

Achieving community benefits through contracts: law, policy and practice

This research examines ways of including 'community benefit' requirements - such as creating new job and training opportunities - in procurement contracts, partnership agreements, funding agreements and planning agreements. It focuses on employment, training and regeneration, but the findings also apply to other community benefits. Key findings are:

- f** Contrary to common perceptions, the inclusion of community benefits in procurement is not prohibited by either the Government's policy or the EC rules.
- f** To comply with the policy and legal framework, the community benefit requirements must be part of the core purpose of the contract and must provide a benefit to the authority at award stage.
- f** To comply with EC rules the community benefit requirements must not disadvantage non-local contractors and must be consistent with the specific requirements in the Directives for specifications, selection and award criteria.
- f** Local authorities in England and Wales can include employment matters in contracts provided that these are supported by their 'best value' policies (e.g. the Community Strategy), 'best value' is demonstrated, and EC rules are complied with. Similar arrangements are being introduced in Scotland.
- f** Community benefit requirements can be included in planning agreements, funding agreements and grant conditions provided that they do not require either party to act in an illegal or discriminatory way.
- f** To avoid contravening the UK equal opportunities legislation and disadvantaging non-local contractors, it is best to use general categories of beneficiary (e.g. unemployed people, trainees, young people) and then target the benefits through 'supply-side' activities (e.g. training and job-matching services).
- f** The use of community benefit requirements needs to be supported by supply-side actions and good monitoring and evaluation processes.
- f** The use of community benefit requirements in contracts and other agreements is complex and contracting authorities should seek expert advice to ensure that they comply with all relevant legal and policy requirements.

Introduction

In its April 2000 Report, *Employability and jobs: Is there a jobs gap?*, the House of Commons Education and Employment Committee states:

“It is important to ensure that those who are unemployed benefit from the employment opportunities being created through regeneration schemes in their local areas ... [and the Government should] ... issue guidance to local authorities encouraging them to incorporate local labour clauses in contracts... .” (Paragraph 65)

This has been difficult to implement because of possible conflict with the Government’s procurement policy, or because of risk of challenge under European Community (EC) rules, and UK equal opportunities legislation.

This research clarifies the relevant rules and suggests methodologies and good practice that will enable public bodies to use such ‘community benefit’ requirements to improve the ‘conversion rate’ between public expenditure and local benefits – especially new jobs. This will improve value for money from regeneration spending while maintaining a level playing field in the award of public contracts.

The report focuses on the achievement of employment and training outcomes, especially in areas with high levels of disadvantage. However, the principles and methodologies could be applied to other community benefits, and to a wide range of mainstream public expenditure.

While every effort has been made to ensure the accuracy of this document at the time of completion (August 2002), advice should be obtained before action is taken or refrained from in specific cases.

Government procurement policy

The Government’s Procurement Policy Guidelines require public procurement to be based on value for money, defined as:

“... the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user’s requirement.”

It is important to have clarity about what is being purchased (the “user’s requirement”) since this is the basis on which contracts are awarded and value for money is judged. It is for the user to define their requirement, and this can include ‘community benefits’ provided they are:

- directly relevant to the product or service being procured;
- supported by the contracting authority’s objectives.

Where these criteria are met the community benefits are part of the “core aims” of the procurement (even if they have a lower weighting than other core aims) and can be reflected in the specification. Where they are not met the community benefits are an “other aim”.

If a community benefit is part of the core aims and relates to the technical capability of the potential supplier, it can be taken into account at the selection stage. If it provides a measurable benefit to the contracting authority (economic or qualitative) it can be used in the award of the contract, (i.e. it is part of the base against which value for money is judged). If a community benefit is an “other aim” it should not be taken into account in the selection or award procedures.

The Procurement Policy Guidelines also suggest that:

- contract requirements must be clearly stated (preferably in terms of output and performance), and capable of being evaluated against objective criteria;
- in most cases, procurement should be through competition, using objective criteria and a fair and transparent evaluation and award procedure.

European procurement rules

The EC Procurement Directives are implemented in UK legislation and prescribe detailed procedures that must be followed by “contracting authorities” for procurement over set “threshold” values.

The term “contracting authority” includes State, regional and local authorities, and other bodies that have all of the following characteristics:

- they aim to meet “needs in the general interest” (i.e. not commercial or industrial organisations);
- they are a legal entity (i.e. not individuals or unincorporated bodies);
- they are subject to management supervision by, or obtain more than 50 per cent of their income or their supervising body (e.g. Board or Committee) from a “contracting authority”.

Discussions are currently taking place between the UK Government and the European Commission about whether Registered Social Landlords in the UK are “contracting authorities”.

For procurements where the anticipated value is below the threshold value (currently £3.86 million for works and £154,477 for most supplies and services) contracting authorities merely need to comply with

the EC Treaty. For procurements over the threshold values more detailed procedures must be followed.

Under the EC procurement rules there is no blanket prohibition on the inclusion of community benefits requirements. The position is as follows:

- procurements by bodies that are not “contracting authorities” are not covered by the EC Procurement Directives;
- community benefit requirements can be included in contracts that are below the threshold values and can be a factor in the selection and award of the contract provided that non-local contractors are not disadvantaged and they comply with the government’s procurement policy/Best Value;
- where procurements are above the threshold value, community benefits can be included and can be used in the selection and award procedures provided that each of the following tests are met:
 - they are related to the subject of the contract,
 - they are mentioned in contract notices,
 - they do not disadvantage non-local contractors,
 - they are supported by the powers and policies of the contracting authority,
 - they provide a “measurable benefit” to the contracting authority (this applies to award only);
- where procurements are above the threshold value but the fourth or fifth tests are not met, the community benefits can be included as contract conditions but cannot be used in the selection and award procedures except in a ‘tie-break’ situation (although this may not comply with Government procurement policy).

In contracts above the threshold any community benefit requirements must be included in contract documents. Community benefits should always relate to the subject of the contract and should not disadvantage non-local contractors. To avoid the latter the community benefits should not be limited to a defined local area. Categories such as ‘long-term unemployed’, ‘young people’, ‘trainees’ etc. can be used. Local targeting should then be achieved through supply-side activities.

Best Value procurement

Section 17 of the 1988 Local Government Act prohibits local authorities and some other bodies from taking labour force matters into account in awarding contracts. This remains in force except where the labour force matters are necessary to achieve “best value”.

Local authorities and some other public bodies are now required to achieve “best value” in their procurement. Community benefit requirements (including labour force matters) may become a part of best value procurement where they are supported in the Community Strategy, the Best Value Procurement Plans or other significant policy statements. In these circumstances the community benefits can be included in the contract specification and used in the selection and award procedures provided they meet all EC and domestic law requirements.

Discrimination issues

The community benefits that are included in contracts or agreements must not directly or indirectly discriminate on the basis of gender, colour, race, nationality or ethnic origin. If a local area is specified in the community benefit requirements then, to avoid indirect discrimination:

- the population of the local area must reflect that in the wider population; or
- there must be a sound justification.

The fact that a local area is a designated regeneration area may provide a “justification” for local targeting but will not be a defence against direct or indirect racial discrimination. It is recommended that in areas where this could be a problem the community benefits should not be limited to a local area. The targeting should be done through supply-side actions that maximise the take-up by the local communities.

Partnering

Partnering can facilitate the achievement of community benefits where these are included in the contract specification. If the requirements are not in the specification then a contracting authority cannot require its partner to embrace them, except as a voluntary commitment.

Voluntary agreements

A voluntary agreement can be negotiated with a contractor after they have been awarded the contract. It could be based on a Local Employment Charter, but the fact that a contractor has signed up to such a Charter, or indicates that they would do so, must not influence the award of the contract.

Funding agreements and land sale/lease contracts

Community benefits can be included in funding and other agreements provided that they don’t require the recipient organisations to contravene the UK anti-discrimination Acts or the EC Treaties, Articles and Directives.

The inclusion of targeted recruitment requirements in funding agreements and as grant conditions can be useful in getting the recipient organisation to re-examine its recruitment procedures and seek ways of increasing recruitment from the target communities.

Planning agreements

In many regeneration schemes the economic benefits will become available through new commercial activities that occupy sites towards the end of the regeneration programme, perhaps after land clearance and decontamination funded by the public sector. The inclusion of community benefit clauses in planning agreements (e.g. requiring developers to target jobs created by their development) can ensure that the number of job opportunities for local residents is maximised.

A 'planning agreement' is a legally binding commitment made by a developer during the process of seeking planning permission. Case law suggests that they can be used to achieve community benefits, provided these:

- have a planning purpose;
- have some connection to the development site;
- are reasonable.

On the basis of Planning Guidance, matters related to tackling social exclusion and achieving sustainable development could have a "planning purpose".

Supply-side actions

In most cases the inclusion of community benefit requirements in a contract or agreement will not be sufficient to improve the 'conversion rate' between local regeneration expenditure and local benefits. Action is also necessary to:

- facilitate the delivery of the requirements;
- progress-chase and tackle emerging problems;
- monitor and report on outcomes.

In relation to employment and training, supply-side actions might include the promotion of opportunities to a target population, the provision of pre-recruitment training and support, and a job matching service. These may be delivered in partnership with the Employment Service, careers guidance services, education and training providers, and community organisations.

Ideally, the inclusion of community benefit requirements in contracts and agreements should be just one part of an on-going partnership approach that includes good supply-side actions.

Conclusions

Provided they comply with the relevant rules and procedures, bodies like Government Departments, local authorities, registered social landlords and local regeneration companies and partnerships can include community benefit requirements in their contracts and other agreements where relevant and appropriate.

As can be seen from the above, policy and legal frameworks typically determine *how* the community benefit requirements are used rather than *whether* they can be used. However, the rules are complex and good advice needs to be obtained on a case by case basis.

To maximise effectiveness and value for money, good supply-side activities must be in place.

About the project

The understanding of procurement issues in the report was furthered by discussions with officials at HM Treasury, the Office of Government Commerce, The Scottish Executive, The National Assembly for Wales, and the Office of the Deputy Prime Minister. Legal analysis was undertaken by Anthony Collins Solicitors (Birmingham). Local research was carried out in Nottingham, Dundee and Torfaen (Pontypool and Cwmbran). The research was conceived and managed by Richard Macfarlane.

How to get further information

The full report, **Achieving community benefits through contracts Law, policy and practice** by Richard Macfarlane and Mark Cook, is published for the Foundation by The Policy Press (ISBN 1 86134 424 4, price £13.95).

The following *Findings* look at related issues:

- **Local action on unemployment**, Jun 99 (Ref: 629)
- **Using planning agreements to tackle social exclusion**, Mar 00 (Ref: 350)
- **Local labour in construction: tackling social exclusion and skill shortages**, Nov 00 (Ref: N80)