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# THE INTEGRATION OF SOCIAL ISSUES IN PUBLIC PROCUREMENT

The integration of social issues into public procurement has been an issue of interest in Northern Ireland for some years. This paper seeks to provide relevant information for the Committee for Finance and Personnel's inquiry into public procurement by setting out the legal framework and drawing on experience from other parts of Europe.

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## KEY ISSUES

- The European legal framework for public procurement allows the integration of social issues. But care must be taken in how this achieved to avoid infringing the procurement Directives or the fundamental principles.
- There have been some examples of the use of social clauses in Northern Ireland. An unemployment pilot project appears to have been successful and the Central procurement directorate continues to use similar contractual provisions.
- The difficulty of monitoring compliance with contractual clauses is a recurring theme across Europe. This was also raised by CPD officials in their evidence session to the Committee of Finance and Personnel on 19 April 2009.
- An integrated approach to encourage social inclusion is taken in France. Contractors can be assisted by facilitators with experience of the particular social needs of certain sections of the community. The facilitator, paid by social service agencies, not only helps firms to manage the integration element of the workforce but also monitors implementation of the clauses.
- There is a relatively high level of policy commitment to using social clauses in Northern Ireland. It is questioned the extent to which this has been translated into their use in practice. There have been a number of legal challenges to the public procurement process which may have led to contracting authorities being cautious. It is also possible that a level of inertia in the system has led to uptake of their use being slow.
- In France there is also a high level of policy commitment. But the domestic courts have interpreted European requirements very strictly (due in part to a legal heritage that places great weight on “égalité”) and has struck down some contract awards. Legal and cultural heritage appears to be important in this respect - the Italian courts, for example, take a much less strict view. An understanding of how the Northern Ireland courts have interpreted social clauses in contracts may be beneficial.
- The case studies in Northern Ireland do not indicate a use of variant tenders – allowing for parallel bids to be submitted with higher levels of social integration than the minimum. This approach is seen as useful in some Member States.
- It is for Member States to determine what constitutes ‘grave professional misconduct’ - which allows for potential bidders to be excluded if they do not meet the level of social compliance determined. It may be that there are certain objectives in the Executive’s Programme for Government that could be strengthened by procurement policy taking them into account – for example, the use of child or forced labour in the supply chain.

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## 1 INTRODUCTION

The integration of social considerations into public procurement has been on the European agenda for quite some time. The Commission issued an Interpretative Communication on the topic as far back as autumn 2001. This was intended to clarify the range of possibilities for integrating social considerations under the Community legal framework that was in operation at that time.

Since that time European law on public procurement has been updated. The Directives that are most relevant are what is known as the “classic” or “public sector” Directive<sup>1</sup>, and the “utilities” Directive of 2004.<sup>2</sup> Above and beyond the specific provisions of the Directives, there are fundamental principles with which all procurement exercises must comply.

Fundamental principles deriving from Treaty provisions:

- Equality of treatment
- Obligation of transparency
- Proportionality
- Mutual recognition

One means of integrating social considerations into public procurement is through the use of ‘social clauses’. The terms of reference for the Committee for Finance and Personnel’s inquiry into public procurement practice in Northern Ireland include consideration of ‘the nature, extent and application of social clauses within public contracts’.

There is some policy commitment to such integration both within the devolved government of Northern Ireland and at the UK level. The Office of the Third Sector (within the Cabinet Office) has undertaken a study examining the use of social clauses, barriers to their use, and the potential for template clauses.<sup>3</sup>

The Cabinet Office has defined social clauses 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.<sup>4</sup>*

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<sup>1</sup> 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (as amended) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004L0018:20080915:EN:PDF>

<sup>2</sup> 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector (as amended) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004L0017:20080915:EN:PDF>

<sup>3</sup> <http://www.cabinetoffice.gov.uk/media/107238/social%20clauses%20report%20final.pdf>

<sup>4</sup> [http://www.cabinetoffice.gov.uk/third\\_sector/public\\_services/social\\_clauses.aspx](http://www.cabinetoffice.gov.uk/third_sector/public_services/social_clauses.aspx)

The Northern Ireland Executive's Programme for Government (PfG) for 2008-11 contains commitments that indicate support for the use of social clauses in appropriate circumstances. In relation to the Executive's reform programmes, for example, 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 the 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.***<sup>5</sup>

The Central Procurement Directorate (CPD) of DFP has included the need to consider the social aspect of procurement in 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 play due regard to the Executive's other economic and social policies, rather than cut across them.*<sup>6</sup>

Across Europe there are different levels of emphasis on the integration of social considerations into public procurement. In some instances (notably in Germany) there is some interest in pursuing not just the domestic social agenda but also wider social issues such as Fair Trade and the prevention of child labour.

This paper considers the European legal framework and issues that relate to the use of social clauses. It also details some case studies from across the EU and concludes with some case studies from Northern Ireland and elsewhere in the UK.

## 2. THE EUROPEAN LEGAL FRAMEWORK FOR PROCUREMENT

Procurement represents about 16% of EU gross domestic product (GDP) and in 2007 the value was estimated at €2,000 billion (including procurements both above and below EU thresholds) and in 2006 nearly 32,000 contracting authorities published public contracts worth €380 billion.<sup>7</sup> It is perhaps not surprising then that the EU has legislated significantly in the field of public procurement for a number of years. It is seen as an important single market issue.

At around 3% of total procurement, direct cross-border procurement is relatively low. (Direct cross-border procurement is where a company based in Germany, for example, wins a contract in the Netherlands.) When *indirect* cross-border procurement is also considered (this includes, for example, a French national company with a subsidiary in Spain wins a contract in Spain) it accounts for around 10%.<sup>8</sup> With free movement of

<sup>5</sup> Programme for Government 2008-11 (page 18) <http://www.pfgbudgetni.gov.uk/finalpfg.pdf>

<sup>6</sup> <http://www.cpdni.gov.uk/index/guidance-for-purchasers/12-procurement-principles.htm>

<sup>7</sup> Presentation by Rita Beuter, Senior Expert, EIPA, Maastricht.

<sup>8</sup> Presentation by Rita Beuter, Senior Expert, EIPA, Maastricht.

goods being a fundamental purpose of the European Union, this is perhaps surprisingly low.

There are three aspects of EU law that apply to procurement. **Primary law** is essentially the Treaty; **secondary law** is the various relevant Directives, and; **case law** of the European courts. The European Court of Justice (ECJ) often places importance on free movement because there is a clear legal basis to do so in the EC Treaty.

The establishment of a single market is the key factor in relation to procurement: all other objectives (such as sustainability) are secondary. As a result, there remains a tension between the single market and the social policy arenas. The EU has limited competence in the social area which has caused problems of legal uncertainty for procurement practitioners.<sup>9</sup> It is notable that this is less the case in the environmental area and there have been direct interventions by the European Commission – for example the Energy Labelling Directive and the Energy Performance in Buildings Directive.

The ‘fundamental principles’ are important because it is possible that social or ethical considerations could operate as a disguised barrier to the free movement of goods, and therefore become a form of protectionism. For example, a technical specification of goods to be provided which refers only to a national standard (for example, a British Standard in construction) would be discriminatory unless it allows equivalent standard from other Member States. It is therefore essential that contracting authorities pay attention to these principles in their procurements or they run the risk of legal challenge.

## 2.1 DIRECTIVE 2004/18/EC ON THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS, PUBLIC SUPPLY CONTRACTS AND PUBLIC SERVICE CONTRACTS

This is the so-called “classic” or “public service” directive. Amongst other things, it deals with the scope of application (thresholds, specific situations and exclusions, and special arrangements), arrangements for public service contracts, technical specifications, procedures (open, restricted, negotiated or competitive dialogue) framework agreements, advertising and transparency, selection of contractors and the award of contracts.

Whether all or only some of the provisions of the Directive apply to a particular contract depends upon the objects of the contract. ‘Part A’ contracts are subject to the full procurement regime. ‘Part B’ contracts are subject to only some of the provisions. Health and social services are classified as ‘Part B’<sup>10</sup> so it is the more limited procurement regime that generally applies to the inclusion of social considerations if they are the subject of the contract. If, however, social considerations are included in a contract which itself is a ‘Part A’ contract, then the full regime applies.

Under the “classic” Directive it is possible for contracting authorities to state in a contract notice that a particular contract or element of the contract is to be **reserved** specifically for sheltered workshops or sheltered employment programmes. Such workshops or

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<sup>9</sup> Presentation by Rita Beuter, Senior Expert, EIPA, Maastricht.

<sup>10</sup> See article 21 of and Annex II B to Directive 2004/18/EC

programmes are defined as those where “most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.”<sup>11</sup> The Directive explains that “such workshops might not be able to obtain contracts under normal conditions of competition” and special provision is made because “sheltered workshops and sheltered employment programmes contribute efficiently to the integration or reintegration of people with disabilities in the labour market.”<sup>12</sup>

It must be noted that the requirement for competition is not removed by this process of reserving contracts. A contract can't be reserved for a particular sheltered workshop but for sheltered workshops in general, thereby allowing a number of such workshops to compete for the tender.

For contracts that the contracting authority does not choose to reserve, there is varying scope to address social issues (which are relevant to but not the direct purpose of the procurement) depending on the stage of the public procurement process. The UK Office of Government Commerce (OGC) sets out those stages as follows:

1. pre-procurement – when identifying the need, approaches and considering the market;
2. when deciding the requirement – the specification stage;
3. when selecting suppliers to invite to tender – the selection stage;
4. when awarding the contract – the award stage; and
5. in the performance of the contract – contract conditions and relationship management.<sup>13</sup>

## 2.2 The stages of procurement and the integration of social considerations

The following section is set out in the order of the procurement processes set out by OGC.

### **A) The pre-procurement stage**

This stage is when a contracting authority is considering what needs it wishes to fulfil and what benefits it wishes to define from the works, services or goods it is to purchase. Social issues may be addressed both through **what** is bought (for example, a service catering specifically for a particular group with specific social needs such as Irish travellers or young people with a history of offending) and less directly through **how** it is bought (for example, by making the requirement easily accessible to Small and Medium-sized Enterprises (SMEs) in particular communities).

OGC guidance specifies that in developing a business case, contracting authorities “should take account of wider benefits including social ones, in accordance with the Treasury Green Book.”<sup>14</sup> (The ‘Green Book’ is the guidance that must be followed by departments in conducting economic appraisals and constructing business cases.) This

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<sup>11</sup> 2004/18/EC article 19.

<sup>12</sup> 2004/18/EC recital 28

<sup>13</sup> OGC ‘Buy and make a difference’ (2008) page 4

[http://www.ogc.gov.uk/documents/Social\\_Issues\\_in\\_Public\\_Procurement.pdf](http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf)

<sup>14</sup> OGC ‘Buy and Make a Difference’ (2008) page 5

[http://www.ogc.gov.uk/documents/Social\\_Issues\\_in\\_Public\\_Procurement.pdf](http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf)

is the stage when contracting authorities are able to consult widely with stakeholders to help them understand fully what is needed and consider which social issues or obligations are relevant to what they plan to buy. Additionally, this is the stage when consultation with potential suppliers will help contracting authorities to understand what the market can readily provide.

## **B) the specification stage**

At this stage, the contracting authority sets out exactly what it wishes to buy. The specifications must be set out in all the relevant documentation – notices, contract documents, etc. Definitions of certain technical specifications are provided in the “classic” Directive. Specifications define the characteristics of a material, product or supply and “shall include levels of **environmental performance, design for all requirements (including accessibility for disabled persons)** and conformity assessment, performance, safety”<sup>15</sup> and other information such as dimensions, test methods, packaging, production methods and so on.

The specification should allow equal access for tenderers (due to the fundamental principles) and may contain references to technical characteristics or equivalents and/or output specifications. These outputs may concern environmental characteristics such as maximum levels of emissions, for example. But they **may not** specify a particular make, source, process, trade mark, patent or label. However, CPD guidance states that “Public bodies should not impose unnecessary burdens or constraints on suppliers or potential suppliers.”<sup>16</sup>

Specifications must be relevant to the subject matter of the contract. OGC guidance states that “a social issue can be a core requirement and reflected in the specifications provided it is central to the subject of the procurement.”<sup>17</sup> It gives an example of where the specification may require helpdesk staff to have fluency in languages other than English.

Also, an authority wishing to buy furniture made from fair trade wood could specify that wood should be sourced in accordance with specific environmental, social or employment standards. But it could not refer to a specific ‘fair trade’ label.

## **A) VARIANT TENDERS**

The “classic” Directive also allows variant tenders to be submitted.<sup>18</sup> This technique could be used in conjunction with social criteria to allow for a kind of parallel bidding. For example, a specification could specify a minimum level of environmental or social protection and then allow second bids which meet a higher level than the minimum. In the event that the parallel bids do not meet the criteria of being most economically advantageous, the contracting authority may then fall back to the regular tender which meets the minimum requirement. This process can allow for market-led innovation.<sup>19</sup>

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<sup>15</sup> See 2004/18/EC Annex VI 1(a) and (b)

<sup>16</sup> CPD’s 6<sup>th</sup> Procurement Principle <http://www.cpdni.gov.uk/index/guidance-for-purchasers/12-procurement-principles.htm>

<sup>17</sup> OGC ‘Buy and Make a Difference’(2008) page 7

[http://www.ogc.gov.uk/documents/Social\\_Issues\\_in\\_Public\\_Procurement.pdf](http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf)

<sup>18</sup> 2004/18/EC article 24

<sup>19</sup> Presentation by Bert Lejeune, Legal Expert, Paulussen Advocaten, Maastricht.

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Again, it must be stated in the contract documentation from this early stage that this approach is to be used.

## **B) SUB-CONTRACTING**

A final permutation allows the contracting authority to ask tenderers to indicate a percentage of the work to be sub-contracted to SMEs and/or Social Economic Enterprises (SEEs).<sup>20</sup> It should be noted, however, that generally it is not permitted for a contracting authority to limit a tender specifically to non-profit service providers (and SEEs would fall into this category). In relation to the “classic” Directive the Commission has stated:

*Individual contracting authorities can not decide themselves to limit a tender procedure to non-profit service providers. The Directive is based on the principle that all economic operators are treated equally and non-discriminatorily. **It is therefore not possible under the Directive to reserve tenders to specific categories of undertakings**, such as non-profit organisations. The provisions mentioned in this paragraph apply to all services, including those only partially covered by the Directive, such as social services.<sup>21</sup>*

## **C) THE SELECTION STAGE**

This is the point at which suppliers are selected for the next stage of the procurement process e.g. invitation to tender.

Potential suppliers can be required to demonstrate technical capability in relation to the contract in question.

OGC guidance states that “if a contract requires specific know-how in the ‘social’ field, specific experience may be used as a criterion to prove the suitability of potential suppliers in regard to technical or professional ability.”<sup>22</sup> A possibility might be to ask for evidence of, for example, language skills or cultural awareness or sufficient research capacity to meet a social criteria.

At this stage it is also possible for the contracting authority to consider a potential supplier’s track record with similar contracts. It is permissible to exclude tenderers on the basis of ‘grave professional misconduct’.<sup>23</sup> This allows contracting authorities to pursue wider social objectives. For instance, a potential supplier could be excluded on the grounds of a breach of health and safety or equality legislation.

It is for Member States to determine what behaviour constitutes grave professional misconduct and this may be proven by any means – there is no specific standard set by the Directive. A Member State could determine that the use of child labour, for example, constituted such behaviour.<sup>24</sup>

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<sup>20</sup> 2004/18/EC article 25

<sup>21</sup> European Commission ‘Frequently asked questions concerning the application of public procurement rules to social services of general interest’ (2007) page 11  
[http://ec.europa.eu/services\\_general\\_interest/docs/sec\\_2007\\_1514\\_en.pdf](http://ec.europa.eu/services_general_interest/docs/sec_2007_1514_en.pdf)

<sup>22</sup> OGC ‘Buy and Make a Difference’(2008) page 8  
[http://www.ogc.gov.uk/documents/Social\\_Issues\\_in\\_Public\\_Procurement.pdf](http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf)

<sup>23</sup> 2004/18/EC article 45 2.(d)

<sup>24</sup> Presentation by Loredana Puiu, EC Directorate General Internal Market and Services.

The OGC guidance provides an example that a contracting authority could require potential suppliers to demonstrate the adequacy of their recruitment and training as these may be relevant to the ability to deliver the contract in question. Such assessment may only be done, however, on a **case-by-case basis**: criteria requiring firms to identify and address imbalances in job applicants or employees on a gender or community background basis may be relevant to an individual contract but they are unlikely to be relevant to **all** contracts. Imposing such criteria in a blanket fashion would run the risk of legal challenge.<sup>25</sup>

#### **D) THE AWARD STAGE**

At this stage the contractor is selected on the basis of the award criteria. It is for the contracting authority to decide the method. It may choose to award on **lowest price only** or it may choose to award on the **most economically advantageous tender (MEAT)**. Using the lowest price only method leaves no scope for any consideration other than price. Using MEAT opens up small possibilities for the integration of social considerations.

The “classic” Directive presents a non-exhaustive list of criteria that may be used. These include price, quality, technical merit, aesthetic and functional characteristics, and environmental characteristics among other things.<sup>26</sup> Social considerations are **not explicitly** mentioned in the articles. But, Recital 1 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...<sup>27</sup>*

Which tender is most economically advantageous and therefore presents best value for money is interpreted from the point of view of the **contracting authority**.<sup>28</sup> This suggests a wider public interest interpretation is not applicable.

OGC guidance confirms that social considerations may be given a weighting at the award stage “where they provide an economic advantage for the contracting authority which is linked to the product or service which is the subject matter of the contract.”<sup>29</sup> Similar to other considerations, any weighting that is to be applied to social criteria at this stage must be stated in the contract documentation, must not confer unrestricted freedom of choice on the contracting authority and must comply with the fundamental principles.

It is recommended by the European Commission that contracting authorities are very cautious about using giving high weightings to social criteria because best value is the main consideration. If social considerations are given a high weighting, a contracting

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<sup>25</sup> OGC ‘Buy and Make a Difference’(2008) page 8

[http://www.ogc.gov.uk/documents/Social\\_Issues\\_in\\_Public\\_Procurement.pdf](http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf)

<sup>26</sup> 2004/18/EC article 53

<sup>27</sup> 2004/18/EC recital 1

<sup>28</sup> 2004/18/EC article 53 1.(a)

<sup>29</sup> OGC ‘Buy and Make a Difference’(2008) page 9

[http://www.ogc.gov.uk/documents/Social\\_Issues\\_in\\_Public\\_Procurement.pdf](http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf)

authority may end up with economically disadvantageous tenders. It is considered less risky to put social considerations into the contract-performance criteria.<sup>30</sup>

### **E) CONTRACT CONDITIONS AND RELATIONSHIP MANAGEMENT**

This stage of the procurement process offers considerable scope for the integration of social considerations. Contracting authorities may lay down special conditions relating to the performance of a contract, as long as they are not incompatible with EC law and have been indicated in the contract notice or specifications. The “classic” Directive says explicitly “the conditions governing the performance of a contract may, **in particular, concern social and environmental considerations.**”<sup>31</sup>

The Directive also provides further clarification:

*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 the 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.*<sup>32</sup>

It is important to note that social conditions **may only refer to the contract in question**. They may not, for example, require a contractor to hire the long-term unemployed for all other works that they undertake. OGC guidance states that “care should be taken to avoid the imposition of blanket clauses on suppliers, which could be regarded as burdensome and might deter suppliers from competing for government work.”<sup>33</sup> Value for money is maintained as a central consideration.

Almost all kinds of consideration (such as measures for equality between men and women or ILO standards) could be included at this stage, as the strict requirement to relate the social conditions to the subject of the contract is not applied as it is, for example, in the specification stage. This is not about what is bought, or about the process of procurement but about the performance of the contract in a way that the contracting authority is happy with.<sup>34</sup>

Finally, OGC guidance suggests that “there may be opportunities post-award for contracting authorities to work outside the formal procurement process, on a voluntary

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<sup>30</sup> Presentation by Loredana Puiu, EC Directorate General Internal Market and Services.

<sup>31</sup> 2004/18/EC article 26

<sup>32</sup> 2004/18/EC recital 33

<sup>33</sup> OGC ‘Buy and Make a Difference’(2008) page 9

[http://www.ogc.gov.uk/documents/Social\\_Issues\\_in\\_Public\\_Procurement.pdf](http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf)

<sup>34</sup> Presentation by Loredana Puiu, EC Directorate General Internal Market and Services

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basis, to promote the importance of social issues...to their suppliers and supply chain”<sup>35</sup>. For example, a contracting authority may let its facilities management company’s staff attend in-house equality training.

### 3. EXPERIENCES FROM OTHER EU MEMBER STATES

The Directorate General for Employment, Social Affairs and Equal Opportunities commissioned a study on the incorporation of Social Considerations in Public procurement in the EU which was finalised in the summer of 2008. This study was to inform the development of a practical Guide to taking account of social considerations in public procurement. The Guide is currently in preparation and is likely to issue in the autumn of 2009.<sup>36</sup>

The study resulted in the publication of four reports:

1. Legal and Policy Review of Socially Responsible Public procurement (SRPP) frameworks in selected EU Member States.<sup>37</sup>
2. Overview of typical applications of SRPP Practices in the EU Member States as collected through the survey questionnaire.<sup>38</sup>
3. Six studies on SRPP Practices in the EU Member States.<sup>39</sup>
4. Study on the incorporation of Social Considerations in Public Procurement in the EU.<sup>40</sup>

These reports contain some useful information about the practice of incorporating social considerations into public procurement. A summary of these European experiences is presented below.

#### 3.1 DENMARK

- High awareness of socially responsible procurement and future potential
- Guidance in forms of manuals
- Lack of legal guidance: uncertainty
- Lots of plans but not so much happening on the ground
- Concern over measurement of outcomes

In June 2008 unemployment in Denmark was below 2%. More than 38% of the total workforce is employed in the public sector and, on average, a Danish municipality employs about 10% of its population. Taxation is the highest in the world.<sup>41</sup>

<sup>35</sup> OGC ‘Buy and Make a Difference’(2008) page 11

[http://www.ogc.gov.uk/documents/Social\\_Issues\\_in\\_Public\\_Procurement.pdf](http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf)

<sup>36</sup> Presentation by Loredana Puiu, EC Directorate General Internal Market and Services

<sup>37</sup> <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en>

<sup>38</sup> <http://ec.europa.eu/social/BlobServlet?docId=694&langId=en>

<sup>39</sup> <http://ec.europa.eu/social/BlobServlet?docId=695&langId=en>

<sup>40</sup> <http://ec.europa.eu/social/BlobServlet?docId=1477&langId=en>

<sup>41</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Denmark case study page 2

## Promotion of employment opportunities

Works and services contracts that require a local presence of at least parts of the workforce involved in the execution of the contract may include as contract conditions requirements to promote employment opportunities for the unemployed. Across Denmark the usual level is 5% (the City or Aarhus requires 10%) of the workforce to be recruited for a certain minimum period of time from the unemployed.

Between 50 and 75% of the salary is paid by the tenderer. The state pays the remainder of the salary which creates an incentive for the tenderer. The policy is **not directly prescribed by law** although each municipality must produce a four-year strategy on the policy. There is provision for administrative enforcement of this requirement but Local Government Denmark reports that no action has ever been taken.

There is anecdotal evidence that the policy has brought many unemployed into employment. The hope is that after the period of funded employment is over the tenderer will keep the formerly unemployed persons in their employment but **“there are no reliable statistics and no test of the efficiency of the policy in practice.”**<sup>42</sup>

It is often difficult to satisfy the contract clauses precisely because the rate of unemployment is so low. There is concern that the policy artificially raises transaction costs and so there is a reluctance to use social clauses. Contracting officers feel overburdened by the additional requirements – staff time in writing additional clauses into contracts is considerable. Also, as people in the most challenging unemployment categories are difficult to integrate, the employment often lapses after the minimum period.<sup>43</sup>

## Promotion of decent work

As above, requirements for ‘decent work’ are integrated only as conditions of the contract not in the technical specifications. Decent work is defined in terms of International Labour Organisation standards. However, contracting authorities reported that it was difficult to implement in practice because of a lack of relevant documentation or instruments for evaluating existing documentation. **Controlling whether or not contractors adhere to the contract clauses was therefore reported to be impossible.**<sup>44</sup>

## Promotion of SMEs

In Denmark an SME is a company with fewer than 250 employees. Municipalities use initiatives to encourage their participation in public procurement (such as holding information meetings prior to call for tender) but **SMEs are not singled out in the technical specifications.**<sup>45</sup> Also, large contracts are sometimes split according to geographical criteria to encourage SME participation.

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<sup>42</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Denmark case study page 4

<sup>43</sup> Presentation by Martin Trybus, Professor of European Law and policy, Birmingham Law School.

<sup>44</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Denmark case study page 4

<sup>45</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Denmark case study page 5

The perception of this process amongst both procurement practitioners and SMEs is split. Some SMEs regard social and environmental initiatives as a chance to distinguish themselves from their competitors (branding) whereas others see them as a burden.<sup>46</sup>

### **Fair and ethical trade**

There is political desire to use Fair Trade labels but this is obstructed by the legal uncertainty. This is further complicated by the fact that SMEs often can't meet the costs of accreditation.<sup>47</sup> Also, there is a limited range of Fair Trade products available – it is mostly in the food/coffee sector with some construction items.

There were two **political scandals** relating to the construction of a new opera house and TV2 studios in Copenhagen. Granite stones that were used in the construction were produced in developing countries using slave and child labour.

### **Enforcement**

Whilst in theory the Danish Competition Authority can inspect whether suppliers adhere to the standards they have agreed to (potentially leading to annulment of the contract or even the closing down of the company) in practice this does not happen.<sup>48</sup>

Secondly, there are no common standards or systems for monitoring compliance. Also, the lack of legal certainty leads to contracting authorities to be very cautious in their approach to integrating social considerations.<sup>49</sup>

### **Conclusions**

Socially responsible procurement is likely to gain in importance as contracting authorities produce information websites, guidelines and brochures to raise awareness. Also they are training procurement officers and there is an internet dispenser for standardised contract specifications.

## **3.2 GERMANY**

- The inclusion of social considerations is highly political.
- Federalised nature means procurement is spread across federal level (limited), 16 authorities at state (or regional) level and thousands at municipal level.
- Social considerations better addressed by instruments other than procurement.

Germany is the largest public and utilities procurement market in the EU. But due to the fragmented nature of structure of public procurement only 7.5% of contracts are advertised in the Official Journal – the lowest of all member States.<sup>50</sup>

<sup>46</sup> Presentation by Martin Trybus, Professor of European Law and policy, Birmingham Law School.

<sup>47</sup> Presentation by Martin Trybus, Professor of European Law and policy, Birmingham Law School

<sup>48</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Denmark case study page 6

<sup>49</sup> Presentation by Martin Trybus, Professor of European Law and policy, Birmingham Law School

<sup>50</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Denmark case study page 4



Generally speaking both policy makers and contracting authorities are opposed to the integration of social considerations into procurement.<sup>51</sup> (Note that this does not apply to the promotion of SMEs which is not seen as a social issue in Germany. Politically the promotion of SMEs is important.) This is not because the objectives are disputed but because social clauses are feared to compromise value for money and transparency.<sup>52</sup>

Social considerations are considered to be more appropriately enforced through other aspects of German law such as employment law, child law or constitutional law. The use of social clauses is also the subject of much political debate, with the country divided on political lines at federal, state and municipal levels. Reservations are often put forward that procurement officers (especially at the municipal level) are already stretched by a complex procurement process.<sup>53</sup>

### **Contracts for workshops for the disabled**

From 2005 a Federal Decree requires federal procurement authorities to reserve a part of their contract budget for contracts that can be awarded to workshops for the disabled. Note that federal procurement is rather limited to the police, the army and some road construction.<sup>54</sup> This can even apply to large supply and services contracts, although the workshops are required to compete and come up with economically sound tenders.

### **Prisons, youth work institutions, vocational training or similar institutions**

A Procurement Order allows the restricted procedure set out in the “classic” Directive to be used – even for contracts where the Directive does not apply – if the contracting authority intends to award contracts to any of the institutions listed above. The restricted procedure is defined by the Directive as:

*Those procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender.*<sup>55</sup>

### **Promotion of SMEs**

Germany has a complex definition of an SME which is on the basis of a combination of turnover and number of employees that varies according to the sector in which the SME operates (i.e. retail, wholesale, professional or crafts or industrial). A Procurement Order requires that, at the federal level, **“whenever it is economically feasible, contracts should be divided into lots to facilitate the participation of SMEs.”**<sup>56</sup> There is also a general SME initiative with the objective of reducing bureaucracy and unnecessary regulations, though this is not legally binding.<sup>57</sup>

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<sup>51</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Denmark case study page 16

<sup>52</sup> Presentation by Martin Trybus, Professor of European Law and policy, Birmingham Law School

<sup>53</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> German case study page 2

<sup>54</sup> Presentation by Martin Trybus, Professor of European Law and policy, Birmingham Law School

<sup>55</sup> 2004/18/EC article 1 11.(b)

<sup>56</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> German case study page 5

<sup>57</sup> Presentation by Martin Trybus, Professor of European Law and policy, Birmingham Law School

At the state level, there are two techniques open to contracting authorities aimed at achieving the same objective. The first is comparable to the federal requirement to split contracts into lots. The second is to include a clause in the main contractor's contract providing for **the participation of SMEs as subcontractors** as long as this can be reconciled with the general requirements of the contract in question.<sup>58</sup>

Finally, some states have a general rule to allow SMEs a fair share of public contracts or requiring SMEs to be specifically asked to bid for contracts as part of the restricted and negotiated procedures. There is no data, however, on how these techniques work in practice. There is no overall control of how this fair share works and so it could be legally questionable.<sup>59</sup>

The state of North Rhine Westphalia is currently intending to introduce amendments to its procurement laws that will: introduce a general requirement to consider SMEs; a requirement to split contracts into lots; a requirement for bidders to carry at least 50% of the contract within their own company; simplify pre-qualification; ensure that consortia are not disadvantaged compared to single bidders; specify at least 14 days for the submission of bids; abolish tender securities; require acceptance of electronic tenders; and introduce a new review procedure. These are all aimed at increasing SME participation.<sup>60</sup>

### **Prevention of exploitative child labour**

Some German states have moved to use public procurement as a tool against exploitation in developing countries. The Bavaria and Saarland state parliaments have passed motions asking their state governments not to procure supplies produced through exploitative child labour. However, these are motions, and not **laws**. The state of Hamburg requires a declaration from contractors that the contract is performed in accordance with ILO standards.

A number of municipalities have also introduced policies in this field however this is often criticised as being a profile-raising exercise by politicians rather than as a serious policy which will be monitored. In any case, it would be difficult to monitor and enforce.<sup>61</sup> But it is thought that they will probably have a positive impact in practice because companies that are known to have supplied goods produced by child labour are likely to find it hard to win contracts. **It is unclear, however, whether these regulations and practices comply with EU and German procurement law.**<sup>62</sup>

### **Promotion of the Employment of Women**

The state of Brandenburg has a specific law on the promotion of the employment of women which applies below the EC procurement thresholds. If **two bids are economically equally competitive** and one of the bidders has a high percentage of

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<sup>58</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> German case study page 8

<sup>59</sup> Presentation by Martin Trybus, Professor of European Law and policy, Birmingham Law School

<sup>60</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> German case study page 8

<sup>61</sup> Presentation by Martin Trybus, Professor of European Law and policy, Birmingham Law School

<sup>62</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> German case study page 11



female employees, that bid will get preference. The law includes provisions to ensure equal treatment and transparency but there is no information on its operation in practice.<sup>63</sup>

## Conclusions

The prevention of exploitation has been subject to much press coverage. Workshops for the disabled and long-term unemployed are often at least partly owned by the municipalities which directly award many low value contracts to these establishments. The promotion of SMEs is seen as a separate issue but is embedded in the different levels of public procurement.<sup>64</sup>

### 3.3 FRANCE

- Centralised political structure with strong policy commitment over a number of years
- Considerable use of social clauses by local contracting authorities
- Strong cooperation between contracting authorities and social services
- Legal establishment not enthusiastic about social clauses and case law is strict

French procurement law is about choosing the best combination of efficiency and the meaningful use of public money. The legal Code, however, does contain references to sustainable development although this is balanced by the requirement that public procurements must answer the needs of the contracting authority.

The integration of social issues is politically popular. But administrative case law has determined a strict approach. The most important case considered works in the municipality of Graveline where the local authority attempted to integrate a requirement for job creation into the contract. Bids over the available budget were received, so the municipality began a negotiated procedure which abandoned the overall pricing method for award and used a maximum price with a system of deductions. Neither bidder presented a proposal for job creation.

Following a legal challenge on the basis that the award criteria had been changed, the contract award was quashed. The central concept is that **any criterion linked to the bidder cannot also be considered to be linked to the object of the contract**. The courts held that long-term unemployment was not related waste clearance, which was the purpose of the contract.<sup>65</sup>

Further, the French courts struck down legislation which reserved a portion of public procurements to social enterprises. The judgement was on the basis that the resulting infringement of the principle of equality was **disproportionate to the public interest**

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<sup>63</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> German case study page 9

<sup>64</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> German case study page 13

<sup>65</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> French case study page 3

**aims pursued.** Essentially, social considerations are not considered to be a strong enough reason to restrict the equality principle.<sup>66</sup>

Despite the legal cases, the French government is pursuing a sustainable procurement strategy that will have some social aspects integrated. For example an objective is that 50% of contracts awarded in relation to parks and other public green spaces will be awarded to social enterprises or those hiring handicapped workers.<sup>67</sup>

### **Contracts for workshops for the disabled**

A statute from 2005 requires public law entities to hire a certain percentage of people with disabilities. This duty can be in part fulfilled by “sub-contracting the duty”. In essence, the contracting authority can use the numbers of disabled workers employed by a contractor on their behalf to count against their obligation. This creates a strong incentive for contracting authorities to use the reserved procedure for sheltered workshops under the “classic” Directive.<sup>68</sup>

### **Promotion of employment opportunities**

Social clauses targeted at job formation and offering job opportunities to people with particular social needs (such as the long-term unemployed or young people with low levels of qualifications) are often inserted in many contracts awarded by local contracting authorities. These are typically in building procurements and services contracts such as cleaning and maintenance. If the successful bidder is not itself an organisation aiming to promote social inclusion it may either sub-contract part of the contract or hire a number of disadvantaged workers directly.<sup>69</sup>

An example may be a clause that requires the contractor to hire 20% of the workforce from the long-term unemployed with a history of substance abuse problems. In this instance the contracting authority can be assisted by a ‘facilitator’ who helps the contractor to manage the workforce involved. The successful bidder may have no experience of managing individuals with particular social needs, so the facilitator is paid by social services to help the firm. This can include tailored vocational training which procurement officers may not have the relevant expertise to identify.<sup>70</sup>

Public institutions with responsibility for social inclusion are involved in the procurement process from an early stage. The promotion of social awareness is raised with bidders through meetings facilitated by these agencies and local associations provide training. Such agencies are also involved in monitoring compliance with the social clauses, as it is common that contracting authorities don’t have the capacity or expertise.<sup>71</sup>

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<sup>66</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> French case study page 4

<sup>67</sup> <sup>67</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> French case study page 7

<sup>68</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> French case study page 7

<sup>69</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> French case study page 10

<sup>70</sup> Presentation by Dr Robert Caranta, School of Law, University of Turin

<sup>71</sup> Presentation by Dr Robert Caranta, School of Law, University of Turin

### **Promotion of SMEs**

French case law has ruled out the possibility of giving preferential treatment to SMEs. However, this can be, and is, achieved by subdividing procurements into lots. This is not an obligation but is an option available to contracting authorities if the subject of the procurement is suitable to sub-division. Alternatively, the contracting authority may require bidders to state the share of the procurement that they intend to sub-contract.<sup>72</sup>

Further - more rigorous - provisions to set a quota of SMEs that had to be invited to bid were quashed by the courts on the grounds that they would discriminate against some potential bidders.<sup>73</sup>

### **Prevention of exploitative child labour**

There is a specific mandatory social requirement in relation to schools procurement. No child labour products may be used in schools, but this legislation is in relation to schools management and so does not apply generally.<sup>74</sup>

### **Conclusions**

The strong policy direction in France to include social considerations in procurements has been restricted by the judgements of the courts. This has made sure that social considerations do not get in the way of the transparency of the procurement process.<sup>75</sup>

The holistic approach taken by contracting authorities working with those agencies responsible for social inclusion allows for monitoring and support that seems to be absent in many other of the case studies. These agencies can also act to certify social compliance.

## **3.4 ITALY**

- Little political commitment at central level to social clauses
- The best value principle may be derogated for social and environmental considerations
- Social cooperatives and those on regional lists may benefit from reserved contracts
- Barriers to SME involvement to prevent corruption

Italy is a centralised state gradually devolving more competencies to regional and local level. However, legislation and regulation of procurement remains at the central level. The legal and procurement culture of Italy is aimed at preventing corruption more than encouraging SME involvement or the use of social clauses.<sup>76</sup>

For example, the provision of the “classic” Directive in relation to reserved contracts for sheltered workshops has been transposed into Italian law. But it is not used.

<sup>72</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> French case study page 14

<sup>73</sup> Presentation by Dr Robert Caranta, School of Law, University of Turin

<sup>74</sup> Presentation by Dr Robert Caranta, School of Law, University of Turin

<sup>75</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Italian case study page 2

<sup>76</sup> Presentation by Dr Robert Caranta, School of Law, University of Turin

There are some provisions that do regulate procurement in relation to social rights. Examples include the exclusion of potential bidders from competition who have breached rules on social security contributions or health and safety requirements (because of the thriving black economy in Italy).<sup>77</sup>

### Promotion of employment opportunities

**SPECIFIC KINDS OF FIRMS MAY BE CLASSIFIED AS SOCIAL COOPERATIVES AND THEY MAY BENEFIT FROM THEIR SPECIAL STATUS IN THE PROCUREMENT PROCESS.** There are two kinds: those operating in health and education where social objectives are met by providing services to the most needy sections of the public and; cooperatives that aim to help disadvantaged people to gain employment. To qualify at least 30% of the workforce must be disadvantaged. Disadvantage is defined in terms of disability, former mental health patients, substance abusers and young people with difficult family backgrounds, though this may be widened by the regional authorities.<sup>78</sup>

Italian law allows contracting authorities to award contracts below the European thresholds to such cooperatives without the usual procurement rules being applied – including possibly the fundamental principles of EC law. Contracts may also be set aside for cooperatives on regional lists. Again **it is questionable whether this is compatible with EC law.**<sup>79</sup>

### Promotion of SMEs

In the other case studies, procurement rules are designed to encourage SME participation in tendering. In Italy the opposite is the case.

Italian legislation is very strict on sub-contracting. Contracting authorities must specify in the contract documentation whether sub-contracting will be allowed. For works procurements a maximum of 30% of the contract may be sub-contracted. But the contracting authority may allow no sub-contracting at all. If it is allowed the winning bidder must send a copy of the sub-contract to the contracting authority along with evidence to prove that the sub-contractor meets necessary requirements such as health and safety.<sup>80</sup>

Joint participation in consortia is also prevented. This makes things easier for the contracting authority in an environment where **prevention of criminality is a prime consideration.** It is questionable whether or not this is compatible with EC law

### Conclusions

Particular social considerations are specific to certain areas of Italy with the result that procurement law does or policy does not directly encourage the use of social clauses. Efforts to keep criminal organisations from benefiting from public procurement also act as strong barriers to SME participation. The social and legal heritage of Italy is very

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<sup>77</sup> Presentation by Dr Robert Caranta, School of Law, University of Turin

<sup>78</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Italian case study page 11

<sup>79</sup> Presentation by Dr Robert Caranta, School of Law, University of Turin

<sup>80</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Italian case study page 12

important: the law is concerned with repressing blatant abuses but at the same time permitting lesser abuses.<sup>81</sup>

### 3.5 PUBLIC PRIVATE PARTNERSHIPS: A CASE STUDY FROM THE NETHERLANDS

Most of the experience of using social clauses from across Europe seems to relate to conventional procurement. However, it is also possible to integrate social considerations into PPP projects.

#### **Development of the A2 in Maastricht**

The A2 is a major arterial highway that runs from Amsterdam to Genova in Italy. Over the whole length of the road there are only six sets of traffic lights. These are all situated in Maastricht, where the highway cuts a significant part of the city off from the centre. The lights are pedestrian crossings.

The authorities have identified a need to develop the road in a way that it can pass through Maastricht without cutting off the inhabitants who live to the eastern side. It was also identified that the areas abutting the road are in need of both economic and social redevelopment.

Four individual branches of government have come together to form the contracting authority: the national government, two local authorities and the municipality of Maastricht. They chose to use an innovative approach to getting an integrated solution to the problems posed by the A2 – in terms of reducing traffic congestion; reducing emissions within the city and; reducing the social and economic isolation of part of the city.

The contract sum was fixed before tendering, at a sum of €1.2billion, for what is expected to be a 20-year project. This fixed contract sum is considerably less than the total estimated cost of the construction work, which will involve not re-routing the road but tunnelling beneath its present route.

Because the sum is fixed, bidders could not win extra points for lower costs. The winning bid will be the one that demonstrates the best level of quality and sustainability. The market will provide the remainder of the financing. In exchange, an area of public land will be handed to the winning contractor for the sum of €1, but of course is worth considerable more. The zoning and infrastructure plan allows for around 1000 housing units to be built as well as a commercial area to be developed, which is how the contractor will make its profits.

Six award criteria were set:

- Synergy of the city of the plan (with the character of the city)
- Effect on the mobility and accessibility of Maastricht
- Quality of the city and country development
- Environment and liveability
- Soundness of technology

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<sup>81</sup> Presentation by Dr Robert Caranta, School of Law, University of Turin  
*Providing research and information services to the Northern Ireland Assembly*

- Situation during realisation (how will the 20-year reconstruction be managed to allow access to and from the city)

The criteria were kept as abstract as possible to allow the market to come up with the best possible integrated solution but giving the state agencies sufficient comfort that appropriate standards will be met. Each consortium had to provide a report on the environmental impacts – emissions, particulates, noise and so on, and were awarded extra points for lower impacts.

Social aspects of the procurement are firstly related to creation of local employment opportunities (stipulated in the contract clauses). Secondly, they come in under the award criteria of synergy of the city. The contracting authorities are focussed on reducing difficulties in people with restricted mobility and children crossing a four-lane highway as well as creating a social amenity for the local population. The current land area taken up by the road will become a city boulevard for cyclists and a green space where once were cars.

### Conclusion

The procurement directives give all the scope that is needed for innovative procurement of large capital contracts. The A2 project will transform what is currently an unpleasant social and economic barrier into a liveable and usable green space with the highway passing underneath.

## 4. NORTHERN IRELAND

- Little difference in procurement law from the rest of the UK
- Legislation outside the field of procurement that is particularly relevant to procurement policy regarding social issues
- Clear policy guidance
- Major constraints lie in inertia in the system

As noted in the introduction, the Executive's Programme for Government (PfG) for 2008-11 contains commitments that indicate support for the use of social clauses in appropriate circumstances. This is picked up in the Central Procurement Directorate's twelve guiding principles for procurement, under the seventh principle. In addition, Public Procurement Policy states:

*The concept of "best value for money" is defined as "the optimum combination of whole life cost and quality (or fitness for purpose) to meet customers' requirements". While "best value for money" will be the primary objective of procurement policy, this definition allows for the inclusion, as appropriate, of social, economic and environmental goals within the procurement process<sup>82</sup>*

This commitment is reflected in the Investment Strategy for Northern Ireland 2008-18 which states:

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<sup>82</sup> CPD Procurement Policy Summary Statement (2002) [http://www.cpdni.gov.uk/pdf-public\\_procurement\\_policy\\_summary.pdf](http://www.cpdni.gov.uk/pdf-public_procurement_policy_summary.pdf) page 2

*We will **seek opportunities to promote social inclusion and equality of opportunity in the procurement of infrastructure programmes.** This will impact through employment plans; building apprenticeships into major delivery contracts – helping those eager to develop key skills valued in the workplace and through a tendering process that prioritises the most economically advantageous option in this context. **Through the procurement process, we will seek to maximise the social and employment opportunities for all our people,** addressing existing patterns of socio-economic disadvantage and using prosperity to tackle poverty.*<sup>83</sup>

These principles have been incorporated into the Code of Practice introduced by the Construction Industry Forum NI.<sup>84</sup>

#### 4.1 Legal Issues In Northern Ireland

Northern Ireland procurement law (like that of the rest of the UK) follows the EC procurement directives closely but there are three pieces of legislation outside procurement law that are seen as being of particular importance regarding social issues. These are the Fair Employment and Treatment Order 1998, section 75 of the Northern Ireland Act 1998 and the sustainable development duty of the Northern Ireland (Miscellaneous Provisions) Act 2006.<sup>85</sup>

Beyond these considerations and the EC Directives, there are also obligations at common law:

*The so-called two contract theory provides that where a contractor submits a tender at the request of an employer the employer is then is then obliged to consider that tender reasonably, equally, fairly and objectively.*<sup>86</sup>

There have been a number of challenges to public procurement in Northern Ireland – some of which have been successful or were settled by the contracting authority. The level of litigation may in part be due to **too much emphasis on quality marks**. CPD guidance suggests quality should make up 20-40% of award criteria, but some maintenance contracts are awarded on 70% quality. Another problem may be the **size of frameworks** (for example the IST and Schools Frameworks) which are very large. Finally, there appear to have been **failures on the part of the contracting authority to comply with the regulations**. Such failures have included criteria not being set out in advance, unequal treatment and failing to publish correct notices.<sup>87</sup>

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<sup>83</sup> NI Executive 'Investment Strategy for Northern Ireland (2008)

<http://www.pfgbudgetni.gov.uk/index/investment-strategy-for-northern-ireland.htm> page 5

<sup>84</sup> Interim report of the Procurement Task Group presented to the Committee for Finance and Personnel on 29 April 2009.

<sup>85</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Northern Ireland case study page 3

<sup>86</sup> Evidence presented by Quigg Golden to the Committee for Finance and Personnel, page 2

<sup>87</sup> Evidence presented by Quigg Golden to the Committee for Finance and Personnel, page 3



## 4.2 Case Studies In Northern Ireland

### **Fair and ethical trade**

The Procurement Board (which consists of NI Departmental Permanent Secretaries and is chaired by the Minister of Finance) has issued a guidance note on the procurement of fair trade products.<sup>88</sup> This defines fair and ethical trade and details the range of products currently available and recognised. It also provides guidance

When CPD itself is purchasing coffee, it is part of the catering contract requirements that fair trade coffee is used. When CPD is not directly paying, but a contract was being let for a café for staff to purchase coffee, the contract specified that fair trade coffee had to be made available as one of the options for customers.<sup>89</sup>

### **Promotion of SMEs**

The Procurement Board has published guidance for SMEs.<sup>90</sup> This aims to raise awareness amongst SMEs of what contracting authorities might purchase. “Meet the buyer” events are also held.<sup>91</sup> Further guidance has been issued to buyers that specifically addresses the barriers that SMEs may face in tendering and suggesting measures to overcome them.<sup>92</sup> Similar to the approach taken elsewhere in Europe, this guidance suggests breaking contracts into lots to make them more accessible.

A barrier SMEs face is also related to obtaining information about tendering opportunities. A web portal has been established through which all public procurement is channelled.<sup>93</sup>

Finally programmes to support SMEs and SEEs have been run, aimed at increasing awareness amongst suppliers in relation to cross-border contracts and develop skills in winning public sector work, amongst other things.<sup>94</sup>

In a recent evidence session to the Committee for Finance and Personnel, CPD officials commented that too much advertising and encouragement of SME involvement can create over-interest – the more pre-qualification questionnaires that are completed, the more resources are required to assess them.<sup>95</sup>

### **Health and safety**

An initiative called *Buildsafe NI* brought together purchasers, industry, trade unions and the health and Safety Executive in a safety initiative. Unions and construction employers developed a **code of practice on health and safety** through the Construction Industry

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<sup>88</sup> [http://www.cpdni.gov.uk/02-06\\_procurement\\_of\\_fair\\_trade\\_products-2.pdf](http://www.cpdni.gov.uk/02-06_procurement_of_fair_trade_products-2.pdf)

<sup>89</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Northern Ireland case study page 10

<sup>90</sup> [http://www.cpdni.gov.uk/index/guidance-for-suppliers/sme\\_guidance.htm](http://www.cpdni.gov.uk/index/guidance-for-suppliers/sme_guidance.htm)

<sup>91</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Northern Ireland case study page 10

<sup>92</sup> [http://www.cpdni.gov.uk/pdf-sme\\_purchasers](http://www.cpdni.gov.uk/pdf-sme_purchasers)

<sup>93</sup> <https://e-sourcingni.bravosolution.co.uk/web/login.shtml>

<sup>94</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Northern Ireland case study page 11

<sup>95</sup> Evidence presented by CPD to Committee for Finance and Personnel 29 April 2009, unpublished  
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Forum as part of the public sector's commitment to social responsibility as a part of sustainable development.

These negotiated standards are now used as the basis for specifications used in the tender. This is seen as a good example of how government can use its purchasing power to pressurise two sides of an industry to come up with an industry-wide agreement.<sup>96</sup>

### **Promotion of employment opportunities**

Addressing unemployment in Northern Ireland has the potential to be an important means of combating inequalities resulting from the socio-religious divide.

A pilot project was undertaken following the Review of Public Procurement in 2002 and which was managed by CPD. Fifteen contracts (construction, security and cleaning) were awarded to a value of £45.9m.<sup>97</sup> The tender documentation required each bidder to provide an **Unemployed Utilisation Plan**. This plan had to set out the firm's social policy and give details of specific proposals for utilising the unemployed on the contract. They also had to detail their experience and their capacity to implement the proposals.

The main aim of the pilot was social: helping the unemployed back to work and improving their career prospects. Additional benefits identified were economic – reducing social welfare payments and making supplier markets more responsive to government objectives.

The evaluation of the pilot scheme found that in relation to social goals, public procurement policy can achieve benefits “economically, efficiently and effectively”.<sup>98</sup> The result was 51 formerly unemployed people finding work, at a rate of approximately one person employed for every £900,000 spent. It found that there were not significant increases in costs for suppliers, nor in workload for contracting authorities.

The approach of stimulating apprenticeship provision in this way was commented on by CPD officials in a recent evidence session to the Committee for Finance and Personnel. The number of apprenticeships required is tied to industry forecasts on the number of apprentices needed. It is seen as important not to end up with oversupply, because trainees might then find no work at the end of their period.<sup>99</sup>

### **Conclusions**

The barriers to the integration of social issues in public procurement in Northern Ireland are not thought to lie in budgetary constraints – the evaluation of the Pilot project found no significant increase in costs. The constraints appear to lie in “**getting procurement professionals and clients to focus on social issues.**”<sup>100</sup> There has been much

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<sup>96</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Northern Ireland case study page 12

<sup>97</sup> CPD ‘Pilot Project on Utilising the Unemployed in Public Contracts’ (2005) [http://www.cpdni.gov.uk/pilot\\_case\\_study\\_on\\_integration-2.doc](http://www.cpdni.gov.uk/pilot_case_study_on_integration-2.doc) page 12

<sup>98</sup> CPD ‘Pilot Project on Utilising the Unemployed in Public Contracts’ (2005) [http://www.cpdni.gov.uk/pilot\\_case\\_study\\_on\\_integration-2.doc](http://www.cpdni.gov.uk/pilot_case_study_on_integration-2.doc) page 6

<sup>99</sup> Evidence presented by CPD to Committee for Finance and Personnel 29 April 2009, unpublished

<sup>100</sup> European Commission (2008) <http://ec.europa.eu/social/BlobServlet?docId=693&langId=en> Northern Ireland case study page 22

guidance produced both by CPD and the Office of Government Commerce which should overcome any lack of clarity with sufficient investment in training.

## 5. THE UK CABINET OFFICE SOCIAL CLAUSES PROJECT

The Office of the Third Sector (part of the UK Cabinet Office) published a report on a Social Clauses Project in 2008. The project was set up to:

- *consolidate knowledge on the existing use and best practice of social clauses;*
- *provide clarity on the merits of using social clauses; and*
- *support good commissioning and procurement by producing user friendly materials to help decision makers.*<sup>101</sup>

The project was based on the work of three local authorities in England following a survey that was undertaken over the summer of 2007.

The initial survey highlighted a number of issues in relation to the integration of social considerations:

*Survey results confirmed that legal uncertainties on the status of social clauses and EU procurement rules, as well as a lack of information and understanding, were barriers to their use. Additionally, responses from stakeholder frequently identified a further two barriers to the use of social clauses:*

- *difficulty in formulating the social clause as a core contractual requirement; and*
- *difficulty in measurement at the evaluation stage.*<sup>102</sup>

Since that time, further guidance has been published by the Office of Government Commerce, as referred in previous sections of this paper. This guidance should have gone some way to addressing the concerns raised and to provide further clarity.

An original aim of the project was to provide template clauses. But as a result of the feedback from the survey, it was decided this aim should be dropped “as it was clear that any contract terms need to be tailored to the particular procurement, must relate to the performance of the contract and be assessed on whether their inclusion represents value for money.”<sup>103</sup> Instead the project explored how and when social issues could be addressed and what support procurement officers would need.

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<sup>101</sup> [http://www.cabinetoffice.gov.uk/third\\_sector/public\\_services/social\\_clauses.aspx](http://www.cabinetoffice.gov.uk/third_sector/public_services/social_clauses.aspx)

<sup>102</sup> Office of the Third Sector ‘Report on the Social Clauses Project’ (2008)  
<http://www.cabinetoffice.gov.uk/media/107238/social%20clauses%20report%20final.pdf> page 5

<sup>103</sup> Office of the Third Sector ‘Report on the Social Clauses Project’ (2008)  
<http://www.cabinetoffice.gov.uk/media/107238/social%20clauses%20report%20final.pdf> page 5

## 5.1 PILOT PROJECTS

### **Leeds City Council**

This pilot initiated by the council's Environmental Services Directorate looked at using social clauses in the development of a re-use shop in East Leeds. It was planned that the shop would be operated by an organisation – possibly from the community or voluntary sector. The aims were to increase recycling and re-use; increase public awareness of waste issues; provide **added social benefits to the community through providing jobs and increasing social inclusion for vulnerable groups**, and; supporting Housing/Social Services clients in the provision of good quality household items at low cost.<sup>104</sup>

### **Cumbria County Council**

This pilot looked at the wider use of social issues in procurement. The council introduced a policy-led approach to procurement and wished to use the Social Clauses Project to develop its work and increase awareness in the wider Cumbrian procurement community. It also had a project to develop the third sector's capacity to respond to procurement opportunities; develop an intelligent procurement process to allow communities to access responsive services, and; to improve the value for money of services delivered through procurement.

Under this project, the council aimed to secure wider community benefits by ensuring that social clauses were used in every appropriate contract and to facilitate the exchange of good practice between procurement teams and develop a deeper understanding of how to monitor and evaluate council contracts.<sup>105</sup> A time-limited role for an officer was created to further this work.

This Third Sector Officer then engaged with all the procurement teams and worked with the procurement officers on a specific contract (for Integrated Youth Support Services) to support the process of using social clauses as part of the tender evaluation criteria. Stakeholders were involved in the service specification process, allowing community benefit to be embedded at every stage of the procurement.

Finally, the Third Sector Officer examined the contracts register to identify contracts coming up for renewal that would be appropriate for the use of social clauses. This process of familiarisation with the range of forthcoming contractual work enabled early identification of opportunities for social clauses in a strategic manner.<sup>106</sup>

### **Findings and Outputs**

The Project found that an integrated approach improved understanding of social clauses and their role in maximising social value from procurement. Not just procurement officers needed to be involved but also heads of service, service managers and legal advisors. **“Support for procurement officers from senior managers was integral to**

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<sup>104</sup> Office of the Third Sector 'Report on the Social Clauses Project' (2008)  
<http://www.cabinetoffice.gov.uk/media/107238/social%20clauses%20report%20final.pdf> page 7

<sup>105</sup> Office of the Third Sector 'Report on the Social Clauses Project' (2008)  
<http://www.cabinetoffice.gov.uk/media/107238/social%20clauses%20report%20final.pdf> page 7

<sup>106</sup> Office of the Third Sector 'Report on the Social Clauses Project' (2008)  
<http://www.cabinetoffice.gov.uk/media/107238/social%20clauses%20report%20final.pdf> page 8

**the success of the work”<sup>107</sup>** This echoes the view from the German study that procurement officers found the integration of social issues to be an added burden on already stretched staff; by taking an integrated approach it seems that procurement specialists felt supported through the process.

## 5.2 SOCIAL RETURN ON INVESTMENT

The Social Clause project identified that a barrier to using social clauses was difficulty in measuring outcomes and the associated costs of their use in procurements. The Office of the Third Sector is addressing this through a programme on measuring social value. The Scottish Government is also running a complementary project.

It is hoped that these projects will result in new guidance to using the tool of Social Return on Investment (SROI), which is a means of understanding and managing the wider impacts of a project, organisation or policy. SROI puts a financial value on impacts identified by stakeholders that do not have market values. This may help with the economic appraisal of social clauses in the future.<sup>108</sup>

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<sup>107</sup>Office of the Third Sector ‘Report on the Social Clauses Project’ (2008)  
<http://www.cabinetoffice.gov.uk/media/107238/social%20clauses%20report%20final.pdf> page 8

<sup>108</sup>Office of the Third Sector ‘Report on the Social Clauses Project’ (2008)  
<http://www.cabinetoffice.gov.uk/media/107238/social%20clauses%20report%20final.pdf> page 10