

Social Enterprise and the Public Sector

A practical guide to law and policy



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This guide was commissioned by the BEST Procurement Development Partnership. It was written by Anthony Collins Solicitors with major contributions from Mick Taylor and Sipi Hämeenaho of mutualadvantage and Jennifer Inglis of SEEM and support from Emma Turner of Leicester Community Action Network.

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mutualadvantage

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Foreword

Does it matter whether or not there is a business model for the 21st Century?

As Einstein said: “We cannot solve our problems with the same thinking we used when we created them”. At their best, social enterprises create and apply new thinking- they develop new business practices, change consumption patterns, deliver services to diverse communities, include the excluded, and tackle the root causes of problems.

For public institutions it can be hard to get beyond thinking that competition is an end in itself, that public value is decided by the efficiency of converting inputs to outputs, and that social enterprises are simply an interest group. Nonetheless, changes are taking place, with some developing new approaches to commissioning in search of better public value. These public service innovators are helped by Government’s promotion of social enterprise in public service delivery, but are also hindered by confusion in practical guidance and apparent conflicts within the range of agendas the public sector pursues.

When SEEM set up the BEST Procurement Development Partnership in 2004, we provided some resource to our Partners- the innovators in the public sector and social enterprise movement- to find routes through the policy and practice jungle. We also worked with public sector staff who were externalising services to new social enterprises and being expected to take risks for reward to the public sector.

We learned that reassessing what is valued in a competition is insufficient to take advantage of the true potential of the social enterprise business model. It is also necessary to create solutions together- a joined up business model needs a joined-up customer!

Along the way Partners had many questions, which this guide answers. It does not advocate one approach, but covers a broad range of topics in a practical way. For those looking for new solutions it offers better paths through the current commissioning frameworks. It can also help today’s social enterprises understand what they can do.

The message to Government is that to accelerate the progress of innovators in the public sector and social enterprises there is a need to:

- **see social enterprises as a public value partner** and include them in Sustainable Community Strategy planning and market testing;
- move on from debating the legitimacy of “social issues in contracts” to recognising that public value creation crosses over administrative boundaries, and encourage commissioners to **look for opportunities** to achieve greater social outcome;
- **make use of pilots**, the “small lots” concession, **and research and development contracts to support innovation and high public value service models**; and
- **put in place a programme for changing how value for money is used** to fully consider outcomes, and improve understanding of how “user need” applies.

It matters greatly that new ways of doing business are developed for the 21st Century - new thinking is required to meet the challenges ahead, thinking that public value innovators in social enterprise and in the public sector are already trying to do.

Jennifer Inglis

Head of Policy, Social Enterprise East Midlands

“ Social enterprise has a long history, from the cooperative movement and mutual organisations of the nineteenth century to the long-standing trading activities of many charities. Over the last few years, one of the most important and exciting developments in the third sector has been an acceleration of interest and innovation in social enterprise. These include community enterprises such as development trusts, new providers of public services, such as GP cooperatives, and an expansion of consumer focused enterprises... These organisations are creating new ways of delivering social and environmental outcomes through business approaches.”

The future role of the third sector in social and economic regeneration: final report - July 2007
HM Treasury/ Cabinet Office

“ At their best, social enterprises can offer a high level of engagement with users and a capacity to build their trust. They are also a valuable source of innovation – including for services they do not deliver directly. Public services learn from the problem-solving spirit of social enterprises, which can help improve the quality of public services by shaping service design and by pioneering new approaches that can influence the way services are delivered by the public sector. Social enterprises often share the concerns faced by public policy makers, and are equally engaged in finding solutions to tackle social inequalities or environmental problems.”

Social enterprise action plan: scaling new heights - November 2006
Office for the Third Sector/Cabinet Office

“ Social enterprise offers health and social care organisations the opportunity to deliver high quality services in ways that are flexible, non-bureaucratic and have the potential to deliver good value for money. It also allows health and social care organisations to deliver services that are tailored to their local population, and make a difference to the local community. Because staff have a stake in social enterprise organisations, experience has shown that they are very committed to the aims of the service, and that this delivers benefits for the organisation, for example, improved staff retention.”

Department of Health website:
what are the advantages of social enterprise?

“ The Government believes there is significant potential for more public services to be delivered by social enterprises, and that local authorities in particular have an important role in opening up the procurement processes. We also need to build know-how in procurement issues amongst social enterprises and their advisors.”

Supporting Rural Enterprise in England: Defra

How to use this guide

This guide identifies opportunities for the public sector to do more and better business with social enterprises. Some legal issues arising where social enterprises supply goods or services to the public sector, or deliver public services, are also covered. The guide has been commissioned by the BEST Procurement Development Partnership to be a useful resource for four groups:

- those involved in commissioning and procurement in the public sector;
- those involved in service development, economic development and strategic policy in the public sector;
- people working in social enterprises who are targeting the public sector as potential customers or are already working with the public sector; and
- those who support social enterprises by providing business advice, training, networking and/or advocacy.

Part 1 encourages readers to take a broad view of the commissioning process and how corporate objectives can be achieved as part of commissioning. It explains the overall commissioning framework that applies to Central Government, local authorities and the NHS, and highlights some of the political agendas influencing commissioning. This Part is relevant to all four audiences.

Part 2 explains the EU procurement framework, dealing with scenarios when the EU rules apply in full, clarifying what can be done when they do apply and what can be done when they do not apply in full.

Part 3 deals with a number of specific legal issues that can help or hinder social enterprises involved with the public sector. It is aimed primarily at those in the public sector involved in commissioning and procurement.

Part 4 is designed as a quick reference guide to a number of legal issues that may be faced by social enterprises working with organisations in the public sector. Each topic has been designed to be read individually. This Part will be most relevant to social enterprises and those supporting them.

Finally, Part 5 provides a set of resources: this includes comments on future developments, a section on VAT, and a glossary and information on publications and references.

This Guide has been prepared by Anthony Collins Solicitors and mutualadvantage on behalf of the BEST Procurement Development Partnership led by Social Enterprise East Midlands ("SEEM"). The VAT section has been written by Baker Tilly. Given the potential circulation of this Guide and the fact that any advice contained in it is not limited to any specific case, no responsibility can be accepted by SEEM, the BEST Procurement Development Partnership, Anthony Collins Solicitors, mutualadvantage or Baker Tilly to any individual, organisation, public body or social enterprise for action taken or refrained from solely by reference to the contents of this document. Public bodies and social enterprises should seek their own legal advice on the application of these general principles to their specific circumstances where they consider it necessary.

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This Guide is based on the legal position in August 2007 in England. Where there are differences in Wales, Scotland or Northern Ireland they are highlighted. England and Wales are the same legal jurisdiction and subject to identical legal provisions, except for provisions devolved to Welsh Assembly Government where they have chosen to adopt a different approach. Scotland and Northern Ireland are separate legal jurisdictions. However, given that much procurement law (particularly the EU rules and Treaty provisions) is derived from the European Union, it is the same in both of these jurisdictions as in England and Wales.

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Introduction

Social enterprises have been successfully providing public services for many years. For many of them, achieving this successful relationship was more complicated than necessary, especially when breaking new ground. At a time when more public sector markets are potentially opening up to social enterprises and when policy through procurement receives more attention, this guide seeks to explain how the public sector can take advantage of what social enterprises have to offer.

There are some things which can be done to maximise the potential for social enterprises to be engaged in public services which simply raises the bar on current good practice. There are other matters which require a sea change in policy and, most significantly, in culture at three levels: local commissioners, the UK Government and the European Union. These include:

- Developing a common language in commissioning and procurement for terms such as "public value", "social requirements" and "community benefits";
- Bridging a number of gaps between policy and regulation;
- Avoiding over-dependence on competition as the primary driver for demonstrating best value in procurement;
- Avoiding excessive use of the full EU tender process when this is not always required and alternative approaches would improve the achievement of the required outcomes, and stimulate local supply markets;
- Commissioning outcomes rather than outputs;
- Establishing a clear legal and policy framework that enables the procurement and support for innovation; and
- Developing a culture of procurement that is not overly risk-adverse.

All too often the process for commissioning remains one which depends on the expertise and approach of the commissioner using the right sort of policies e.g. through the sustainable community strategy and the local area agreement. In Central Government there is no equivalent framework for policy development, possibly because the lines of accountability to service users may be less clear than where there is an obvious "community of interest".

There is one missing link which would serve to do much to hasten the process of change in service delivery. Procurement generally depends on the commissioner taking actions: policy adoption, business case preparation, OJEU notice etc. There is no commonly held framework in the UK for social enterprises (and potential public service partners from other sectors) to take innovative ideas and develop them for adoption by the public sector in ways which recognise the endeavours of the organisations taking the initiative. A route map for doing this which has the approval of Central Government (especially the Treasury) would do much to release a new spirit of enterprise in the delivery of better services for people. Some commissioners (especially local authorities) do this on an ad hoc basis and are generally regarded as being "courageous" for doing so. If the much needed process for public service reform is to gather momentum, it cannot simply happen through centrally designed programmes: there has to be a parallel good practice route for capturing innovation at the initiative of the provider. This would be on the basis of understanding that:

- formal procurement is only one way to commission, and, if used inflexibly, may be a poor approach for delivering new services;

- social enterprises can provide public benefits that achieve better value for money. Failure by commissioners to respond to opportunities that do not fit within current administrative boundaries is a significant barrier;
- contrary to popular belief, competition is not always legally required in a procurement or partnership process. In a number of circumstances there are opportunities to negotiate directly, with a view to maximising the public value;
- an understanding of the complexity of “user need”, and a commitment to achieving the widest possible public value, enables value for money to be assessed against long-term measurement of outcomes and effectiveness, and not simply inputs, outputs and unit costs;
- artificial constraints on access to some markets should be reviewed, for example the restrictions on some forms of social enterprise providing General Medical Services or Primary Medical Services;
- much can be done to expand upon the good work that public bodies, especially local authorities, are doing to help build the capacity of social enterprises and other third sector organisations to deliver public services;
- social enterprises can be included in Sustainable Community Strategy planning, in defining soft-market testing, in supplier surveys and in all pre-contract discussions;
- contracts can be redesigned and re-packaged so that they capture greater public value;
- processes can be simplified, especially where the full EU rules do not apply;
- tax and VAT implications should be determined at an early stage; and
- a statutory basis should be developed for committing to the economic, social and environmental well-being of people served by Central Government, thus creating a platform for social considerations to be included in Central Government procurement.

While local authorities have a clear legal framework for engaging with communities, no equivalent structure is in place for Government departments or the National Health Service. A similar statutory basis for committing to the economic, social and environmental well-being of people served by Central Government would help unlock opportunities for social requirements in public procurement across the board. Perhaps as part of the ongoing constitutional review, it needs to be explicit that Government is for the common good of the people as much as this is now clear for local authorities. This will provide a platform for social considerations to be strongly embraced in central public procurement.

There is an increasing focus on better relationships between commissioners and service providers. From a legal viewpoint, commissioners should:

- understand the powers available, and the ways these can be applied to the widest objectives possible (including working together with other public agencies to achieve even greater benefits);
- adopt policies which enable a wider range of social, economic and environmental benefits to be accepted, promoted and delivered as being of public value;
- use a range of commissioning routes (including procurement) as appropriate to their purpose;
- respond proactively to proposals from social enterprises for different ways of fulfilling this purpose, where there is a good chance that this might be in the public interest;
- adopt policies which enable the widest possible public value considerations to be incorporated into what is bought;
- know when it is legitimate to hold direct negotiations with the social enterprise and when to use competition;
- prepare a robust business case prior to any competition or contracting process;
- prepare a specification which allows for the full scope of what could be delivered by the social enterprise;

- be clear about the type and level of data required to measure compliance with the specification, and the delivery of value for money with reference to comprehensive core requirements which embrace a broad well-being agenda;
- publish a flexible Contract Notice alerting the market through parallel domestic publications (where there is competition);
- set realistic and sensible thresholds for pre-qualification;
- use most economically advantageous award criteria which embrace social and environmental benefits within the core of the commissioner's requirements in a way that fully assess the costs and benefits of the whole life of the contract;
- address staff and pension issues early enough in the tendering/negotiation process to be able to address them fully and properly;
- base the decision to award to the supplier on reliable and credible data which clearly demonstrates value for money and a commitment to continuous improvement;
- establish a contract management process which allows partnering and working together on principles of mutual trust;
- agree a clear and realistic dispute resolution process with early warning systems for when things could go wrong; and
- check that everybody implements outcomes planned at the outset, with a view to service delivery transformation.

Where there is competition, commissioners can adopt model provisions not just in terms of contract conditions but provisions to be adopted all the way from OJEU through PQQ to invitations to bid. A standard approach where there is no competition should be also developed, from concept through to implementation.

There needs to be greater openness to the giving and receiving of suggestions and ideas, and when they are made, a commitment to testing them out through properly allocating resources to business case development.

But the onus is not just on the public sector. Social enterprises can and should do more to develop their relationships with public bodies so that they can find routes to having their public value offers accepted. They can find opportunities for partnering and testing out new ideas, influencing a way of determining value for money that a commissioner is prepared to accept or winning contracts and then raising standards.

In our experience, committed people in the public sector and in social enterprises can achieve much by will and determination and by harnessing the resources of those willing to assist by a "can do" approach: such people do exist!

This guide develops the art of the possible, seeks to answer some of the problematic issues that arise, and expands on the detail of what the law provides.

The guide is broken into a number of parts for ease of reference. It aims to avoid duplication: explanations given to cover one situation will be relevant to other scenarios. The guidance in this document can be adapted to a variety of circumstances: flexible application will help you make the most of the content.

Mark Cook

Anthony Collins Solicitors LLP

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Part One:

The Commissioning Framework





Section 1:

How does commissioning work?

1.1 Introduction

Public bodies achieve their corporate objectives in a number of ways, both by supporting others and directly carrying out activities. In broad terms this process can be described as “commissioning”. In this Guide we use the term “commissioning” to mean the entire cycle of assessing the needs of people in a local area (or the relevant “users”), designing services and then securing them (following the [Office of the Third Sector Action Plan](#)).

“Procurement” covers the specific activities of buying goods and services, from the initial advertising through to the final contract arrangements. Other ways of delivering a commissioner’s requirements include:

- delivering the activity itself by employing people and providing the resources necessary to carry it out;
- giving a grant or subsidy to an organisation to carry out that activity;
- providing capital funding to the organisation which is then able to carry out the activity on a self-financing basis;
- giving financial support to users of the service to meet fees charged by the organisation providing the service or for them to purchase their own service;
- providing “in-kind” support (such as seconding staff, or providing services, equipment or assets) to the organisation delivering the activity;
- setting up a joint venture; or
- giving an organisation the right (a concession or licence) to provide the service.

Understanding commissioning is important both for a commissioner and a social enterprise because:

- the powers and policy framework of a commissioner determine what can be requested and valued; and

- social enterprises can proactively take steps to influence what a commissioner buys through developing good relationships before procurement commences.

An increasing amount is being written about commissioning and its challenges by both different Government agencies and the third sector itself (see, for example, the interesting discussion in [“The Future of Commissioning: Leadership Challenges”](#) (ACEVO/Futurebuilders)).

In general, social enterprises provide services to public bodies at a local level. This guide therefore concentrates on procurement at a local or frontline level, rather than procedures instigated by centralised procurement organisations, for example the NHS Purchasing and Supply Agency.

Every commissioning process should start with the public body identifying what it wants to commission. This should be considered in the broadest terms since there are many artificial boundaries within public bodies which have evolved for administrative rather than strategic purposes. Just because social housing and social care are dealt with separately doesn’t mean they don’t influence each other. A good starting point is the high level objectives of the public body, i.e. what has it been set up to do and what legal powers does it have to achieve those objectives? Local authorities have a process for doing this through their community consultation requirements, but this discipline is not so apparent for other types of public bodies. Our contention is that if they did this basic review, far from narrowing the scope of what they would commission, many commissioners would enlarge what they sought to achieve.

The decision on what to commission should reflect its corporate priorities and strategies. For example, when exercising the power to promote the economic, social or environmental well-being of their area, local

authorities are required by statute to “have regard to” their community strategy. In fact, the sustainable community strategy should be the guiding document for the exercise of all of a local authority’s functions - perhaps this should be more explicit in the legislation governing councils.

This critical stage of identifying “what” to commission or procure before commencing the process is essential if public bodies are to derive full value. This decision over what is being commissioned should then be translated into a set of outcomes that the public body would like to see being achieved as a result of its commissioning activity.

Public bodies should not move on to the “how” to commission until they have decided “what” they want to commission.

A checklist for the commissioning process could therefore read:

- What are the public body and its stakeholders looking to commission?
- Does it further the public body’s objectives?
- How does it fit into wider corporate strategies and are there any other strategies it can be linked with?
- What are the outcomes that the public body and its stakeholders want to achieve?
- Through what type of commissioning can those outcomes best be achieved?
- Does the public body have the legal powers to achieve this?
- How will value for money be assessed against outcomes being commissioned?
- What are the capabilities of potential suppliers?
- Are there innovative approaches that could be tested?

Public bodies have to exercise their statutory powers:

- for the purposes for which they are given and not for “improper purposes”;
- by reference to all relevant considerations (as set out in the statute giving the power and all other applicable statute or case law);
- without taking account of irrelevant considerations;
- without the decision being so irrational that no reasonable authority could take it;
- by the organisation itself (the organisation cannot “fetter” how it will exercise its decision making by a contract giving up its right to take decisions on the exercise of powers in favour of a third party); and

- with regard to any legitimate expectations of third parties.

These principles cut across the commissioning activities of all public bodies.

1.2 Which Commissioners?

This guide specifically addresses:

- Central Government in the UK (including Welsh Assembly Government, the Scottish Executive, the Northern Ireland Executive together with Government Departments, executive and statutory agencies and other central bodies);
- Regional Development Agencies, Local Authorities and organisations closely aligned with them, such as housing “Arms Length Management Organisations” (ALMOs) and leisure “Trusts”; and
- National Health Service (NHS) organisations.

However, there are other public bodies to whom it will be relevant.

1.3 Government Departments

The powers of the UK Central Government are derived from two main sources. The Royal prerogative involves the exercise of the Crown’s powers through Government ministers (Secretaries of State) who represent the Queen. To these are added powers and duties specifically allocated to those Secretaries of State by Acts of Parliament (known as statute law).

Each Secretary of State heads a Government Department, set up under the Ministers of the Crown Act 1975 and staffed by civil servants who undertake the commissioning on behalf of the Secretary of State.

Statutory powers can only be exercised in accordance with the terms of the statute granting them.

Within Government Departments there are executive agencies (which include organisations such as the Environment Agency, the Probation Service, the Benefit Service and the Passport Agency). Executive agencies are not to be confused with Non-Departmental Public Bodies (NDPBs, which include English Partnerships and the Arts Council), which are generally set up under a statute which sets out their objectives and powers. Most have the power to do anything “necessary or expedient” for the purposes of achieving their statutory objectives.

1.4 Regional Development Agencies

Regional Development Agencies (RDAs) are NDPBs set up under the Regional Development Agencies Act 1998. Their purposes are to:

- further economic development and regeneration;
- promote business efficiency and competitiveness;
- promote employment;
- enhance the development and application of skills relevant to employment; and
- contribute to sustainable development.

A RDA has the power to *“do anything which it considers expedient for its purposes, or for purposes incidental thereto.”*

RDAs must work with other regional and sub-regional bodies to agree a ten-year “Regional Economic Strategy”.

RDAs influence the commissioning process in a number of ways. They themselves are commissioning bodies. They can have a strong influence in the development of regional markets in which social enterprises have an interest.

1.5 Different types of local authorities

Local authorities are created and regulated by Acts of Parliament. The principal act defining their existence is the Local Government Act 1972. Their primary function is to act as vehicles for “local representative democracy”. They are increasingly being regarded as vehicles for “community leadership” and “place shaping”.

There are different “tiers” of Local Government. In the larger cities and medium sized towns there is a single tier of Local Government in the form of either a Metropolitan District Council or a Unitary Authority. In rural areas there are generally two tiers of Local Government, a County Council and a District Council. Although some functions (such as planning or highways and footpaths) are shared between the authorities, in general education and social services are provided by the County Council and housing, licensing and environmental health are dealt with by the District Council.

Since local authorities’ functions are given to them by statute, they may not do anything outside those statutory functions. These functions are divided into statutory duties, which authorities must carry out, and powers, where they have a choice whether or not to act. For example, local authorities pursue economic

development under their economic well-being powers (see below) which replaced previous specific powers, whereas RDAs have a duty to further the economic development and the regeneration of their areas. If a local authority acts without the necessary powers or does not exercise those powers properly their decisions will be “ultra vires”. Ultra vires decisions can be held to be invalid and contracts based on them are at risk of being set aside.

1.6 The well-being power

Local authority powers were significantly enhanced by the “well-being” power in the Local Government Act 2000 (which applies in England and Wales). This gives a local authority the power to do:

“anything which they consider is likely to achieve the promotion or improvement of the economic, social or environmental wellbeing of the area, or part of the area.”

There is a specific power to incur expenditure and enter into “arrangements or agreements” when exercising the well-being power. This gives scope for innovative methods of commissioning, although the well-being power cannot be used where other specific powers exist or where a specific restriction applies (i.e., the well-being power fills gaps rather than being a blanket power). It’s certainly clear that this power enables local authorities to engage in proactive ways of engaging with social enterprises especially in circumstances where the full EU tendering rules do not apply (see Part 2).

Case Studies

- Fenland District Council – using the power of well-being, Fenland set up fenESS, an energy services scheme combining energy supply with the provision of measures concerned with efficient use. fenESS works with registered social landlords and other landlords in both the public and private sectors, whilst helping achieve energy conservation targets.
www.fenland.gov.uk
- Kirklees Metropolitan Borough Council – the power of well-being enabled the local authority to join the UK emissions trading scheme. The scheme offered the Council the opportunity to secure additional funding to reduce carbon dioxide emissions. In return it is signed up to a legally binding reduction of 1000 tonnes CO2 for part of its municipal buildings.

www.kirklees.gov.uk/community/environment/energyconservation/conservationprojects.shtml



- Nottinghamshire County Council – the well-being power enabled the creation of Renewable Nottinghamshire Utilities Limited, which aims to develop the physical and commercial infrastructure necessary to encourage the wood-heat industry in the East Midlands.

www.nottinghamshire.gov.uk/beacon-renu.pdf

It can sometimes be difficult to establish the “outer limits” of a power such as the well-being power. Recent case law suggests the Courts are looking to uphold the wide interpretation of the well-being power promoted by the Government guidance, rather than the more restrictive approach taken to the interpretation of Local Government powers in the 1990s. This supports the broader interpretation taken by some authorities.

The well-being power is available in Scotland under the Local Government in Scotland Act 2003. There are minor differences, for example over the extent to which the proposed use of the power to be in accordance with the community strategy. In Scotland, what is known as “community planning” is part of the law rather than the guidance, and is contained in Part 2 of the same Act.

There remains no equivalent to the well-being power in Northern Ireland.

1.7 Community co-ordinators

Local authorities must consult widely on a community strategy, setting out the steps they will take to promote the economic, social and environmental well-being of their area. Community plans are being renamed sustainable community plans but there is no legislation underpinning this change.

Local Area Agreements (LAAs) are increasingly being seen as the means by which local authorities implement those community strategies. The development of LAAs continues, with proposals for them to be given a statutory footing to emphasise the “place shaping” role envisaged for Local Government in the future. It is also proposed that the LAAs will be used as the forum for negotiating targets for local authorities with Central Government. These will replace the numerous centrally imposed targets that exist at the moment. The legislation also proposes placing duties on other statutory bodies to co-operate with the LAA process. The lack of such a requirement has been a weakness in the process to date.

1.8 Related companies

Bodies set up by local authorities such as housing ALMOs or leisure trusts are usually limited companies (or sometimes industrial and provident societies). Their powers to commission goods and services from others will be set out in their constitutional document. In general they will have fairly wide powers to commission goods and services. However, where the authority retains a significant involvement in their running and they do not operate as a commercial company, they must comply with the EU procurement rules in their procurement activities.

1.9 Regional Centres of Excellence

Regional Centres of Excellence were set up to promote good procurement practice and produce tools to support this in Local Government: they are likely to be superseded by new regional structures in the near future.

1.10 Non-commercial considerations

When the commissioning activity involves procuring contracts, local authorities need to be aware of section 17 of the Local Government Act 1988.

Section 17(1) states that "It is the duty of every public authority to which this section applies, in exercising, in relation to its public supply or works contracts, any proposed or any subsisting such contract, as the case may be, any function regulated by this section to exercise that function without reference to matters which are non-commercial matters for the purposes of this section." 'Non-commercial matters' are listed in s.17(5).

In terms of workforce issues in England these are now permitted (since 13th March 2001 to the extent that local authority considers it necessary for best value purposes).

There remain some archaic provisions originating from the days when the then Government sought to stop local authorities boycotting goods supplied from certain countries which require abolition, because of the strange consequences they could have in perfectly legitimate circumstances. These relate to "any involvement of the business activities or interests of contractors with irrelevant fields of Government policy" (of particular interest is that 'irrelevant' includes foreign policy) and "any political, industrial or sectarian affiliations or interests of contractors or their directors, partners or employees".

The difficulty here is that issues such as fair treatment of employees based outside of the UK, fair trade, and protection of the environment abroad could be argued to be matters of foreign policy. If they are foreign policy then they would be classed as 'non-commercial matters' and cannot be taken into account by local authorities. To counter this, a local authority (if it wants to take into account any of these things when appointing a contractor) must show that these things are pursued principally not as foreign policy but as matters of domestic policy which are not "irrelevant"; for example, "fair trade" is analysed not only for products produced abroad but principally required of products in the UK. This is an artificial distinction which it would be better to address by the repeal of Part II Local Government Act 1988 altogether.

1.11 Internal requirements

Local authorities have contract standing orders as to competition. These set down the rules which are to be followed by the local authority when entering into contracts. They deal with issues such as authorisation for signing off contracts, selection of the successful bidder, and how terms and conditions are decided. Standing orders include financial thresholds for different contracting procedures, with contracts of a low value being dealt with in a range of ways, from award of contracts subject to benchmarks of value for money, to, more typically, a limited competition for the contract opportunity. The starting point for any contract is to follow the process in the standing order. However, the local authority (acting through someone with the appropriate level of authority) is entitled to depart from the standing order in certain circumstances (known as a waiver).

Whilst the contract standing order can be waived, this should be the exception rather than the rule. The London Centre of Excellence produced its best practice guidance (in June 2006) on contract standing orders, including waivers. It concludes that *"all waivers need to properly documented and an audit trail provided for the circumstances and persons involved, including full explanation and sign off"*

www.lcpe.gov.uk/Library/pdf/etho-060609-Model%20CSOv2.pdf

1.12 NHS objectives and bodies

The core aim of the NHS is

“to continue the promotion in England of a comprehensive health service which is designed to secure improvement in:

- (a) *the physical and mental health of the people of England, and*
- (b) *the prevention, diagnosis and treatment of illness.”*

This duty is given to the Secretary of State for Health.

Strategic Health Authorities, Primary Care Trusts and NHS Trusts are currently governed by the National Health Service Act 2006. This sets out their respective functions and the relationship that they each have with the Secretary of State. Specific powers of the Secretary of State are delegated under the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002, whereas NHS Trusts have their own statutory framework. “Foundation Trusts” have constitutions that are developed for each of them: to be explored is the opportunity to develop well-being within their terms of reference.

Strategic Health Authorities manage the NHS regionally and locally and are a key link between the Department of Health and other NHS bodies. They are also responsible for ensuring that national priorities are integrated into plans for the local health service. They are required to develop strategies, ensure high-quality performance and build capacity in the local health service.

The role of NHS Trusts is to provide goods and deliver services for the purposes of the health service, principally through owning and managing hospitals and related facilities.

Primary Care Trusts (PCTs) are responsible for planning and commissioning health services for their local population. For example, PCTs must make sure there are enough GPs to serve the community and that they are accessible to patients. PCTs must also guarantee the provision of other health services such as dentists, patient transport and screening clinics. PCTs are now responsible for over 80% of the total NHS budget.

NHS bodies such as NHS Trusts and PCTs generally have the power to do anything “necessary or expedient” to further their statutory objectives.

1.13 Arrangements in Wales, Scotland and Northern Ireland

The arrangements for the NHS in Wales, Scotland, and Northern Ireland all differ from those in England.

In Wales the Department of Health is replaced by the NHS Wales Department, with Regional Offices, NHS Trusts and Local Health Boards.

In Scotland the Scottish Health Department is the Government Department, with Special Health Boards, NHS Unified Boards and Community Health Partnerships.

In Northern Ireland, health and social services are managed and delivered together. The Government Department is the Department of Health, Social Services, and Public Safety, with Health and Social Services Boards, Health and Social Services Trusts and Local Health and Social Care Groups.

1.14 NHS commissioning framework

The January 2006 white paper Our Health Our Care Our Say committed the Government to bringing in a new commissioning framework. This was followed in July 2006 by Health Reform in England: Update and Commissioning Framework, which was predominantly aimed at PCTs. In March 2007 the Commissioning Framework for Health and Well-being was issued for consultation. This is in the context of moving from the previous system (with funds often going directly to local providers under block contracts) to a new “commissioning” system that is intended to be based more on assessing health needs.

“Practice-based commissioning” (PBC) in England devolves some key commissioning decisions (and the budgets linked to them) to GP practices. Although the decisions may lie with the practice, the PCT is actually responsible for procuring what the practice wants to commission. A budget is devolved either to a single practice or to “locality cluster” of several practices.

Joint commissioning has been around for some time and is currently being encouraged as part of the strategy of joining up service delivery. For example, section 75 of the National Health Service Act 2006 now allows a joint fund to be set up by a local authority and NHS body to further shared functions. However, a key limitation on joint commissioning is that funding provided by one participant may only be used to further the functions of that participant.

It can be difficult to keep track of the latest policy moves but see, for example The Chartered Society of Physiotherapy's useful overview [Getting To Grips With NHS Commissioning](#), which notes the following in relation to other parts of the UK:

- new commissioning structures have been in operation in Northern Ireland since April 2007; and
- the "Delivering for Health" reforms are continuing in Scotland on the back of the Kerr Report in 2005 called [Building A Health Service Fit For The Future](#).

1.15 Peculiarities about NHS contracting by PCTs

A PCT may enter into a contract with "any person" (meaning any organisation or individual) who is capable of delivering the primary medical services in question. However, there are requirements on the legal structure of the contractor depending on the kind of contract that is being tendered. This means that the successful tenderer must pass a two-stage test: first, having the right kind of constitution; and second, showing that it has the capacity to deliver the services.

The structural requirements for the main types of contracts are summarised below:

General Medical Services (GMS):

- a general medical practitioner;
- two or more individuals in partnership (where at least one must be a general medical practitioner and the other(s) being a medical practitioner, healthcare professional, GMS or PMS provider (or employee of one), or employee of PCT, NHS trust, or a Foundation Trust); or
- a company limited by shares (with rules on the ownership of the shares)

Personal Medical Services/Specialist Provider Medical Services (PMS/SPMS):

- a medical practitioner;
- a healthcare professional;
- an individual who is a PMS or GMS provider;
- an NHS, GMS, or PMS employee;
- an NHS Trust, PCT, or NHS Foundation Trust; or
- a company limited by shares. (all shares in which must be owned by one or more of those listed in (i) to (v) above).

Alternative Provider Medical Services (APMS):

- There are no legal structural requirements but, as with GMS or PMS, the service provider must be capable of delivering the service.

Example

If a particular social enterprise is a company limited by guarantee (CLG) then since it has company members rather than shareholders, it is clear that the Company (as it is) will only be able to bid for an APMS contract, since a CLG is not one of the permitted forms for GMS or PMS. However, there are potential issues in relation to pensions if the Company (as it is) were to be awarded an APMS contract. (In theory it would be possible to set up a community interest company limited by shares with all its shareholders being individuals as listed above, but this would not allow for wider stakeholder participation, including community and patients' representatives.)



Section 2:

The Policy framework

There are a number of themes which strongly influence the way in which commissioners procure services and which social enterprises need to understand:

- value for money;
- strategic procurement, especially the [Gershon Review of Public Sector Efficiency](#) and the [Simms Review of Sustainable Procurement](#);
- sharing costs and benefits across the public sector; and
- stimulating a mixed economy of providers.

2.1 Value for money

“Value for money” has always been a key feature of public sector commissioning. For example, local authorities are under a duty to act in the best interests of their Council-tax payers.

Central Government departments are covered by the principles in Government Accounting 2000 (as updated), and in particular chapter 22 on procurement. This states that the Government’s policy is “to achieve value for money having regard to propriety and regularity”. In practical terms, this states that

“goods, works or services should be acquired by competition unless there are compelling reasons to the contrary. Subject to the department’s legal obligations, the form of competition should be appropriate to the value and complexity of the product or service to be acquired.”

The Government definition of “value for money” is “the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user’s requirement”. Value for money does not mean the lowest price.

Local authorities are subject to a duty of “best value”. This is a duty to:

“make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness”.

It is generally understood that the “arrangements” that are made should include the principle that procurement is undertaken on the basis of value for money.

Using value for money assessments in relation to the user’s needs places the onus on commissioners to obtain social benefits that can be measured within the core requirement of a contract. Commissioners should therefore simply include social and other well-being outcomes in their requirements. Too often “whole life cycle” criteria are ignored in determining value for money: developing these criteria to embrace “whole well-being” factors is a piece of work which urgently needs more attention from the Audit Commission and the National Audit Office.

There is almost universal acceptance in recent guidance that commissioning should be undertaken on the basis of value for money rather than lowest price. However, value for money can only be assessed in relation to what is being commissioned.

Commissioners should therefore think carefully about what their requirements are – “user need” - and take into account the economic value of all of the public benefit outcomes they want to achieve through the commissioning process.

There is currently insufficient developed guidance on how social and environmental requirements in procurement can be developed into measurable outcomes providing the basis for determining value for money. Some intelligent thinking is reflected in the Audit Commission’s “[Hearts and minds: commissioning from the voluntary sector](#)” (July 2007)

which sets out principles capable of application to public sector contracts with social enterprises. A major conclusion arrived at in this report is that commissioners “seeking a better understanding of value for money need to collect evidence on outputs and outcomes as well as inputs”. More work does need to be done to work out what this means in practice with regard to “whole well-being” requirements.

Value for money therefore should not be thought of only in financial terms, but requires a deeper understanding and a joint approach across different disciplines. This is in significant measure because as the Audit Commission notes, “Understanding the market implies understanding how diverse and competitive it is, how much power the authority has in this market, and how the authority’s actions may influence the future development of that market.”

Service providers need to develop a better understanding of how value for money should be demonstrated. This should be considered at business case and soft market-testing stage (as to which see Part 4), with the following line of approach:

- Does the specification adequately cover measurable outcomes which reflect the best and the greatest innovation available from social enterprises?
- How does the commissioner judge any bid by a social enterprise as to how it would achieve those outcomes, against the criteria for selecting the most economically advantageous tender?
- Do the evaluation criteria match what is being sought under the specification? If not, they should!
- How is ongoing value for money measured against the specification throughout the period of the contract in a way that encourages continuous improvement?

For local authorities, the Comprehensive Performance Assessment process is soon to be replaced by the simpler but wider Comprehensive Area Assessment. All local authorities are audited and monitored by the Audit Commission. One strand of the testing is on “use of resources”: a report is based on five themes which look at how well a local authority manages its finances and delivers value for money. Use of resources, when combined with the other strands, is used to give local authorities an annual CPA star rating. Poor performance can lead to a loss of reputation for an authority, as well as a risk of reduced funding from Central Government. Social enterprises need to develop an understanding therefore not only of value for money in the contract

they are performing, but the impact they can have in strategic services on the authority’s overall performance under its CPA/CAA.

Given the Audit Commissioner’s clear aim that commissioners need to understand how social and environmental objectives are factored into the value for money assessments, value for money needs to be assessed against a specification which embraces:

- outcomes from the main service in question;
- outcomes which benefit the rest of the commissioner’s objectives - “public value” - and which therefore need to be incorporated as core to the specification; and
- outcomes which are of direct benefit to other public bodies, but have arguably less direct impact on the commissioner itself - “wider public value”. Local authorities can certainly harness such benefits through their well-being power, underpinned by their Local Area Agreements – the reverse, i.e. how PCTs and other local public agencies can do this is less clear and needs to be given express statutory footing.

Example

A local authority distilled “community cohesion” into specific requirements in a carer support services tendering exercise. Outputs identified included ensuring that carers were taken out of positions of isolation and supported by their surrounding community. These are verifiable requirements against which value for money judgements can be made.

2.2 Strategic procurement

There has been significant encouragement from Central Government to adopt a strategic approach to procurement, both within Government and the wider public sector.

This has been driven by Sir Peter Gershon’s Independent Review of Public Sector Efficiency, the need to demonstrate savings in public expenditure and a desire to improve value for money through the commissioning process, ensuring that it reflects wider corporate objectives.

Most local authorities have now adopted a procurement strategy, following encouragement to do so from Central Government, particularly in the National Procurement Strategy for Local Government. The extent to which this refers to and embraces the authority’s community strategy varies enormously.



Example

See the Government's [Sustainable Development website](#) for case studies of local authorities who have embedded sustainable development into their community strategies, local area agreements and corporate procurement strategies:

- Oldham Partnership - planning for sustainable communities;
- Durham's LSP - sustainability appraisals;
- holistic thinking embeds sustainability into Birmingham's LAA;
- Kingston's LAA builds on sustainability in community plan;
- Shropshire's LAA - prioritising 'sustainable communities';
- triple bottom-line built into Cornwall's LAA; and
- Kirklees Metropolitan Council - a sustainable agreement.

Specific commitments to giving social enterprises opportunities to provide local services should be generally be made in procurement strategies, not only of local authorities but also other public bodies. Local authorities have a clear mandate to do this through the well-being power, but the basis for Central Government departments to do so is unclear as there is no equivalent statutory framework.

A related subject is the trend for local authorities and other Government organisations to enter into strategic service partnerships, particularly in connection with corporate or back office operations. These drive service delivery improvements to support public sector organisations in their frontline services. As social enterprises will invariably be involved with frontline services, they need to understand what their relationship will be with the strategic service provider in such instances.

2.3 Sharing costs and benefits across the public sector

A very strong theme promoted by Government, following on from the [Gershon Review of Public Sector Efficiency](#), is the promotion of shared services between public bodies in the same sectors. In addition the joint commissioning of services between the NHS and particularly local authority social services departments has statutory underpinning in the form of section 75 partnerships. These provide both opportunities and challenges for social enterprises.

A common theme that does give cause for concern is that there is no readily recognisable mechanism for one public body to achieve recognition from HM Treasury for expenditure that creates savings in

another part of the public sector. This is a particular problem for local authorities, e.g. when commissioning leisure trusts to target poorer people to undertake sport, thereby benefiting the NHS budget.

Although LAAs do offer some opportunity for joint commissioning, the opportunity for doing so at a neighbourhood level with the appointment of a single community services managing organisation is an idea which requires further development and piloting.

The National Health Service Act 2006 does provide that “in exercising their relevant functions NHS bodies (on the one hand) and local authorities (on the other hand) must co-operate with one another in order to secure and advance the health and welfare of the people of England and Wales”. Social enterprises are therefore ideal partners for assisting councils and NHS bodies to fulfil this duty.

2.4 Stimulating a mixed economy of providers

Local authorities are increasingly proficient in creating a mixed economy of service providers, ranging from large contracts with major public companies (often connected with capital investment) to smaller contracts with small and medium enterprises (SMEs). Social enterprises often fall into the category of SMEs (although there are notable exceptions). This balancing act is one for each local authority to manage – there can often be tensions, for example where the economies of scale may reduce competition.

In the report *Smaller Supplier – Better Value?*, the OGC gives the following reasons why small and medium sized enterprises (SMEs) are being discouraged from tendering for public sector contracts:

- not being able to find out about opportunities;
- believing that the processes are involved in bidding are unnecessarily complex and costly;
- current trends in public sector procurement towards larger and longer contracts, and rationalising the number of suppliers, meaning that smaller businesses often find the resulting contracts too large for them; and
- believing that public sector procurers perceive a risk of contracting with diverse forms of business such as social enterprise, where their value can be misunderstood and overlooked.

The National Procurement Concordat for Small and Medium-sized Enterprises (SMEs) is a statement of principles to encourage effective trade between local authorities and SMEs. Since many social enterprises are also SMEs, its principles are relevant to the majority of social enterprises. The key commitment here is to publish a procurement strategy that includes a commitment to the role procurement is to play in delivering the authority’s objectives and its contribution to the community strategy, workforce issues, diversity and equality and sustainability.

While there is much encouragement to stimulate a wider supplier base, there is little practical guidance on how this is to be done within the context of a commissioning process. There are different drivers in a successful social enterprise which require recognition by the commissioner in achieving a mixed economy of services. For example, if its members include staff and user representatives, it is internally accountable for its services in a way which is not achieved to same degree as a business driven principally by the maximisation of profit.

2.5 Sustainable procurement

Sustainable procurement is explored in more depth in Part 3. At a national level, sustainable procurement was moved on by the Government’s Sustainable Procurement Taskforce (“SPTF”). The SPTF produced its action plan (the Simms Report) in June 2006. Progress on sustainable development (which includes aspects of procurement) is monitored by the Sustainable Development Commission. Of particular note is the Flexible Framework which enables public bodies to measure their progress in pursuing sustainable procurement and which is a benchmark reference tool used by an increasing number of local authorities.

There are a number of publicly available tools designed to assist with achieving sustainable procurement. There is guidance from IDeA (in conjunction with SOLACE and WRAP) in the form of “Sustainable Procurement – Making It Happen”. Forum for the Future has developed several versions of its “sustainable procurement tool” covering the public sector, local authorities, and the NHS, including part of the BEST Procurement Development Partnership.

Key to sustainable development is the consideration of the social and environmental impact of commissioning and procurement. Work on social considerations in public procurement is considerably less developed than other sustainability considerations, and requires a broader treatment than the project on social clauses in contracts, which is the responsibility of the Office for the Third Sector, as set out in the Government's response to the SPTF recommendations, the report of the Third Sector Commissioning Taskforce and the [Social Enterprise Action Plan](#).

There are special labels given to different aspects of sustainable procurement which result in them being perceived as incidental rather than at the centre of a commissioner's requirements. This means that much more needs to be done about mainstreaming economic, social and environmental benefits in commissioning so that what cannot be done is described by way of exception rather than the current fog of platitude and uncertainty. To state clearly - you can buy anything that is relevant to the subject matter of the contract and this is defined by what you choose to buy, provided you are not behaving in ways which are discriminatory.



Sherwood Energy Village
www.sev.org.uk



Part Two:

EU Procurement



Commissioners in the public sector can only procure goods or services within the EU procurement rules. However, this does not always require the full, detailed and complex tendering process. Nor are the rules as inflexible as is often perceived to be the case.

Social enterprises want to be in position where they can easily access information about current and future contracting opportunities. They look for a “level playing field” that provides the opportunity for them to show commissioners their capacity to achieve complex social results. This requires a procurement process which expects clear, “joined-up” outcomes and is appropriate to the scale and complexity of the service or product.

In this Part we answer three questions:

- When do the full EU rules do apply?
- What to do when they do apply? and
- What to do when they do not apply in full?

When appropriate, social enterprises seek to have assessment of the full value of their proposals including the total public benefit of their service delivery methods.

Social enterprises may help public bodies achieve the maximum possible delivery of their strategic as well as service delivery objectives through their procurement activities.



Section 3:

Do the full EU Rules apply?

3.1 Introduction

There are many situations where public bodies follow the full EU procurement rules although they do not need to do so.

Public bodies should take full advantage of their ability not to follow the full advertising requirements of the EU procurement rules when this is not necessary. This approach can reduce complexity and cost of participating in the process by a range of potential providers, including social enterprise. Public body officers need a good understanding of when the full EU rules do and do not apply.

3.2 The Legal Framework

Rules derived from the EU Treaty apply to all contracts entered into by public bodies, including:

- contracts to which the full EU procurement rules apply;
- excluded contracts;
- concessions; and
- contracts for Part B services (see below).

There are additional rules that apply to higher value contracts. These are derived from the EU Directive on the procurement of public contracts and translated into law in England, Wales and Northern Ireland by the Public Contracts Regulations 2006. In Scotland the equivalent regulations are the Public Contracts (Scotland) Regulations 2006. However, since the Regulations implement the same EU Directive, they are similar in all jurisdictions.

In this Part we refer to these rules as the EU procurement rules, so as to distinguish them from rules derived from the EU Treaty. Public bodies are called “contracting authorities” in the EU procurement rules.

The EU procurement rules distinguish between contracts for works (construction activities), services and supplies (the purchase or hire of goods).

3.3 Excluded Contracts

Some types of contract are specifically excluded from the EU procurement rules, including:

- land transactions;
- employment contracts; and
- contracts for research and development services, unless the research is solely for the public body’s own benefit and paid for wholly by the public body itself.

There are special rules for contracts procured by utilities.

3.4 Concessions

There are also special rules for concessions, where a public body gives an organisation permission (in the form of a licence or right) to run a facility and retain the income from it. An example of a concession is a shop run by volunteers in a hospital where the organisation running the shop retains the income from customers but is not funded in any other way. Concessions to deliver services are excluded from the full EU procurement rules. There are special rules for concessions to carry out and exploit works requiring a different competition process but also requiring the concessionaire to apply the procurement rules to its processes.

3.5 “Part A and Part B” Services

The EU procurement rules divide services into Part A and Part B services. Part A services include:

- accounting and financial services;
- services provided by construction professionals; and
- housing and property management.

The full EU procurement rules do not apply to contracts for Part B services, which are:

- hotel and restaurant services;
- transport services;
- legal services;
- personnel placement and supply services (agency staff);
- investigation and security services (other than armoured car services);
- education and vocational health services;
- health and social services;
- recreational, cultural and sporting services; and
- other services [not listed in Part A].

The Part B services can be the sorts of services provided by social enterprises and the maximum opportunity should be taken to apply a less prescriptive tendering regime to such opportunities.

3.6 Thresholds

The full EU rules will only apply if the total value of a contract exceeds the relevant threshold. These are currently (from January 2006):

- in relation to all works, just over £3.6 million; and
- for supplies and Part A services, just under £95,000 for contracts let by Central Government bodies and £145,000 (for most other public sector bodies).

The exact amounts are expressed in euros and are benchmarked to the pound biannually on 1st January in even numbered years (see the [OGC website](#)).

Contracts must not be split artificially to keep their value below the EU threshold.

3.7 Aggregation Rules

For contracts valued below the threshold, the “aggregation” rules need to be considered. If the combined value of a contract and other contracts that are aggregated with it is over the threshold, then each contract must be procured under the EU procurement rules. They do not need to be procured together.

Contracts for services and supplies need to be aggregated with other services or supplies contracts where they are part of a:

- “single requirement” for those services or supplies; or
- “requirement over a period” for those services or supplies.

A ‘single requirement’ is a ‘one-off’ requirement at a particular time for goods or services of the ‘same type’ as those being procured under the contract.

A ‘requirement over a period’ for goods or services of the same type is intended to cover spot purchasing arrangements. Here the estimated amount payable under contracts for similar types of goods or services over a 12-month period is used.

There is no definition of ‘type’ of goods or services. Most commentators consider that goods or services are of the ‘same type’ if they are generally purchased from the same contractor.

The rules on aggregation are different for works. There is no requirement to aggregate contracts for similar types of works, but only all contracts for work to build a single new building or part of a building, such as an annex.

3.8 Small lots

A public body can choose not to follow the EU procurement rules for separate contracts where:

- a total value of all of those contracts is less than 20% of:
 - the value of the total construction cost for work to create a single building or part of a building; or
 - a total requirement for services or supplies which is being tendered under the EU procurement rules at the same time; and
- the estimated value of each of those contracts is less than just under:
 - £55,000 where they are services or supplies contracts; or
 - £650,000 if they are works contracts.

This is an EU concession intended to allow these contracts to be used to encourage small and medium-sized enterprises, including social enterprises. For example, it could be used to commission a small architect’s practice to design part of a larger development without it being tendered, where the rest of the design is commissioned at the same time through a tender under the EU procurement rules. Public bodies can use these schemes more widely particularly in terms of allowing innovative ways of working to be piloted at the same time as “traditionally” procured schemes. The contracts for the remaining 80 percent of the value of the work or the requirement for services still need to be let under the full EU procurement rules. General EU Treaty requirements still apply to contracts procured in



reliance on this exemption (i.e. transparency, non-discrimination and proportionality).

The public body can also exclude from the aggregation rules contracts let by a 'discrete operational unit'. This is a part of the public body that acts autonomously from the rest of the public body (for example a locally managed school, where the governing body purchases separately from the local education authority).

3.9 Relevant policy and how it relates to the law

The starting point here is the law: the full EU Procurement Rules either apply or they do not. Public bodies commonly have internal policies and procedures governing which process they will use to tender a contract depending on the value. Where the full EU Procurement Rules do not apply, they may be able to waive their policies for a particular case, or could consider changing their policies.

3.10 Key findings

Public bodies should be aware of the circumstances where the full EU rules do not apply and should take full advantage of their ability not to follow them in these cases. Procuring contracts without using the full EU procurement rules gives greater opportunities to integrate wider policy objectives into their procurements, although this is subject to the general procurement rules.

Even where the full EU procurement rules apply, there is scope for commissioners to structure their procurements so they can take account of the wider public benefit outcomes that are being delivered. These wider social and public benefit outcomes should be seen as part of the case of what is being procured, not as 'extras' that are 'bolted on'. Using procurement terminology, these should be developed as part of the core requirement of a commissioner (and not a secondary requirement).



Section 4:

Procurement under the full EU rules

4.1 Introduction

Intelligent commissioning requires commissioners to embed wider policy objectives, including social outcomes, into their procurement processes. Procurements should be used to deliver improved service outcomes and wider public benefit strategies.

4.2 Legal Framework

The full EU procurement rules set out a process which public bodies have to follow when letting contracts covered by those rules. For most contracts the usual process is the restricted procedure under which:

- a notice is inserted in the Official Journal of the European Union (OJEU) advertising the contract;
- bidders fill in a prequalification questionnaire (PQQ) which the public body uses to ensure that they meet its minimum requirements for technical ability and financial security;
- the public body selects which bidders will be invited to tender for the contract from amongst those who pre-qualify and issues an invitation to tender to those bidders;
- tenders are returned, clarified and evaluated; and
- the contract is awarded, unsuccessful bidders debriefed and the contract signed.

The process can vary as follows:

- the open procedure omits the pre-qualification and selection stage, with all contractors tendering;
- the negotiated procedure is similar to the restricted procedure except that the public authority can negotiate with bidders after the tendering stage. Because of this it can be used only in very limited circumstances; and
- the competitive dialogue procedure inserts an additional stage between the pre-qualification and

final tendering stage during which the project is discussed and developed with a number of bidders.

4.3 Business Case and Specification

Commissioners should refer to Part One of this Guide, which illustrates how commissioning and procurement practices should reflect corporate objectives. When considering the commissioning strategy, public bodies should focus on the whole impact of what they are proposing to commission. They need to think strategically about how procurement can be used to secure wider corporate objectives, rather than focusing on the asset or service they may have procured previously. This requires those officers engaged in procurement to engage in grasping what their whole organisation is seeking to achieve and not just the part they work in: this is a cultural shift consistent with the public service reform agenda of the UK Government. There are a number of councils who are cross-referring their procurement strategy to their community strategy. For this good practice to be embedded in other parts of the public sector requires wider ownership of responsibilities to local communities and that connection is not made strongly enough outside Local Government.

The specification sets out the detailed requirements for the contract, including any social outcomes that are envisaged within corporate objectives. It says what is to be provided under the contract. All specifications should be challenged against their delivery of corporate objectives, i.e. how they create public value.

Where public value outcomes are capable of being expressed in terms of economic value to the public body conducting the procurement they can be included in the specification as part of what is being procured. This is an extension of the principle of

whole life costing to “whole benefit costing”. At this stage the public body is able to carry out soft market testing to identify what the market is able to provide. This establishes whether there are suppliers who are able to deliver the specification, particularly in terms of these wider public objectives, so as to see which of them it is realistic to seek to procure. This soft market testing must not favour particular suppliers or types of suppliers. All potential suppliers should be given an opportunity to participate. The results can then be used to inform the specification.

Example

A public body wished to build a community centre. It also wanted the contractor to engage and train a number of long-term unemployed people on its construction.

Had the contract been drafted solely as a contract to build the community centre, this would not have been relevant to the value for money of that contract. The number of unemployed people engaged should not have affected the quality of the community centre and could have increased the construction costs.

Instead, the core purpose of the contract was drafted as both the construction of the community centre and the provision of training and job opportunities for previously unemployed people. This meant that the employment and training was relevant to value for money. It also allowed the public body to assess the quality of the training.

Preparation of the business case creates an opportunity to ensure the procurement reflects the full value of what can be achieved. A considerable amount of work has been done to demonstrate social returns on investment, especially in the public sector (for example, by the [New Economics Foundation](#)). Tools are now available to help organisations identify the added value they offer in service delivery and express it in terms meaningful to commissioners to strengthen opportunities for service delivery by social enterprises. An example is [Selling Added Value by the Social Enterprise Support Centre](#). Commissioners can also use these tools to help them make the link on a case by case basis between their strategic documents and their commissioning. This will help to move what has been perceived as “added value” into the core of the requirement of the commissioners.

4.4 Contract Packaging and “Lots”

Public bodies have considerable flexibility over how they package contracts together, as long as they do not artificially break up larger contracts to avoid the EU procurement rules.

There is a growing trend to package contracts into larger and larger units with the intention of achieving economies of scale and save on transaction costs. This process is also reflected in the growing use of buying clubs. Packaging contracts together in this way can make it harder for smaller organisations to bid.

It is possible for a public body to procure the contract as a series of “lots”. These are separate contracts to deliver a part of what is being procured within, for example, separate areas.

Bidders can be given the opportunity to bid for one lot, a number of lots or the whole procurement. Bids for each lot can then be evaluated separately. The public body should have a method for comparing the benefits of any economies of scale offered by organisations bidding for more than one lot.

Procuring the contract by separate lots gives smaller organisations the opportunity to bid for it on their own without having to seek to form a consortium with other bidders.

When putting contracts together a public body should consider precisely what it wants to procure.

Example

A local authority leases a leisure centre to a social enterprise to operate. Responsibility for the structure of the centre remains with the local authority which engages its own contractors on whole life cycle works, while the social enterprise is responsible for day to day maintenance.

4.5 OJEU and Advertising

All contracts procured under the full EU procurement regime require an OJEU notice. Where the public body is seeking to procure social or environmental outcomes the OJEU advert should state this. An OJEU notice can state that bids are welcome from a range of potential providers, including social enterprises, provided that no reference is made to locality.

Social enterprises can only respond to OJEU notices of which they are aware. Some smaller social enterprises do not have the resources necessary to monitor OJEU adverts.

It is possible for public bodies to advertise a procurement in places other than the OJEU, and this is often very effective, subject to two requirements:

- the advertisement must not be placed anywhere else before it has been sent to the OJEU; and
- the advertisement elsewhere may not contain any more information than in the OJEU notice (although it can contain less).

This advertisement can be on the public body's website or on a portal website. Many public bodies now have a "supplying to the authority" section of their website. Alternatively there are portal websites such as Source East Midlands

www.sourceeastmidlands.co.uk/DefaultRegion.aspx in the East Midlands and nearbyyou

www.nearbuyou.co.uk specifically targeted at the social enterprise sector, (nearbyyou is a national trading network for social enterprises and those that wish to trade with them).

Contacting organisations to check that they have seen an OJEU notice as part of a strategy to stimulate a wide range of bids, and not to favour particular bidders, is entirely acceptable. However, the public body must scrupulously ensure that those conversations do not lead to information being given to a social enterprise (or indeed any other potential bidder) that could favour them over any other bidder.

Example

A local authority regularly targets a range of bidders including social enterprises by advertising contract opportunities in newsletters circulated in the local third sector.

It is possible to supplement the information in the OJEU notice by supplying a Prospectus or Information Memorandum with the prequalification questionnaire as long as this is sent to all bidders who express an interest. This can give more information about the scope of the procurement and where it fits within the public body's corporate strategies.

4.6 Pre-qualification

There are two issues in relation to prequalification – the thresholds set and the types of questions that can be asked.

The purpose of the prequalification process is twofold. The first stage involves ensuring that bidders invited to tender are not ineligible and meet the public body's minimum requirements for technical or professional ability and economic or financial

standing. The second stage involves selecting those bidders who are invited to bid from all those who do meet these minimum thresholds.

Minimum thresholds for pre-qualification should be set to reflect the reasonable requirements for the contract, but not be inappropriately higher. Standard pre-qualification questionnaires should be amended to reflect the public body's reasonable requirements in relation to the contract being procured. This will ensure that social enterprises and other SMEs are not excluded from tendering for the contract. These criteria were helpfully explored in "[Think Smart: Think Voluntary Sector](#)". Commissioners should think carefully as to their requirements in relation to:

- the number of years of accounts required;
- the appropriate balance sheet requirements, particularly in relation to smaller contracts; and
- financial strength.

If there is a valid reason why a social enterprise cannot provide the financial information requested in the PQQ, the public authority can accept other appropriate information instead.

An increasing number of local authorities are setting thresholds for financial capacity which match the type of provider they are seeking to attract. This good practice is to be encouraged.

Although there is no equivalent provision in relation to demonstrating the bidder's technical or professional ability to deliver the contract, public authorities are given a wide discretion over the information they can consider. A failure to provide non-financial information may not be fatal if the social enterprise can demonstrate in another way that they have the ability to deliver the contract.

When assessing a bidder's technical capacity and ability, the specification should cover all the public outcomes required to be provided under the contract, so that relevant questions can be asked at the pre-qualification stage. Those questions must then relate to the bidder's experience, capability and capacity, and management structures available to deliver the entirety of what is being procured under the contract as set out in the specification. For example, if the specification requires the contractor to assist people who are unemployed to move into positions where they are more employable as well as the construction of a building, capacity and track record questions can be asked about this as much as in relation to the construction works.

The selection of contractors to be invited to tender at the second stage must also be based on their technical ability and/or financial strength. When deciding how to specify the selection criteria, commissioners should consider whether it is an advantage to have a contractor that is financially stronger, as long as its minimum financial strength requirements have been met. If there is no advantage, the selection could be based just on technical ability. Including financial strength in the criteria could disadvantage smaller social enterprises, so this should only be done where this is justified.

4.7 Contract Conditions

Contract conditions are the terms and conditions governing how the contract is delivered. There is clearly some overlap between the specification and the contract and some terms could go in either place.

It is possible to include social and environmental requirements in a contract as long as they are consistent with the EU Treaty requirements and are highlighted in the OJEU notice, or Invitation to Tender or documents that accompany it. Such clauses are now expressly contemplated by the EU procurement rules.

Public bodies should approach contract conditions on the basis that they should be sufficient to protect their position under the contract but should not be so onerous that they put off bidders. Where a contract is likely to be bid for by, particularly smaller, social enterprises, public bodies should consider creative ways in which that contract can be tailored to make it attractive to those social enterprises. This could include provisions such as, for example, payment in advance, or providing for the public body to take out relevant insurances rather than the contractor.

Example

A local authority has put in place arrangements under its financial regulations for payments in advance so long as in relation to a single contractor these do not exceed £10,000 at any time. This flexibility is designed to assist smaller contractors including many social enterprises.

4.8 Tendering Processes

There are a number of ways in which public bodies can make the tendering process helpful to social enterprises. Clearly drafted procurement documentation, adequate tendering periods and flexible interview dates all help social enterprises participate.

For an example on work done to reflect community benefits in specification writing see the free online learning course:

www.specification-writing.info/welcome.aspx

A number of local authorities are facilitating training for social enterprises to help them bid for contracts. Some are grouping together with other commissioners in their region to provide mentoring to social enterprises bidding for contracts in neighbouring authorities or adjacent services.

Case Study

The Birmingham Disability Resource Centre (BDRC) recently tendered for and won a contract from Birmingham City Council to provide disability equality training to prospective taxi drivers.

BDRC found the tender process a positive experience. The process was very well administered and they were given approximately 6 weeks to respond.

The 4-person interview panel came out to BDRC's premises for the interview, which gave them a feel for the organisation and what they do. BDRC was given plenty of notice to reschedule any prior arrangements they had for the date set for the interview.

More information on the BDRC's work can be obtained from their website at: www.disability.co.uk

4.9 Contract Award Criteria

Contracts can be awarded on the basis of either lower price or 'most economically advantageous tender'. This again illustrates the importance of the specification covering all the outcomes to be delivered through the contract. Where specifications have been written to achieve wider public outcomes the award criteria must be devised to assess which bid is best placed to deliver them. The criteria used to determine the 'most economically advantageous tender' must:

- be relevant to the subject of the contract (including the delivery of any wider public outcomes);

- give a benefit to the contracting authority which has some economic value; and
- be consistent with EU Treaty principles.

The award criteria must choose the most economically advantageous tender to deliver the specification. The process must assess objectively whether there is an economic advantage for the contracting authority from one bid compared to another.

Public bodies should consider carefully how to set and describe award criteria which measure which bidder is best able to deliver the social outcomes, or wider public benefit, the contract requires.

4.10 Contract Award and Debrief

Unsuccessful bidders are entitled to be told of the name of the successful bidder, the criteria used to award the contract and (where a scoring method was used) their score and that of the successful bidder. After providing this information this public body must wait 10 days before signing the contract.

If a bidder so requests within two working days of that notice being sent, the public authority must explain to the unsuccessful bidder why the successful bid was better than theirs. These are useful tools for social enterprises to gain feedback on their tenders and improve them for the future.

There are similar rights for bidders who were unsuccessful at earlier stages in the procurement process to ask for an explanation why. Here the period for response is 15 days.

4.11 Contract Management

Whilst strictly there is little point in specifying outcomes in a contract that will not be monitored and verified, this should not stop both commissioners and service providers describing their aspirations as a basis for common achievement especially in parallel partnering documentation.

Monitoring refers to the supply of information on performance. Verification involves the contracting authority checking the monitoring information.

The decision about what social outcomes to include in the specification should determine the systems and resources available for the monitoring and verification. Outcomes should be specific and measurable; contrary to some perceptions, social outcomes can be secured most effectively against targets which are not overly sophisticated.

Commissioning departments should look within the wider authority for expertise in monitoring the delivery of outcomes outside their field of expertise. Where they do not have the necessary experience themselves, it may be found in another part of the public body.

4.12 Key Findings

It is not always necessary for a public sector commissioning body to follow the EU procurement rules for every contract it lets.

The requirements of the EU Treaty also apply where the full EU procurement rules apply.

Where the full EU procurement rules do apply, steps can be taken to encourage participation by social enterprises and to stimulate the market by widening the range of potential service providers. These include:

- ensuring the specification covers all the requirements for outcomes that are both useful to the contracting body and deliverable by potential suppliers;
- using lots and contract packaging to create opportunities for smaller bidders;
- advertising the procurement so social enterprises who do not regularly study the OJEU are aware of it;
- setting appropriate pre-qualification thresholds and ensuring that each bidder's technical ability to deliver the social outcomes is assessed;
- selecting tenderers just on the basis of technical and professional ability, where appropriate;
- using contract conditions which are sufficient to protect the public authority but are not unduly onerous;
- adopting procurement processes which do not make it unduly difficult for social enterprises to participate;
- ensuring unsuccessful social enterprises are properly debriefed as required by the EU procurement rules; and
- ensuring social outcomes required are properly monitored and verified.



Section 5:

Procurement when the full EU procurement regime is not relevant

5.1 Introduction

A number of legal rules apply to all procurements, whether or not subject to the full EU procurement rules. Some of these rules are derived from the EU Treaty but some of them also reflect the general legal environment within which public bodies have to operate (as to which see Part 1).

Public bodies must also comply with their internal procedures including decision-making processes and standing orders. Standing orders can sometimes be waived as long as this is done for good reason. They can of course also be changed.

5.2 EU Treaty

The EU Treaty includes a number of rules derived from the free market objectives set out in the EU Treaty, which apply to all contracts let by a public body. These require a public body:

- not to discriminate between businesses because of the EU Member State in which they are based or from which they provide services. This includes accepting products and services from businesses in other EU Member States if they meet the public body's legitimate requirements for the contract;
- not to include contract terms that are disproportionate to the contract or inhibit the freedom of movement of workers, goods and businesses. A public body may not ask for evidence of technical capability, professional status or economic strength that is way beyond that needed to deliver the contract. The public body must accept technical specifications and qualifications if they are equivalent to the national specifications and qualifications the public body has specified; and
- to adopt transparent and objective procurement processes so as to demonstrate that the public body has complied with the other EU Treaty requirements.

5.3 Advertising requirements in the EU Treaty

Case law has expanded the obligation to adopt transparent and objective procurement processes into a requirement to advertise certain contracts. The European Commission, in the Interpretative Communication on contracts not covered by the full EU rules, requires commissioning bodies to make a judgement about whether the contract is 'likely to be of interest' to contractors based in other parts of the European Union, and advertise accordingly.

Where advertising is required, it must be "adequate" and accessible across the EU. The greater the likely interest from contractors in other EU countries, the wider the advertising coverage should be. Possible advertising methods include:

- using the public body's own website;
- using a portal website; or
- inserting a notice in the Official Journal of the EU on a voluntary basis.

The advertisement must contain sufficient information to enable a contractor to decide whether or not to bid.

The precise scope of the transparency requirement is not clear where the requirement to advertise does not apply. It is likely to be interpreted as a requirement to use objective and justifiable criteria to select the organisation to deliver the contract. Compliance with the public body's standing orders can help demonstrate this.

Public bodies generally have the power to waive their standing orders as long as this is based on proper grounds, such as value for money considerations. This should be supported by appropriate decision-making which sets out an audit trail for doing so.

Case Study

Helping To Break Down The Barriers

Nottingham City Council's Adult Services Housing and Health (NCC-ASHH) currently procure, home care services from two social enterprises.

Nottingham City Council recognises the value of working with Social Enterprises as they are able to provide local services that have an 'added value', from a social or public perspective, which supports the Council's own local agendas. Nottingham City Council has to meet the diverse needs of a diverse community and, through its procurement strategy, has sought to increase its procurement activities with Small and Medium Enterprises.

Along the way a number of barriers to purchasing from social enterprises have been identified, including:

- the lack of understanding of social enterprises amongst procurers, many of whom presume that social enterprises are simply 'not for profit' organisations like charities;
- conflicts between various agendas, i.e. efficiency agenda v. full cost recovery and sustainable procurement;
- risk management – risks can appear to be minimised with larger, well established organisations;
- start up social enterprises finding it difficult to 'get through the door', often because of local authorities require potential providers to meet quite rigid, pre-set specifications; and
- local authorities fearing that contracting with social enterprises will lead to more work for them in terms of supporting them.

Despite these barriers NCCASHH has, at times, 'nurtured' social enterprises. It has held regular meetings to resolve operational issues and has, on occasion, paid in advance for services to avoid cash flow problems. It has offered free training and support to, amongst others, employees of social enterprises, i.e. Adult Protection, Grievance, Disciplinary and Employment Law, Dementia Awareness, Management Development etc.

One of the two social enterprises currently working with the City Council was originally awarded a contract following a rigorous procurement exercise. This organisation is now one of the largest Home Care providers in the City. The other is one of the City Council's smallest providers. Both are unique organisations and are equally valued by the City Council.

5.4 Key Findings

There are a number of general principles that apply to how public bodies must let contracts, whether or not the full EU procurement rules apply.

Beyond this public bodies have considerable discretion over how they let contracts that are not subject to the full EU procurement rules or commission activities other than through contracts. The only constraints on this other than the EU Treaty and any specific requirements applying to the public body are the general requirements of reasonableness (including financial reasonableness) and the need for other public bodies to follow their own internal procedures. Much more can be done to take full advantage of this discretion, by opening up markets to suitable partner organisations.



Sandwell Community Caring Trust
www.sandwellcct.org.uk



Part Three:

Issues for the Public Sector





Section 6:

Social and Environmental considerations

6.1 Introduction

The subjects of community benefits and sustainable procurement suffer from the lack of a shared vocabulary. The following hierarchy may be helpful in understanding this emerging field of policy and activity:

- a requirement such as targeted recruitment and training (TR&T), rather than the term “local labour” which is discriminatory, is one element in a wider range of community benefits;
- community benefits is one element in a wider range of ‘social issues’;
- ‘social issues’ are part of a still wider concern - ‘sustainable procurement’;
- sustainable procurement is a way of delivering an over-arching Government objective - sustainable development.

‘Community benefits’ include not only TR&T, but also equal opportunities, access to services in deprived areas, training for the existing workforce, supply-chain initiatives, community consultation, ‘considerate contractor’ schemes, contributions to education, the promotion of social enterprises, and resources for community initiatives.

‘Social issues’ includes core labour standards¹, disabled access, disability, gender and race equality, employment and training issues, fair trade, and support for SMEs including social enterprises, black and ethnic minority enterprises and women and disabled-owned businesses.

‘Sustainable procurement’ has primarily been concerned with environmental issues, but there is now acceptance of the need to extend this to social and local economy issues. The Sustainable Procurement Task Force’s definition of sustainable procurement is:

“a process whereby organisations meet their needs for goods, services, works and utilities in a way that

achieves value for money on a whole life basis in terms of generating benefits to society and the economy, whilst minimising damage to the environment”.

To gain the full benefit of social and environmental requirements in a procurement, these should be described clearly within the subject matter of the contract, ideally with references back to the relevant policies adopted by the commissioner. It is best to see these as part of the “core requirement” of the commissioner rather than to use terms such as “added value” which can suggest that they are only secondary requirements of the authority.

As awareness grows of the importance of sustainability, so organisations in the public sector and social enterprises are increasingly delivering their activities in ways that are sustainable. In particular, there is a growing movement to:

- source and supply goods and services to maximise local economic benefits;
- use purchasing power to combat social disadvantage and provide opportunities for a range of people, including those with a disability;
- use “fair trade” products; and
- source organic products, particularly in relation to food supplies.

Many social enterprises are able to respond to these developments as they already provide goods and services and aim to work in a way that minimises damage to the environment, encourages the use of environmentally friendly and organic products and promotes fair trade. These are significant issues to be addressed when looking at long term outcomes from contract performance.

¹ as established by the International Labour Organisation (ILO).

6.2 General Principles

There are three stages in a procurement process when social and environmental outcomes should be considered:

- when prequalifying contractors, in terms of assessing their technical and professional ability to deliver those outcomes;
- as contractual requirements in the specification or contract conditions which the successful bidder is required to deliver under the contract; or
- as part of the contract award criteria.

The UK Regulations now specifically permit the second of these as long as the requirements are:

- compatible with EU law (including the EU Treaty); and
- referred to in the OJEU notice or Invitation to Tender.

In order for requirements to be “compatible with EU law” they must not breach any of the EU Treaty requirements and must be “relevant to the subject-matter of the contract”.

Any requirements that are specified must relate to the service or product and not the way a contractor runs its own business. For example, a public body can require that a building completed under a public works contract is accessible to people with a disability, but not insist that the contractor’s own head office conforms to such standards. This requirement prevents a public body from specifying that a contract must be delivered by a social enterprise. The European Commission does not regard the ownership structure of the enterprise as relevant to what the public body is procuring under the contract, notwithstanding the differences in service delivery which many believe may arise from different ownership structures.

Both the European Commission and the OGC have issued guidance on the kinds of social and environmental issues that can be taken into consideration and how this can be done. The [OGC Guidance on Social Issues in Purchasing](#), issued jointly with DEFRA, covers matters such as labour standards, workforce skills and training and equal opportunities. It encourages contracting authorities to consider these at the start of the procurement rather than seeking to add them in later.

The BEST Procurement partnership, through one of its European networks, surveyed the attitudes to using social issues in procurement and assessed the extent to which member states were using the freedoms that the law allows (see BEST procurement section of SEEM website www.seem.uk.net).

Requirements can only be included if compliance with them is independently verifiable. A condition requiring the contractor to source a proportion of its energy from renewable sources (beyond that required for the serviced offices the contract was procuring) was not allowed, on the basis that it was neither linked to the subject matter of the contract nor independently verifiable. The condition would have been acceptable if it had been limited to the electricity supplies for those offices included in the specification, and had been verifiable: in the UK this should now be possible.

This would allow public bodies to specify things such as:

- vehicles with low emissions;
- the use of recycled materials in the delivery of services or products; and
- the requirement to recycle materials produced as part of the contract.

6.3 Locality

Public bodies cannot specify locality in any contract nor can they consider issues of locality in a tender evaluation. Clauses requiring local labour, or requiring priority to be given to local subcontractors are contrary to the EU Treaty requirement not to impose barriers on the free movement of workers. Conditions requiring contractors to source a percentage of their supplies from local firms or to increase their use of national products and labour have been declared unlawful (See section 6.4).

A clause requiring a contractor to have a local office at the time of bidding is not allowed, although a requirement to open and maintain a local office is legitimate as long as it is a genuine and necessary requirement.

There is some scope for public sector organisations to shape contract requirements in ways that may make it easier for local applicants, as long as this is a genuine requirement.

