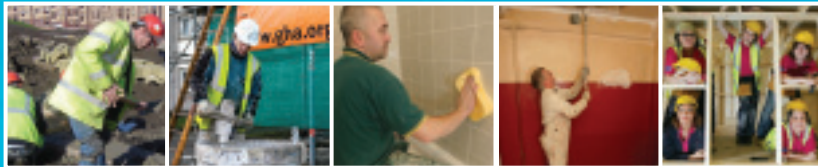


THE SCOTTISH GOVERNMENT

COMMUNITY BENEFITS IN PUBLIC PROCUREMENT GUIDANCE NOTE



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COMMUNITY BENEFITS IN PUBLIC PROCUREMENT

PURPOSE

1. The purpose of this note is to provide guidance on the use of ‘community benefits’ in public sector procurement. The note draws on the findings of the Scottish Government’s pilot Community Benefits in Procurement (CBIP) Programme.
2. ‘Community Benefits’ in this context are contractual requirements which deliver a wider social benefit in addition to the core purpose of the contract. In particular, requirements in relation to targeted training and employment outcomes.

BACKGROUND

3. It has become clear over recent years that there is scope within the EU legal framework which applies to public contracts, to use contracts to deliver wider social benefits. However, notwithstanding the legal possibilities, there are significant practical and vfm issues around adopting this approach. The background for these type of programmes can be found in the following report; *Achieving Community Benefits through Contracts – Richard Macfarlane and Anthony Collins Solicitors LLP*.
4. The Government established a pilot programme to examine these issues in a practical context (the ‘CBIP Programme’). The pilot programme commenced in 2003 and included participation in pilot contracts by five authorities: Glasgow Housing Association, Raploch Urban Regeneration Company, Inverclyde Council, Dundee City Council and Falkirk Council.
5. In addition to the targeted training and recruitment requirements, the pilot projects involved the procurement of a wide range of works and services on varying scales. The Community Benefits in Procurement Report summarises the pilot projects and analyses the use of community benefit clauses and the effectiveness of the procurement process in obtaining a contractor that is committed to delivering the required community benefits. The report also describes the supply-side initiatives (e.g. training and recruitment services) that were needed to help contractors deliver their obligations under the various contracts. Also included are recommended model clauses to assist public bodies in recruitment and training matters in their contracting processes. The full Community Benefits in Procurement Report was published on 19th February 2008 and is available on the Scottish Procurement Directorate’s website¹.

1 <http://www.scotland.gov.uk/Topics/Government/Procurement>

6. This note is not a comprehensive guide to the use of community benefit clauses; it is intended to provide an overview of the legal and practical issues. Those considering including community benefit clauses in contracts are advised to take appropriate legal advice.

COMMUNITY BENEFIT CLAUSES

7. There is potential for public procurement projects to impact on training, employment and investment in a local community and its longer-term regeneration. The CBIP Programme focused on one area – targeted recruitment and training – where there is scope for incorporation of community benefit clauses in public sector contracts.

LEGAL POSITION

8. Social and environmental requirements can be included in public contracts if they comply with the requirements of the EU procurement rules and general EU law. The EC Treaty Principles of equal treatment and proportionality have particular relevance to these clauses.

The Public Contracts (Scotland) Regulations 2006, regulation 39 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.”

Contracting authorities must have a legal and policy basis for incorporating community benefit requirements into their procurement processes. The Local Government in Scotland Act 2003 confers “well-being” powers on local authorities facilitating their scope to pursue targeted recruitment and training requirements in a way which meets their sustainable development responsibilities. The scope for other public bodies will depend on their particular frameworks. Procurements must always be carried out on the basis of Best Value or Value for Money.

POLICY RATIONALE

9. The priority for all public procurement is to achieve **Value for Money (VfM)**. Value for money does not, however, mean ‘lowest price’. It is defined in the *Scottish Public Finance Manual*² as “the optimum combination of whole life cost and quality to meet the end user’s requirement”. The CBIP Programme sought to examine the inclusion of community benefits clauses in contracts in a way which also achieved value for money.
10. At a national level, the importance of linking regeneration spend to opportunities for disadvantaged communities is clearly stated in the Scottish Government’s Regeneration Policy Statement.³ At the local level, many Community Planning Partnerships have adopted policies to address social exclusion.
11. The Review of Public Procurement in Scotland⁴ recommended that the Scottish Government should prepare and issue guidance on Corporate Social Responsibility. The Scottish Procurement Directorate has published guidance on *Social Issues in Public Procurement* in line with this requirement.⁵
12. Additional information on incorporating social issues into public procurement is available from the Office of Government Commerce.⁶

SUMMARY OF KEY LESSONS

LEGALITY

13. Community benefit clauses need to be carefully considered to ensure that they meet the requirements of the EU procurement rules and general EU law. In particular, care should be taken to ensure that clauses do not cause either direct or indirect discrimination. Contracting authorities must have a legal and policy basis for incorporating community benefit requirements in their procurement processes.

2 <http://www.scotland.gov.uk/Topics/Government/Finance/spfm/procure>

3 <http://www.scotland.gov.uk/Publications/2006/06/01145818/0>

4 <http://www.scotland.gov.uk/Publications/2006/03/14105448/0>

5 <http://www.scotland.gov.uk/Resource/Doc/116601/0053331.pdf>

6 http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf

CLARITY AND COMMITMENT

14. It is essential that all involved have a full understanding of community benefit clauses. A team or group dedicated to the project is advantageous and, where possible, should involve those with previous experience of targeted recruitment and training clauses. Procurement Officers should undertake an analysis of the labour content of the contract. Professionals from the field of employment and training can also provide invaluable advice on community benefits clauses. This ensures that the clauses are given robust consideration in the tender documents and forces providers to seriously consider how they will implement and report on the requirements. Bids should be compared in a standardised format and community benefit clauses judged solely on objective and measurable outcomes. Once in place, the monitoring of deliverables needs to be robust with clearly defined detail.

LIMITATIONS

15. The following considerations should be borne in mind with relation to use of community benefits clauses in contracts:
 - check legal and subsequently policy justifications;
 - all procurement of goods and services should achieve Value for Money, having due regard to propriety and regularity (the cost of incorporating community benefit clauses will vary with the requirements);
 - contract suitability and capacity need to be addressed on a case-by-case basis;
 - key components which together indicate the appropriate targeted recruitment and training (TR&T) clauses which can be used in a particular case must be linked. Such components include employment planning, industry capacity, funding, as well as possible routeways for employment support and training providers to facilitate achievement of targeted recruitment and training (TR&T) clauses;
 - responsibility for the whole process, including implementation and monitoring, needs to be clearly set in advance;
 - community benefit clauses must be mentioned in any OJEU notice by a contracting authority and throughout the procurement process;
 - community benefit clauses need to have a direct link to the core purpose of the contract, in order that they can be included in the technical assessment of potential contractors and in award of the contract;

- to avoid any form of discrimination, including indirect discrimination, the wording of community benefit clauses needs to emphasise ‘social inclusion characteristics’ and cannot be aimed specifically at employing people from a certain locality, of a certain age or sex, etc. Targeted training is permissible;
- indirect discrimination, to the disadvantage of non-local contractors, must be avoided;
- monitoring of contract deliverables and outcomes to ensure compliance.

WHEN USE OF COMMUNITY BENEFIT CLAUSES CAN BE APPROPRIATE

16. Market factors contributing to compliance with targeted recruitment and training (TR&T) clauses, such as beneficiaries, training, funding and the supply of trainees and recruits all need to be aligned. In addition:

- the mere act of considering the possibility of inclusion of a Community Benefit clause can encourage authorities to rethink strategies and encourage a more innovative approach to implementing these strategies across the organisation;
- successful community benefit programmes can lead to the permanent employment of formerly non-working people leading to a positive cycle of experiences for these people;
- community benefit clauses can enhance the regeneration of deprived areas.

ENQUIRIES

17. Any enquiries in relation to this guidance should be addressed to:

scottishprocurementdirectoratescotland.gsi.gov.uk

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