

Community Benefit Clauses

Frequently Asked Questions

Community Benefit Clauses in Procurement

1. When do the EU procurement rules apply?

Over the last few years, there has been a tendency to follow the EU procurement rules in cases when it is not necessary to do so. This can result in additional “process costs” that can erode value for money. It is important that public sector bodies (i.e. “contracting authorities” as the EU procurement rules call them) and the third sector understand the different procurement regimes that can apply.

Above Threshold

The EU procurement rules, and the Public Contracts (Scotland) Regulations 2006 (the Regulations) require to be followed where the value of a contract to be awarded by the public sector exceeds certain thresholds. Even where above threshold, certain types of contract are excluded from the scope of the Regulations, such as land transactions. In addition, Part B contracts (covering most “social service” contracts, amongst many other categories) do not require to follow the full provisions of the Regulations (although it should be noted that there are general proposals to update the European Directives underlying the Regulations in summer 2014 – see point 12 below).

Below Threshold

Where a contract is below the thresholds, although the EU procurement rules as set out in European Directives and in the Regulations do not apply there are two alternative treatments:

- **Below threshold** – contract of potential cross-border interest

The European Court has established that contracting authorities need to follow general principles of European law where the contract is of potential cross-border interest. Those general principles require a process to be followed that ensures – transparency (including appropriate advertisement), equal treatment, non-discrimination and fairness. Regulation 8(21) of the Regulations legislated for this long-standing obligation.

- **Below threshold** – contract with no potential cross-border interest

Where a contract is considered by the contracting authority to be of no cross-border interest, neither the EU procurement rules nor general principles of European law apply. In such cases, most contracting authorities are likely to remain subject to a duty, often a statutory one, to secure “best value”. Most contracting authorities will also be required to follow internal procedures for awarding such contracts (for example “local authority schemes of administration”)

The Scottish case of *Sidey v Clackmannanshire Council*, heard at the Court of Session, considered, on the facts available to it, that a £2.5m works contract to fit kitchens and bathrooms was not of “potential cross-border interest” and as a result EU legal principles were not engaged.

KEY POINT 1:

Contracting authorities and third sector providers should be aware of the different procedural rules that apply to different contracts and values. Where the EU procurement rules do not apply, less prescriptive rules and procedures that are less costly to take part in may enable more effective and efficient third sector engagement. Where the EU procurement rules do apply, benefits at community level can be achieved through taking into account "social considerations" and/or through the use of "community benefit clauses". As with other procurements, the more fully these elements are integrated into the requirement at commissioning stage the greater the potential to generate social value.

2. Is it legal to include social considerations and/or "Community Benefit Clauses" in a procurement covered by the EU procurement rules?

It is entirely lawful, provided key principles are followed, to take into account "social considerations" within a procurement process under the EU procurement rules, and has been for many years. The current procurement Directives and Regulations expressly allow this. Care does however have to be taken to ensure that a contracting authority is not prevented from including a particular social consideration in its procurements on any other basis.

The circumstances in which social considerations/community benefits can be taken into account have been the subject of case law. Based on the judgments in such cases, the key principles outlined in the following questions emerge. If these are followed, social considerations ought to end up being taken into account on a wholly compliant basis.

3. What do I need to do if I wish to include social considerations and evaluate a bidder's proposed approach to delivering those?

An approach involving scoring of bidders' approaches to delivering social considerations, including through evaluating a bidder's proposed methodology to be captured within a contractual performance clause (Community Benefit Clause), is likely to result in bidders focusing on how their proposals would deliver social considerations. The following are key to ensuring that evaluating social considerations complies with procurement law:

- **Transparency** – the fact that the contracting authority is to take into account social considerations must be made clear in the contract notice (the initial advertisement) / the contract documents issued to bidders for that procurement;
- **Non-discrimination** – in its effects, an evaluation criterion focused on social considerations used in a procurement must not be capable of causing unfair disadvantage or advantage to a particular bidder or category of bidder, (and not just) a bidder from another Member State. As broad examples:
 - **Compliant example** – assessing a bidders' proposals to maximise training opportunities for the unemployed or a requirement on bidders to include training places for the unemployed through performance of the contract;
 - **Compliant example** – assessing a bidders' proposals to provide additional value to communities in receipt of a service, through their approach to performing that particular service;

- **Non-compliant example** – scoring a bidder higher because it delivers benefits to a particular community on account of its products being manufactured in a particular geographic area (i.e. unfairly disadvantaging, without justification, other bidders);
- **Non-compliant example** – scoring a bidder higher because it delivers benefits to a particular community on account of having its head office in a contracting authority's area (i.e. unfairly disadvantaging other bidders);

The above non-compliant examples involve "direct discrimination". Care also has to be taken around "indirect discrimination". For example, this could arise in a specification requirement more suited to bidders based in a particular country.

- **Proportionate and related to the subject matter of the contract** – Social considerations must be related to the subject matter of the contract and should not confer an unrestricted freedom of choice on a contracting authority – Again as broad examples:
 - **Compliant example** – training for unemployed whilst performing a regeneration works contract;
 - **Compliant example** – in a contract for day-care services, assessing a provider's proposals to liaise and engage with complementary community services to enhance the service provided to the end-user;
 - **Non-compliant example** – scoring a bidder's approach to training unemployed people generally across its business – going beyond training proposals associated with performance of the contractor
 - **Non-compliant example** – assessing a bidders approach for ensuring

sustainable ingredients are used in all of its products when the procurement concerns only one of the bidders products (there was a recent European case on this that summarises the law around use of social considerations in procurement (Commission v Netherlands 12th May 2012) <http://curia.europa.eu/juris/documents.jsf?num=C-368/10>).

- **Objective Scoring** – the criterion to be evaluated and mechanism used to score bidders' approaches to delivering against social considerations must be transparent, objective and must not confer an unrestricted freedom of choice on the contracting authority.

The above considerations also apply where a contracting authority proposes to include a "minimum requirement" to be met by bidders.

4. Can I incorporate social considerations into a procurement without evaluating bidders' proposals to deliver them?

With this approach, a contractual performance clause (Community Benefit Clause) or a particular requirement within the specification focused on delivering social considerations is simply included with no assessment made of bidders' proposals to further social considerations.

With this approach, the requirements surrounding Transparency and Non-discrimination outlined above will apply and any clause included must be related to the subject matter / performance of the contract (see point 6 below).

Some contracting authorities across the UK have used this approach – when incorporating social considerations for the first time; and/or wishing simply to include a requirement without the need to evaluate bidders'

proposals in relation to that requirement. A general observation would be that inclusion of social considerations in this way does not provide the same "incentive" for bidders to focus on delivering social value. A second observation would be that this approach can take out procurement risk (flowing from how a contracting authority conducts evaluation against an evaluation criterion).

5. Does it assist to have a policy in place concerning use of social considerations / community benefit clauses in procurement?

If a contracting authority has a clear policy, flowing from delivery of its core functions, of delivering social considerations / community benefits, this can provide a relevant basis for inclusion of social considerations/community benefit clauses in relation to its requirements

KEY POINT 2 –

Inclusion of social considerations / community benefit clauses in a procurement must be made clear to bidders at the earliest opportunity.

KEY POINT 3 –

Social considerations / community benefit clauses in a procurement must not have the effect of discriminating against / disadvantaging a particular bidder.

KEY POINT 4 –

Social considerations / community benefit clauses must be proportionate and related to the subject matter of the contract and capable of objective assessment. A clear policy of delivering community benefits in performance of core functions assists in meeting this requirement.

6. Can a requirement to pay a living wage be included?

No. The Scottish Government has obtained clarification from the European Commission on this question (SPPN re minimum wage www.scotland.gov.uk/Resource/0039/00399217.pdf) which confirmed that a performance clause requiring payment of a minimum wage to workers will not be compatible with EU Treaty requirements.

7. Where can I obtain information setting out, in detail, what a contracting authority must consider in order to ensure compliant use of social considerations / community benefit clauses?

Further detailed information is available within the following publications:

Scottish Government Community Benefits in Procurement

www.scotland.gov.uk/Resource/Doc/212427/0056513.pdf

European Commission Interpretative Communication

http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm#social

Buying for Good

www.readyforbusiness.org/library

Community Benefit Clause Guidance

www.polha.co.uk/community_benefit_clauses

KEY POINT 5 –

Detailed thinking has been done on how and when social considerations / community benefit clauses can legitimately be used. You can see for yourself through looking at the documents available through this site.

8. What if I have follow-up questions relevant to how I can incorporate use of social considerations / community benefit clauses in my organisation's procurement?

Under the Developing Markets programme, contracting authorities can contact Ready For Business and access consultancy services to take forward social considerations and community benefit clauses within their procurements, including input and advice from MacRoberts LLP. Please get in touch by email: rodody@readyforbusiness.org or telephone 0141 425 2914.

9. Where can I find examples of actual community benefit clauses / approaches to inclusion of social considerations that different organisations have successfully used?

Actual examples are set out within the following publications:

Scottish Government Community Benefits in Procurement

www.scotland.gov.uk/Resource/Doc/212427/0056513.pdf

European Commission Interpretative Communication

http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm#social

Buying for Good

www.readyforbusiness.org/library

Community Benefit Clause Guidance Manual

www.polha.co.uk/community_benefit_clauses

If your organisation has further examples that you would like to share with the Developing Markets Programme / RFB, please do so (contact rodody@readyforbusiness.org). We wish to maximise the sharing of successful incorporation of social considerations / community benefit clauses in procurements.

KEY POINT 6 –

If you are looking for examples to consider / implement or to inform your own ideas, there are an increasingly large number. If you have follow-up questions, we are here to assist.

10. Is engaging with providers / third sector organisations prior to procurement anti competitive?

Engagement between a contracting authority and all potential suppliers/contractors, not just third sector bodies, can help. It can allow a contracting authority to explain the requirements they have to parties and it provides an opportunity for bidders to improve what they can ultimately offer a contracting authority, through better understanding of that contracting authority's requirements.

That said, it is essential for a contracting body to avoid discriminating or conferring an unfair advantage through engaging prior to procurement. In the interests of competition, when engaging with parties, contracting authorities should offer the chance to engage with them to everyone.

There are many instances in which a contracting authority will, in the general course of business, meet with and engage with potential providers outwith a procurement setting, including to improve each other's understanding of legitimate and proper concerns. Provided that such engagement does not confer a particular advantage, this is permitted in a procurement context.

11. Is best value always achieved through competition?

Structuring a competition to put in place a service or to secure supplies or works always needs to be appropriate and proportionate to the particular requirement, including the value of that requirement, otherwise value for money can be impaired.

There has been considerable press-coverage of the costs of tender processes run by the public sector (both for the public sector and private / third sector providers). Alternatives to competition can, in certain circumstances (see Key Point 1) allow for best value to be achieved – including through quick-quote systems, etc.

12. Are there any changes on the horizon in this area of law?

In Scotland, the Procurement Reform Bill is under consideration.

In 2012, the Public Services (Social Value) Act was passed in England in Wales (www.legislation.gov.uk/ukpga/2012/3/enacted).

At a European level, the European Commission published proposals to update the relevant European procurement directives in December 2011. The European Parliament proposed amendments to the drafts in January 2013. Once the detail is agreed and finalised, the new procurement directives are scheduled to be implemented in summer 2014.

Amongst other changes and of relevance to social considerations/community benefit clauses and increasing social value in procurements, the drafts:

- Propose removing the separate category of "Part B Services" (to which a less detailed regime applies);
- contain proposals to increase SME participation;
- firmly reinforce the place for social considerations within the procurement process;
- propose measures to simplify all procurement processes;
- propose higher thresholds at which the European procurement directives (and national implementing regulations) would apply; and
- propose a new category for social and health services procurements with a significantly higher threshold (the European Commission's initial proposal was €500,000 and the European Parliament's proposed amendment was 750,000) and to which a less detailed regime applies.



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