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Public Finance Scrutiny Unit

A Comparative Perspective on Public Procurement Requirements: social, environmental and economic

This Briefing Paper supplements RalSe paper [NIAR 925-13](#). It provides a comparative perspective to the use of public contracts to address ancillary objectives of government when securing works, supplies or services, such as social, environmental, or economic considerations.

This information is provided to MLAs in support of their Assembly duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as professional legal advice or as a substitute for it.

Key points

- Public procurement throughout the United Kingdom and the Republic of Ireland is largely defined by European Union law.
- Within the context of public procurement, there are key terms. However, the use of the same or similar terms, with different meanings, presents challenges when making policy and legislative comparisons between and within jurisdictions.
- Scotland has introduced legislation that will impose a statutory duty on authorities to consider using Community Benefit requirements in public procurement exercises to address social, environmental or economic issues.
- In England, Wales and Northern Ireland authorities are encouraged, but not required, by government policies to consider the use of contractual requirements in public procurement exercises to address social, environmental or economic issues.
- In Northern Ireland, there is an accountability gap arising from the lack of the Department of Finance and Personnel's power to compel departments to provide data in relation to the use of public contracts addressing ancillary objectives of government when securing works, supplies or services.

Introduction

In February 2010, the Committee for Finance and Personnel (CFP) reported on its *Inquiry into Public Procurement in Northern Ireland*.¹ Among other things, CFP made a number of policy recommendations aimed at maximising the social benefit of the Executive's expenditure. In particular, CFP recommended:

*... the use of clauses setting quotas for employing apprentices and the long-term unemployed in all suitable public contracts.*²

This Briefing Paper updates RaISe paper *Implementation of social clauses policy in Northern Ireland* (NIAR 925-13).³ As requested by CFP, the Paper provides a comparative perspective about the use of public contracts in Northern Ireland, Great Britain and the Republic of Ireland to address social, environmental or economic considerations. It is intended to support CFP's scrutiny of the Department of Finance and Personnel's (DFP's) implementation of CFP's previous policy recommendations in this area.

The Briefing Paper is structured as follows:

- Section 1 sets out the European Union (EU) procurement context, as that provides the primary framework for Members States' (including their regions) procurement law;
- Section 2 presents the comparative context in this area, highlighting relevant policy and legislation in Northern Ireland, Scotland, England, Wales, and the Republic of Ireland; and,
- Section 3 discusses key themes arising from the previous sections.

¹http://archive.niassembly.gov.uk/finance/2007mandate/reports/Report_19_08_09R.htm

²CFP (2010) 'Report on the Inquiry into Public Procurement in Northern Ireland' available online at: http://archive.niassembly.gov.uk/finance/2007mandate/reports/Report_19_08_09R.htm#3 (accessed 17 February 2015) (see Key Conclusions and Recommendations, paragraphs 26-30)

³<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2015/finance/2715.pdf> (accessed 23 February 2015)

1. European Context

The overarching purpose of the EU's procurement rules is to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU.⁴

It is especially relevant to this Paper that the European Commission (EC) itself has observed apparent increasing interest in the use of public contracts to address social, environmental, or economic considerations. In a working paper the EC noted:

*...growing policy interest in re-orienting public expenditure towards solutions that are more compatible with environmental sustainability, promote social policy considerations, or support innovation.*⁵

The working paper recognises the interest of Member States, including the United Kingdom (UK) and Republic of Ireland (RoI), in harnessing their spending power to address ancillary objectives of government. Such objectives may include sustainable development issues, such as social, environmental, or economic goals. For example, in its 2010 report on its *Inquiry into Public Procurement in Northern Ireland*, CFP noted the Executive's *Programme for Government* recognised the potential role of public procurement in reducing inequalities and promoting social inclusion.⁶

The EU's *Public Contracts Directive 2014* (the 2014 Directive) sets out the legal framework for public procurement by Member States' contracting authorities. Amongst other things, the 2014 Directive consolidates and updates the rules with regard to social, environmental or economic considerations in contracting authorities' public contracts.

The 2014 Directive was intended to:

*...provide a much more modern, flexible and commercial approach compared to the existing regime. Outdated and superfluous constraints have been removed, and many new features have been added to streamline and modernise public procurement.*⁷

⁴CCS

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407236/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Feb_2015_update.pdf (page 2)

⁵European Commission (2011) Impact and Effectiveness of EU Public Procurement Legislation

http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/er853_1_en.pdf (page 11)

⁶http://archive.niassembly.gov.uk/finance/2007mandate/reports/Report_19_08_09R.htm (paragraph 225)

⁷CCS

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407236/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Feb_2015_update.pdf (page 2)

According to the Crown Commercial Service (CCS), the 2014 Directive brings in:⁸

Improved rules on social and environmental aspects, making it clear that:

- social aspects can now also be taken into account in certain circumstances (in addition to environmental aspects which have previously been allowed);
- contracting authorities can require certification/labels or other equivalent evidence of social/environmental characteristics, further facilitating procurement of contracts with social/environmental objectives;
- contracting authorities can refer to factors directly linked to the production process.

The full life-cycle costing can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements which might save money over the long term despite appearing on initial examination to be more costly.

Legal clarity that contracting authorities can take into account the relevant skills and experience of individuals at the award stage where relevant (e.g. for consultants, architects, etc).

The 2014 Directive codifies case law that showed that social, environmental and economic requirements could be built into specifications provided they were linked to the subject matter of the contract and made transparent to suppliers. It makes clear that publicly available labels are an effective method of demonstrating compliance with such specifications subject to safeguards linked to equal treatment and non-discrimination. This is shown in the following slide from the CCS's training material on the 2014 Directive:⁹

Crown Commercial Service
Delivering value for the nation through outstanding commercial capability and quality customer service

Using environmental and social labels

- Social/environmental labels are permitted as part of specification, award criteria or terms and conditions as proof of compliance with a requirement with specific characteristics that are *linked to the subject matter of the contract* (e.g. working conditions of the employees producing coffee to be supplied to the authority)
- **However**, suppliers must be allowed to offer compliance with equivalent labels or offer other proofs (e.g. technical dossiers) where the label cannot be obtained within the relevant time limits
- Labels must also, as now, meet certain conditions such as being based on transparent and non-discriminatory criteria and awarded by a body independent of the supplier applying for the label

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The CCS' *A Brief Guide to the EU Public Contracts Directive (2014)*¹⁰ describes the changes introduced by the 2014 Directive. These include:

⁸CCS

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407236/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Feb_2015_update.pdf (page 5)

⁹CCS: training slide set: <https://www.gov.uk/transposing-eu-procurement-directives>

¹⁰https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407236/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Feb_2015_update.pdf

- The ability to reserve the award on certain services contracts to mutual/social enterprises for a time-limited period;
- Encouraging contracting authorities to break contracts into lots;
- A simpler process for selecting suppliers;
- Procedure changes (such as more freedom to negotiate, for example); and,
- Mandatory publication of electronic procurement information from 2018.

For the purposes of this Briefing Paper, the most important changes are in relation contract award.

Within the parameters established by the EU, the following section highlights key developments in the UK and the RoI in transposing and applying public procurement law, including the 2014 Directive.

2. Comparative context

This section outlines key policy and legislative developments across the UK and the RoI in relation to with regard to social, environmental or economic considerations in contracting authorities' public contracts.

2.1. England, Wales and Northern Ireland

The *Public Contracts Regulations 2015*¹¹ (the 2015 Regulations) transpose the EU law in whole in England, and in part in Wales and Northern Ireland.

Parts 1 to 3, and 5 of the 2015 Regulations apply across England, Wales and Northern Ireland, and concern the rules implementing the 2014 Directive. In relation to social, environmental and economic considerations, the 2015 Regulations provide for, among other things:

- the exclusion of suppliers that have not complied with working conditions contained in law or collective agreements;
- the award criteria or the contract performance conditions may require a specific label as means of proof that the works, services or supplies correspond to the required social, environmental or economic characteristics; and,
- new flexibility to limit competition for certain services contracts, to encourage certain organisations such as fledgling social enterprises and mutuals to bid for government contracts.¹²

Part 4 of the 2015 Regulations however, does not apply in Northern Ireland or Wales. It deals with access to public sector contracts by smaller businesses. The Explanatory Note to the 2015 Regulations explains:

*Part 4 [...] does not apply to public bodies in Wales or Northern Ireland whose functions are wholly or mainly devolved functions in those jurisdictions. This recognises the fact that these Devolved Administrations already have their own arrangements in place for ensuring smaller businesses have better access to public sector contracts which reflect the particular circumstances of devolved procurement matters in those areas.*¹³

Since public procurement policy is devolved to Wales and Northern Ireland, further information on these administrations' procurement policies is provided in sub-sections 2.1.2. and 2.1.3.

The 2015 Regulations were made on 4 February 2015. It remains to be seen how effective they will be in enabling contracting authorities incorporation of sustainable development requirements in their procurement exercises.

¹¹<http://www.legislation.gov.uk/ukxi/2015/102/contents/made>

¹²<http://www.legislation.gov.uk/ukxi/2015/102/memorandum/contents>

¹³http://www.legislation.gov.uk/ukxi/2015/102/pdfs/ukxiem_20150102_en.pdf (page 6)

2.1.1. England and Wales: the Public Services (Social Value) Act 2012

Also relevant in this context is the *Public Services (Social Value) Act 2012* which extends to England and Wales. The Act requires public bodies in England and Wales are required to consider how the services (i.e. not works or goods) they commission and procure might improve the economic, social and environmental well-being of their area.¹⁴

The 2012 Act reflects, at Member State level, the desire to use public contracts to address social, environmental, or economic considerations that was noted in at the EU level in section 1 of this Paper.

Note however, that its application to Wales is limited in that the provisions of the 2012 Act do not apply to procurement by authorities which exercise functions that are wholly or mainly devolved in Wales. For this reason, the Welsh Government's policies are discussed in sub-section 2.1.2.

The 2012 Act is relevant now because on 13 February 2015 the UK Cabinet Office published the *Social Value Act Review*. The Review's findings are likely to be of interest to CFP. The headline finding was:

*...where the Act is being used, it has a positive impact and that the variety (if not yet the number) of organisations that support the Act is quite striking.*¹⁵

Moreover, the Review refers to:

*...the benefits the Act is starting to bring, [which] should send a strong signal to commissioners and providers about the Act's importance.*¹⁶

Whilst these are qualified positive endorsements of the 2012 Act, the Review also found three main barriers to the development of the Act's potential:

1. Awareness and take-up of the Act is a mixed picture.
2. Varying understanding of how to apply the Act can lead to inconsistent practice, particularly around:
 - knowing how to define social value and how and when to include it during the procurement process
 - applying social value within a legal framework and procurement rules
 - clarifying its use in pre-procurement.

¹⁴A helpful guide to the Act has been produced by Social Enterprise UK, available at:

http://www.socialenterprise.org.uk/uploads/files/2012/03/public_services_act_2012_a_brief_guide_web_version_final.pdf

¹⁵https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_15021_2.pdf (page 7)

¹⁶https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_15021_2.pdf (page 7)

3. Measurement of social value is not yet fully developed.¹⁷

The Review further recommended "... *these barriers should be addressed, and progress reviewed within the next two years.*"¹⁸ RalSe will keep a watching brief and keep CFP informed of any developments in this regard.

Alongside this central recommendation, the Review contained a number of other recommendations aimed at overcoming the barriers identified. Amongst other things, future recommended actions for the Cabinet Office included:

1. Focused promotion of awareness, targeted at small businesses, the Health sector, senior commissioners and procurement officers, and investigation of ways to incentivise take-up of social value;
2. Promotion of better understanding around:
 - Knowing how to define social value;
 - Applying social value within a legal framework and procurement rules; and,
 - Clarifying its use in pre-procurement;
3. Support of a strengthened framework for measuring and evaluating social value.¹⁹

In order to facilitate such actions, the Review produced two sets of best practice guidance: the first around definition, application, and clarification; the second around a framework and principles of social value measurement.

Overall, it seems reasonable to conclude from the Review's findings that the 2012 Act has had some positive impacts. But it appears there are barriers to fuller implementation, which the recommendations aim to address. If nothing else, this reaffirms the view that the use of commissioning and procurement to deliver ancillary objectives is challenging. It remains to be seen what actions the Cabinet Office will take in response to the Review's recommendations.

Also of note in this context, the Chartered Institute of Public Finance and Accountancy's report on its March 2015 procurement summit noted that:

*Social value can be dismissed as being at the 'fluffy' end of the spectrum and hard to do in the current fiscal climate, but there's a growing sense that this is an area finance professionals need to engage in because of the wider value and benefits it can secure.*²⁰

¹⁷https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_15021_2.pdf (page 7)

¹⁸https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_15021_2.pdf (page 7)

¹⁹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_15021_2.pdf (pages 9-12)

²⁰http://www.publicfinance.co.uk/news/2015/03/social-value-fluffy-yes-but-just-look-at-the-benefits/?utm_source=Adestra&utm_medium=email&utm_term

The following sub-section looks at the procurement policies of the Welsh Government with regard to the use of public contracts to address social, environmental, or economic considerations.

2.1.2. Wales: Welsh Government procurement policy and legislation

At the devolved level, there does not appear to be a statutory requirement to include social, environmental, or economic considerations requirements in public contracts. There is however, a demonstrable policy commitment contained in the Welsh Government’s *Programme for Government 2011-16*. In December 2012, the commitment was underlined when the Minister for Finance announced the Welsh Government’s Procurement Policy. This included a principle dedicated to community benefits:²¹

4. **Community Benefits** – delivery of added value through Community Benefits policy must be an integral consideration in procurement.

How will this be achieved?

<p>Welsh Government will:</p> <ul style="list-style-type: none"> • lead on maintaining and strengthening Community Benefits policy; strengthening support available on the ground and challenging the application. 	<p>The Welsh public sector will:</p> <ul style="list-style-type: none"> • apply Community Benefits to all public sector procurements where such benefits can be realised. • apply the Measurement Tool to all such contracts over £2m to capture and report outcomes to the Welsh Government.
<p>Policy link : Community Benefits Wales Infrastructure Investment Plan</p>	

The Welsh Government has since published new guidance *Community Benefits: Delivering Maximum Value for the Welsh Pound*.²² Elements of this guidance may be of considerable interest to CFP. Key points are highlighted below.

²¹<http://wales.gov.uk/about/cabinet/cabinetstatements/2012/welshprocurement/?lang=en>

²²<http://wales.gov.uk/docs/dpsp/publications/valuewales/140904-community-benefit-report-en.pdf>

Community Benefits: Delivering Maximum Value for the Welsh Pound

Community Benefits is the Welsh Government's policy guidance for including sustainable development requirements in public contracts. The scope of the policy is shown in the diagram below:²³



As can be seen from this diagram, the Welsh Government has taken a wide interpretation of community benefits. For example, the diagram shows that retention of existing workforce is included, in addition to recruitment or training of the economically inactive. More detail and examples are provided in this guidance. It also explains that “*the two primary focuses [sic] of Community Benefits policy are Workforce initiatives and Supply chain initiatives*”.²⁴

Defining ‘Community Benefits’

Table 1 summarises the different possible forms of Community Benefits, as described in the Welsh Government's guidance.²⁵

²³ <http://wales.gov.uk/docs/dpsp/publications/valuewales/140904-community-benefit-summary-en.pdf> (page 6)

²⁴ <http://wales.gov.uk/docs/dpsp/publications/valuewales/140904-community-benefit-report-en.pdf> (page 14)

²⁵ <http://wales.gov.uk/docs/dpsp/publications/valuewales/140904-community-benefit-report-en.pdf> (pages 14-20)

Table 1: Forms of Community Benefit

Category of Community Benefit	Description
Workforce initiatives	<p>Targeted Recruitment and Training (TR&T), including Retention and Training for the existing workforce.</p> <p>TR&T focuses on employment and training opportunities for disadvantaged people and target groups - such as short- or long-term unemployed, or workless households.</p> <p>Retention and Training for the existing workforce can be a focus where investment in the training of current staff can be supported by the award of the contract – this has the scope to maintain or improve the skill pool in Wales.</p>
Supply chain initiatives	<p>Supply chain Community Benefit objectives focus on initiatives to maximise the opportunities for smaller and more local suppliers and contractors to compete for tenders or sub-contract for supply chain opportunities (such as ‘Meet the Buyer’ or ‘Meet the Contractor’ events), and measures to ensure prompt and fair payment terms.</p>
Community initiatives	<p>Contractors can meet their own Corporate Social Responsibility objectives innovatively, working with public sector clients and the local community. Examples include, sponsoring events for local under-10 sports; providing labour ‘in kind’ to renovate a community centre; donating surplus materials for the renovation of a community facility; loaning an on-site tower crane for fire service training when not in use. The Welsh Government’s Community Benefits Measurement Tool is a resource to capture for the financial benefits and to record a narrative description of the impact on individuals and the community.</p>
Educational initiatives	<p>The best results are achieved when the client works with local schools or colleges to plan activities linked to the contract or project. For example, through the Welsh Government’s Numeracy Employer Engagement Scheme, initiatives may include work experience placements for schools, site visits and classroom work supported by the contractor.</p>
Environmental initiatives	<p>Traditionally associated with construction, but may apply to all kinds of contract. For example: kilowatt hours of renewal energy generated to help deliver the contract; tonnes of waste diverted from landfill; reduction of water consumption initiatives; measures taken to reduce travel, whether reductions in business mileage or transportation or delivery miles.</p>
Equality and Diversity	<p>Equality and Diversity is a core principle of the other community benefits listed above. Consideration of equalities issues in procurement can deliver higher quality services and achieve better value by reflecting the needs and meeting the expectations of the wider community.</p>

The policy focus for targeting Community Benefits

The Welsh Government specifies in its guidance where the focus of a contracting authority’s efforts should be targeted. It states:

The specific groups that are targeted for community benefit opportunities should be determined by considering the local issues to maximise benefits to communities in which the contract will be delivered. The contracting authorities’ own priorities will also inform targets for Community Benefits as will national issues and priorities for regional or all Wales contracts or

*frameworks. The type of activities generated by the specific nature of the contractual activities will also help to identify community benefit targets.*²⁶

Powers to procure Community Benefits

The issue of powers is specifically addressed in the Welsh Government's guidance.

*When considering whether to pursue Community Benefits in the context of any procurement process, a contracting authority must determine whether they have the legal power, express or implied, to do so. Without appropriate powers, Community Benefits cannot form part of a Contracting Authority's procurement exercise.*²⁷

The guidance suggests that, for central government activities, Welsh Ministers may be able to rely on the so-called 'power of wellbeing'.²⁸ This power is contained in section 60 of the *Government of Wales Act 2006*. Section 60 states:

(1)The Welsh Ministers may do anything which they consider appropriate to achieve any one or more of the following objects—

(a) the promotion or improvement of the economic well-being of Wales,

(b) the promotion or improvement of the social well-being of Wales, and

*(c) the promotion or improvement of the environmental well-being of Wales.*²⁹

'Core' and 'Non-core' approaches to procuring Community Benefits

The Welsh Government's guidance describes two methods for contracting authorities to procure Community Benefits:

- The **Core** approach means that community benefits are specified as part of the subject matter of the contract, for example setting a minimum requirement and asking the market to provide additional ideas;
- The **Non-core** approach means that community benefits are requested as proposals and ideas, but not evaluated as part of the tender. Employment utilisation plans and advertisement of local supply chain opportunities are included as conditions of the contract.

The guidance states that the core approach should be the default position and be used "*whenever possible*".³⁰ But it fails to specify any further.

²⁶ <http://wales.gov.uk/docs/dpsp/publications/valuewales/140904-community-benefit-report-en.pdf> (page 21)

²⁷ <http://wales.gov.uk/docs/dpsp/publications/valuewales/140904-community-benefit-report-en.pdf> (page 26)

²⁸ <http://wales.gov.uk/docs/dpsp/publications/valuewales/140904-community-benefit-report-en.pdf> (page 26)

²⁹ <http://www.legislation.gov.uk/ukpga/2006/32/section/60>

³⁰ <http://wales.gov.uk/docs/dpsp/publications/valuewales/140904-community-benefit-report-en.pdf> (page 29)

Scrutiny point: what is DFP's view of the pros and cons of this core/non-core approach in the context of Northern Ireland?

2.1.3. Northern Ireland: Executive Policy and DFP guidance

The Northern Ireland Executive's 2011-15 Programme for Government included the commitment to:

*Include Social Clauses in all public procurement contracts for supplies, services and construction.*³¹

DFP's Central Procurement Directorate (CPD) *Guidance on sustainability requirements, guidance & model contract clauses*³² includes model clauses in relation to encouraging the economically inactive into work, encouraging training and skills development and so on. In addition however, the social section includes requirements to comply with health and safety and equality legislation and agreements.

In 2013, CPD published guidance that includes an overview of the Executive's commitment on 'social considerations' in public procurement:

- The Programme for Government (PfG) includes a commitment to "include social clauses in all public procurement contracts for supplies, services and construction".
- The approval in March 2011 of a definition of 'Best Value for Money' as follows:

'Best Value for Money' – 'the most advantageous combination of cost, quality and sustainability to meet customer requirements'

- The approval, in May 2002, of 12 key principles to govern the administration of public procurement. The Executive believes that the principles reflect the statutory obligations related to equality of opportunity and sustainable development and link to the Programme for Government. A key principle – integration – is defined below:

*Integration: in line with the statutory duties on equality of opportunity and sustainable development and the Executive's policy on joined-up government, procurement policy should pay due regard to the Executive's other economic, social and environmental policies, rather than cut across them.*³³

- In May 2008, the Executive endorsed the guidance for policy makers, commissioners and procurement practitioners entitled 'Equality of Opportunity &

³¹<http://www.northernireland.gov.uk/pfg-2011-2015-final-report.pdf> (page 8)

³²http://www.dfpni.gov.uk/index/procurement-2/cpd/cpd-policy-and-legislation/content_-_cpd_achieving_sustainability_in_construction_procurement/content_-_cpd_proposal_for_promoting_equality_and_sustainable_development/model-clauses-sep-2012-updated.pdf

³³The 12 principles can be seen at: http://www.dfpni.gov.uk/index/procurement-2/cpd/cpd-policy-and-legislation/cpd_12_procurement_principles.htm

Sustainable Development in Public Sector Procurement'. This guidance was produced jointly by the Equality Commission and CPD.

- On 7 June 2012, the Procurement Board agreed a revised strategic plan that includes a number of key objectives for public procurement. In relation to social clauses, the Procurement Board requires Departments:
 - *to set targets for the implementation of social clauses to meet the Programme for Government commitment on the inclusion of social clauses in public procurement;*
 - *to monitor compliance with the social clauses as an aspect of general contract management; and*
 - *to report quarterly to CPD, details of the opportunities delivered through social clauses.*³⁴

It is of interest to note, that many of the cited references in the cited passage refer to 'social clauses' and do not mention environmental or economic considerations.

The Strategic Investment Board (SIB) is currently undertaking a *Social Clause Strategic Review*. According to DFP, SIB's Review was commissioned by the Northern Ireland Procurement Board³⁵ as an independent review:

*...to assess progress in the use of social clauses in Northern Ireland, and in particular clauses that seek to address poverty by creating training and job opportunities for people that are disadvantaged in the labour market.*³⁶

(A Briefing Note prepared by SIB on the terms of reference for its Review is provided at Appendix 1 to this Paper.)

RaISe will keep a watching brief on the outcome of the SIB Review.

Prior to writing this Briefing Paper, RaISe discussed the issue of definitions and interpretation with the SIB Review Team. The Review Team suggested that the term 'Sustainable Development Requirements' may be appropriate. This is a broader term that would allow the full range of social (e.g. jobs and training), economic (e.g. opportunities for SMEs in the supply chain), and environmental (e.g. materials recycling) sustainability to be captured in procurement exercises. On the other hand, use of that term by some but not all stakeholders could potentially create more, not less ambiguity.

In relation to implementation of the Executive's policy in this area in Northern Ireland, there are some challenges which are outlined below.

³⁴ http://www.dfpni.gov.uk/index/procurement-2/cpd/cpd-policy-and-legislation/content - cpd - policy - procurement guidance notes/pgn-01-13/pgn_01_13_sus_considerations - revised_27_february_2015.pdf (pages 5-7)

³⁵ For more information on the composition and role of the Procurement Board, see <http://www.dfpni.gov.uk/cpd-procurement-board-roles-responsibilities> (accessed 17 February 2015)

³⁶ SIB Strategic Review of Social Clauses in Northern Ireland: Terms of Reference (TOR), provided to RaISe by CFP.

DFP has a lead role in public procurement, with the DFP Minister chairing the inter-departmental Procurement Board. The Department's CPD supports the Board in the development and implementation of new procurement policy. CPD also provides a centralised professional procurement service to the Northern Ireland public sector and monitors and mentors the work of seven other Centres of Procurement Expertise (CoPEs).

CFP has previously discussed whether DFP has sufficient power to compel departments and other contracting authorities to comply with the Executive's non-statutory policies, or to provide information returns on request. The final bullet point in the cited passage above requires departments "to report quarterly to CPD".

On 4 February 2015 however, CPD indicated to CFP in evidence that the Department of Education was "not prepared to make a return."³⁷ Arguably, this raises an issue about an accountability gap in the existing system.

Scrutiny point: CFP may wish to ask DFP and/or SIB to propose possible safeguards against this situation arising in future.

2.2. Scotland

In Scotland, the *Procurement Reform (Scotland) Bill* was granted Royal Assent on 17 June 2014.³⁸ The 2014 Act provides Scottish Ministers with powers to make regulations and issue statutory guidance on a number of specified issues. Most provisions of the Act do not come into effect immediately. In other words, they will come into force at a later date, to be specified by Order.³⁹

According to the Scottish Government, the work to develop the regulations and guidance will be aligned to the work on the development of regulations to transpose the 2014 Directive. The new regulations are expected to be in place towards the end of 2015.⁴⁰

Amongst other things, the 2014 Act provides that for qualifying procurements over a value of £4 million "a contracting authority must consider whether to impose community benefit requirements as part of the contract delivery before carrying out the procurement."⁴¹ In other words, after commencement by Order, **the Act will impose a statutory duty on contracting authorities to consider community benefits.**

Until such time as the regulations are made under the 2014 Act, the Scottish Government has issued interim guidance. On 20 November 2014, it issued Scottish

³⁷ <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=11849&evelID=6872>

³⁸ <http://www.legislation.gov.uk/asp/2014/12/introduction/enacted>

³⁹ <http://www.legislation.gov.uk/asp/2014/12/section/45/enacted>

⁴⁰ <http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/ProcReformAct>

⁴¹ <http://www.legislation.gov.uk/asp/2014/12/notes/division/3/3/2>

Procurement Policy Note *Delivering community benefits in public procurement*. This states:

The Procurement Reform (Scotland) Act 2014 has established a national legislative framework for sustainable public procurement that supports Scotland's economic growth through improved procurement practice – and requires public bodies to consider how their procurement activity can improve the economic, social and environmental wellbeing of the authority's area.

It also specifically requires public bodies to consider imposing community benefit requirements as part of a major contract; these might relate to, for example, employment opportunities or to sub-contracting opportunities.⁴²

The Procurement Policy Note also explains the functionality of the web-portal *Public Contracts Scotland* in relation to the use of community benefit clauses. (That Note is provided as Appendix 2 to this Paper.)

The key point arising from the Note is that, **where no community benefit clause is to be used, the contracting authority must provide an explanation** in the box provided on the web-portal. This information is then available to the Scottish Government to help it assess the impact of the community benefit policy.⁴³

2.3. Republic of Ireland

The RoI Government intends to transpose the 2014 Directive by the end of 2015.⁴⁴

There is however, private member legislation currently progressing through the Oireachtas which is relevant to public procurement.

The *Social Clauses in Public Procurement Bill* includes the following requirement:

Social clause requirement

2. Public procurement contracts, in which the overall project value of the contract is in excess of €1,000,000, shall hereby include the following social clauses—

(a) a requirement that the main contractor comply with a local labour employment scheme to be determined by the Minister upon the enactment of this Act,

(b) a requirement that the main contractor recruit one long term unemployed person, directly or through the supply chain, for each €1,000,000 of project value while retaining all current employees of the company,

⁴²<http://www.gov.scot/Resource/0046/00465015.pdf>

⁴³<http://www.gov.scot/Resource/0046/00465015.pdf>

⁴⁴<http://www.oireachtas.ie/parliament/media/committees/finance/Opening-Remarks--Mr-Paul-Quinn-OGP.docx> (page 9)

(c) a requirement that the main contractor recruit one apprentice, directly or through the supply chain, for each €2,000,000 of project value,

(d) a requirement that the main contractor complies with the application of fair employment, equality of treatment and anti-discrimination principles as identified in the Act of 1998 and the Act of 2000,

(e) a requirement that the main contractor provides, directly or through the supply chain, an opportunity for all employees to develop work-related skills and partake, where necessary, in specified training programmes,

(f) a requirement that the main contractor contribute to sustainable development,

(g) a scheme to be drafted and agreed to by parties to the contract in relation to a penalty process where a breach of contract, in relation to the social clauses contained within this section, has been deemed to have taken place, **and**

(h) any other social clause which the Minister or public authority sees fit to be included in the contract.⁴⁵ [emphasis added]

This draft provision proposes the inclusion of **all** of the specified clauses where specified thresholds are met.

The Bill:

*...legislates for the mandatory inclusion of social clauses in all public procurement contracts worth in excess of €1 million. Social clauses enable Government to use public procurement contracts as a multitasking instrument of policy. Merely using public contracts to obtain goods and services is now an outdated approach. The inclusion of social clauses in public contracts requires public purchasers and suppliers also to protect the vulnerable, support the disadvantaged, develop the social economy, protect the environment and promote other social goals and community benefits during the course of the project as a condition of the contractual award. In other words, social clauses are a tool for getting more value out of each public euro spent.*⁴⁶

The Bill was introduced on 17 December 2013, and second stage was taken on 17 October 2014. Committee (third) stage was ordered to be taken in Select Committee and the Bill was referred to the Select sub-Committee on Public Expenditure and Reform on the same day. Committee stage has not been scheduled to date.⁴⁷

⁴⁵<http://www.oireachtas.ie/documents/bills28/bills/2013/13413/b13413d.pdf> (

⁴⁶Dáil debates

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014101700003?opendocument>

⁴⁷Source: e-mail from Oireachtas Bill office to RalSe, 13 April 2015

It is of interest that the Irish Government's position on the Bill was set out in a written answer to a question about local authority housing contracts:

Minister for Public Expenditure and Reform: *[O]n 17 October 2014, the Government supported in principle the Second Stage of the Private Member's Social Clauses in Public Procurement Bill 2013 [...] and sees significant merit in developing a social clause framework where such clauses are applied in a targeted manner. The Government did not oppose the Bill.*

Whilst Government sees the merit in using social clauses in particular circumstances, it is important that contracting authorities are not compelled to use them on every contract particularly where their deployment may disproportionately impact on SMEs bidding for public contracts. It is for this reason that an interdepartmental group has been set up by the Office of Government Procurement which is considering the sectors where such clauses might be implemented. The deliberations of this group will therefore be important in forming the Government's response to [the] Bill.

Much work needs to be done before the Private Member's Bill can become a viable piece of legislation that provides the necessary flexibility to procure the wide variety of works, goods and services necessary to deliver vital public services. I believe that further debate and discussion is required as to the correct policy approach regarding enabling social clauses.⁴⁸

The key point to note is that the Minister explained that the Government **does not wish to compel contracting authorities in all circumstances**. The written answer does however, indicate a degree of willingness by the ROI Government to develop the use of social clauses.

In the meantime there is a Government pilot underway trialling social clauses.⁴⁹ Announced in 2013, the *Devolved Schools Programme* requires that:

- at least 10% of those working on the sites are drawn from the live register and have been unemployed for more than 12 months; and,
- at least 2.5% of workers on the sites are engaged in an approved registered apprenticeship, training or educational work placement scheme.

In total the three contracts cover fourteen sites. The works comprise both stand-alone, new build and extensions/refurbishment works. Construction work started on all three contracts during spring 2014. The aggregate capital value of the contracts is approximately €70 million. The most recent monthly progress reports (dated

⁴⁸ Written answer 240, 16 December 2014:

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014121600071?opendocument#WRH00100>

⁴⁹ Press release: <http://www.per.gov.ie/minister-for-public-expenditure-and-reform-mr-brendan-howlin-td-announces-establishment-of-social-clauses-project-group/>

December 2014) provided by each main contractor indicate that they are on target to achieve the cumulative percentages set out in the pilot clause.⁵⁰

At the time of writing this Briefing Paper, the RoI Inter-Departmental Group on Social Enterprise has not made a formal submission to the Office of Government Procurement regarding the inclusion of social impact clauses in public procurement contracts.⁵¹

⁵⁰E-mail correspondence from Deirdre Halloran, IRC Scholar at Law Department, NUI Galway, dated 24 February 2015.

⁵¹<https://www.kildarestreet.com/wrans/?id=2015-02-10a.343>

3. Key themes

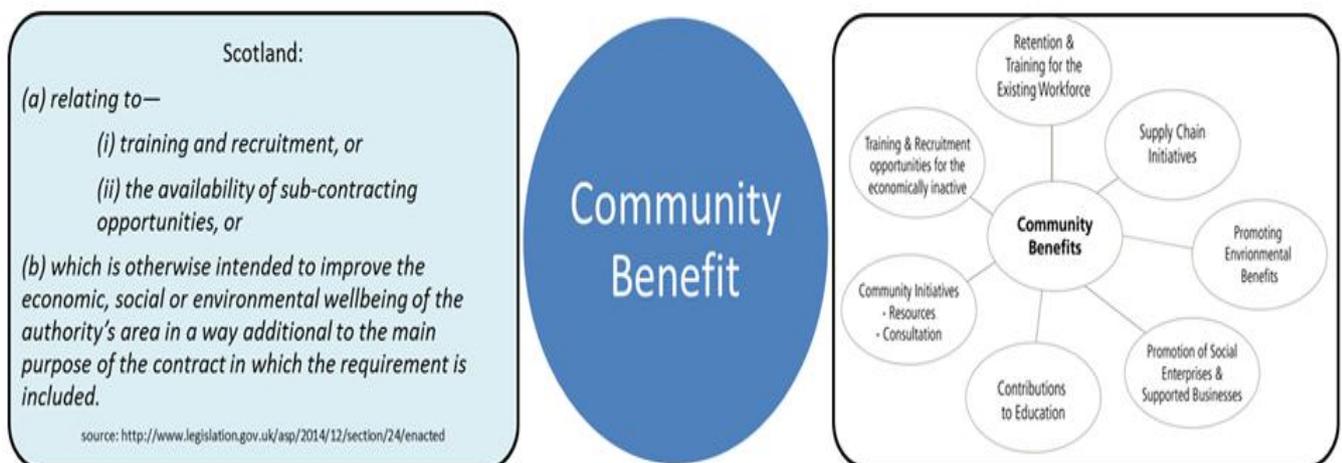
This section highlights key themes emerging from the comparative information outlined in section 2.

3.1. Similar terms, different meanings?

There appears to be similar key terms in the policy documents and statutory provisions relevant to the use of public contracts to address ancillary objectives of government when securing works, supplies or services. However, they have different meanings, which presents challenges when making policy and legislative comparisons between and within jurisdictions.

3.1.1. Community Benefit

The diagram below shows the Scottish and Welsh Governments' definitions of 'Community Benefits'



It can be seen that the Welsh Government's definition appears to be slightly broader, as it also includes "retention and training for the existing workforce". On the other hand, it is possible - but far from certain - that workforce initiatives might meet the Scottish definition for this term under 'improve the economic, social or environmental wellbeing of the authority's area.'

3.1.2. Social Clause

The Northern Ireland Executive's 2011-15 Programme for Government included the commitment to:

*Include Social Clauses in all public procurement contracts for supplies, services and construction.*⁵²

⁵²<http://www.northernireland.gov.uk/pfg-2011-2015-final-report.pdf> (page 8)

The ‘social’ part of DFP’s Central Procurement Directorate (CPD) *Guidance on sustainability requirements, guidance & model contract clauses*⁵³ includes model clauses in relation to encouraging the economically inactive into work, encouraging training and skills development and so on. In addition however, the social section includes requirements to comply with health and safety and equality legislation and agreements.

In the RoI, the private member bill currently before the Oireachtas seeks to include social clauses in terms of employment, training, skills development, sustainable development, and “*any other social clause which the Minister of public authority sees fit*”⁵⁴.

It can be seen that, amongst other draft provisions, this bill includes a requirement to contribute to ‘sustainable development’ as a social clause. This therefore leads to another term which is also used in other jurisdictions in relation to public procurement, as well as in wider environmental contexts.

On the basis of the CPD guidance highlighted in 2.1.3., social clauses are arguably to be considered within the wider sustainability context. In other words, in the context of making communities sustainable not just the ecosystems they live in.

Point for scrutiny: CFP may wish to ask DFP if key terms’ definition and related guidance should be enhanced to aid consistent interpretation and application amongst contracting authorities and suppliers in Northern Ireland.

3.2. Statutory duty

It was noted in Section 2 that contracting authorities in Wales and Northern Ireland do not have a statutory *duty* to consider use of public contracts to address social, environmental or economic considerations. Instead, there are policy and guidance to *encourage and mandate* such activity.

In this context, CFP may wish to note that the publication *Social Value and Public Procurement: A Legal Guide* recommends that the Scottish statutory duty approach should be applied throughout the UK.⁵⁵

Scrutiny point: in the context of the SIB review, CFP may wish to consider if a statutory duty to consider use of public contracts to address social, environmental or economic considerations would be beneficial in Northern Ireland, and to ask DFP and/or SIB for their individual views.

⁵³ http://www.dfpi.gov.uk/index/procurement-2/cpd/cpd-policy-and-legislation/content_-_cpd_achieving_sustainability_in_construction_procurement/content_-_cpd_proposal_for_promoting_equality_and_sustainable_development/model-clauses-sep-2012-updated.pdf

⁵⁴ <http://www.oireachtas.ie/documents/bills28/bills/2013/13413/b13413d.pdf> (

⁵⁵ <http://www.anthonycollins.com/sites/default/files/Social%20Value%20and%20Public%20Procurement%20-%20a%20Legal%20Guide%20-%20January%202014.pdf> (page 17)

3.3. Contracting authorities' powers

It may of interest to CFP to note that CPD's guidance PGN 01/13 seems to avoid the issue of contracting authorities' powers to use public contracts to address social, environmental or economic considerations by recommending contracting authorities should seek advice:

*The legal framework for public procurement is complex. It is recommended that Departments seek expert procurement and legal advice as early as possible in their deliberations on social considerations.*⁵⁶

Scrutiny point: CFP may wish to ask DFP to provide examples of how such procurement and legal advice ensures compliance with prevailing equality, human rights, and other relevant law.

3.4. Data

As noted in subsection 2.1.3. DFP informed CFP that one department did not make an information return, creating an accountability gap exists. Such a gap results in incompleteness in data. In turn, this makes it difficult for the Executive, or CFP, to evaluate the effectiveness of the policy as a whole. This position may be contrasted with Scotland – as shown in Section 2 – where a contracting authority is required to explain when community benefit clauses are not used. These explanations are then captured by the web-portal to inform policy evaluation and development.

⁵⁶http://www.dfpni.gov.uk/index/procurement-2/cpd/cpd-policy-and-legislation/content - cpd - policy - procurement_guidance_notes/pgn-01-13/pgn-0113-vers-18112013.pdf

Appendix 1: SIB's Social Clause Strategic Review⁵⁷

The Strategic Investment Board

Social Clause Strategic Review

Briefing Note

Background

1.1 Social clauses are a means of reflecting 'social considerations' within the procurement process, extending across supplies, services and construction. Commitments to their inclusion within all public procurement contracts cascade throughout the PfG 2011-16 and Procurement Guidance. Endorsed by the Procurement Board, the social clause agenda has consolidated its position within capital spend.

1.2 Recently, SIB has captured the wider UK experience of Social Clauses in a 'Buy Social' Toolkit. This brings together Principals and Priorities within the social clause agenda, Methods and Practices for implementation around jobs and skills, and several leading examples of social clause implementation, presenting valuable perspectives across capital spend.

Purpose

1.3 It is recognised that knowledge and thinking on the use of social clauses within Northern Ireland is still in its infancy. Therefore, in order to gain a more definitive picture across public procurement, the Procurement Board has requested a review of social clause implementation.

1.4 This will be undertaken independently by SIB and will capture more accurate data on the current social clause agenda; focusing on implementation, outcomes of social clauses within public procurement, and identifying recommendations for better guidance and practice.

1.5 This review will capture and support thinking and learning on the incorporation of social considerations within Northern Ireland. It will not assess performance by organisations and agencies, but rather contribute to improving knowledge and practice.

Action Required

1.6 Perspectives will be gathered from across the public procurement process; incorporating consultations with relevant NICS Departments, CPD Centres of Procurement Expertise, Registered Social Landlords, and industry stakeholders including Local Councils.

1.7 Case studies of public procurement will be presented, focusing on several contracts across services and construction that provide valuable perspectives. --

1.8 It is asked that you facilitate these consultation sessions, and designate a representative to provide any necessary input and reporting.

Review Team

1.9 The Social Clause Review will be conducted by:

- Richard Macfarlane, SIB Associate Strategic Advisor;
- Mary McKee, SIB Strategic Advisor for Social Regeneration; and
- Stephen McGlew, SIB Development Officer.

Outputs

1.10 Recommendations on amendments to current CPD guidance in the use of social clauses from a Northern Ireland perspective, leading to better guidance and practice.

1.11 It is proposed that the review will be presented to the Procurement Board by June 2015.

⁵⁷ Provided to RaSe by SIB via e-mail, 16 February 2015.

Appendix 2: Scottish Government Interim Guidance

Inclusion of community benefit clauses using PCS

Guidance note on using the functionality of Public Contracts Scotland to increase the inclusion of community benefits clauses in major works contracts.

A question will be asked within the templates for Works Contract Notices at OJEU level – see Fig 1. The buyer must answer whether a Community Benefits Clause (CBC) applies to the contract. The question will have a default answer of “no”. This is to avoid the buyer inadvertently inserting a Community Benefit Clause into their contract notice where it may not be appropriate to the nature of the contract in question.

Whichever answer a buyer selects, they are required to provide more information.

Inserting a Community Benefits Clause

If the buyer answers “Yes”, they are required to enter a description of the CBC(s) which apply.

Fig 1.

This image displays the description box on the PCS system should you answer yes, when asked, if community benefits apply to your contract.

The screenshot shows a web-based form titled "Required information" with a breadcrumb "Go to question: [Community Benefits Clauses (OJEU Works)]". The main heading is "Will Community Benefits Clauses apply to this contract?". There are two radio buttons: "Yes" (selected) and "No". To the right are three buttons: "Next", "Save", and "Cancel". Below the heading, there is a paragraph: "If community benefits clauses apply to this contract, a standard clause will be inserted into the notice as follows: Under the terms of this contract the successful supplier(s) will be required to deliver Community Benefits in support of the authority's economic and social objectives. Accordingly, contract performance conditions may relate in particular to social and environmental considerations. The Community Benefits included in this contract are:". This is followed by a text input field with a placeholder: "Please provide a brief description of the community benefits clause(s) that may apply to this contract. The text you provide will be appended to the clause above and inserted into the notice." Below this is another text input field with a placeholder: "If no community benefits clauses apply to this contract, please provide a reason why a community benefits clause is not being included in this contract. This is for reporting purposes only and will not be published within the notice."

Continued on next page...

This information is appended to a standard clause which is then inserted into the "Additional Information" section of the published notice.

VI.3) Additional Information

(SC Ref:192390)

Under the terms of this contract the successful supplier(s) will be required to deliver Community Benefits in support of the authority's economic and social objectives. Accordingly, contract performance conditions may relate in particular to social and environmental considerations. The Community Benefits included in this contract are:

Not inserting a Community Benefits Clause

If the buyer chooses to answer "no", they are required to provide a reason for not including a Community Benefits Clause. These details will not be published but will be made available to the Scottish Government to help them assess the impact and value of this approach.