



SOCIAL CLAUSES IN PUBLIC CONTRACTS

On 19th November 2008, the Assembly Committee for Finance and Personnel agreed terms of reference for an inquiry into public procurement practice in Northern Ireland. These included reference to the application of social clauses within public contracts. This paper provides an overview of the use of social clauses to assist the Committee of OFMDFM contribute to the CFP inquiry.

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EXECUTIVE SUMMARY

- A Social Clause is a requirement within a procurement contract or process which stipulates that the contract should provide added social value. For instance, a contract which will lead to new employment could ensure that the long-term unemployed from the local community are employed.
- The Executive has committed to using government procurement to further its social objectives in the PfG.
- As the department with responsibility for monitoring the PfG and for the Strategic Investment Board, OFM DFM is in a position to influence procurement policy.
- As a department with responsibility for a number of cross-cutting social policies, socially aware procurement could be an important tool in delivering on these policies.
- There is a growing body of guidance within Northern Ireland and elsewhere on how to implement social clauses.
- Rather than being an obstacle to the inclusion of social clauses, the EU is showing increasing interest in writing guidance outlining the benefits of socially responsible procurement.
- Although the concept of delivering social policy through the procurement process has seen significant development and offers an innovative policy tool, a number of potential obstacles are identified in this paper.
- It is accepted in government that within the procurement field there is a need for a cultural change – that procurement professionals are not aware that they are able to or are unfamiliar with how to consider the wider social policy aspects in specific procurement exercises.
- With regards how to action the inclusion of social clauses, it is accepted that there are technical difficulties. For instance, when faced with two procurement proposals, each proposing different social benefits, how can they be to be compared and scored.
- OFMDFM has a role in overcoming such barriers.

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INTRODUCTION

1. On 19th November 2008, the Committee for Finance and Personnel (CFP) agreed the following terms of reference for an inquiry into public procurement practice in Northern Ireland:

- examine the experience of SMEs and SEEs in tendering for and delivering public contracts;
- consider the nature, extent and application of social clauses within public contracts;
- identify issues to be addressed and which are within the remit of Department Finance Personnel (DFP);
- assess progress by DFP in achieving associated objectives and targets, including those contained in the Programme for Government and related Public Service Agreements; and
- make recommendations to DFP for improvements to public procurement policies and processes, aimed at increasing access to opportunities for SMEs and SEEs and maximising the economic and social benefits for the local community, whilst taking account of the principles governing public procurement.

2. Given the cross-cutting nature of public procurement, the CFP agreed to seek the views of the other statutory committees in the Assembly on the issues covered in the terms of reference. This paper provides an overview of the use of social clauses, in order to assist the Committee of the First Minister and Deputy First Minister (COFMDFM) contribute to the CFP inquiry. Social clauses have been defined by the Cabinet Office as:

...requirements within contracts or the procurement process which allow the contract to provide added social value through fulfilling a particular social aim. For example, a social clause in a public contract could prioritise the need to train or give jobs to the long-term unemployed in the community as part of the contracting workforce.¹

3. The COFMDFM has a scrutiny role in relation to OFMDFM and the interests of this department in the use of social clauses is clear. As a policy tool, social clauses offer OFMDFM an opportunity to seek progress in relation to issues such as equality, human rights, community relations and social exclusion. In addition, OFMDFM, is in a position to influence the use of social clauses given its direct role in relation to the Strategic Investment Board, the Sustainable Development Strategy for Northern Ireland, and the performance management framework elements of the Programme for Government.

¹ http://www.cabinetoffice.gov.uk/third_sector/public_services/social_clauses.aspx

4. The paper provides a broad overview and the following sections of this paper deal with:
 - *The Programme for Government and Social Procurement*
 - *Social Procurement Policy in Northern Ireland*
 - *The EU and Socially Responsible Public Procurement*
5. The paper concludes by considering developments in relation to social clauses and highlights a number of potential barriers to their use.

THE PROGRAMME FOR GOVERNMENT AND 'SOCIAL PROCURMENT'

6. The Programme for Government which sets out the Executives plans and priorities for 2008-2011, whilst not using the label 'social clauses', does contain commitments which indicate support for their use in appropriate circumstances. For instance, when outlining government's reform programmes, the PFG states that:

*We are committed to taking forward key reform programmes in areas such as health, education, water and planning and will shortly announce our plans for the reform of local government. These will result in significant changes to both the structure and delivery of public services, reducing bureaucracy and enabling us to focus our energy and resources on frontline services. **We will ensure that the reforms and restructuring will be compliant with recognised best practice in social procurement guidelines.** (p18)²*

7. What the Executive means by social procurement is expanded upon in Public Service Agreement 11 (PSA 11) headed "Driving Investment and Sustainable Development". Objective 4 of PSA 11 details the Executive's aim of supporting the public sector by taking account of sustainable development when procuring works, supplies and services and outlines a number of the actions and targets in achieving this (Table 1).

Table 1 PSA 11 Driving Investment and Sustainable Development

PSA 11	<i>DRIVING INVESTMENT AND SUSTAINABLE DEVELOPMENT</i> <i>Driving sustainable long-term investment in our key infrastructure over the period 2007/08 to 2017/18 and promoting sustainable development across the public sector, business and wider society</i>
<i>Objective 4</i>	<i>Support the wider Public Sector in taking account of sustainable development principles when procuring works, supplies and services.</i>
<i>Actions</i>	<i>Integrate sustainable development priorities within the public procurement process where appropriate.</i> <i>Deliver improvements to the public sector infrastructure and social and affordable housing that incorporate sustainable development principles.</i> <i>Increase access to public sector procurement opportunities for SMEs and</i>

² Programme for Government 2008-2011. <http://www.pfgbudgetni.gov.uk/finalpfg.pdf>.

	<p><i>Social Economy Enterprises.</i></p> <p><i>Achieve the Strategic Objectives on Sustainable Consumption and Production as identified within the Sustainable Development Strategy.</i></p>
Targets	<p><i>Ensure that by December 2008 Sustainable Development principles are considered in capital investment decisions on all publicly funded building and infrastructure projects.</i></p> <p><i>Monitor and report on compliance with guidance on integration of equality and sustainable development priorities into procurement processes.</i></p> <p><i>To have appropriate systems in place by 30 September 2008 to allow access by SMEs and SEEs to opportunities for doing business with public sector organisations.</i></p> <p><i>By March 2009 all procurement staff to have received basic training in sustainable procurement.</i></p> <p><i>Through the Sustainable Development Implementation Plan 2008-2011, progress delivery, where appropriate, of the Key Targets associated with strategic Sustainable Consumption and Production objectives.</i></p> <p><i>By December 2008 Centres of Procurement Expertise to produce Action Plans to deliver sustainable development priorities.</i></p> <p><i>Extend the statutory duty to relevant public bodies to contribute to the achievement of sustainable development.</i></p>

8. The outcome of PSA 11 should be that within OFMDFM, and across government, each procurement exercise deliberates on more than just the economic considerations of value for money but also the social and environmental impact. The aim is to make the procurement process a delivery mechanism for a range of government policies. For instance the PfG points out that:

Government procurement can play an active and effective role in the process of tackling patterns of socio-economic disadvantage. (p17)³

9. PSA 11 commits government to integrate sustainable development within the procurement process, as well as the delivery of social and affordable housing and to increase opportunities in procurement for SMEs and SEEs. The targets associated with these aims are to train procurement staff in sustainable procurement, and to embed sustainable development within the procurement process.

³ Programme for Government 2008-2011. <http://www.pfgbudgetni.gov.uk/finalpfg.pdf>.

10. In PSA 21, the emphasis is on ensuring “the most economically advantageous outcomes in Government procurement”, an aim which might be considered by some to be at odds with social procurement. However the social element is still considered, as PSA 21 goes on to say:

*Departments, their Agencies and NDPBs to ensure procurement plays an optimal role in achieving the most economically advantageous and efficient outcomes in procurement (i.e. **taking quality and policy outcomes into account alongside cost.**)⁴*

11. There is also a commitment for departments to produce annual procurement plans that will deliver economically advantageous outcomes but which will also include measures to “assist in the delivery of PfG commitments and the full consideration of social procurement guidelines”.

GUIDANCE ON SOCIAL PROCUREMENT

12. The Central Procurement Directorate (CPD) of DFP has, included the need to consider the social aspect of procurement into its twelve guiding principles for purchasers. The seventh principle states:

Integration: in line with the Executive’s policy on joined-up government, procurement policy should pay due regard to the Executive’s other economic and social policies, rather than cut across them.⁵

13. In the CPD’s Strategic Objectives for 2005-2008, within objective 2 “To provide best value for money from all procurement undertaken by the public sector”, one of the strategic priorities is that all departments will work with CPD to “where possible, integrate, economic, social and environmental objectives in procurement policy and practice”.⁶

14. Therefore the overriding aim of achieving value for money through procurement is no longer defined in the narrow terms of gaining the best goods or services at the lowest price but is seen in the wider context of ensuring that each procurement exercise can be a cost effective way of delivering on government’s wider social agenda.

15. To these ends, the Procurement Board, the CPD and the Equality Commission for Northern Ireland (ECNI) have jointly published guidance aimed at policy makers and procurement professionals on integrating equality and sustainability into the procurement process. The guidance applies to all public sector procurement, including PPPs and PFIs. The stated aim of the guidance is to:

support public authorities as they embed equality of opportunity, including good relations, and sustainable development in their procurement practice.⁷

⁴ Programme for Government 2008-2011. <http://www.pfgbudgetni.gov.uk/finalpfg.pdf>

⁵ <http://www.cpdni.gov.uk/index/guidance-for-purchasers/12-procurement-principles.htm>.

⁶ <http://www.cpdni.gov.uk/6th-annual-report-to-procurement-board-2007-2008.pdf>.

⁷ http://www.cpdni.gov.uk/equality_of_opportunity_and_sustainable_development_full_guidance.pdf.

16. In his forward to the document, the then Minister of Finance and Personnel, stated:

The leverage of public procurement to contribute to delivering greater equality and social inclusion as well as sustainability goals, within the current legislative framework, should not be underestimated. Public procurement currently accounts for approximately £1.9 billion of supplies, services and construction works. Over the course of the next 10 years this will be significantly augmented by the additional investment of the order of £20 billion under the Investment Strategy for Northern Ireland.⁸

17. Guidance and instruction, on how to integrate social policy with procurement policy, is well established at the UK level. The term used by the Cabinet Office is a “Social Clause” and is defined as:

requirements within contracts or the procurement process which allow the contract to provide added social value through fulfilling a particular social aim. For example, a social clause in a public contract could prioritise the need to train or give jobs to the long-term unemployed in the community as part of the contracting workforce.⁹

18. In turn the Office of Government Commerce (OGC) has produced guidance on how to address social issues in public procurement. In the forward to the report the Exchequer Secretary to the Treasury points out that:

The Government has a responsibility to create a fairer society for everyone, support those with a disadvantage and improve people’s well being and we also have a responsibility to use taxpayers’ money wisely. These responsibilities aren’t mutually exclusive and somewhere they can work in tandem is in public procurement.¹⁰

19. The report goes on to explain that:

With an annual expenditure of over £150billion, public procurement has an important part to play in furthering the Government’s agenda for tackling social issues. This short guide, with examples, shows how social issues can be legitimately addressed within the policy and legal framework governing public procurement, information on which is at the end of this guide.

20. The OGC has developed a number of such documents¹¹ outlining how the procurement process should integrate wider government social policies on the environment, equality, sustainability and employment. In addition the OGC has given advice on how the procurement process should be conducted to include

⁸ http://www.cpdni.gov.uk/equality_of_opportunity_and_sustainable_development_full_guidance.pdf.

⁹ http://www.cabinetoffice.gov.uk/third_sector/public_services/social_clauses.aspx.

¹⁰ *Buy and Make a Difference*, Office of Government Commerce, June 2008.
http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf.

¹¹ http://www.ogc.gov.uk/procurement_documents_best_practice_guidance.asp.

the views of relevant departments in prioritising and weighting how wider social issues should be considered.¹²

THE EUROPEAN UNION AND SOCIALLY RESPONSIBLE PUBLIC PROCUREMENT

21. In the Member States of the EU, contracts for supplies, works and services between public authorities and private sector contractors are regulated by a number of directives dating back to the 1970s.¹³
22. It has been argued that these directives may have impacted negatively on the pre-existing use of social clauses, as public procurement '...did not always have the economic focus and the competition and open market access objectives of the EU directives'.¹⁴
23. The EU has, however, recently shown an increasing interest in the linkages between social considerations and public procurement. The European Commission DG Employment, Social Affairs and Equal Opportunities recently commissioned a study on social considerations and public procurement. This study focused on *Socially Responsible Public Procurement (SRPP)* which it defined as:

*procurement operations that take into consideration, inter alia, the promotion of employment opportunities, build-in safeguards with respect to the standards of working conditions, strive to support social inclusion (including persons with disabilities), social economy and SMEs, promote equal opportunities and "accessibility and design for all", take into account Fair and Ethical Trade issues as well as human and labour rights and seek to achieve wider voluntary adherence to CSR while observing the principles of the EU treaty and the EU Procurement Directives.*¹⁵

24. One of four reports¹⁶ produced as part of the study and published in July 2008 cites a number of case studies from Northern Ireland. The report is designed to be used to help the European Commission write a guide which will outline the benefits of socially responsible procurement. The guide will address the issue of making the business case for social clauses, as well as providing definitions, and outlining how to embed social criteria into different stages of the procurement cycle. Whilst the guide will not be legally binding, it will present the European Commission's interpretation of current legal provisions and will apply to all contracts, even those below the EC procurement thresholds.¹⁷

¹²

[http://www.ogc.gov.uk/documents/Value for Money Evaluation in Complex Procurements.pdf](http://www.ogc.gov.uk/documents/Value%20for%20Money%20Evaluation%20in%20Complex%20Procurements.pdf).

¹³ http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm

¹⁴ Social Clauses in EU Public Procurement paper presented by Martin Trybus (University of Birmingham) at International Conference on Corporate Social Responsibility, Business Responsibilities for Human Rights, and International Law Copenhagen University and Copenhagen Business School 6-7 November 2008

¹⁵ Study on the incorporation of Social Considerations in Public Procurement in the EU: Proposed Elements for taking account of the Social Considerations in Public Procurement <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=417> (p. 10)

¹⁶ Available online at <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=417>

¹⁷ http://blog.lga.gov.uk/roller/dominicrowles/entry/4_can_we_afford_socially

CONCLUSION

25. For OFMDFM, social clauses may represent an important policy tool which it can use to deliver against its responsibilities in relation to issues such as equality, human rights, community relations, poverty and social exclusion. Accounting for a large proportion of government expenditure across all departments and government agencies, procurement of external supplies, services and works represents an opportunity to deliver on those cross-cutting policies within the OFMDFM remit.
26. The PfG contains a range of commitments to consider the wider policy context of procurement policy and OFMDFM clearly has an interest in monitoring and reviewing government's progress on these commitments.
27. In addition to the PfG commitments, the Procurement Board, the CPD and the Equality Commission for Northern Ireland (ECNI) have jointly published guidance aimed at policy makers and procurement professionals on integrating equality and sustainability into the procurement process. The guidance applies to all public sector procurement, including PPPs and PFIs.
28. On their own, however, the PfG Commitments and the published guidance may not be sufficient to ensure the most progressive use of social clauses. Two potential barriers to the use of such clauses can be foreseen. Firstly, there is the cultural challenge required from procurement professionals and secondly there is the technical challenge of how to value important potential social impacts that do not have market values.
29. As regards the cultural change, Exchequer Secretary to the Treasury, Angela Eagle MP, launching the pamphlet Buy and Make a Difference to the TUC in June 2008 observed that:

procurement professionals obviously need to be thinking about this wider range of issues and the end aim of all of this is that we create a fairer society with opportunities to get better value for the money that we spend in terms of inclusion, particularly of those with a disadvantage, and also open up fairer and more equal life chances to many people that still don't have access to them...A lot of public procurement professionals simply don't know that they're able to think about some of these issues within the procurement framework, they have bought the myth that somehow it is not legal, and so I hope that this will raise awareness and begin to change the culture... it is clearly quite a culture to crack, but working together we can really begin to make a change.¹⁸

30. NI Guidance should help procurement professionals address these wider issues but OFMDFM clearly has a role in promoting the cultural change.

¹⁸ Social Issues in Public Procurement – Speech by Angela Eagle MP, Secretary to the Exchequer 11 June 2008
http://www.hm-treasury.gov.uk/speech_xst_110608.htm

31. In relation to the technical difficulties presented by a need to measure social outcomes, the UK Government's Social Clauses project report stated that:

One of the barriers to working with social clauses that was identified by the social clauses project survey was the difficulty in measuring outcomes and the costs associated with incorporating social objectives into procurements.

The first phase of the social clauses project identified this as a concern but was unable to take work forward on measurement processes during this stage of the project.

Future work by the Office of the Third Sector will include a project examining the potential use of social return on investment (SROI) and will be used to address the second objective from the social clauses project scope and specification which was to provide more clarity about the advantages and costs of addressing social issues in procurement.¹⁹

32. It can be argued, however, that attempts to develop concepts such as social return on investment or indeed the use of social clauses more widely are misguided and that it may be better not to try to integrate the social and the economic because, given the culture and priorities that currently exist amongst procurement professionals, the social will lose out.
33. It would of course be useful if there was a body of evidence to support or reject such views. There is, however, at present no answer to the question "Are Procurement Linkages Worth it?". In response to that question, Professor Chris McCrudden in his book entitled 'Buying Social Justice'²⁰ notes that there is '*... a dearth of empirical information available on which to judge the effect of these linkages*' and concludes that '*in the context of arriving at policy on procurement linkages, there is a clear need for further empirical research of the phenomenon*'.²¹ Amongst the many questions which Professor McCrudden suggests research might address are:

Does linkage increase the opportunity for, or have the effect of, excluding competitors?

Does linkage make it more difficult for SMEs to tender successfully?

Does linkage increase overall costs?

Does linkage lead to a reduction in transparency of the procurement process?

Does linkage lead to greater bureaucratization of the procurement process?

Does linkage increase the opportunity for corruption?

Does procurement linkage lead to an evasion of democratic and constitutional control?

Are policies on linkage serious or mere window-dressing?

Are the adverse effects of procurement linkages proportionately?²²

¹⁹ Cabinet Office and Office of the Third Sector (2008) Report of the Social Clauses Project <http://www.cabinetoffice.gov.uk/media/107238/social%20clauses%20report%20final.pdf> (p10)

²⁰ McCrudden C (2007) Buying Social Justice. Oxford University Press

²¹ In above reference p. 616

²² As above

34. There is an opportunity for OFMDFM given its research programme to commission work which will provide evidence to enable decision makers to answer at least some of these questions.