find that efficiency and value for money simply mean that they can afford much less within the budget that is available to them.

⁷⁸See http://www.ogc.gov.uk/key_policy_principles_delivering_value_for_money_in_procurement.asp. See also OGC's policy on Value for Money at [http://www.ogc.gov.uk/documents/VFM\(1\).pdf](http://www.ogc.gov.uk/documents/VFM(1).pdf), which states: "Value for money is the primary driver for public procurement. It usually means buying the product or service with the lowest whole life costs that is 'fit for purpose' and meets specification."

- 5.25 In this climate it is important not to lose sight of what can be achieved. Yes, it may be necessary to perform a 'reality check' on what the public body can afford. However, as case studies from the construction industry can show, there is a great deal in the way of increased public and community benefit from contracts that can be achieved at nil cost to the client public body, and other considerations which can even save the public body money. As always, it is still the case that sustainable procurement is good procurement practice. Public bodies should not feel forced to go down a route of considering lowest price tendering when this is not even government policy, let alone being in the best interests of the public body or the community it serves. There may be a decision to be made at the start of each contracting / procurement exercise over what can be afforded, but this should always have been the case.
- 5.26 Sadly, however, where budgets are being significantly cut, there will be situations where a public body cannot enter into a contract at all, let alone consider what possible community benefit it can achieve through a contract. The best possible light to put on this unfortunate scenario is for the public body to take it as an opportunity to consider where else in its contracting it could incorporate requirements relating to jobs and skills development. It may also be seen as an opportunity to consider collaboration with other public bodies where this has not previously been considered. Collaboration is encouraged under the efficiency agenda and as part of value for money considerations and could, in the right circumstances, provide public bodies with opportunities to proceed with contracts and social requirements which would otherwise have been felt to be unaffordable at the current time.
- 5.27 In a buyer's market, however, the public body does have a certain amount of control. It presents an opportunity for contracting authorities to have candid discussions with bidders and contractors about what is affordable by the contracting authority, but also about what is needed of the contractors. Better communication at the procurement stage will tend to lead to an improved relationship between client and contractor, and to better contract management. But in circumstances where businesses in many industries and sectors are now actively seeking to contract with the public sector (whether or not due to the recession and the drying up of private sector work), contracting authorities should see the opportunity to take better control of contracts, and be clearer, firmer and more insistent about what they want and need. There is an opportunity to be seized by contracting authorities to take control of their contracts and relationships and achieve increased social and economic benefits for the communities they serve.
- 5.28 The Government's responses to the crisis in the banking sector and the ensuing recession have resulted in clear signals that public expenditure may be subject to significant constraints over the life of the next Parliament, and possibly beyond.
- 5.29 However, even if the immediate future were to hold out the prospect of real and substantial cuts in public expenditure, the sector would still remain the largest customer in the British marketplace, with significant opportunity to influence and shape the market's response to its requirements for goods, services, capital investments and construction
- 5.30 Arguably, the prospect of public sector jobs losses, reduced resources and constraints on expenditure may lead to procurement decisions that are far more output-driven and heavily weighted towards efficiency rather than the long-term outcome-focused procurement policies this Framework supports.
- 5.31 On the other hand, the public sector will still be - arguably more so - required to achieve specific qualitative outcomes from procurement exercises. If public expenditure contracts, whole life costs and outcome driven procurement strategies will prove even more crucial to improving delivery and thereby meeting the expectations of the customer, the Citizen and, not least, the principal inspection bodies such as the Audit Commission (via CAA).

OGC Contracts

- 5.32 There often seems to be pressure from central government to amalgamate public needs into larger and larger contracts, with the intention that this will create efficiency savings as a result of economies of scale. However, there is simultaneously a desire to support and stimulate small businesses (and social enterprises as well as the Third Sector more generally) through public contracts. Whilst these drivers appear mutually exclusive, small businesses and social enterprises need not be consigned to playing the role of subcontractor if they enter into consortia.
- 5.33 There is a great deal of benefit to be achieved from using centralised contracts and frameworks in appropriate circumstances. BuyingSolutions offers to facilitate “the buying process in a vast and highly complex marketplace, providing access to over 500,000 products and services through more than 600 suppliers”.⁷⁹ It offers the benefit of having gone through the EU procurement process where necessary, which means that the public body drawing goods or services from one of its frameworks need not worry about complying with the EU procurement rules. This clearly has an added benefit in terms of time savings as well as, potentially, cost savings; BuyingSolutions estimates that by going through one of its existing frameworks or suppliers, a public body can save itself an average of 77 days.⁸⁰
- 5.34 What centralised frameworks do not necessarily allow for sufficiently is the flexibility to accommodate different public bodies’ specific requirements. Framework suppliers can be incredibly useful when a public body knows it requires the same things as any other public body that uses that framework. In such circumstances central suppliers will be able to provide the economies of scale needed for this approach to improve efficiency. As a contrast, if a public body is wishing to do something innovatively, a centralised contract may not represent the best value for money. The public body will wish to tailor its contract, and therefore its procurement method and process, to ensure its chosen contractor is fit for purpose and will provide what is required.
- 5.35 This may especially be the case when it comes to providing community benefits in the shape of TR&T. The importance of the need for recruitment and training requirements to be relevant to the contract in question is discussed elsewhere in this framework. It would be incredibly difficult to argue the relevance of such requirements to a broad centralised framework contract, so TR&T provisions in this context would struggle to be EU compliant. This means that to achieve these ends public bodies will inevitably need to enter into individual contracts that satisfy their specific needs.
- 5.36 This is not to say that entering into an individual contract rather than using a pre-existing framework cannot afford the public body efficiency and value for money – in fact, quite the opposite. It is through the appropriate use of a mix of centralised frameworks and separately procured contracts that a public body may perhaps best achieve efficiency savings and value for money. Blindly following one path for all contracts, regardless of which path that is, will never be good procurement practice.
- 5.37 SMEs and social enterprises will often struggle with large frameworks, in that they find it difficult to satisfy the requirements to allow them to be appointed as framework suppliers. This is not to say that a framework cannot be designed such that it is possible to appoint a mixture of SMEs, third sector organisations and larger providers, only that it is so often not the case. With thought and care, frameworks can be successful in providing a range of suppliers from which public bodies can source their goods or services. However, SMEs are often put off from even bidding for such frameworks, as they can find the procurement process lengthy, expensive and difficult to navigate. This is something which is considered later in this framework.

⁷⁹<http://www.buyingsolutions.gov.uk/aboutus/>

⁸⁰<http://www.buyingsolutions.gov.uk/aboutus/generalinformation/>

⁸¹See, for example, “Worklessness and health – what do we know about the causal relationship?” an evidence review by the Health Development Agency, March 2005, intended to inform policy and decision making.

Collaboration and Contract Size

- 5.38 The Efficiency Agenda has led to public bodies being encouraged to communicate and collaborate more with other public bodies (and others). This can lead to some truly innovative outcomes; the joining up of policy across areas can be incredibly useful when it means that public bodies can see and acknowledge the benefits of the activities of others around them. For example, there are clear links between health and worklessness,⁸¹ which suggest that collaborations between NHS trusts and Local Authorities to tackle issues of worklessness and skills shortages would be mutually beneficial.
- 5.39 However, collaboration is seen to imply a need or desire for larger and longer contracts. To the extent that this is true, it may be in conflict with the policy aim of encouraging contracting with SMEs and social enterprises, in a similar way to the encouragement of the use of centralised frameworks. Contracting authorities need to carefully consider the needs of the contract(s) in question, and to consider every commissioning process on a case-by-case basis. The truth is that both large, collaborative contracts and smaller contracts have their place; both have a role to play in achieving the varying policy goals of different contracting authorities. What is important is that contracting authorities always consider the opportunities available to them, and make robust value for money assessments on every occasion.
- 5.40 Because different solutions will suit different situations and produce different outcomes, contracting authorities will need to choose (on a case-by-case basis) the option most suitable for their policy and strategic needs. But the spending power of the public sector is sufficiently large that different goals can be achieved through different contracts – while a contracting authority will never be able to achieve all its policy and strategy goals in every one of its contracts, so long as it considers which goals are relevant to which contracts, there will be room for both small contracts and for the use of a collaborative approach on other, larger contracts.

Organisational Issues

Internal Divisions of Budget and Responsibility

- 5.41 Many public bodies will divide both their budgets and their powers and responsibilities internally. For example, there is often a divide between capital (outlay resulting in the increase or acquisition of an asset – such as a building – or an increase in earning capacity) and revenue (outlay necessary for the maintenance of earning capacity, including the upkeep of fixed assets in a fully efficient state – such as routine repairs to a building) expenditure.
- 5.42 Similarly, many public bodies will separate their procurement function from their operational function(s). Some divisions may be required by law or policy (such as is often the case in the division between revenue and capital accounting and expenditure). Others may be self-imposed with a view to seeking greater internal efficiency (such as arbitrary divisions between departments).
- 5.43 These internal divisions can prove to be barriers to good procurement practice, even where their aim is to improve efficiency. The way of breaking down these barriers is almost always found through improved communication within the organisation. As always, there is also a need to find ‘champions’ within any organisation – people who are motivated and passionate about achieving social ends through procurement – who are able to communicate with each other. These champions will often be the drivers of sustainable procurement, and can help to break down barriers within an organisation where these are unnecessary and to overcome any other organisational issues that arise.
- 5.44 The revenue and capital split is a clear example of a potential barrier to the effective use of resources. For example, Local Authorities that provide housing⁸² are obliged to keep a housing revenue account (HRA) in relation to their housing stock.⁸³ The HRA effectively ring-fences funds for Local Authority housing which, of course, has its benefits. However, any ring-fencing of funds has the effect of denying the public body the opportunity to combine funds with a view to enabling those funds to have the greatest possible impact.

Organisational Costs of Social Clauses

- 5.45 Many public bodies are discouraged from considering the inclusion of social issues in their procurement by the fear that to do so will come at a cost to the organisation. This cost may relate not simply to the price of the contract being procured, but to the internal management of the procurement process and the contract once it has been entered into. The organisational costs of incorporating social issues into procurement can include:
- satisfying training needs where an organisation, team or individual is new to the issues involved;
 - the development of appropriate policy and strategy for the inclusion of social issues in contracts; and
 - the ongoing resource needed for contract management and coordination of the procurement process.
- 5.46 Clearly, some of these costs are ongoing, while others are periodical or one-offs. In either case, it is important to emphasise that these costs will decrease over time with increased experience in the field. If the public body holds true to the principle that including social issues in procurement makes the organisation's contracting practices more sustainable overall, and fits within good procurement practice more generally, then these costs are easily justifiable. Additionally, these organisational costs should ultimately be more than offset by the overall benefit of the contracts within which social issues are included.

What is the Solution?

- 5.47 The solution to both of the issues discussed above is, perhaps, the same. There is a need within most public bodies for continuing professional development around these areas, in the form of training, raising awareness of the issues involved, and creating networks of contacts both within and between organisations that can share experiences, best practice and guidance.

- 5.48 Increased experience and support may have the following impacts:

- greater experience can lead to increased efficiency in the procurement process and in contract management, with the effect that organisational costs are reduced, as implementation will be less time-consuming and resource-hungry;
- increased support from networks within the organisation and between organisations can lead to efficiencies as both best practice and mistakes are shared and learned from;
- networks of contacts can also broaden knowledge and enable officers to be braver in their procurement as they learn from other people's successes and failures;
- better communication within organisations through the building of networks and increased awareness of the capabilities of different officers, teams or departments can lead to better linkages between previously divided budgets and responsibilities.

Overcoming Barriers to the use of Social Clauses

- 5.49 Many of the legal barriers to the use of social clauses are perceived rather than actual. There are, however, some real legal and non-legal barriers which can either stop or dissuade contracting authorities from using social clauses or restrict their use or effect. Hopefully, the discussion below will help to ease contracting authorities' minds regarding what they are and are not able to do.
- 5.50 Many of the barriers to social clauses are not absolute. There are many things that make using social clauses more difficult, but far from impossible. Similarly, social clauses can be more or less cost effective or affordable in different circumstances. In general terms a lack of understanding or commitment within an organisation will always hinder progress – expertise and enthusiasm are needed across all areas of the contracting authority, as well as, of course, the contractors. This may mean encouraging links and lines of communication between separate departments of a contracting authority which have broken down (or have never existed).

⁸²“Local housing authorities” under Part 1 of the Housing Act 1985

⁸³Housing provided or acquired for the purposes of being provided in accordance with the Housing Act 1985.

The Climate for Challenge

- 5.51 Unsuccessful bidders are becoming more confident in challenging contracting authorities on their procurement processes and decisions. In part this has come about as bidders in different sectors have become more familiar with public procurement processes. As bidders are more aware of their rights, and contracting authorities' responsibilities under the EU procurement rules, they have become more adept at noticing when contracting authorities get it wrong and more confident about challenging a procurement decision when they have been unsuccessful. The recession has also played a part. As private sector work in many industries and sectors has been drying up, more organisations are willing to look to the public sector for work. And unsuccessful bidders have more to lose than before when a lost contract could more easily be replaced with another.
- 5.52 Bidders' confidence and experience in public procurement processes has increased, leading to a greater propensity to challenge and question. While this may be a symptom of the recession, it is one which will not necessarily disappear as the economy once again starts to grow. This is perhaps as it should be; contracting authorities should be expected to work within the rules and regulations that govern them, and bidders should be entitled to be able to rely on contracting authorities to act consistently and lawfully.
- 5.53 What it does mean for contracting authorities is that they need to start running tighter ships. The fact that bidders are more likely now to challenge procurement decisions or request the detailed feedback to which they are entitled should not act as a deterrent to using procurement as a route to achieving social policy objectives. It simply means that contracting authorities must act fairly, transparently, proportionately and in accordance with the rules. This means nothing more than that contracting authorities should put in place good procurement practices – something they undoubtedly should be doing in any case. In this sense, consideration of social clauses may prove to be an opportunity to sharpen procurement practice within a contracting authority more generally.

- 5.54 In terms of responding to both requests for information and feedback and, potentially, challenges to contract award decisions, contracting authorities should consider the following measures (which are, as mentioned above, good practice in any case):
- ensure that selection and award criteria are agreed in advance and are disclosed to bidders;
 - ensure that scoring mechanisms are agreed in advance and disclosed to bidders, and are adhered to when selecting and evaluating bidders. Contracting authorities should also ensure that documentation is retained so that any requests for information and feedback can be responded to in full and within the relevant timescales; and
 - wherever possible maintain a simple and straightforward selection and evaluation process. Overly and unnecessarily complex criteria and scoring mechanisms leave the greatest room for error and therefore for challenge.
- 5.55 The EU Remedies Directive⁸⁴ has recently been implemented in England and Wales through the Public Contracts (Amendment) Regulations 2009, which amend the Public Contracts Regulations 2006. The impact of these changes remains to be seen, but it is likely that case law will develop over the coming months and years which will have an impact on the challenges that bidders make and contracting authorities receive.

Organisational Concerns

- 5.56 The organisational issues of how to achieve social issues through procurement are largely discussed elsewhere in this Framework. However, as a whole, organisational concerns can act as a barrier to the use of social clauses.⁸⁵ A contracting authority will need to consider how it is going to address each of the following concerns when it chooses to consider issues such as jobs and skills in its contracting:
- **political will:** this is clearly vital. Support for the use of social clauses is needed at all levels of an organisation – from the officers who will be implementing and delivering the contracts on the ground to service directors, chief executives and political leaders;

⁸⁴Council Directive 2007/66/EC

- **the need for expertise**, capacity and champions: training can be an organisational cost, but is invaluable for officers being asked to deliver contracts on the ground. The need to consider jobs and training requirements needs to be built into officers' job descriptions and roles if capacity is to be found to ensure these additional requirements are fulfilled;
- **organisational costs and pressures**: these include the perceived added expense of training staff (and contractors!) in the use of social clauses in contracts;
- **access to advice and guidance**: one of the tips for a smooth procurement and contracting process is to direct bidders and contractors to external advice, guidance, resources and funding that are available to them. To be able to do this, contracting authorities need to know not only where these sources of assistance are to be found, but also where in turn they themselves can find external (or internal) advice and guidance on how best to implement jobs and training requirements.

5.57 Ultimately, what most of the above boils down to is the need for a culture change within the contracting authority – once social issues are embedded in the everyday practices of the contracting authority, training becomes standard, expertise and capacity are built into job descriptions and roles, and champions are identified and communicate well with others in the organisation. Political will for the improvement of jobs and training provision through the public body's contracts will only increase as the organisation's attempts at including jobs and skills requirements in its contracts are seen to be successful and valuable. And advice and guidance will increase and improve over time as these social issues become embedded in contracting authorities' practices and therefore become more mainstream.

Comprehensive Area Assessment and Audit Commission Inspections

- 5.58 Comprehensive Area Assessment (CAA) is the new way of assessing local public services in England. It examines how well Local Authorities are working together with other public bodies to meet the needs of the people they serve. It is a joint assessment made by a group of six independent watchdogs.⁸⁵
- 5.59 There are three overarching questions that the Audit Commission will ask for each CAA area:
- how well do local priorities express community needs and aspirations?
 - how well are the outcomes and improvements needed being delivered?
 - what are the prospects for improvement?
- 5.60 The CAA approach is very much focused on local priorities. This means that if creating jobs or developing skills contributes towards an LAA local priority the use of this Framework might potentially be relevant. This therefore also means that it may be more applicable in one area than another. This principle also applies at the organisation level for local government bodies.
- 5.61 Local Authorities are assessed through the Managing Performance Assessment. This is described in depth within the CAA guidance. However, in summary; the Audit Commission is addressing two questions:
- how well is the organisation delivering its priority services, outcomes and improvements that are important to local people?
 - does the organisation have the leadership, capacity and capability it needs to deliver future improvements?
- 5.62 The Framework is particularly relevant to the first question if it addresses an organisation's priority. This would need to be evidenced through both the articulation of such a priority and through the provision of evidence that it had delivered some outcomes such as creating local new jobs. It is important to note that the following are possible links and cannot guarantee that simply adopting the Framework would result in a positive assessment for an area or organisation.

⁸⁵The Local Government Sustainable Procurement Strategy contains a Flexible Framework, where a number of steps identify how an organisation can move towards successfully embedding a sustainable procurement framework. <http://www.idea.gov.uk/idk/aio/7643299>

⁸⁶<http://www.audit-commission.gov.uk/localgov/audit/CAA/Pages/default.aspx>

- 5.63 The Procurement Framework for Jobs and Skills could be relevant in two ways:
- A Comprehensive Area Assessment (CAA) - if it supports a Local Area Agreement (LAA) priority;
 - B (i) Local government organisations and Fire and Rescue Services: It is relevant to theme 2.1 of the Use of Resources Assessment and possibly the managing performance assessment, if it also supports a local priority.
 - B (ii) Primary Care Trusts and Police: it is relevant to theme 2.1 of the Use of Resources Assessment.

The most relevant Key Line of Enquiry (KLOE) is 2.1: *“Does the organisation commission and procure quality services and supplies, tailored to local needs, to deliver sustainable outcomes and value for money?”*

- 5.64 The KLOE focuses on an organisation includes assessing if it:
- has a clear vision of intended outcomes for local people which shapes its commissioning and procurement, and is based on an ongoing analysis and understanding of needs;
 - involves local people, partners, staff and suppliers in commissioning services;
 - seeks to improve the customer experience, quality and value for money of services through service redesign, making effective use of IT;
 - understands the supply market and seeks to influence and develop that market;
 - evaluates different options (internal, external and jointly with partners) for procuring services and supplies; and
 - reviews the competitiveness of services and achieves value for money while meeting wider social, economic and environmental objectives.
- 5.65 The last point is particularly relevant for the Framework. It is important to note that in adopting the Framework and providing it as evidence during an assessment, it may be valuable to demonstrate that an organisation is aware that it may inflate the price of a contract and that the organisation has assessed what the extra cost might be. Formally assessing the costs and benefits and explaining how the benefits justify the additional costs would be valuable.

- 5.66 As with other aspects of inspection, the CAA is designed to measure overall outcomes. Demonstrating the link between certain, easily measurable, outputs and the longer-term outcomes will be a useful way of signalling progress. Evidence of the targeted recruitment and training outputs achieved through one or all of the four Approaches within the Framework will be important to support any claims of the impact, and value of the Framework.

Practical Limits: Parameters for Application of the Framework

- 5.67 While there is nothing that completely precludes jobs and skills from being relevant to any contract, there will always be practical limits on what a public body (and its contractors) can achieve. In terms of applying the framework strategically across the range of a public body's activities (i.e. applying Approach 4), the following parameters may be worth considering:

Monetary Value

- 5.68 The monetary value of the contract in question will have an impact on the degree to which jobs and training requirements are realisable. A contractor will only be able and willing to recruit or train staff to the extent that this is necessary for delivery of the contract and realistic within costs constraints – realistically, a contractor needs to make a profit, and will not deliver jobs and training requirements that cause it to suffer a loss. The ways in which public sector organisations can work with contractors to deliver Targeted Recruitment and Training (TR&T), services that can reduce and even eradicate such costs are explored in Chapter 7: *‘Reducing Costs and Complexity - the public sector jobs and skills offer’*.
- 5.69 Equally, there are practical limitations to what can be achieved within contracts of very low value. For example, for it to be practicable for a contractor to take on a new apprentice, the contract value would need to justify this additional expense, and there would need to be sufficient work to occupy an apprentice's time. Further guidance for procurement teams on the relevance of jobs and skills clauses to specific contracting exercises - taking into account contract category, duration and value - can be found in Section 1 of the Toolkit for Stakeholders.

Duration

- 5.70 Similarly, the duration of a contract will have an impact on what can be achieved within the time available. What might be feasible within the scope of a long-term contract may not be possible within a much shorter timescale. This is for similar reasons as those mentioned above in relation to contract value. On short contracts (or those for a lower monetary value), however, there may instead be scope to consider “softer” requirements, perhaps involving on the job training rather than additional recruitment, which can still have a tangible benefit.
- 5.71 What this boils down to, as ever, is a need to ensure that the approach taken has been carefully considered in the context of the length and size of the contract in question. It is as much about being ‘brave’ with larger contracts as it is about being realistic with smaller ones.

Subject Matter

- 5.72 While it is possible to contemplate jobs and training requirements in almost any context, it is nonetheless worth exercising a degree of realism concerning the subject matter of a contract and what requirements can be considered “relevant” to it. Again, this illustrates the need to consider each and every contract or framework on its merits. What will be relevant to a large scale construction contract will not immediately be relevant to a small scale services or supply contract, for example.
- 5.73 Apprenticeships, for example, are an employment and training model found in many sectors, but not in all. The subject matter of the contract needs to be considered before it can be made clear whether a requirement that the contractor employs a specified number of apprentices would be relevant, let alone practically realisable. So while it is not necessarily the case that the subject matter of the contract will completely preclude the use of jobs and skills-related requirements, it will mean that some requirements are rendered more relevant than others.

- 5.74 What may affect the public body’s ability to form useful requirements relating to a particular contract, however, is the existing experience of (a) the public sector and (b) the bidders in putting such requirements into practice. Much of the experience in the use of social clauses to date has been within the construction industry – in part due to the length, size and value of contracts that the industry necessarily offers, and the opportunities that such contracts provide – which can mean that, outside of this industry sector, it is felt to be more difficult to form requirements that are relevant to the contract’s subject matter. This, hopefully, is only a matter of time – as experience grows in applying social issues to other subject matters, courage in other parts of the public sector to follow suit can only grow. For the time being, all this situation needs is for somebody to go first.

Chapter 6 Encouraging Small and Medium Size Enterprises, Social Enterprises and Contractors new to Public Procurement

Small and Medium Sized Enterprises (SMEs)

- 6.1 SMEs can typically make up a very large proportion of a market or sector. Sole traders in 2008 made up nearly three quarters of all businesses, with enterprises with fewer than 10 employees making up a further 10%.⁸⁷ More than half of all employees are employed by an SME. As such SMEs are a form of business not to be ignored.
- 6.2 For the sake of clarity, SMEs are generally understood to include:
- micro-businesses: with 10 or fewer people, and/or an annual turnover of no more than £2m;
 - small businesses: with 50 or fewer people, and/or an annual turnover of no more than £10m; and
 - medium-sized businesses: with 250 or fewer people, and/or an annual turnover of no more than £50m.

Organisations New to Public Sector Contracting

- 6.3 There is a wealth of untapped resource in the private and third sectors from which public bodies could benefit. However, for various reasons, not all potential suppliers currently contract with public bodies. Some are discouraged by what they perceive as a lengthy, costly and complicated purchasing process, while others may simply be unaware of the spending power of the public sector or the value of their product or service to the public sector. Others do not fully understand public sector procurement procedures or how to tailor their bids to meet public sector requirement. Some simply do not know how to find out about public sector tender opportunities.
- 6.4 However, in economic circumstances where private money is dwindling, more and more private and third sector organisations are looking to the public sector for work. As awareness of the spending power of the public sector (even in a recession) and understanding of the rules with which public bodies must comply increases, there may be many “newcomers” to the public marketplace – organisations that

have not previously had much contact with the public sector but who are now contemplating, or actively seeking, a greater relationship with public bodies.

- 6.5 These “newcomers” are not all small, inexperienced organisations. Many will be large organisations with a great deal of experience from which public bodies could benefit, and that will be very willing to learn and adapt to the public sector’s needs.
- 6.6 Others may be inexperienced in the world of public contracting, but nonetheless experts in their field that can therefore have a lot to offer. In either case, organisations that are new to the world of public sector contracting can prove to be the best choice for a contracting authority, and certainly should not be discounted on the basis of their lack of public sector experience.
- 6.7 It should also be noted that public sector funding already constitutes around 40% of the income of medium and large size Voluntary and Community Sector (VCS) organisations, despite that fact that the public sector spends less than 4% of its overall funds via the VCS. The real challenge for a sector far more familiar with grants and service level agreements is the Commissioning process per se. The Commissioning process presents a ‘sea-change’ for large parts of the sector.

Social Enterprises

- 6.8 Social enterprises, with their focus on different social and environmental goals, can often be best placed to deliver social requirements, if given the opportunity to do so. While many social enterprises have a long history of working with the public sector, others may be afraid of, or discouraged from, doing so for exactly the same reasons as other organisations. “More for your money”⁸⁸, a guide to procuring from social enterprises, produced by the Social Enterprise Coalition and the New Economics Foundation (NEF), identifies three areas in which social enterprises can often deliver better value for money than other potential suppliers, namely:
- meeting more than one objective with the same expenditure;

⁸⁷Statistics on SMEs from the Department for Business, Innovation and Skills: available from <http://stats.berr.gov.uk/ed/sme/smestats2008.xls>.

⁸⁸More for your money: A guide to procuring from social enterprises, SEC and NEF first section 2005,

Reprinted with revised case study 2006, available from www.socialenterprise.org.uk/procurement.

- having a competitive advantage in delivering particular goods and services; and
- delivering innovative solutions and stimulating new markets.

6.9 “More for your money” also provides some useful guidance (specifically aimed at Local Authorities and the NHS) and informative case studies.

6.10 Social enterprises, therefore, can appear better placed than many to contract with the public sector. However, this successful relationship between social enterprises and public bodies was, for many, difficult to achieve, and there is certainly still more work to be done. In 2006 the Cabinet Office published Government’s Social Enterprise Action Plan: Scaling New Heights,⁸⁹ which set out to:

- foster a culture of social enterprise;
- ensure that the right information and advice are available to those running social enterprises;
- enable social enterprises to access appropriate finance; and
- enable social enterprises to work with government.

6.11 While some headway has been made on these aims, contracting authorities (and, of course, social enterprises) could still be doing more to enable social enterprises to “work with government”. As discussed in the Social Enterprise East Midlands / BEST Procurement publication, “Social Enterprise and the Public Sector: A practical guide to law and policy”:

*“Procurement generally depends on the commissioner taking actions: policy adoption, business case preparation, OJEU notice etc. There is no commonly held framework in the UK for social enterprises (and potential public service partners from other sectors) to take innovative ideas and develop them for adoption by the public sector in ways which recognise the endeavours of the organisations taking the initiative. A route map for doing this which has the approval of Central Government (especially the Treasury) would do much to release a new spirit of enterprise in the delivery of better services for people”.*⁹⁰

Social firms, in a way a subset of social enterprises, may also be of particular concern and interest to contracting authorities, as they satisfy the definition of “supported businesses”, to which contracting authorities may reserve contracts under the EU procurement rules.⁹¹ These rules allow contracting authorities to reserve contracts to be delivered by supported businesses (referred to as ‘sheltered workshops’ by the EU) where more than 50% of the employees have a disability.⁹² People do not need to be registered as disabled to satisfy this test.

Whether social enterprises or social firms are being considered, contracting authorities should remember to make a considered decision in the individual circumstances as to whether or not giving particular attention to these organisations is necessary, appropriate and relevant.

The Impact of Jobs and Skills Requirements on SMEs, Social Enterprises and Newcomers

6.12 The last thing that a public body would wish to do by including social requirements in their procurement would be to put off potential bidders. This is a potential risk that may especially affect SMEs, the third sector, and any other potential bidders who are new to, or nervous of, bidding for public sector work. Bidders who are inexperienced in bidding for public sector contracts can find the panoply of rules governing public procurement intimidating and off-putting, let alone the imposition of additional requirements.

“Many potential suppliers, including small firms, may be discouraged from tendering for public sector contracts because of a number of perceived or real barriers. These include:

- *not being able to find out about opportunities*
- *believing that the processes involved in bidding are unnecessarily complex and costly*
- *current trends in public sector procurement towards larger and longer contracts, and rationalising the number of suppliers, meaning that smaller businesses often find the resulting contracts too large for them*

⁸⁹Available (along with two leaflets looking at progress one and two years on) at: www.cabinetoffice.gov.uk/third_sector/social_enterprise/action_plan.aspx

⁹⁰Social enterprise and the Public Sector: A practical guide to law and policy, BEST Procurement Development Partnership, 2007, available from www.seem.uk.net

⁹¹See in particular Regulation 7 of the Public Contracts Regulations 2006

- *believing that public sector procurers perceive a risk of contracting with diverse forms of business, like social enterprise, where their value can be misunderstood and overlooked.*⁹³

6.13 SMEs can often feel that the tendering process is both too expensive in terms of the input that is required simply to bid for a contract, and too restricting in terms of the time limits that are imposed. Resources are therefore a big concern for SMEs, in terms of both money and time.

6.14 The ways in which the rules governing public procurement are applied by contracting authorities are often off-putting to potential bidders, and can act as a barrier by themselves, regardless of the subject matter, length or value of the contract in question. A change in the public sector's thought processes is needed before many bidders will be encouraged to bid. This means finding ways of undergoing less elaborate and complicated procurement processes, and embarking upon processes that are more engaging, communicative and welcoming to bidders of all shapes and sizes. Many public bodies are already responding by offering greater levels of support to third sector organisations and small and SMEs as the example below illustrates.

Walsall Metropolitan Borough Council has recognised the issues facing Third Sector and 'Micro Enterprise' organisations when bidding to provide services. Communication is a vital part of any project and the Council seeks to actively engage with the various stakeholders through a range of different means:

- Stakeholder Workshops & Forums
- Consultation Group/s – both providers and service users
- Regular written update correspondence (inc Frequently Asked Questions (FAQ))
- Website & Media updates – newspapers and industry journals
- Tendering Support Services
- Engagement with any governing / regulatory body

The recent tendering process for the Residential and Nursing Care Service involved 2 full-day provider workshops, prior to the release of the tender documents, with a cumulative attendance of over 200 providers; 6 service user consultation events, several internal stakeholder workshops, a quarterly update and an open questions session at the Residential and Nursing Care Forums, ongoing consultation and partnering with the West Midlands Care Association (WMCA) around the content, style and format of the tender documents along with the legal expertise of both the council and the lawyers of national providers regarding the terms and conditions. A monthly update was dispatched to the entire market via the Council's website and emailed directly to providers who had expressed an interest, along with the publication of an FAQ list. The project had been advertised on OJEU and in the industry journal Community Care. The Council arranged for tendering support to be offered to providers through the provision of 3 full-day tender support surgery days, as well as an ongoing tender helpline. The results of this investment was that the tender evaluation panel noted the high quality of the bids that were submitted by the providers who had accessed support enabling the council to be more confident in the quality of service to be provided. **For further information, contact Lawrence Brazier, Walsall MBC on 0192265099.**

See also the Third Sector Compact Principles set out at Annex A to this Chapter.

⁹²"Disabled" and "disability" are given the meanings found in the Disability Discrimination Act 1995

⁹³Smaller Supplier ... Better Value (OGC & SBS, 2005), page 5

Does the Use of Social Clauses put Bidders off Tendering for Public Contracts?

- 6.15 It is worth considering whether the inclusion of requirements relating to jobs and skills will actively discourage SMEs, social enterprises and/or newcomers and other ‘new entrant’ bidders from bidding for a contract. A social enterprise may be able to identify that it is capable of offering what the public body is requiring (and even that it is better placed to do so than a more ‘conventional’ bidder), and will on this basis feel confident in bidding for the contract. Many social firms, offering long term support to those most at a disadvantage in the labour market fall into this category. However, the opposite can also be true, especially, for example, when requirements are not set out clearly, or are perhaps more onerous than they need to be in the context of the contract in question. SMEs, social enterprises and, indeed, any organisations may be put off from bidding if they feel that they have little or no chance of being successful in winning the contract.
- 6.16 It is perhaps particularly important in this context to emphasise the need to point bidders in the direction of resources that are available to them – whether this includes financial resources or practical guidance and assistance. Advice from the OGC and the Department for Business, Innovation and Skills (BIS) is as follows:

Small and medium-sized enterprises (SMEs)

The Government is committed to ensuring that its contracts remain accessible to small businesses, including those owned and managed by women or ethnic minority groups, as well as supported factories and businesses for people with disabilities. Accessibility for these groups of suppliers can be further improved by engaging with them to find out what they can provide and by ensuring advertisements for contracting opportunities can reach them. The Government has taken steps to make it easier for suppliers to find contracting opportunities. For example, the Supply2.gov web portal provides business with easy access to lower value contracts (typically below £100,000). <http://www.supply2.gov.uk/>

Wider government support for skills and training

SMEs and larger employers can access a range of Government support to help them meet skills requirements in the procurement process. In England, employers can access support through the Train to Gain service and the Apprenticeships programme”.⁹⁴

Creating a ‘Level Playing Field’

- 6.17 Public bodies will often feel that they wish to actively encourage contracting with SMEs and the third sector, but will need to justify why they wish to do so, taking into account the need to achieve value for money, and the impact on the market as a whole. In doing so, it is vitally important to ensure that procurement processes (and, of course, commissioning more broadly) remain fair and transparent, and that the public body does not inadvertently discriminate in favour of some bidders and against others.
- 6.18 It would therefore be best practice for public bodies to aim for a level playing field – by encouraging the involvement in the procurement process of SMEs, social enterprises and newcomers and helping to break down barriers, rather than specifically targeting particular organisations, or types of organisation, when entering into a contract. It should always be the case that the public body is seeking to contract with the best possible candidate available, assessing the delivery of value for money and the efficient provision of public services. SMEs, social enterprises and newcomers are capable of providing the best value for money for a contract, but this needs to be assessed on a case by case basis.
- 6.19 SMEs, social enterprises, and newcomers can all offer excellent value for money in many contexts. This in itself is an argument for breaking down the barriers that exist to stop anyone from bidding for public contracts. Simply broadening the marketplace is an end in itself, and one which will inevitably lead to increased competition and therefore a better chance of achieving value for money.

⁹⁴Promoting skills through public procurement, OGC and DIUS, 2009, page 6, available online via the following link: Promoting skills through public procurement

⁹⁵Smaller Supplier ... Better Value? Page 6

6.20 The OGC guidance *Small Supplier ... Better Value?* emphasises the following benefits to contracting with an SME:

Better value for money

- *Bringing in more suppliers will often bring greater competition to the market place, so reducing the costs of procurement from all suppliers*
- *SMEs have lower administrative overheads and management costs than larger firms. Depending on the nature of the procurement, this can result in lower prices.*

Better quality of service

- *SMEs have short management chains and approval routes, so they can respond quickly to changing requirements. SMEs may also be highly focused on particular markets making them particularly responsive to changes in those markets*
- *Being a large customer of a small business means your business is important to the SME. This can result in a better, and often more personal, level of service and in a better relationship with the supplier*
- *The SME may also be more willing and able to tailor a product or service to meet specific customer needs than a large firm that sells an established offering and so increase the potential for innovation*
- *Many SMEs, including social enterprises, VCOs and BMEs, supply higher quality specialist products or services than larger suppliers, either because larger suppliers are discouraged by the limited demand, or because the SME has skills, originality and commitment in that field that are greater than those found in their large company competitors".⁹⁵*

6.21 In the context of achieving jobs and skills development through procurement, again, the decision will need to be made on a case by case basis what solution achieves best value for money for the public body. Depending on the context, SMEs, social enterprises or newcomers may be able to more successfully deliver recruitment and training requirements, especially where they are more familiar with the target community or group. Where a social

enterprise or social firm has a particular focus on the target community or need, it will inevitably have a degree of experience and expertise that may not be available elsewhere. For example, if a social enterprise has a particular focus on seeking to employ people who have been amongst the long term unemployed, they will almost certainly have the networks in place and the knowledge that will ensure that they are able to deliver a requirement within a public contract for a percentage of new recruits to be found from the long term unemployed. As a contrast, a large national or international organisation may be less well placed to deliver these same benefits.

6.22 Similarly, encouraging SME, social enterprise and newcomer participation in procurement exercises can lead to benefits for the community served by the contracting authority. In many cases SMEs, social enterprises and newcomers will look to contract within a particular location or region, and this can mean that the community served by the contracting authority benefits from increased economic activity. This can mean that there are increased jobs and training opportunities and benefits for the community, even without specific jobs and skills requirements being included in a contract.

6.23 The suitability of an SME or social enterprise (or, indeed, any organisation) to deliver jobs and training requirements may depend also on the subject matter of the contract itself. The potential impact of the size of a contract is considered at paragraphs 6.25 to 6.31 below, but it is also clear that the works, services or supplies being procured will have an impact on the suitability or otherwise of a bidder. This is something that says as much about the strengths of SMEs and the third sector as it does about their weaknesses, and is perhaps demonstrated by the industries and sectors in which they are dominant. Social enterprise has a tangible presence in both the health and social care and education sectors. Voluntary and community organisations have similar strengths in many ways, with a thriving presence in health and social welfare, sport and recreation, environmental protection and the arts. Looking to voluntary and community organisations - whether as chosen providers or as subcontractors - can enable public bodies to achieve a community focus that may not otherwise be possible.

6.24 As mentioned in the OGC guidance referred to above, SMEs are capable of providing specialist services that a larger organisation may not offer. This means that in some sectors SMEs will be dominant. However, this is also what makes SMEs so strong and successful as subcontractors to main contractors in some industry sectors. The most obvious example of this is construction, where a project will very often have a main contractor whose core activity is very general and, therefore, subcontracts the specialist work to smaller, more focussed companies – it can even be the case on some projects that the vast majority of the work will be done by subcontractors.

The Impact of the Size of Contracts

6.25 Careful consideration needs to be given to the impact that the size of contracts can have. Amongst the questions contracting authorities will need to answer are:

- are SMEs and third sector organisations put off from bidding for large contracts?
- do the advertising and tendering requirements placed on many larger contracts have an adverse effect on the bids that are received?
- can contracting authorities achieve value for money from smaller or larger contracts?

6.26 It will always be important for the procuring body to consider the size of the contracts it is procuring, and the appropriateness of either aggregating contracts or separating contracts into lots. The EU procurement rules restrict, to a certain extent, what contracting authorities can do to mould the shape and size of contracts. There are rules that govern:

- what contracts must be aggregated for the purposes of determining whether or not a contract must be advertised in the Official Journal and an EU procurement procedure followed;
- the way in which contracts can be divided into 'lots' while still being compliant with the EU procurement rules more generally;
- the use of 'small lots', which can be used as an exception to the usual rules where certain circumstances apply.

6.27 Within this legal framework, contracting authorities may wish to consider the impact that the size of their contract has on bidders. It is not possible under the EU procurement rules to artificially adjust the size of a contract (for example to avoid the contract falling above the threshold over which the EU procurement rules apply). However, contracting authorities can use the rules governing the division of contracts into lots, and the small lots rule in particular, to encourage the greatest possible participation by the marketplace in a procurement exercise. In this sense, the use of lots also sits well with the need to achieve value for money.

6.28 SMEs (including those that are also social enterprises, charities and so on) can often be discouraged from bidding for larger contracts, so in this sense the size of the contract does have an impact on who will bid. For example, Third Sector organisations, especially social enterprises, can be put off bidding for service contracts when the geographical coverage of the contract is increased beyond their normal catchment area. These organisations exist to provide for local communities. Although their catchment areas can be quite extensive, once contract coverage extends to a City, Borough or a region, the costs of meeting contract requirements can prove prohibitive.

6.29 As discussed elsewhere, the best practice approach for contracting authorities is to seek to level the playing field. Contracting authorities must be careful not to discriminate in favour of or against bidders, but can (and should) ensure that it is possible for all interested bidders to find out about the opportunity and to bid. It is always important to ensure that bidders have appropriate access to contract opportunities, and this is no less the case for larger contracts. Where contracts are advertised through the OJEU, contracting authorities should nonetheless advertise elsewhere as appropriate. This does not disadvantage those bidders who respond to the OJEU Contract Notice, but ensures the widest possible audience for the contract opportunity.

6.30 Contracting authorities should also consider the potential for consortium bids for larger contracts. SMEs and the third sector may be able to successfully bid for contracts where consortium bids are accepted, and can offer

great value for money and considerable experience and expertise when able to join forces with each other. Constructing consortia, and managing through the legal and administrative complexities associated with such collaborations, presents a critical challenge for The Office of the Third Sector (OTS) and key regional third sector 'infrastructure organisations'. In addition to championing the policy objectives of the Framework they will need to facilitate an exchange of good practice and provide relevant learning and skills development opportunities across the sector.

- 6.31 When considering value for money, as always contracting authorities must consider how appropriate the size of the contract is, and this needs to be considered on a case by case basis. There may be some contracts where a large contract allows for economies of scale that ensure the best value for money (and, of course, there will always be contracts which by their very subject matter have to be large). However, a smaller contract, or a range of smaller contracts, can offer the best value for money in other circumstances, especially where specialist skills or knowledge are needed. The OGC publication, *Aggregation – Is Bigger Always Better?* offers some useful guidance on this subject. The guidance is “*designed to inform decision making during the development of organisational procurement strategies and during the strategic planning stage prior to a programme or project. It aims to clarify what is meant by the term ‘aggregation’; identifies the possible advantages and disadvantages associated with it; and discusses the key issues that will inform the decision-making process.*”⁹⁶

The Glover Report

- 6.32 In the 2008 budget, Anne Glover was asked to lead a committee to examine what the Government could be doing to make it easier for SMEs to contract with the public sector. This resulted in “*Accelerating the SME economic engine: through transparent, simple and strategic procurement*” (the “Glover Report”).⁹⁷ The Glover Report highlighted:

*“Public procurement, estimated at over £175 billion per annum, represents approximately 13 per cent of UK Gross Domestic Product and is a substantial proportion of the economy. Although there is much good practice in both local and central government, with some real progress being made since the 2003 [Better Regulation Task Force and Small Business Council report, “Government: Supporter and Customer?”], it quickly became clear from the evidence gathered that small firms still face substantial hurdles to compete on an equal footing with larger enterprises in the public sector procurement market place. This means that they lose out and that Government also misses the opportunities for innovation and better value for money small firms can provide.”*⁹⁸

- 6.33 The Glover Report established a set of 12 recommendations for how to improve SME participation in public procurement, based on the principles of transparency, simplicity, strategic procurement and measurement:
- (1) contract opportunities above £20,000 to be advertised electronically by 2010, accessible through a single, free, easy to use online portal;
 - (2) all tender documentation to be kept as brief as possible and issued electronically by 2010, and for there to be no “paper-only” tenders;
 - (3) details of contract awards should be published online and accessible on the proposed single portal by 2010;
 - (4) where tendering opportunities are thought to be especially suitable for SMEs (or SME consortia), this should be flagged during the advertising process;
 - (5) any qualification criteria that are not sector-specific should be standardised and incorporated into all PQQs;
 - (6) businesses should be given the opportunity to provide details of all previous experience, not just public-sector experience;

⁹⁶The full OGC guidance note, *Aggregation – Is Bigger Always Better?*, can be found online via the following link: [Aggregation – Is Bigger Always Better?](#)

- (7) procurers should take a flexible, risk-based approach to the use of accreditation and standards as a way of pre-qualifying bidders or awarding contracts;
- (8) Innovation Procurement Plans should be used to set out how procurement aligns with Government Departments' overall commercial strategies, encourages innovation and to give advance notice of procurement plans;
- (9) wider use of outcome-based specifications should be encouraged as a means of driving innovation;
- (10) prime contractors should be expected (and enabled) to make subcontracting opportunities accessible through the proposed online portal;
- (11) contract management should be used to ensure that subcontractors' contract terms are no worse than those given to their prime contractors; and
- (12) central Government Departments should report annually on the value of their contract spend with SMEs.

6.34 These recommendations show a clear focus on levelling the playing field for bidders so that SMEs are no longer placed at a disadvantage when bidding for public contracts. While these recommendations are focussed on central Government to a certain extent, many of them can be seen as good procurement practice for all public bodies.

Annex 1

The Eight Principles of the Third Sector Compact

- 1 **Understand the needs of users** and other communities by ensuring that, alongside other consultees, public sector bodies engage with the third sector organisations, as advocates, to access their specialist knowledge;
- 2 **Consult potential provider** organisations, including those from the third sector and local experts, well in advance of commissioning new services, in order to set priority outcomes.
- 3 Put **outcomes for users at the heart** of the strategic planning process.
- 4 **Map the fullest practical range of providers** with a view to understanding the contribution they could make to delivering those outcomes.
- 5 Consider **investing in the capacity of the provider base**, particularly those working with hard-to-reach groups.
- 6 Ensure **contracting processes are transparent and fair**, facilitating the involvement of the broadest range of suppliers, including considering sub-contracting and consortia building, where appropriate;
- 7 Ensure **long-term contracts and risk sharing**, wherever appropriate, as ways of achieving efficiency and effectiveness; and
- 8 Seek **feedback from service users**, communities and providers in order to review the effectiveness of the commissioning process in meeting local needs.

⁹⁷HM Treasury, November 2008, available from: http://www.hm-treasury.gov.uk/d/pbr08_economicengine_2390.pdf

⁹⁸Page 3, Foreword to the Glover Report

Chapter 7 Reducing Costs and Complexity - the public sector jobs and skills 'offer'

Introduction

- 7.1 The ability of the local supply chain to deliver cost effective responses to the recruitment and skills needs of prospective contractors will be crucial to the successful adoption of the Procurement Framework for Jobs and Skills. In the West Midlands public sector bodies have come together to produce the '**Employer Offer**', which describes to businesses the straightforward ways in which their recruitment and training needs can be met.
- 7.2 It is clearly not feasible within this document to provide full details of all the public and third sector bodies that provide employment and training support services at the national, regional, area and local level and therefore constitute the potential 'local supply chain' that can be accessed by prospective contractors, and all businesses for that matter. Section 8 of the Toolkit for Stakeholders provides more detailed information on the West Midlands 'Employer Offer' as well as individual summaries of the type and range of employment and training support available to businesses from five key public sector bodies: Graduate Advantage, Jobcentre Plus, the Learning and Skills Council, Business Link and the National Apprenticeship Service.
- 7.3 This Chapter considers the extent to which TR&T can reduce or eradicate the associated costs and complexities of delivering against jobs and skills requirements; explores what businesses look for when attempting to find out about and access these services; considers how the main TR&T support services available to purchasing organisations and contractors alike stack up against business requirements; and sets out the core components of the business case for accessing local supply chain services.
- 7.4 One of the key barriers for procurers and prospective contractors alike is the commonly held assumption that jobs and skills requirements (TR&T) linked to contracts will result in a level of additional cost that will:
- undermine the ability of procurement teams to achieve value for money;
 - create insurmountable barriers for prospective bidders, thus leading to potential 'market failure'.
- 7.5 The availability of local supply chains for jobs and skills will also be important in enabling a level playing field to be maintained between local and non-local bidders in the contract award process. For example, a requirement to provide opportunities for communities in and around the area of delivery of the contract could disadvantage non-local bidders, but a requirement to recruit trainees from a named local source could be met equally by local and non-local bidders. For example, Jobcentre Plus can ensure that job vacancies are advertised nationally through its network of over 800 Jobcentres and its On-line services, including its links through the European Employment Service (EURES) Network which can display vacancies throughout the European Economic Area. Prospective bidders can also access *Apprenticeship Vacancies Online* at www.apprenticeships.org.uk, which shows the availability of apprenticeships nationally.
- 7.6 A key issue in the selection of the jobs and skills requirements is what relevant supply side services are available locally. A key issue in making jobs and skills requirements affordable is the terms on which these local services are provided.
- 7.7 As with other elements of what a public body purchases, the cost and deliverability of jobs and skills requirements will be influenced by the supply chain. However, in relation to this aspect of procurement the supply chain is most likely to be provided by other public sector and not-for-profit organisations which operate within the area of delivery of the contract. Requiring a prospective contractor to provide training and employment opportunities for which there is not a local supply chain is likely to be ineffective, because the requirement will be too difficult to deliver or will be simply unaffordable, if the full cost has to be borne by the contract.

Costs and Complexity

- 7.4 One of the key barriers for procurers and prospective contractors alike is the commonly held assumption that jobs and skills requirements (TR&T) linked to contracts will result in a level of additional cost that will:
- undermine the ability of procurement teams to achieve value for money;
 - create insurmountable barriers for prospective bidders, thus leading to potential 'market failure'.

- 7.8 It is, therefore, important that the ‘local supply chain’, that will be available to the prospective contractor, is taken into account in setting jobs and skills requirements, so that these requirements can be delivered in an affordable way. It is equally important that the purchaser can provide prospective contractors, at the earliest possible stage, with clear information on the range of services available and precisely how these can be accessed. And it is absolutely crucial that the purchaser understands, and can strongly promote, the ‘economic’ value to the contractor of engaging with the public and third sector support services that are available.

But What Information do Businesses Want, and in What Form?

- 7.9 Clarity on the range of support services that exist and the access routes available to businesses seeking to offer TR&T opportunities will be critical to the successful deployment of this Framework.
- 7.10 It will be essential that the procuring organisation offers prospective bidders information not only about the range of support which major delivery agencies such as Jobcentre Plus, the Learning and Skills Council and the National Apprenticeship Service can provide, but equally to supplement this with details of the additional and complementary support services that can be provided from within the locality or area covered by the proposed contract. See the local supply chain example “Think Walsall” in Section 10 of the Toolkit for Stakeholders.
- 7.11 It is not only essential that such services exist, but also that they are brought to the attention of prospective contractors at the *earliest possible pre-contracting stage*; can be easily accessed and are responsive. This Framework will, to a great extent, rely on the goodwill of businesses to engage. The first point of contact is therefore critical. For example, email only contact points can be a disincentive if emails are not quickly responded to and there are no other forms of contact available.

Focus Group Feedback - Getting the Basics Right

- 7.12 In the course of developing this Framework the Panel’s Project Team has worked in partnership with the Birmingham Chamber of Commerce and Industry to bring together a focus group of local contractors to discuss the range of employment and training support available to businesses and to develop the ‘Self Assessment Tool for Businesses’ that can be found at Section 9 of the Toolkit for Stakeholders. These discussions have led to some initial conclusions about the information businesses need and the ways in which they wish to access it.
- 7.13 In general, focus group members were very positive about the proposed content of the Toolkit guide to local supply chain services, and offered valuable input on the way in which this paper-based product might be usefully developed into a web-based tool.
- 7.14 Their input was equally valuable in terms of focusing attention on the information businesses want to see ‘right up front’ - to use the old adage, ‘time is money’. And what businesses want is speedy and accurate responses to some very simple, but absolutely crucial questions: ‘What’s on offer?’, ‘Is it available to my type of business?’, ‘Do I qualify?’, ‘How much will it cost?’, ‘How much can I get?’, ‘How can I access it?’, and ‘Who do I go to?’
- 7.15 In addition, businesses are keen to see case study evidence of how these services have benefited companies of a similar size operating in the same or similar markets. They want information in manageable bite-sized chunks, which is up-to-date, accurate and refreshed each time a new employment and training initiative is announced.

The Scale of the Response

7.16 If this is what business needs, how does the local supply chain offer stack up? The scale of response to the challenge of worklessness in the West Midlands – specifically, the level of investment made in up skilling the workforce and preparing local unemployed people to prove themselves suitable candidates for jobs - remains very significant. A recent employment and training programme *mapping exercise*, undertaken on behalf of the Panel, estimated the level of investment - from national, regional and local funding sources - to have been in the region of £1.3 billion in 2007-08 alone.

The West Midlands ‘Employer Offer’

7.17 The West Midlands is, therefore, well positioned to meet prospective contractors’ recruitment and training requirements, not least given the successful introduction in 2008-09 of the Region’s **Integrated Employment and Skills (IES) Programme**, led jointly by Jobcentre Plus and the Learning and Skills Council.

7.18 At the core of the IES sits the West Midlands ‘**Employer Offer**’. This describes to businesses the straightforward ways in which their recruitment and training needs can be addressed. Any business looking to develop or expand its workforce, regardless of its size or the sector in which it operates, can take up the ‘Employer Offer’. In return, the business will be asked to commit to opening up its job opportunities to a wider pool of applicants and to offer further training to its existing workforce. There is a wide range of pre-employment support structures available that will support potential contractors in developing recruitment and skills solutions. The ‘**Employer Offer**’ must therefore be central to the additional advice and guidance which public sector purchasers provide to prospective contractors. Full details of the ‘Employer Offer’ can be found in Section 8 of the Toolkit for Stakeholders.

Local Supply Chains Supporting Deployment of the Framework

7.19 While the overarching aim of the Framework is to secure public sector-wide endorsement of the strategic approach to the procurement of jobs and skills requirements, as set out in Framework Approach 4 (see Chapter 2 of this Guide), it will suffice here to simply illustrate the key components of the support services available to any business that agrees to sign up to Approach 1: A Jobs and Skills Charter.

7.20 The reason for focusing on the range of recruitment and training services that can be freely accessed by businesses that make a commitment to a Jobs and Skills Charter, is that Approach 1 is the least ‘legally binding’ commitment to the Framework. Business might, therefore, reasonably assume that the level of training and recruitment support available to them (as a consequence of making this commitment) would be comparatively limited. In fact, a contractor committing to a Jobs and Skills Charter will be able to access a wide range of support to provide the recruitment and skills solutions they need, including

- customised support from Jobcentre Plus for recruitment programmes through Local Employment Partnerships (LEP) - a flexible recruitment package tailored to individual needs⁹⁹;
- through LEPs, access to ‘bespoke’ pre-recruitment training programmes designed to equip prospective recruits with essential skills required by the employer;
- job scoping and individual skills assessments, to ensure a match between prospective recruits and the skills requirements of the job;
- Work Trials, which offer employers and prospective employees a ‘risk free’ opportunity to assess their suitability for a particular role;
- access to a recruitment subsidy of £1,000 for eligible jobseekers, with a further offer of possible Train to Gain support for on-going skills development following recruitment;
- access to the wider Train to Gain service, which can address the full spectrum of the business’s organisational development and training needs, with a possible choice of preferred training providers.

7.21 The local supply chain offer can be seen to address many of the key questions that businesses are seeking answers to. The good news for business is that, in commercial terms, these support services are predominantly¹⁰⁰ free at the 'point of sale' or, as the public sector would prefer to put it, 'publicly funded'.

The Business Case for Accessing the Local Supply Chain

7.22 The local supply chain offer is not only predominantly free to the purchaser and the prospective contractor, but can have a significant and positive impact on the 'bottom line'.

7.23 By reviewing, streamlining and diversity-proofing HR, advertising, selection, recruitment and training procedures, and by reducing staff turnover, the local supply chain can significantly reduce business overheads and help secure a workforce that has a direct and positive impact on profitability.

7.24 Recent research undertaken on behalf of the Department for Work and Pensions identified the benefits of early employer engagement in the design and delivery of bespoke pre-employment training programmes to be as follows:

- building effective working relationships with employers from the start of what is a continuous process;
- working within the interest and capacity of employers in providing an array of opportunities to be involved, at different levels of intensity, in the design, set-up and implementation of the programme;
- incorporating employer requirements in all stages of the programme, from selection of participants to training content;
- utilising existing relationships with the targeted sector, either through the chosen intermediary or through existing employer networks;
- focusing on selected occupations and areas with skills shortages, as directly experienced by local employers;

- creating employer confidence and trust in the processes and outcomes;
- the adaptability and flexibility by delivery organisations, including intermediaries and Jobcentre Plus, to changing requirements from employers over time.

7.25 It is therefore essential that the issues of affordability, value for money and the positive impact that public sector TR&T models can have on the 'bottom line' are communicated crisply and forcefully to prospective contactors at the earliest possible stage in the procurement life cycle. It is equally essential that the purchasing organisation has a sound understanding of the local supply chain and the benefits it can offer to contractors to reduce cost and complexity in delivering jobs and skills requirements.

7.26 It is unlikely that procurement teams who are instructed to deploy the Framework will want to access the local supply chain information directly. It is more likely that they will rely on colleagues from within their own organisations, who are expert in employment and training supply side issues, or from within the main delivery agencies highlighted in the Toolkit for Stakeholders.

7.27 There is perhaps, therefore, an immediate training need around procurement teams' awareness of the business case and economic value of TR&T models and how contractors can access these, as well as a medium term training need to embed the skills required to deploy the Framework and the business case for accessing local supply chains within Continuing Professional Development for procurement professionals.

⁹⁹LEPs have already helped over 260,000 people find work, thus exceeding the Government's original job placement target of 250,000. In September 2010 the Department for Work and Pensions announced a new target of a total of 500,000 people to be helped by LEP, by the end of 2010.

¹⁰⁰There may be some costs associated with accessing the West Midlands Graduate Advantage Programme.

¹⁰¹The National Skills Strategy: Skills for Growth White paper, published on 11 November 2009.

Securing More Apprenticeship Places via Procurement

- 7.28 The Panel wishes to champion the creation of further apprenticeship places across the West Midlands through widespread adoption of the Framework. This is wholly consistent with the aims of the National Skills Strategy: Skills for Growth¹⁰¹, which contains a specific commitment to *'promote skills and apprenticeship opportunities through the procurement contracts.... let across government'* and a target of supporting an additional 20,000 apprenticeship places via the procurement route over the next three years. The Panel sees the Framework as a key enabler of this goal.
- 7.29 Alongside the West Midlands 'Employer Offer' businesses willing to provide apprenticeship places can access the wide range of support and advice available from the National Apprenticeship Service (NAS). Comprehensive information on the services available from NAS can be found at Section 8 of the Toolkit for Stakeholders.
- 7.30 The NAS is making it easier for businesses to benefit from Apprenticeship programmes in the workplace and has developed a free web-based recruitment service - Apprenticeship vacancies which can be accessed at www.apprenticeships.org.uk. This offers:
- a free professional and efficient recruitment service which can save upwards of £2,000 on recruitment costs;
 - the opportunity for businesses to advertise Apprenticeship vacancies online and find candidates who match their criteria;
 - access a pool of individuals actively seeking Apprenticeships.
 - potential for a first sift to be completed by the businesses agreed training provider;
 - ongoing support throughout process;
 - no recruitment agency fees when employee in place.
- 7.31 Over 130,000 organisations already offer Apprenticeships because they understand the benefits apprentices bring to their business. For example:
- 81% of businesses say that employing apprentices generates higher overall productivity;
 - 82% of employers rely on their Apprenticeship programme to give them the skilled workers they need for the future;
 - 92% of employers thought that Apprenticeships resulted in greater employee motivation and job satisfaction;
 - 66% of businesses report that their Apprenticeship programme makes them more competitive in their industry; and
 - 67% of employers believe that Apprenticeships reduce recruitment costs.¹⁰²
- 7.32 For these reasons Apprenticeships are rapidly becoming a preferred way for businesses to train and develop skilled staff, both existing employees and new recruits. As most Apprenticeships attract support through public funding, many employers realise the opportunity to maximise training budgets through joint investment.

A Common Goal

- 7.33 The Panel wishes to champion a sea-change in public sector procurement, which will see all key players - public sector leaders, commissioners, procurement teams and contractors - understanding and buying into the business case and the benefits of using local supply chain services, which:
- Improve the business 'bottom line';
 - Offer cost-effective recruitment;
 - Reduce HR Costs;
 - Reduce Turnover;
 - Deliver Pre-Employment Training Programmes designed to business requirements;
 - Offer free proofing of the business's end-to-end recruitment process against current legislative requirements;

¹⁰² Populus Research conducted on behalf of the Learning and Skills Council, January 2009.

- Provides personal and professional development opportunities for staff engaged in the process;
- Improves staff loyalty;
- Increases staff diversity; and
- Enhances business reputation.¹⁰³

7.34 Securing a public sector-wide commitment to deploy and champion the Procurement Framework for Jobs and Skills constitutes a critical step forward in tackling the unacceptable level of worklessness and the skills and output gap faced by the West Midlands and a clear signal that public sector leaders are fully committed to ensuring a far greater number of local citizens will benefit directly from the inevitable economic upturn.

¹⁰³These are the core components of an ideal 'demand-led' TR&T model, based on employer feedback, and set out in the West Midlands Regional Observatory Report: 'Employers' experiences of employing those who have been workless: Literature Review. June 2009. See www.wmro.org

Glossary

BIS	Department for Business, Innovation & Skills	LSC	Learning & Skills Council
BME	Black & Minority Ethnic	LSP	Local Strategic Partnership
CAA	Comprehensive Area Assessment	MEAT	Most Economically Advantageous Tender
CPA	Comprehensive Performance Assessment	NAS	National Apprenticeship Service
CPD	Continuous Professional Development	NEC	New Engineering Contract
DCLG	Department for Communities & Local Government	NEF	New Economics Foundation
DH	Department of Health	NHF	National Housing Federation
DSO	Departmental Strategic Objective	NI	National Indicator
DWP	Department for Work & Pensions	NOMS	National Offender Management Service
EC	European Community	OGC	Office of Government Commerce
EHRC	Equality & Human Rights Commission	OJEU	Official Journal of the Economic Union
EU	European Union	PCT	Primary Care Trust
FRS	Fire & Rescue Service	PQQ	Pre-qualification Questionnaire
GVA	Gross Value Added	PSA	Public Service Agreement
HCA	Homes & Communities Agency	RDA	Regional Development Agency
HRA	Housing Revenue Account	SHA	Strategic Health Authority
IDEA	Improvement & Development Agency	SMEs	Small & Medium Sized Enterprises
IEMA	Institute of Environmental Management & Assessment	SOCA	Serious Organised Crime Agency
IIL	Impact Investment Location	SSC	Sector Skills Council
ILO	International Labour Organisation	TR&T	Targeted Recruitment & Training
JCP	Jobcentre Plus	UKBA	United Kingdom Border Agency
JCT	Joint Contracts Tribunal	VCS	Voluntary & Community Sector
LAA	Local Area Agreement	WMES	West Midlands Economic Strategy
LDA	London Development Agency	WMIEP	West Midlands Improvement & Efficiency Partnership
		WMRO	West Midlands Regional Observatory



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**For further copies of this document,
please contact:**

Advantage West Midlands
3 Priestley Wharf
Holt Street
Birmingham Science Park Aston
Birmingham B7 4BN

Tel: +44(0)121 380 3500

Fax: +44(0)121 380 3501

This Main Guide to the Procurement Framework for Jobs and Skills, along with the Summary Guide and Toolkit for Stakeholders, can be found on the Advantage West Midlands website at www.advantagewm.co.uk

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