

NWIEP PROCUREMENT PROGRAMME

Briefing Note: Use of Economic, Environmental and Social Clauses within Procurement

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Background

Economic, environmental and social (or sustainability) clauses are requirements within contracts, or the procurement process, which allow the contract to provide added sustainability, social value or community benefits. These clauses are now recognised as being a key route by which to deliver sustainable procurement.

Commissioners and procurers can find it difficult to understand the role that economic, environmental and social clauses can play, where the clauses should be used in the procurement cycle and how they are affected by EU rules.

Directive 2004/18/EC concerns the procedures for public procurement in the European Union. From its very outset, in Recital 2, it makes it clear that it '*clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and / or social area*'. In Recital 5, it states that; '*this Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development*'.

The fundamental objectives of the European Union in the EC Treaty are non discrimination on the grounds of nationality and the freedom of movement of workers, services and goods. Therefore conditions, criteria or other contractual requirements which create preference based on geographical locality are contrary to EU law.

Directive 2004/18/EC was brought into UK law through the Public Contracts Regulations 2006. This provides that local authorities may stipulate social (including employment) and environmental conditions in contracts provided they are compatible with EU law and that they are specified in the OJEU / contract notice and other tender documents. In addition the conditions must be related to the subject matter of the contract (Regulation 30 Public Contracts Regulations 2006) and must be capable of being objectively verified and monitored.

Local Authority Position

Within each authority, it is important that appropriate powers exist to introduce economic, environmental and social sustainability clauses into procurements. Generally local authorities' well-being powers, as conferred by the Local Government Act 2000, support the promotion or improvement of the economic / environmental / social well-being of their area. Additionally however, procurers need to identify how sustainability measures they plan to take are supported by policy and enabled by internal governance rules. Measures which are not supported by appropriate economic, environmental, social (or sustainability) policy may be open to challenge.

Sustainable procurement approaches can be a powerful way through which sustainability policy and community benefit can be delivered.

The first stage when economic, environmental and social conditions can be considered is when commissioning takes place. Prior to advertisement of the opportunity there is greater freedom to consider sustainability strategies. These may include strategies to encourage the engagement of more diverse suppliers, including small and medium size enterprises, black, Asian and minority owned businesses and the third sector.

If targeted recruitment and training initiatives are envisaged (for example), then there is an opportunity to identify and align supportive public sector organisations, so that bidders can be guided to appropriate sources of advice and assistance.

Once advertisement takes place, the inclusion of economic, environmental or social (or sustainability) clauses needs to be identified. There is a good case for including the sustainability concept in the wording of the Contract Notice – so for example you may seek ‘sustainable construction services for the provision of a new building’. This opens the door to considering sustainability issues in the procurement, as it is essential that such criteria are linked to the subject matter of the contract. The body of the notice should also identify the sustainability issues which will form part of the evaluation and selection criteria.

In selecting sustainability criteria it is important to maintain a structure that is easily marked and recognises the possibility that responses might vary considerably. The greater the clarity of the sustainability themes identified, then the easier the evaluation of responses can become. Clear sustainability theming can also be a useful way through which responses can be shaped – as it should be recognised that many bidders might have only emerging awareness of the full spectrum of sustainability issues.

The pre-qualification stage is one which is governed by clear constraints on the type of questions which can be asked. From a practical point of view, given the likelihood of a large number of responses to evaluate and time and cost issues, it is also sensible to ask limited and closed questions which relate to economic, environmental and social issues. This stage is the more appropriate one at which to obtain Policy statements and clear factual evidence, relating to your sustainability themes. Pre-qualification selection criteria must relate to the ability and suitability of a tenderer to perform a contract.

Later procurement stages allow for a deeper interrogation of a company’s planned methodologies for responding to economic, environmental and social clauses. The award criteria should test which of the tenders is most economically advantageous.

In general, with all economic, environmental and social clauses consideration should be given as to how the ultimate outputs can be monitored and measured – either through key deliverables or key performance indicators. If a desired outcome is not measurable it is less likely to be successfully delivered.

Whole Life Value

There should be proper consideration of the whole life value (or cost) of goods and services. These facets should be reviewed with your Finance Department but whole life value can broadly be considered as comprising:

Procurement Costs - if undertaking a new tender there will be associated costs, particularly when compared with calling off from an existing framework contract.

Acquisition Costs - this is the initial cost and will include the capital cost, delivery and configuration costs, any initial implementation, training and staff costs.

Operating and Finance Costs - this is the cost incurred during the expected life of the goods (or contract length for the service), including; any leasing, financing or hire costs, maintenance or support costs, running costs, upgrade costs and insurance. Variability in life expectancy should be considered (if this is likely).

Disposal costs – any final disposal fees, costs of decommission, less any resale value.

Sustainability and wider community benefits - what the contract will provide in respect of wider economic, environmental and social benefits.

Supply Chain Issues

Many procurers are investigating the nature of bidders supply chains and how these are to be selected. This can create greater visibility of the supply chain and its selection criteria, without compromising value for money issues.

The supply chain is one area where intelligent bidders recognise the value of integrating local and diverse suppliers on larger opportunities. Understanding and measuring supplier diversity is a worthwhile exercise. It helps to encourage greater engagement of enterprises which may have a beneficial impact on the local economy. Transport for London, the Greater London Authority group and the Olympic Delivery Authority are all potential sources of more information about diverse supplier definitions and strategies.

Consideration can also be given to ethical standards, minimum labour standards, fair trade conditions and prompt payment requirements – helping to ensure that there is no exploitation of supply chain members.

Environmental Clauses

Low Carbon Supply Chains

Where the authority has initiatives to reduce its carbon and other greenhouse gas emissions, in support of EU, UK and local policies, it is reasonable to seek suppliers whose environmental credentials and approach show that they can support its carbon reduction strategies.

This can be done through requiring copies of a company's Sustainability (or Climate Change) Policy at pre-qualification stage and by asking questions relating to their carbon reduction strategies at bid stage.

Environmental Specifications

A complementary method of delivering environmental outcomes is through specification considerations. In this regard eco-labels can provide useful guidance on specifications but cannot themselves be used as a requirement, as there are many different and comparable eco-labelling systems across Europe.

Environmental Clauses

Environmental themes are generally considered to include:

- *Climate change issues, including the reduction of carbon and other greenhouse gas emissions*
- *Climate change adaptation issues; recognising the changing world we live in, changing climate and the increasing likelihood of extreme weather events*
- *Sustainable consumption and production issues*
- *Use of natural resources, including water*
- *Waste reduction strategies*
- *Bio-diversity issues and support for species and their habitats*
- *Transport and logistics issues*
- *Compliance with environmental legislation*

Some example clauses for pre-qualification are listed below. These could be used where they support the evaluation of the suitability of a tenderer to perform a contract:

- *Please provide details of your Environmental / Environmental Sustainability Policy*
- *Please identify your approach to reducing your carbon and other greenhouse gas emissions*
- *Please advise of the steps you take to comply with environmental legislation*

- *Please advise of any environmental management accreditations you hold e.g. ISO 14001, EMAS or (for businesses and public bodies) or PQASSO (for voluntary organisations)*
- *Please advise how you support the reduction of waste and promote the reuse and recycling of materials*
- *Please advise how you ensure compliance with the Waste Electrical and Electronic Equipment (WEEE) Directive (2002/96/EC)*

Tender Clauses

The clauses included within the tender itself should flow naturally from:

- *Local authority policy on the environment and sustainability*
- *The nature of the contract notice and its identified environmental themes*
- *The environmental competencies tested in the pre-qualification stage*
- *The environmental themes identified*

The questions should be structured, with clear theming to support easy evaluation but open ended enough to give bidders room to explain approaches which are likely to be innovative.

As an example:

Carbon Reduction

- *Please advise how you will ensure that the service you deliver is provided with a low carbon ethos – reducing carbon and other greenhouse emissions, in support of our local 'Climate Change Policy'.*
- *Please advise how you will ensure that your supply chain supports your approach.*
- *Please advise how you will measure, report upon and reduce your (and your supply chain's) carbon and other greenhouse gas emissions associated with this project.*

Social Clauses

Recital 33 of the EU Directive states that contract performance conditions may ‘*be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against un-employment ... 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 ...*’

Clearly this clause gives potent support for social clauses to be integrated into the performance of the contract. On larger procurements, many authorities align supportive public sector bodies specifically to help the private sector deliver upon the social opportunities that are possible through this clause. Generally the responses are called ‘targeted recruitment and training’ and are usually underpinned by a strong awareness of equality, diversity and inclusion issues.

Currently responses to ‘targeted recruitment and training’ include a broad spectrum from non-prescriptive, allowing the bidder to propose an approach, to rigorous – demanding a specific number of ‘new-entrants’ within the delivery team or specific numbers of training days to be generated.

Corporate Social Responsibility

In support of social sustainability agendas, many procurers are becoming more enquiring about a company’s approach to corporate social responsibility. In more significant procurements, consideration should be given to requesting a copy of a company’s corporate social responsibility policy (or report) and / or policy on business ethics.

In the tender stage it would be feasible to investigate how a bidder would support the local community and help support your response to local social issues.

Sustainable Communities Plan

In larger procurements it can be worthwhile exploring how a bidder can support the delivery of key objectives in the authority’s Sustainable Communities Strategy or Local Area Agreement. Consideration can be given to this in the commissioning phase and strategies developed to ensure appropriate social sustainability themes are integrated into the procurement.

One particular measure that can be explored is the diversity of the workforce. Establishing awareness of diversity issues and how they impact upon the workforce and supply chains is likely to improve inclusion, especially where appropriate systems are set up to measure and report upon the makeup of the workforce.

Fair and open employment practices are essential to promote; equal life chances, open and fair recruitment, to counter harassment, to allow for reasonable adjustments, to achieve flexible working for parents and carers and proper work-life balance for all.

Further Reading

Social Clauses Project: A Cabinet Office - Office of the Third Sector research project.
http://www.cabinetoffice.gov.uk/third_sector/public_services/social_clauses.aspx

Social Issues in Purchasing: A detailed OGC publication containing valuable guidance.
http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf

Community Benefits in Procurement: A Report published by the Scottish Government with a focus on targeted recruitment and training:
<http://www.scotland.gov.uk/Resource/Doc/212427/0056513.pdf>

Transport for London, Supplier Diversity Implementation Strategy:
<http://www.tfl.gov.uk/assets/downloads/businessandpartners/supplier-diversity-implementation-strategy-jan2008.pdf>

DEFRA's Catering Services and Food Procurement (CSFP) Toolkit: This toolkit contains a number of templates for procurements.
<http://www.defra.gov.uk/farm/policy/sustain/procurement/toolkit/documents/index.htm>

Guidance on the inclusion of community benefit considerations in procurement and example clauses. Produced by the former North East Centre of Excellence.
http://www.nwiep.org.uk/files/NECE_guidance_inclusion_community_benefit_considerations.DOC

Good Practice Guidance on Procurement of Services from the Voluntary and Community Sector: A joint report by The Home Office and OGC.
<http://commercial.homeoffice.gov.uk/documents/thinksmart.pdf?view=Binary>

Social Clauses examples: From Cumbria Council
http://www.cumbria.gov.uk/communityinformation/communities/thirdsector/social_clauses_examples.asp

Whole Life Costing and Cost Management: A construction focused advice note from the OGC.
<http://www.ogc.gov.uk/documents/CP0067AEGuide7.pdf>

Buy Green and Make a Difference: How to address environmental issues in public procurement – An OGC guide.
http://www.ogc.gov.uk/documents/Environmental_Issues.pdf