SOCIALLY RESPONSIBLE PROCUREMENT

A Manifesto for Labour

Report by the
Labour Finance and Industry Group / Society of
Labour Lawyers Task Force on Public
Procurement

March 2015
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Foreword

To win the next General Election, Labour must not only put forward a vision for the future that attracts a majority of voters, but also demonstrate that it knows how to deliver that vision. In other words, winning on May 7th is about delivery as well as vision.

This report is one of a number published in the run up to the 2015 General Election which aim to support the incoming ministers of a Labour government as they seek to take control of the machinery of Government to deliver the manifesto on which they were elected. We believe that task is too important to be left to the civil service.

Recent reports on the delivery of Labour’s manifesto include: the report for the Shadow Defence Team on Ideas for Future UK Defence Procurement;1 the report by Lord (Parry) Mitchell’s Labour Digital group entitled Number One in Digital;2 and the report commissioned by Chi Onwurah MP on Making Digital Government Work for Everyone.3

This report aims to provide incoming Labour ministers with a roadmap to navigate the public procurement process in a way that will reflect Labour’s vision for a better country – using the Government’s massive purchasing power to deliver social value and community benefits, as well as competitive prices, when buying goods and services for the public sector.

Like previous reports, this report has benefitted greatly from the input of experts in business, trade unions and the professions who are prepared to give their time on a pro bono basis to help build Labour’s capacity to deliver its Manifesto in Government. The Task Force has been sponsored by the Labour Finance and Industry Group, and the Society of Labour Lawyers. It has been ably led by Hamish Sandison, a partner in a firm of City solicitors with more than 25 years’ experience of advising on major public procurement projects for Government departments and agencies. He has been supported by a multi-disciplinary team of lawyers, procurement professionals, trade union officers, and business experts.4 All of them have contributed to this report in a personal capacity, and we are very grateful to all of them.

We are also very grateful to the public affairs firm Quatro - especially Rob Fellows, Joseph Wade and Rachael Friel - for their help in designing this publication, and in managing the launch event.

The Task Force has consulted widely in preparing this report, but there are always more organisations and individuals we would like to have consulted with. So the Task Force would welcome comments from everyone who is interested in what this report has dubbed a “Socially Responsible Procurement Policy” – a policy which is designed to secure better economic, social and environmental outcomes for our country when the Government buys public goods and services.

Please send your comments to www.lfig.org.uk.

David Offenbach
Chair, Labour Finance and Industry Group

Kate O’Rourke,
Chair, Society of Labour Lawyers

10 March 2015

2 http://www.labourdigital.org/number-one-in-digital
3 http://www.digitalgovernmentreview.org.uk/
4 For a full list of Task Force members, see Appendix B.
Introduction

With £45 billion a year to spend on public procurement, equivalent to 3% of our GDP, few would deny that the UK Government commands massive purchasing power. The question addressed in this Report is how Central Government should use that purchasing power. Should the sole aim of public procurement be to drive down the cost of buying public goods and services, with "lowest price" being its only guiding principle? Or should government contracting aim to drive up social value and community benefits, while at the same time seeking to achieve value for money in what it buys?

The core argument of this Report is that an incoming Labour Government at Westminster in May 2015 should adopt a procurement policy that reflects Labour values – using its purchasing power to secure beneficial social and environmental outcomes, as well as competitive prices, when buying goods and services for the public sector. We call this "socially responsible procurement." Our contention is that socially responsible procurement is not only more in tune with best practice around the world, and fully in harmony with the latest requirements of EU procurement legislation, but can also deliver greater social value across our own communities - more jobs, better pay, improved skills, vibrant small businesses, technical innovation and environmental benefits - thereby achieving an even bigger boost for the UK economy overall, and hence for our public finances.

During the last Labour Government, from 1997 to 2010, it is probably not unfair to say that Labour Ministers were slow to use public procurement to stimulate social and environmental improvements. There was a tendency, albeit a reluctant one, to follow the most cautious legal advice, which held that Ministers at Westminster would be acting in violation of EU rules, and running the risk of legal challenge, if they took non-economic factors into account when awarding government contracts. Most commentators – even those who are favourably disposed towards the last Labour Government – would accept that opportunities were missed to use public procurement to promote Labour values.

By contrast, between 2010 and 2015, the Conservative-led Coalition Government has almost gleefully cited EU rules as a reason why lowest price should be the decisive factor in awarding government contracts, while social and environmental concerns could not be considered. Encourage government contractors to pay the Living Wage? Certainly not; that would invite legal challenge under EU rules. (As discussed in Part One of this Report, this is a deliberate misreading of current and future EU law.)

The Coalition Government's narrow obsession with lowest price has coincided – not perhaps accidentally – with its ideological commitment to privatisation, transferring more and more of our public services into the private sector. While we deplore their ideology, this Report does not seek to calibrate the "right" size for the public sector. We do not argue that the Government should make or buy particular public goods, nor that it should insource or outsource particular public services. Our working assumption is that, for the foreseeable future, Government will need to buy a substantial proportion of its public goods and services from third parties – whether from suppliers in the private sector or from social enterprises and voluntary organisations. We do not envisage that the Government is ever likely to manufacture its own paper clips; public procurement is always going to represent a significant slice of our GDP. This Report is about how Government should buy the goods and services it needs, not whether it should buy them or make them.

Looking ahead to the next 5 years at Westminster, there has never been a better time in our country's history for the incoming government to use public procurement to deliver social value and community benefits. Contrary to some popular belief, it is the European Union that is enabling more socially responsible procurement, not holding it back.

5 See http://www.civilservice.gov.uk/networks/gps. Including health and local government, the total UK public sector procurement spend for 2013-14 was £238bn, equivalent to 33% of public sector spending. See www.parliament.uk/briefing-papers/SN06029.pdf.
6 See "Labour to force firms bidding for Government contracts to pay the 'living wage,' Daily Mail (19 September 2014); "Miliband and No 10 in living wage legality scrap," Politics (5 November 2012).
7 See Paragraph 1.60.
In 2014, the EU adopted a new public procurement directive ("the New Directive") which provides the legal framework for government contracting at all levels of government in the UK and other Member States. The New Directive expressly requires Member States to take into account the widest possible range of social and environmental considerations, as well as price, when buying goods and services for the public sector. As the Council of the EU explained when the New Directive was adopted, "the new rules seek to ensure greater inclusion of common societal goals in the procurement process. These goals include environmental protection, social responsibility, innovation, combatting climate change, employment, public health and other social and environmental considerations."  

The purpose of this Report, therefore, is to provide incoming Labour Ministers with a roadmap to navigate the new freedoms enshrined in the 2014 EU procurement directive in a way that will help deliver Labour values through socially responsible procurement. It includes our "wish list" of what we'd like to see in Labour's procurement policy for 2015-20. And it provides examples of best practice from across the UK and abroad where many of our recommended policies have already been successfully implemented.

Hamish Sandison
Chair, Labour Finance and Industry Group/Society of Labour Lawyers
Task Force on Public Procurement

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8 Directive 2014/24/EU.
9 See Recital 37, Directive 2014/24/EU.
Executive Summary

Part One of this Report sets out the current legal position on the use of non-economic social and environmental criteria at various stages of the public procurement process. It also highlights how the New Directive will increase the scope for using social and environmental criteria. It busts the myth – which the Coalition Government has found convenient – that only economic criteria can be taken into account in awarding government contracts.

What follows here are the key points of our legal analysis (with cross-references to the more detailed discussion in Part One of this Report). By examining the old and new directives, and the court cases interpreting the applicable law, we show how:

- Bidders must be excluded if they have committed certain offences, such as conspiracy, corruption, bribery, fraud and money laundering (Para 1.14);
- Bidders may be excluded for non-payment of taxes or social security contributions, or for "grave misconduct," which can include engaging in "blacklisting" of union members and whistle-blowers (Paras 1.17-1.19);
- The New Directive has expanded considerably these discretionary grounds for exclusion by (to take just two examples) adding a right to exclude for non-payment of taxes or social security contributions even in the absence of a final and binding judicial/administrative decision (Para 1.20) and for "significant or persistent deficiencies" in performing previous government contracts and violation of environmental laws (Para 1.20);
- A bidder’s willingness to commit to certain contract conditions relating to social and environmental matters may be set as a pass/fail participation condition, provided that the matters are non-discriminatory and mentioned when the contract is advertised (Paras 1.27-1.31);
- Bidders may also be short-listed on the basis of their track record in meeting social and environmental award targets, giving a lower ranking and potentially de-selecting those who fall short, again subject to non-discrimination and transparency (Para 1.36);
- At the award stage, there is even greater scope to specify social, environmental and community benefit criteria, and to evaluate bidders on their proposals to meet those criteria, subject to certain conditions: the criteria must be compatible with EU law, non-discriminatory, transparent, objective, proportionate and linked to the subject matter of the contract (Para 1.39);
- This potentially gives contracting authorities scope, subject always to the non-discrimination principle, to evaluate bids in terms of their proposals for delivering social value (e.g. promoting equality and diversity among the contract workforce, etc.), community benefits (e.g. contributing to reducing unemployment, providing for apprenticeships, on-the-job training, etc.), good employment practices (e.g. reducing poverty and enhancing the dignity of work through payment of the Living Wage, eliminating employer abuses such as blacklisting and zero-hours contracts, etc.), enhanced environmental protection (e.g. reducing or eliminating adverse environmental impacts from the production process), promoting better public health and animal welfare in appropriate cases (e.g. the production of food), etc. (Paras 1.40-1.53);
- The New Directive goes even further in allowing contracting authorities (a) to specify environmental and climate performance levels in relation to the production of goods and performance of services at any stage of the supply or service life cycle (Para 1.55), and (b) to stipulate the environmental characteristics for works, service or supply contracts in terms of performance or functional requirements, as well as requiring the relevant products to bear a specific eco label (Para 1.56-1.60);
- The same social, environmental and community benefit criteria may also be made enforceable as conditions of the contract, subject to non-discrimination and transparency (Paras 1.61-1.67);
The New Directive will add a further requirement that contract conditions – like award criteria - must be linked to the subject matter of the contract (Para1.64). But this requirement is stated so broadly that it may be doubted whether it amounts to a substantive constraint on contract conditions such as payment of the Living Wage, especially where it can be shown to be justified by reference to staff retention, quality standards, and broader dignity-at-work considerations (Paras 1.65-1.67). Likewise, targets for apprenticeships both within the contract workforce and across the company more widely may now be justifiable (Para1.67).

Part Two of this Report sets out our “wish list” for a range of progressive, socially responsible procurement policies and practices which a Labour Government should consider adopting in order to deliver added social value and wider community benefits in Central Government contracting over the next 5 years.

Our recommended measures are true to Labour’s values – more jobs, less unemployment, greater equality in the workplace, better pay (including the Living Wage where appropriate), better employment practices (including a ban on zero-hours contracts and blacklisting), more apprenticeships and on-the-job training, vibrant small businesses, technical innovation, environmental protection, public health, animal welfare, and a ban on suppliers who do not pay their taxes or fail to perform their obligations under previous government contracts.

These measures require no new legislation, and no new public expenditure. They are completely consistent with current and pending EU procurement law. Overall, we expect them to deliver not only excellent value for money in the supply of public goods and services, but also a stronger UK economy, particularly in the domestic small business sector, with healthier public finances as a result.

What follows here are the key points (with cross-references to the more detailed discussion in Part Two of this Report):

- A Labour Government’s approach to public procurement needs to be strategic rather than ad hoc, taking full advantage of the freedoms allowed under EU law to align government contracting with Labour’s wider political goals and underlying values (Para2.5).

- Our specific recommendations can (and should) be introduced as a statement of policy from Day One of a new Labour Government (Paras 2.5-2.6), but we also recommend that an independent review should be commissioned to consult with affected stakeholders on their detailed implementation: this review should be completed within 3 months of the formation of a Labour government, and should be updated annually to check actual delivery against planned targets (Para 2.7).

- Because they offer the greatest scope for the use of non-economic considerations, we recommend that an incoming Labour Government should focus on the award criteria and conditions of contract to introduce a new and socially responsible procurement policy reflecting Labour values (Para 2.22). These criteria/conditions should include:
  - Compliance by the prime contractor (and by all subcontractors and suppliers in its supply chain) with all applicable environmental, social and labour laws, including but not limited to applicable EU laws, national laws, collective agreements and ILO conventions listed in the New Directive on forced labour, minimum age, discrimination, equal remuneration, child labour, etc. (Paras 2.24(a) and2.27);
  - For these purposes, compliance with relevant national laws would include employment legislation, taxation and national insurance obligations, health and safety standards, child protection laws, data protection/privacy requirements, and equalities legislation (Para 2.24(b)), along with a duty to conduct equal pay audits as evidence of compliance with equal pay obligations post-award (Para 2.24(c));
  - Compliance with UK freedom of information and other human rights legislation in relation to the contract as if the supplier were a public authority (Para 2.24(f));
  - A ban on blacklisting, zero-hours contracts, and similarly abusive employment practices over the contract lifecycle (Para 2.24(d));
o A commitment to offer apprenticeships measured against a benchmark of one apprentice for each £1m of government contract value, coupled with a commitment to provide on-the-job training to all members of the contract workforce (Para 2.24(e));

o A commitment to promote family-friendly employment practices, for example by providing child care facilities at work (Para 2.24(g));

o A commitment to contribute to the employment of unemployed people who are qualified to work on the contract, including by using local recruitment agencies and engaging with local schools to identify future employees (Para 2.24(h));

o A commitment to paying fair wages, including the Living Wage where appropriate (Para 2.24(i)); and

o A commitment to minimising environmental damage from the activities envisaged by the contract and promoting sustainable and environmentally friendly policies, including requirements for environmental and climate performance levels in relation to the production of goods and performance of services, as well as the environmental characteristics for works, service or supply contracts in terms of their performance or functional requirements (Para 2.24(j)).

- At the award stage, some of these criteria (such as compliance with applicable laws) would be considered mandatory, and evaluated on a pass/fail basis. Other criteria (such as a commitment to reducing unemployment) would be considered discretionary, and bids would be evaluated with appropriate weighting to take into account each bidder's proposals for delivering social value and community benefits in the areas listed above; the winning bidder's proposals could then be made enforceable through contract performance conditions (Para 2.25).

- In this way, while not mandating apprenticeships or payment of the Living Wage in every case, bidders could be encouraged to make proposals for taking on apprentices and paying the Living Wage, and the winning bidder's proposals would become enforceable under the contract (Para 2.26).

- In food procurement (for example school meals), contracting authorities should be required to establish a general policy of (i) improving the health, wellbeing and education of communities in the contracting authority's area, and (ii) promoting the highest standards of animal welfare (Para2.28).

- At the pre-qualification stage, when contracting authorities decide who is eligible/suitable to bid, we recommend that a socially responsible Labour procurement policy should take full advantage of the scope that exists in EU procurement law to exclude those who have displayed criminal or anti-social behaviour in the past (Para2.14).

- Mandatory exclusion should apply to bidders who have committed the offences specified in the EU procurement directives, such as conspiracy, corruption, bribery, fraud and money laundering (Para2.15).

- Discretionary exclusion should be interpreted broadly to apply to bidders who are guilty of:
  o tax avoidance as well as tax evasion, including (a) tax avoidance schemes which are brought before a tax tribunal and declared unlawful even in the absence of a criminal conviction and(b) behaviour which is shown to amount to aggressive tax avoidance even in the absence of a final and binding tribunal decision (Para2.18);
  o "Grave misconduct," including blacklisting of union members and whistle-blowers (Para2.16);
  o "significant or persistent deficiencies" in performing previous government contracts and violation of environmental laws (Para2.17).

- Bidders should be allowed to avoid discretionary exclusion by demonstrating to the reasonable satisfaction of the contracting authority that they have stopped their mis-behaviour and provided adequate redress to past victims (e.g. of blacklisting); but self-certification of good behaviour should not be considered sufficient (Para2.16).
At the short-listing stage, we recommend that bidders should be evaluated on their track record of complying with the community/social/environmental requirements which we have recommended as award criteria and their commitment to these as conditions of contract (a) to exclude bidders who are not willing to meet those conditions, and (b) to rank bidders on the basis of their track record in achieving them and potentially de-select those who fall short of the top 3 scores (assuming at least 3 bidders have qualified) (Para2.21).

Further shortlisting against outline proposals for meeting those community/social/environmental award criteria in the future should also be considered if outline proposals are requested during the award phase, provided that any shortlisting is done against the full award criteria and preserves a sufficient number of bidders for genuine competition (Para 2.21).

As well as recommending specific procurement policies, we also recommend a number of changes in procurement practice that are needed to implement these policies on the ground. We highlight three areas: (1) the appointment of a Cabinet Minister with responsibility for public procurement; (2) a professionally resourced procurement and contract management function within the civil service; and (3) opening up central government contracting to SMEs. These recommendations are summarised here:

First, to underpin Labour’s strategic approach to socially responsible procurement, an incoming Labour Government needs a Cabinet Minister with the clout to drive forward that approach at a political level (Para2.33).

Second, to deliver the procurement policies we have recommended, it essential to create a professionally resourced procurement and contract management function within the civil service across Central Government. We recommend that this function should have a benchmark of at least one procurement professional per £1m of procurement expenditure. This is not only about having a sufficient number of procurement professionals in government, but also about their being held in equal esteem, with the same training opportunities and career progression as other civil service roles (Para 2.35).

Third, in order to open up government contracting – especially Central Government contracting - to more SMEs, an incoming Labour Government needs to set targets for SME participation, and adopt procurement practices that will achieve that target.

We recommend a target of 25% of Central Government contracting expenditure going to SMEs at all levels of the supply chain by 2020 (Para2.39).

To help achieve the 25% target, a number of changes to procurement practice will be needed (this is not an exhaustive list):

- As well as dividing up larger contract requirements into smaller contracts, where that is appropriate, contracting authorities should look to reduce the level of commercial risk which they expect SMEs to take under those smaller contracts (Para2.42);
- Where a larger contract is more appropriate, bidders should be encouraged to form group bids in which SMEs can participate on reasonable terms either as subcontractors or as consortium members (Para 2.44);
- SMEs should also be encouraged to participate further down the supply chain (Para2.46);
- In order to incentivise such SME involvement, bidders who bring SMEs into a group bid or further down the supply chain should be entitled to receive a higher score at the short-listing and award evaluation stages than other bidders (Para2.47).
PART ONE: THE LAW

Section 1: Use of non-economic criteria in the tendering process

1.1 The purpose of this Part of the Report is to provide an overview of the relevant legal principles applicable to the use of “non-economic” community, social and environmental criteria and conditions in public procurement. These criteria might include targeted recruitment and training, the use of labour targets, the provision of apprenticeships, good employment practices and other measures designed to achieve wider community benefits. They may also include measures to help SMEs and voluntary/third sector companies. We also include within these non-economic criteria mechanisms to combat fraudulent companies and those which act unlawfully or otherwise against the public good. Environmental criteria include those relating to sustainable and energy efficient purchasing, as well as animal welfare and environmental considerations in the food chain (e.g. for school meals).

1.2 It is a fundamental principle of EU law that any such criteria must not discriminate, either directly or indirectly, against non-nationals and non-national companies. However, within these constraints, the question is how far can national community, social and environmental benefits be advanced in the course of the procurement process.

1.3 We address this question in five sections, the first dealing with the pre-tender stage of a procurement, the second dealing with the pre-qualification stage, the third dealing with the short-listing stage, the fourth dealing with award criteria and the fifth addressing contract conditions.

1.4 It is noted that this Report deals with the law applicable to procurements which are fully subject to the procurement rules as laid down in the UK Public Contracts Regulations 2006 as amended (“the 2006 Regulations”), implementing Directive 2004/18/EU (“the Old Directive”). These are procurements which are above the relevant financial threshold, not excluded and, in the case of services contracts, Part “A” services. The procurement rules have recently been updated in the UK by the implementation of Directive 2014/24/EU (“the New Directive”) through the Public Contracts Regulations 201511 (“the 2015 Regulations”), which are now in force in relation to tenders commenced on or after 26 February 2015. Relevant changes to current law are noted below.

1.5 By way of general summary, there is considerable scope under current procurement law to take into account community, social and environmental considerations at various stages of the procurement process.12 The New Directive increases this scope in a range of ways described below and by explicitly requiring Member States to “take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.”13

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11 SI 2015 No. 102 of 5 February 2015. For ease of reference this Report refers to the Articles of the New Directive. However, the 2015 Regulations implement the articles of the New Directives in regulations with the same numbering. Certain policy choices have been made by the Coalition Government with the result that the provisions of the 2015 Regulations are not identical to those of the New Directive. It would be open to a Labour Government to reconsider those policy options and reissue the 2015 Regulations provided this is done before 18 April 2016, which is the deadline for implementation of the New Directive.

12 There is even greater flexibility in relation to contracts not caught by the Regulations and certain health and social care services which are governed by a new “light touch” regime (the old “Part B” services). See Articles 74-77 of the New Directive. Until 18 April 2016, clinical commissioning is subject to a separate competitive tendering regime. See National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013 and 2015 Regulations at Regulation 77(6).

13 Article 18(2), Directive 2014/24/EU.
Section 2: The Pre-Tender stage

1.6 The pre-tender stage is the preparation and planning stage during which all key decisions about the scope and nature of the tender should be taken. As explained below, this stage may include contacting potential bidders. During this stage, the contracting authority will also make key decisions about which contract award procedure to use,¹⁴ and will usually have to advertise its procurement in the Official Journal of the European Union (“OJEU”).¹⁵

1.7 Before advertising a contract, the contracting authority will consider various matters, including the award criteria and contract conditions. These are considered in sections 5 and 6 below. The authority will also consider appropriate eligibility, suitability and selection criteria which are the main subject of section 3 below. It will also consider whether it wishes the contract to be divided up into “lots”. This is an important decision as it may determine the size and nature of companies that are suitable to bid for the contract. Clearly, the smaller the lot, the more likely it is that SMEs will respond and be able to pre-qualify. SME participation can therefore be encouraged by designing the contract in a way that will be more attractive to smaller companies. Guidance and training can also be provided to SMEs on how best to respond to public tenders.

1.8 In recognition of the importance of the SME agenda, Recital 78 of the New Directive expressly encourages contracting authorities to use the procurement framework to facilitate SME participation, including by encouraging authorities to divide large contracts into lots. Article 47 sets out the rules on lots. Under these rules:

(a) Authorities may award contracts in lots and determine the size and subject-matter of these lots;

(b) Authorities must provide an explanation where they decide not to divide the contract into lots; and

(c) Authorities may limit the number of lots that each bidder can win provided these are stated in the OJEU notice and the criteria used to allocate lots where one bidder would have won all are explained.

1.9 Other ways to encourage SME participation in government contracting include:

(a) Actively encouraging SMEs to form bidding consortia in order to share out risk. The previous rules (Regulation 25(3) of the 2006 Regulations, now Regulation 63(10) of the 2015 Regulations) specifically prohibit discrimination between different legal structures put forward by bidding entities;

(b) Using Prior Information Notices to give advance warning of forthcoming contracts, thus giving SMEs more time to plan consortium arrangements;

(c) Encouraging participation by SMEs in the supply chain. This can be imposed on prime contractors through supply chain targets provided that these do not have a discriminatory effect. It can also be encouraged by ensuring that the Pre-Qualification Questionnaire recognises and allocates marks to the experience and

¹⁴ See Regulation 12, now Regulation 26 of the 2015 Regulations.
¹⁵ See Regulation 42 and Annexes, now Regulation 49 of the 2015 Regulations.
capabilities of key sub-contractors and through discussions with potential providers during the pre-tender engagement stage (for example on bidder days).

1.10 The New Directive also makes express provision for pre-tender engagement with the marketplace (Article 40). This expressly allows authorities to engage with the supplier base, including SMEs and other local businesses. This engagement can achieve a wide variety of commercial objectives, including exploring different options for the contract specification, gathering information on what the market can deliver and even road-testing award criteria. However, it can also be used as a means of furthering social and environmental objectives, by drawing attention to the importance of non-economic considerations and the relationship of the tender to the authority’s wider strategic objectives and encouraging and facilitating the participation of tenderers which would contribute to these objectives.

1.11 In addition, in England and Wales, before starting their procurement procedure, contracting authorities are now legally required by the Public Services (Social Value) Act 2012 to consider how the services they propose to procure "might improve the economic, social and environmental well-being" of the area in which the services are to be provided.¹⁶ This applies to all public contracts which are above the applicable financial threshold¹⁷ and subject to the EU procurement rules.

Section 3: The Pre-Qualification Stage

1.12 The pre-qualification stage is when the contracting authority decides who is eligible to be invited to tender. Bidders are evaluated through their responses to a Pre-Qualification Questionnaire ("PQQ"). Although conventionally undertaken as a single exercise, the pre-qualification stage consists of two elements:

(a) **Eligibility:** Excluding those who have been convicted of certain offences, are insolvent, or who have otherwise committed some act falling within the list set out in Regulation 23 of the 2006 Regulations, now Regulation 57 of the 2015 Regulations; and

(b) **Suitability:** Eliminating those who fail to meet any specified minimum standards of economic and financial standing (Regulation 24, now 58(7) to (10)) or technical/professional ability (Regulation 25, now 58(15) to (18)).

Where there is a sufficient number of eligible and suitable bidders, and a contracting authority wishes further to reduce the number of those participating, it may do so by applying a shortlisting stage (other than in an open procedure).¹⁸ This can take place at the same time, or immediately after, the pre-qualification stage. Shortlisting may be performed only by applying objective, transparent and non-discriminatory criteria to limit those invited to tender, and must not be used to reduce the number of participants below the minimum specified in the regulations. See Section 4 below.

¹⁶ Section 1(3), Public Services (Social Value) Act 2012. See also The Social Value Guide: Implementing the Public Services (Social Value) Act 2012, Social Enterprise UK
¹⁷ There is no express reference to the EU thresholds on the face of the 2012 Act, but it is generally assumed that the thresholds apply. See Local Government Association," National Procurement Strategy for Local Government in England 2014," (July 2014) at page 22. We recommend that this uncertainty should be removed by making clear that the 2012 Act applies to all public contracts, regardless of the threshold. See Para 1.54 below.
¹⁸ The open procedure is a single stage process, used for commoditised supplies and services, by which bidders are provided with all the tender documents at the outset and invited to provide both a PQQ response and bid simultaneously. All eligible bidders who pass the minimum PQQ standards have their bids evaluated in accordance with Regulation 30, now Regulation 27 of the 2015 Regulations. Shortlisting is not allowed.
The New Directive maintains this basic structure but adds a number of new categories of eligibility criteria. These are reviewed below.

Pre-Qualification: Eligibility

1.14 The eligibility assessment under Regulation 23 (now 57) provides a further opportunity for pursuing social or environmental policy goals. In particular, these rules mandate the exclusion of contractors when the contractor (either itself or via its directors or other persons with powers of representation, decision or control) has been found to be fraudulent, by reference to a number of specified criminal convictions (Regulation 23(1), now 57(1)). These so-called “mandatory” exclusion criteria include conspiracy, corruption, bribery, fraud and money-laundering. By way of exception, the contracting authority may disregard the mandatory exclusion if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator (Regulation 23(2)). The New Directive and 2015 Regulations (Regulation 57) have extended and updated the list of offences which give rise to mandatory exclusion, including where the operator has been found to be in breach of obligations relating to payment of taxes and social security by a judicial or administrative decision having final and binding effect.19

1.15 Guidance on the "mandatory exclusion of economic operators" was issued by the Office of Government Commerce, now part of the Cabinet Office, in 2010. This recommends that authorities accept a self-declaration of compliance. Such self-declarations are standard practice and feature in most PQQs.

1.16 There are further "voluntary" exclusion criteria under Regulation 23(4), now Regulation 57(8), where exclusion is discretionary rather than mandatory. These include:

(a) Bankruptcy;

(b) Conviction for other criminal offences relating to the conduct of a business or profession;

(c) Committing an act of "grave misconduct" in the course of a business or profession;

(d) Non-payment of tax or social security contributions.

1.17 If a supplier has one or more convictions for, say, environmental offences, this might justify exclusion under Regulation 23(4). The principle of proportionality would, however, need to be considered by the authority. Excluding a supplier for a minor conviction, particularly in an area of its business that was unrelated to the contract to be awarded, could well be regarded as disproportionate. Questions relating to compliance with legislation such as the Equality Act 2010, employment legislation (including the minimum wage) are permissible, and suppliers who had been in serious breach of this legislation might be excluded on the "grave misconduct" ground (see Paragraph 1.19 below).

1.18 The broadest ground under the 2006 Regulations for exclusion at the pre-qualification stage is committing an act of "grave misconduct" in the course of a business. In a recent EU case (C-456/11, Forposta), the Court of Justice of the European Community ("the European Court") stated that grave misconduct requires conduct which demonstrates a wrongful intent or negligence of a certain gravity. For example, the defective performance of a contract does not necessarily entail grave misconduct. A specific and individual assessment of the

19 Note that the New Directive has also added a discretionary ground for exclusion for non-payment of taxes or social security contributions even in the absence of a final and binding judicial or administrative decision. See Para 1.20(i) below.
misconduct must be carried out to assess its gravity. The European Court found a national rule automatically excluding contractors which had been the subject of a contract termination by the authority in the preceding three years to be illegal.

1.19 An example of how these rules can work in practice is seen in the Welsh Government's approach to "blacklisting" (i.e. the specific activity by which construction companies draw up lists of active trade unionists or whistle-blowers on health and safety issues and use the list to block their employment opportunities). The Welsh Government made it clear that this could amount to grave misconduct justifying exclusion from public tenders. The Welsh Government added that exclusion from tenders must be proportionate and considered on a case by case basis. Exclusion must be justified by evidence and should be used not as a punishment, but rather as a means of putting right past misconduct. Further, companies should not be excluded if they can show that they have taken steps to "self-cleanse" through clarification of their actions, repair of the damage caused (e.g. compensation of victims) and personnel and structural measures to avoid recurrence. See also our materials on the Welsh Government's procurement policy more generally in Appendix D of this Report.

1.20 Under the New Directive (Article 57), discretionary grounds for exclusion have been expanded to include:

(a) Bankruptcy of the bidder;
(b) Where the authority can demonstrate by any appropriate means the violation by the bidder of social and environmental laws;
(c) Where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
(d) Where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
(e) Where the bidder has shown significant or persistent deficiencies in the performance of a public contract leading to early termination, damages or comparable sanctions;
(f) Conflict of interest (e.g. due to a staff member involved in conduct of the procurement having a financial or personal interest in a bidder) which cannot otherwise be remedied;
(g) Serious misrepresentation in supplying information to the authority on grounds for exclusion or fulfilment of selection criteria;
(h) Where the bidder has tried to unduly influence the decision-making process, obtain confidential information which would give it an advantage or negligently provided misleading information relating to exclusion, selection or award.

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20 See Written Statement by the Welsh Government (Jane Hutt AM) on "Blacklisting" and associated Policy Advice Note (September 2013), reproduced in Appendix D.

21 Under Article 57(4), contracting authorities may be required by Member States to exclude contractors on these bases. The Coalition Government has decided to leave this decision to individual authorities. See Cabinet Office, Consultation Document: UK Transposition of new EU Procurement Directives (2014) at page 28 and Regulation 57 of the 2015 Regulations.
Where the contracting authority can demonstrate "by any appropriate means" that a supplier is in breach of its obligations relating to the payment of taxes or social security contributions, even in the absence of a final and binding judicial or administrative decision.\(^\text{22}\)

1.21 These additional grounds will provide contracting authorities with much greater scope for ensuring that bidders which have acted unlawfully or against the public interest may be excluded at the eligibility stage. Guidance will be needed for authorities on how these grounds are to be applied. It may be disproportionate, for example, to exclude a bidder simply because delays on a previous contract have resulted in liquidated damages payments.

1.22 There are also new rules in Article 57(6) of the New Directive on “self-cleansing”,\(^\text{23}\) by which contractors can take measures to show their reliability despite the existence of a ground for exclusion. If these are considered sufficient (having regard to the gravity of the offence and all relevant circumstances), the contractor should not be excluded. Article 57(6) indicates that such measures would include the contractor having:

(a) Paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct\(^\text{24}\);

(b) Collaborated with the investigating authorities; and

(c) Taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.\(^\text{25}\)

Pre-Qualification: Suitability

1.23 The criteria and evidence that may be taken into account in assessing suitability are set out in Regulations 24-26 of the 2006 Regulations.\(^\text{26}\) Regulation 24 covers economic and financial standing. Regulation 25 covers technical and professional ability and Regulation 26 permits authorities to request information supplementing the matters referred to in Regulation 25. The requirement to meet minimum levels of financial standing or technical ability must be specified in the tender documents and must be related to and proportionate to the subject-matter of the contract.

1.24 The financial standing assessment is designed to ensure that bidders are sufficiently robust financially to take on the risk which is to be transferred to them under the contract. This can represent a significant hurdle to smaller companies, start-ups and SMEs. The authority enjoys considerable discretion in setting and applying the financial thresholds. In the exercise of that discretion, strategic consideration can be given to ensuring that these thresholds are designed in a manner which avoids unnecessarily precluding smaller companies.\(^\text{27}\)

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\(^{22}\) Article 57(2), Directive 2014/24/EU and Regulation 57(4) of the 2015 Regulations.
\(^{23}\) See Regulation 57(13) to (17) of the 2015 Regulations.
\(^{24}\) An example of the UK Government seeking compensation from contractors can be seen in the investigation of Serco. Serco was found to have been overcharging the Ministry of Justice in relation to electronic monitoring contracts. On 19 December 2013, it was announced that Serco would repay £68m to the MoJ. See National Audit Office report, Transforming contract management: Home Office and Ministry of Justice (2014).
\(^{25}\) The New Directive specifies that there is a back stop by which exclusion for mandatory grounds should be limited to five years and for voluntary grounds is limited to three years. See Article 57(7) and its implementation in Regulation 57(11) to (12).
\(^{26}\) Regulation 58 of the 2015 Regulations.
\(^{27}\) Equally, it would not be lawful to introduce maximum turnover levels as this would discriminate against larger suppliers who might be among the best qualified to perform the contract and this might be considered as a form of indirect discrimination against non-national companies.
1.25 Under the New Directive, there is a specific provision (Article 58(3)) by which a minimum turnover requirement should not exceed twice the contract value save in duly justified cases (e.g. where there are special risks). This measure is designed to promote the SME agenda.\textsuperscript{28}

1.26 In relation to professional suitability, Regulation 25, now Regulation 58, sets out an exhaustive list of information that a contracting authority may have regard to in determining whether any minimum standards of technical or professional ability are met in accordance with “the purpose, nature, quantity or importance of the contract”. This list relates to matters such as certificates of satisfactory compliance on previous contracts and statements of goods or services sold and technical resources available. It also includes environmental management measures necessary for the performance of the contract. More generically, Regulation 25(2)(a) allows the contracting authority to have regard to the supplier’s “technical ability, taking into account in particular [its] skills, efficiency, experience and reliability”.

1.27 As further explained in Section 6 below, it is permissible to include contract conditions relating to social objectives (such as providing apprenticeships or jobs for the long term unemployed) and environmental targets. The key question here is whether, at the PQQ suitability stage, the contractor’s skills, ability and experience in the performance of such non-economic contractual conditions can be evaluated. A similar question arises at the award stage as to whether the bid meets social and environmental criteria (see Section 5 below).

1.28 In \textit{Beentjes} (C-31/87), the European Court considered the lawfulness of rejecting a tender response on the basis that the bidder was not in a position to employ long-term unemployed persons. It held that:

(a) “… the authorities awarding contracts can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability”.

(b) The condition that bidders must be in a position to employ long-term unemployed persons bears no relation to the process of checking suitability against financial standing, technical knowledge and ability criteria;

(c) Nevertheless, such a condition could be lawful provided it complied with the Treaty principles. For example, it would not comply with Treaty principles if it were a condition which could only be met by national bidders or indeed that would be difficult to meet by non-national bidders;

(d) Such a condition would additionally need to be mentioned in the contract notice.

1.29 The use of non-economic pre-qualification criteria was further considered by the European Court in the case of \textit{Commission v Netherlands}\textsuperscript{29}. The relevant tender (for coffee machines) included requirements as to bidders’ minimum levels of technical ability which assessed their ability to contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production. These requirements were set out under the heading “Suitability conditions/minimum conditions” in a section dealing with turnover, insurance, experience and quality – all PQQ considerations. Bidders were asked to set out how these criteria were met. The Court held that:

\textsuperscript{28} Implemented in Regulation 58(9) of the 2015 Regulations.

\textsuperscript{29} Case C-368/10
(a) The Kingdom of Netherlands was wrong to consider that these criteria were contract specifications. They were criteria relating to minimum levels of professional capacity, which are subject to Article 48 of Directive 2004/18 (which corresponds to Regulation 25);

(b) The Article 48 technical or professional capacity criteria constitute an exhaustive list of relevant factors; and

(c) The criteria of sustainable purchasing and socially responsible business are not connected to any of those factors and are therefore non-compliant with that Article.

It may be noted that it was also held in Commission v Netherlands that the use of award criteria which allocated marks for coffee carrying an eco-label demonstrating that it was sourced in accordance with fair trade principles was considered lawful (see section 5 below).

1.30 In view of the above authorities, the current position is that there is some doubt as to the lawfulness of assessing a bidder’s skills, ability or experience against non-economic conditions or criteria at the PQQ suitability stage. Nevertheless, these cases have been decided on the specific facts. As explained below, there is increasing support in the case law and the New Directive for the use of award criteria and conditions linked to non-economic considerations. It is likely to be increasingly arguable that, just as a bid may be assessed against such criteria, so the track record of a bidder in delivering such outcomes can be assessed to check its suitability to bid.

1.31 Furthermore, the Beentjes case suggests that it would be permissible to introduce at PQQ stage a participation condition based on the fact that the bidder would, if ultimately successful, have to commit contractually to achieving certain non-economic conditions in the contract, provided such conditions are transparent and non-discriminatory. If it was unable to confirm at PQQ stage that it was able and willing to do so, then it would follow that it could be excluded.

1.32 It may be noted that the New Directive does not clarify the law in this regard. The provisions on selection criteria at the pre-qualification stage (Article 58) largely replicate the current system.

1.33 In relation to the SME agenda, PQQ criteria designed to evaluate the extent to which SMEs are used in the supply chain would probably not be permissible on the basis that they are not related to Regulation 25 suitability considerations. However, there is considerable discretion as to how high the bar should be set in assessing suitability. If, for example, a PQQ required evidence of 5 years’ worth of satisfactory contract completion on projects of a similar size or larger, this may make it more difficult for SMEs to pre-qualify and would preclude new start-ups. A proportionate and considered approach should be taken to the suitability assessment and this may well take into account the more limited experience enjoyed by new or smaller companies. In addition, as indicated above, allowance can be made for the experience of SMEs in the main contractor’s supply chain where such SMEs are part of the bid team.

1.34 In relation to sustainability considerations, the environmental management measures that the contractor is able to apply when performing the contract may be taken into account (Regulation 25(2)(h)). This is subject to the restriction that such measures may be taken into account “only where it is necessary for the performance of the contract”. Moreover, the evidence that suppliers may be required to provide is limited to evidence of compliance with environmental management standards based on the EU Eco-Management and Audit Scheme or relevant European or international standards (or measures that are equivalent to those standards).
Section 4: The Shortlisting Stage

1.35 There is probably more scope to use social and environmental criteria at the shortlisting stage of the tendering process. This shortlisting opportunity would arise in the competitive dialogue, negotiated procedure or restricted procedure where the number of pre-qualified bidders exceeds the number that the authority wishes (or is required) to take through to the invitation to tender, negotiate or dialogue stage. Regulation 16(9), now Regulation 30 (competitive dialogue), Regulation 17(11), now Regulation 29 (negotiated procedure) and Regulation 18(12), now Regulation 28 (restricted procedure) all provide in similar terms that the authority may in these circumstances limit the number of bidders (i.e. "down-select" those who do not make the grade), provided that the contract notice specifies:

(a) The objective and non-discriminatory criteria to be applied in order to limit the number of bidders; and

(b) The minimum number to be invited to participate and, where appropriate, the maximum number.

1.36 The shortlisting criteria and methodology are not therefore constrained by Regulation 25 and could be based on any objective, non-discriminatory, transparent and proportionate criteria. This could include, for example, a ranking or "down-select" mechanism based on the social and environmental track record of bidders, and/or the participation of SMEs in a grouping of bidders or further down in the supply chain. An authority could therefore potentially operate a reasonably low bar to pre-qualification supplemented with a shortlisting methodology based on a range of considerations including social and environmental factors. Both the level of the bar and the shortlisting criteria would need to be objective and justifiable, in addition to being transparent and non-discriminatory.

Section 5: The contract award stage

1.37 The rules on the use of non-economic criteria at the award stage are in many respects even more permissive than at the PQQ and shortlisting stages. As explained above, the stage at which the award criteria should be designed and documented is actually the pre-tender preparatory stage. The award criteria should be fully set out for bidders in the tender documents. Once bids are submitted by pre-qualified and shortlisted bidders, these are then evaluated against the transparent award criteria. The award stage denotes this later stage of the tender process even though all the criteria will have been devised and set at an earlier stage.

1.38 This section therefore deals with the use of non-economic award criteria. An argument historically advanced by parts of central government was that the inclusion of social considerations in procurements is likely to render a Minister's discretion more vulnerable to challenge. However, this view is clearly no longer good law in light of both domestic legislation such as the Public Services (Social Value Act) 2012 and guidance from the European Commission on integrating social and environmental considerations into public procurement (see Appendix C). Moreover, it will be apparent that such non-economic criteria have been accepted in a number of European and domestic court cases as being

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30 The New Directive does not significantly change the existing requirements as to the nature of PQQ or short-listing criteria (see Article 65). Further "shortlisting" may also be conducted during the award phase by evaluating outline Proposals submitted in response to a Request for Proposals or draft Invitation to Tender, but any "down-select" must be based on the full award criteria and must leave a sufficient number of shortlisted bidders to make for "genuine competition" (see Article 66).

31 Note that the 2006 Regulations specify the minimum number of economic operators – 5 in the restricted procedure (Regulation 16(9)(b)), and 3 in the negotiated procedure (Regulation 17(11)(b)) and in the competitive dialogue procedure (Regulation 18(12)(b)). The 2015 Regulations carry forward the same minimum numbers: see Regulation 65.
relevant to the performance of contracts. As discussed further in Section 6 below, the rules are more permissive still in relation to the inclusion of social and environmental factors as contract conditions.

1.39 Unlike at the PQQ stage, there is no prescriptive list of the factors that may be taken into account in selecting the winning tender at the award stage. Although there are examples in Regulation 30(2) of the 2006 Regulations and Article 67(2) of the New Directive of the kinds of factors that may be used in award evaluation, the general principle is that any criteria are permissible provided that they:

(a) are linked to the subject matter of the contract;
(b) do not confer an unrestricted freedom of choice on the contracting authority;
(c) are expressly mentioned in the contract notice or tender documents;
(d) comply with EU Treaty obligations and specifically are not directly or indirectly discriminatory (in particular, do not breach the rule against overt or covert national discrimination or have the effect of favouring or eliminating certain products or economic operators;
(e) are compatible, generally, with EU law;
(f) are used to evaluate the most economically advantageous tender ("MEAT") or identify the lowest price;
(g) can be compared and/or evaluated objectively.

Due to EU Treaty obligations, it remains unlawful for contracting authorities to evaluate bids on the basis of use of local labour or of whether an enterprise has established an office within a particular locality. An emphasis in tender documents that a particular area needs to be regenerated economically and/or socially will often elicit a response from more sophisticated tenders to offer schemes involving the use of local labour. Although EU Treaty obligations prevent contracting authorities from evaluating the provision of local labour, the obligations do not prohibit contracting authorities from voluntarily accepting offers to involve local labour provided this has not influenced their award decision. Two examples (one in Glasgow and another in Northern Ireland) cited by the Joseph Rowntree Foundation illustrate how it is possible to require contractors to work with named local employment agencies and job-brokerage services to recruit the long-term unemployed, provided that non-local bidders

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32 Regulation 67(3) of the 2015 Regulations.
33 Recital I - the Old Directive 2004/18; Regulation 30(2), Public Contracts Regulations 2006; and Case C-225/98 - Commission of the European Communities v French Republic (aka Nord Pas de Calais case).
34 Recital I, the Old Directive 2004/18; and Case C-513/99 - Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne.
35 See Regulation 30(3).
37 Article 26, the Old Directive 2004/18; and Regulation 39(1), Public Contracts Regulations 2006.
38 Regulation 30(1) and (2), Public Contracts Regulations 2006.
39 Recital 46, the Old Directive 2004/18.
40 Laboratori Brunau Srl v Unità Sanitari Locale RM/24 de Monterotondo [1994] 1 C.M.L.R. 707
are not disadvantaged. Also, where local delivery of services is relevant to the subject matter of the contract (for example, services to be accessible to members of the public in a particular locality), then evaluation of accessibility to service users would be permissible. From a practical viewpoint, therefore, the appropriate and judicious inclusion or consultation with service users in a carefully managed evaluation process can often incentivise tenderers to put forward offers that will involve social or economic regeneration, and these offers can become part of the contract without mandating them at the outset.

1.40 A key challenge to the inclusion of non-economic award criteria has been the requirement that the award criteria must be linked to the subject-matter of the contract. However, in the Commission v Netherlands case, relating to criteria rewarding coffee which exhibited an eco-label, the European Court made it clear that:

(a) Social criteria can concern not only the users of the service, but also other persons;

(b) The link to the subject-matter of the contract refers to its object and need not be intrinsic to the product;

(c) As the object of the contract included the promotion of organic agriculture and fair trade with small scale suppliers, the award criteria based on the eco-label were lawful.

1.41 This case and others such as Wienerstrom have in recent years strengthened the argument that non-economic criteria can be considered to be linked to the subject matter of the contract even though they pursue strategic aims which are ancillary to the commercial aim of the specific contract. This argument is also strengthened by the relevant provisions of the New Directive, which provide an expansive definition of "linked to the subject matter of the contract" in Article 67(3) as follows:

“Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

(a) the specific process of production, provision or trading of those works, supplies or services; or

(b) a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance”.

1.42 In its latest guidance on procurement policy in relation to employment practices and workforce matters, the Scottish Government has taken the view that "[w]orkforce matters are most likely to be relevant in relation to contracts involving services and construction," and it goes on to list the factors that a contracting authority should consider in deciding whether workforce matters are relevant to the subject matter of a particular contract, namely, "whether:

- the purchaser has any previous experience of workforce matters or poor employment practices, including pay and conditions, impacting on the quality of service to be delivered;"

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43 Case C-448/01 - EVN AG and Wienstrom GmbH v Republik Österreich
• there is any history of low pay in that sector;
• there is a risk that those working on the contract might be exploited in any way, e.g. through the inappropriate use of zero hours contracts or as a result of being employed by an umbrella company;
• contractors might seek to cut their costs through driving down workers’ terms and conditions, including pay;
• the contractor’s workers will be required to interact directly with the public body’s employees and/or members of the public and whether they will spend any time on the public body’s premises.

If the answer to any of the above questions is “yes”, then workforce matters are likely to be a relevant consideration for the contract in question. This is not, though, an exhaustive list and other factors may be relevant depending on the specifics of an individual contract.  

1.43 A number of key policy areas are considered below.

Apprenticeships

1.44 It is apparent from the cases mentioned above that criteria relating to the campaign against unemployment are permissible as award criteria provided that the seven points (a) to (g) mentioned in Paragraph 1.39 above are complied with. By analogy, criteria linked to the employment of apprentices and training of under-skilled staff would be acceptable in principle, provided that such criteria, can be said to relate to the contract in question. Thus it is permissible to specify that workers employed on the particular project include a number who are on an apprenticeship scheme run by the contractor and to require that workers employed on the particular project are given certain kinds of training. By contrast, it is unlikely to be permissible to assess tenderers on the basis of the number of apprentices taken on in their businesses generally. However, if a bidder could show that it was not practicable to meet a particular apprenticeship target within the contract workforce itself, but it was practicable to meet that target across the company's wider workforce and that the target would be a contractual one, we think there are good arguments that this would be permissible under the revised and broader definition in the New Directive of what award criteria can be considered to be "linked to the subject matter of the contract".

Good employment practices

1.45 Again, there is no reason in principle why criteria relating to diversity, equality and other good employment practices in the contract workforce should not be used in the award of contracts to evaluate the quality of the services or goods offered, provided that the contracting authority complies with the seven factors mentioned in Paragraph 1.40 above. As the Scottish Government has recently declared: "We believe that workers who are treated fairly, who are well-rewarded, well-motivated, well-led and who have appropriate opportunities for training and skills development are likely to deliver a higher quality of service and that good relationships between the contractor and the workforce contribute importantly to sustainable economic growth." Among the "fair employment practices" it expects those who deliver public contracts to adopt, the Scottish Government has listed "no inappropriate use of zero

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44 Scottish Procurement Policy Note, SPPN 1/2015, “Evaluating employment practices and workforce matters, including living wage, in public contracts.” (4 February 2015) at page 5, reproduced in Appendix D.
45 See Para 1.42 above.
46 Scottish Procurement Policy Note, SPPN 1/2015, “Evaluating employment practices and workforce matters, including living wage, in public contracts.” (4 February 2015) at page 2, at Para 2, reproduced in Appendix D.
hours contracts and ensuring that workers receive fair terms and conditions and fair pay.”47 In addition, as explained above, a bidder may be excluded on eligibility grounds for failure to comply with certain social and environmental laws48 (such as the International Labour Organisation conventions to which the UK is a party) and there is a proactive duty under the New Directive to ensure compliance in the performance of public contracts with social and labour laws established by national law, EU law, collective agreements and the international provisions listed in Annex X of the New Directive (see Section 6 below for further detail)49.

Minimum/Living Wage

1.46 It has traditionally been considered difficult for a contracting authority to demonstrate that payment of a minimum or "living" wage (or indeed any other employment protections above and beyond those legally required) relates sufficiently to the subject matter of a contract for it to be a lawful award evaluation criterion. However, the evolution of the case law and the terms of the New Directive now make it more credible to argue that employee protections are linked to the contract. This is particularly the case where performance quality or standard of service demonstrably depends on ensuring the motivation, retention and continuity of staff. This may well be the case in service industries where a significant investment in training employees is required or in areas of low unemployment or otherwise where contractors (and their public customers) suffer from high staff turnover. The case for imposing a living wage in London, for example, is generally arguable given the higher accommodation and travel costs which make the retention of effective and valued workers more difficult to achieve than in lower cost areas. Likewise, in Scotland, the Scottish Government has made clear that "[i]t values the delivery of high quality services and recognises that service levels are often critically dependent on the quality and engagement of the workforce engaged in delivering public contracts," and it has gone on to affirm that "the payment of the living wage is a significant indicator of employer commitment in this regard."50 There is also a growing recognition that payment of the Living Wage to assure "dignity at work" is a legitimate consideration for both purchasers and users of services such as health and social care.

1.47 In Scotland, the Procurement Reform (Scotland) Act 2014 now requires contracting authorities to prepare a procurement strategy which includes a statement of the authority's "general policy on the payment of a living wage to persons involved in producing, providing or constructing the subject matter of regulated procurements"51. In order to implement such a policy, the Scottish Government has now announced that "[w]herever it can be deemed relevant to quality of service or goods or delivery/performance of the contract, it is important to ensure that a bidder’s employment practices and approach to the workforce it will engage to perform the contract is evaluated as part of the procurement exercise," and it goes on to suggest that "[f]air pay, including payment of the living wage, is one of the ways a bidder can demonstrate that it takes a positive approach to its workforce."52 In order to encourage suppliers to pay a living wage, the Scottish Government now recommends that contracting authorities in Scotland ask bidders an ITT question on their approach to workforce matters, including their commitment to paying at least the living wage.53 The recommended ITT question makes clear that: "Good answers will reassure evaluators that your company

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48 Articles 56(1) and 57(4)(a), Directive 2014/24/EU.
49 Article 18(2), Directive 2014/24/EU.
50 Scottish Procurement Policy Note, SPPN 1/2015, “Evaluating employment practices and workforce matters, including living wage, in public contracts.” (4 February 2015) at page 2, reproduced in Appendix D.
51 Section 15(5)(b)(iii), reproduced in Appendix D.
52 Scottish Procurement Policy Note, SPPN 1/2015, “Evaluating employment practices and workforce matters, including living wage, in public contracts.” (4 February 2015) at page 1, reproduced in Appendix D.
53 Scottish Procurement Policy Note, SPPN 1/2015, “Evaluating employment practices and workforce matters, including living wage, in public contracts.” (4 February 2015) at page 2, Paragraph 3, reproduced in Appendix D
takes the engagement and empowerment of workers seriously; takes a positive approach to rewarding workers at a level that can help tackle poverty (e.g. through a commitment to paying at least the living wage), …." This reassurance is to be given "by providing tangible and measurable examples that can be monitored and reported during contract management procedures." In other words, the successful bidder’s pay policy is to be incorporated into the resulting contract.

1.48 The Scottish Government reports that it has recently successfully piloted this approach in a tender exercise for catering services on its premises. On this occasion, the Scottish Government allocated 10% of the overall scoring for responses to the workforce question in the ITT, but the Scottish Procurement Policy Note goes on to make clear that the weighting to be allocated to workforce matters must be considered on a case by case basis: “On this occasion, we reserved 10% of the overall quality scoring for the responses to the question. It is important, however, that the amount of marks allocated is proportionate and takes account of the likely impact on quality for that particular contract. In some cases, e.g. personal social care, the impact on quality will merit a high score. In other cases, where workforce matters may be relatively less important to quality, the amount of marks may need to be lower. Each procurement must be considered on its own merits.”

1.49 Local authorities across England have been following a similar approach to require and/or encourage their contractors to pay the Living Wage to their workers.

1.50 In our view, therefore, although the risk of legal challenge cannot be ruled out, it will often be permissible to encourage bidders to pay the Living Wage. This can be done – as in Scotland - by establishing award criteria (with weightings appropriate to the nature of the contract) which invite bidders to set out their proposed approach to employment matters, including payment of the Living Wage, explaining how their proposed approach will contribute to the quality of the services or goods to be delivered. Such proposals by the winning bidder can then be made enforceable as conditions of the contract.

Equality

1.51 Procurement processes constitute a “public function” of public bodies under the Equality Act 2010. Thus, contracting authorities who are also public bodies must comply with their public sector equality duty when conducting procurement exercises. This duty requires the public body to pay due regard to the:

(a) Elimination of discrimination, harassment, victimisation and other conduct prohibited by the Equality Act;

(b) Advancement of equality of opportunity between those who share protected characteristics and those who do not; and

(c) Fostering of good relationships between those who share protected characteristics and those whose who do not.

The protected characteristics covered by the public sector equality duty are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual

54 Ibid at Annex A.
55 Ibid.
56 Ibid at Paragraphs 7-8.
57 Ibid at Paragraph 7.
58 See Appendix D.
Therefore, tender evaluation criteria can be designed (provided they are related to the subject matter of the contract) to test how tenderers in their delivery of services, works or supplies will respond to the diverse needs of particular communities - particularly groups with protected characteristics.

Disability

1.52 There are provisions in the New Directive which assist contracting authorities to award contracts to sheltered workshops and suppliers "whose main aim is the social and professional integration of disabled and disadvantaged persons."60

Social Enterprises

1.53 The New Directive also allows contracting authorities to reserve contracts in the field of health, social and cultural services for social enterprises.61

Local Government

1.54 Sections 17(1) and (5) of the Local Government Act 1988 were enacted to prevent local authorities from having regard to "non-commercial matters" in relation to public supply or works contracts62. These provisions have been modified by the Public Services (Social Value) Act 2012.63 In its national procurement strategy for local government in England, the Local Government Association advises that the 2012 Act "requires councils to consider social value in all services contracts with a value above the EU threshold," and goes on to comment that "social value" can mean "many different things, for example the inclusion of targeted recruitment and training opportunities in public contracts that can make a contribution to addressing the issue of poverty and reduced social mobility."64

1.55 However, the precise legal position on the use of non-economic criteria in local government procurement remains unclear and Section 17 could be improved to bring it in line with the New Directive and the 2012 Act, either by being more specific as to the nature of non-economic criteria that can be considered or by repealing Sections 17(1) and (5) completely. There is also some doubt as to whether the 2012 Act applies to procurements below the EU threshold, and we think that this doubt should be resolved in favour of applying "social value" considerations to all public contracts, regardless of the EU threshold, especially as the EU threshold is now much higher (750,000 Euros) for social and other specified services (the old "Part B" services) under the New Directive.65

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60 Article 20, Directive 2014/24/EU.
61 Article 77, Directive 2014/24/EU. However, the Coalition Government has implemented these provisions in a manner which excludes healthcare service tenders from the 2015 Regulations until 18 April 2016—see Regulation 77(6).
62 Section 17(1) of the Local Government Act 1988 provides 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…." Section 17(5) provides that: "The following matters are non-commercial matters as regards the public supply or works contracts of a public authority, any proposed or any subsisting such contract, as the case may be, that is to say—
(a) the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces;…"

63 Section 2 of the Public Services (Social Value) Act 2012 adds a new subsection 17(11) to the 1988 Act: "This section does not prevent a public authority to which it applies from exercising any function regulated by this section with reference to a non-commercial matter to the extent that the authority considers it necessary or expedient to do so to enable or facilitate compliance with a duty imposed on it by section 1 of the Public Services (Social Value) Act 2012."

Sustainability

1.56 Similar principles apply to award criteria relating to environmental performance. Given the widespread recognition across all sectors of the economy of the need to take action to reduce the environmental impact of human activities, it is normally possible without great difficulty to establish a link between the subject matter of the contract and environmental performance. Hence environmental evaluation criteria are now common in procurements.

1.57 The Wienstrom case66 and Commission v Netherlands67 made it clear that contracting authorities can legitimately evaluate environmental and social criteria where they relate to technical specifications. For example, as explained above, an award evaluation criterion relating to method of production (e.g. organic, sustainable, fair trade, no adverse environmental impact and, potentially, no use of child labour) would be lawful.

1.58 Also, it is now perfectly permissible for a contracting authority to take into account a tenderer's environmental policy68.

1.59 As explained above, the New Directive will allow contracting authorities to include requirements that refer to a specific production process, a specific mode of provision of services or a specific process for any other stage of the life cycle of the product or service, provided they are linked to the subject-matter of the contract and are proportionate to its value and objectives.69 Moreover, specifications for works contracts may now refer to "levels of environmental and climate performance ... and production processes and methods at any stage of the life cycle of ... works" and specifications for service or supply contracts may refer to characteristics relating to "environmental and climate performance levels ... including requirements relevant to the product as regards ... production processes and methods at any stage of the life cycle of the supply or service"70.

1.60 Also, the New Directive will allow contracting authorities to stipulate environmental characteristics for works, service or supply contracts in terms of performance or functional requirements, and require the relevant products to bear a specific eco label71.

Section 6: Contract conditions

1.61 As with the award criteria, consideration of appropriate contract conditions should also take place pre-tender. Bids are evaluated at award stage against their responses to the specification, including the contract conditions which should be made available to bidders with the tender documents.

1.62 The position in relation to contract conditions is more permissive than either pre-qualification criteria (see Section 3 above), short-listing criteria (see Section 4 above) or award criteria (see Section 5 above).

66 Case C-448/01 - EVN AG and Wienstrom GmbH v Republik Österreich.
67 Case - C-368/10 - European Commission v Kingdom of the Netherlands – AG Kokott - "public purchasers must be allowed to procure environmentally friendly, organic and fair trade products without excessive administrative burdens."
68 Case T-331/06 - Evropaliki Dynamiki - Proigma Systimata Tilepikoinion Piroforykis kai Tilematikis AE v European Environment Agency (AEE).
69 Article 42(1), Directive 2014/24/EU.
70 Annex VII(1)(a) and (b), Directive 2014/24/EU.
71 Recital 75, Directive 2014/24/EU.
Article 26 of the Old Directive makes clear that contracting authorities may lay down "special conditions" relating to the performance of a contract, including conditions relating to "social or environmental factors," provided that those conditions are compatible with EU law, i.e., essentially that they do not directly or indirectly discriminate against suppliers from other Member States and provided that they are mentioned in the OJEU notice or the contract documents during the competitive process. The Recitals to the Old Directive explain the intention behind Article 26 as follows:

"Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements applicable during performance of the contract - to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation."  

In the past, there has not been a requirement that the contract condition must be related to the subject matter of the contract or have any relation to achieving best value. Article 70 of the New Directive effectively aligns the test for the lawfulness of contract conditions with that of award criteria by requiring that contract performance conditions must be linked to the subject-matter of the contract and must be set out in the OJEU notice or tender documents. However, Article 70 goes on to incorporate the much wider definition of "linked to the subject matter of the contract." This definition is contained in Article 67(3), which makes clear that the contract conditions "may include economic, innovation-related, environmental, social or employment-related considerations." The discussion above in relation to award criteria therefore should apply equally to contract conditions in the future. This will, quite sensibly, allow authorities to set (contract-related and non-discriminatory) social, environmental and employment-related conditions and award criteria to assess the bidder's approach to delivering such contract conditions.

Whilst it is perfectly permissible to incorporate contract conditions that require a contractor to implement national legal requirements (where related to environmental matters or terms of employment, for example), it may be noted that EU case-law has, to date, not permitted contract conditions that require minimum wage terms that are specific to that contract. This seems to have been on the basis that such workforce conditions may disadvantage bidders from countries with lower social costs. As indicated above, our view is that there are good arguments that living wage award criteria and contract conditions are often contract-related and justifiable by reference to legitimate performance objectives.

Moreover, there is increasing latitude in the way in which the courts have approached the question of the pursuit of social and employment-related objectives, and that latitude is reflected in the New Directive. In particular, it is noteworthy that Article 18 of the New Directive stipulates, as one of the "principles of procurement," that "Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour
law established by [European] Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.”

Significantly, although not legally binding on the courts, it bears noting that the European Commission, in response to a Question in the European Parliament, has very recently stated that "living-wage conditions guaranteeing pay higher than the minimum wage may be included in contract performance clauses, ...provided they are not directly or indirectly discriminatory, are indicated in the contract notice or in the contract documents, and are related to the execution of the contract in the Member State in question. Such conditions must also be compatible with Directive 96/71/EC on the posting of workers.” In light of these developments, while the risk of challenge may remain, we consider that a more robust approach to the inclusion of minimum/living wage contract conditions can now be taken, especially where they are introduced to reflect proposals from the winning bidder offering added social value or community benefits.

By way of a further example, whilst it might in a particular case be regarded as impermissible to assess tenderers during the competitive process either at PQQ or award stage on the basis of the quality of their existing employment policies, it would be acceptable to insist on a contract condition that required the successful tenderer to have or, if necessary, introduce, good employment practices that complied with, and even went beyond, the current requirements of employment legislation, especially when such contract conditions are introduced to reflect proposals from the winning bidder offering added social value or community benefits and provided they are non-discriminatory, proportionate and broadly linked to the subject-matter of the contract. As noted above, this is precisely the approach now recommended by the Scottish Government to encourage fairer employment practices which can contribute to the quality of the services delivered (see Paragraph 1.47 above). Such good employment practices might include targets for the number of apprenticeships within the contract workforce. Such a target would have to be disclosed during the competitive process so that tenderers could factor compliance into their pricing if necessary. Where a bidder could show that it was not practicable to meet a particular target within the contract workforce itself, but it was practicable to meet that target across the company’s wider workforce, we think it arguable that this is permissible under the New Directive.

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75 Annex X lists 8 ILO Conventions and 4 international environmental conventions.
76 OJC 335 (25/09/14).
PART TWO: OUR "WISH LIST"

Section 1: Introduction

2.1 Part One of this Report demonstrates that there is much more freedom than is generally supposed to use EU public procurement rules to secure not only value for money in the supply of public goods and services, but also wider community, social and environmental benefits.

2.2 Appendix D of this Report provides examples of best practice, illustrating how contracting authorities in the UK are actually using procurement as part of their policy toolkit to deliver broader social value and community benefits.

2.3 In this Part, our aim is to set out an inventory of procurement policies and practices which a Labour government at Westminster should consider adopting as part of a more progressive, socially responsible, Labour approach to delivering better value for money when it buys goods, services, and construction projects WHILE AT THE SAME TIME securing tangible community, social and environmental benefits through government contracting - such as training and apprenticeships, local employment opportunities, better access to government business for SMEs, reduced damage to the environment, greater sustainability of public services, and many more. In effect, this is our "wish list" for a more progressive, socially responsible, Labour procurement policy and practice across the UK. It is not a statement of current Labour policy, though it reflects deep-seated Labour values and we hope that our recommendations will be adopted by an incoming Labour government after the General Election.

2.4 Our focus here is on public procurement at the UK central government level. However, we believe that Labour at Westminster can and should play a leadership role in championing better public procurement across the UK, and we would hope that the policies and practices we are recommending here would be adopted by progressive administrations in Wales, Scotland and Northern Ireland, by local authorities, by NHS bodies, by bodies governed by public law, and by the wider public sector.

Section 2 – Our Recommendations in General

2.5 In developing its procurement policies and practices, we recommend that a Labour government should take full advantage of the broad legal freedom available to it under EU law to use government contracting to promote a progressive, socially responsible, Labour agenda.

2.6 Based upon the legal analysis set out in Part One of our Report, and drawing on the examples of best practice in Appendix D of this Report, we offer a number of specific recommendations for procurement policies and practices which an incoming Labour government should consider introducing as soon as possible. In the considered opinion of the legal experts who have contributed to this Report, these recommendations are fully consistent with the permissible legal framework of EU law outlined in Part One. Moreover, as demonstrated by the examples of best practice set out in Appendix D, many of these recommended policies and practices have already been stress-tested elsewhere, and are successfully being used at many levels of government in the UK.
2.7 We further recommend that an independent review should be commissioned immediately after the General Election to put the flesh on the bones of this Report and to allow a full consultation on our recommendations with the affected stakeholders. It is right, in our view, that procurement professionals in government and the private sector should be consulted before these recommendations are implemented; indeed we see this as an essential condition of their successful implementation. The initial review should be completed within 3 months after the formation of a Labour government. A similar review should be conducted at least annually to check actual delivery against planned targets, and to make further recommendations.

2.8 While consultation with stakeholders is essential, we must stress that none of our recommendations requires legislation – either primary or secondary – in order to implement it. There is certainly a case to be made for the 2015 Regulations to be amended in order to take fuller advantage of the more socially oriented policy choices available to the UK Government under the New Directive, but that is not a pre-condition of implementing any of the recommendations in this Report. Nor is increased public expenditure required. These recommendations can be adopted from Day One of an incoming Labour government across all of its departments and agencies; consultation can and should follow immediately; and implementation of the recommended policies and practices would be possible within a matter of months.

2.9 Although this would require legislation, we recommend that the Public Services (Social Value) Act 2012 should be amended (a) to clarify the non-economic criteria that can be considered in local government procurement, (b) to extend the Act to cover supply and construction contracts, and (c) to apply it to all public contracts which are subject to the EU procurement rules regardless of whether they are above or below the applicable EU threshold.

Section 3: Recommended Procurement Policies

2.10 As indicated in Part One, the legal freedom to use non-economic policy criteria in procuring government contracts varies from the pre-qualification stage, through to the short-listing and award stages, and is least constrained in the scope of the conditions which may be included in the contract itself. This freedom is now further enhanced under the new EU procurement directive ("the New Directive") and the Public Contracts Regulations 2015 ("the 2015 Regulations"). Accordingly, to indicate the full extent of our recommended approach, we offer our recommendations on the pre-qualification stage first, then the short-listing stage, and finally the award criteria and contract conditions.

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78 See UNISON Briefing for MPs – Delay the UK Public Contracts Regulations 2015

79 Directive 2014/24/EU, currently being implemented in the UK by the draft Public Contracts Regulations 2015.
Pre-Qualification Criteria

"Growth is built on sand if it comes from our predators and not our producers". Ed Miliband MP, Labour Party Conference, 26 September 2011.

2.11 Current law requires contracting authorities to exclude suppliers who have been found guilty of "fraud" and other specified criminal offences,\(^{\text{80}}\) and it permits (but does not require) contracting authorities to exclude suppliers who have been declared bankrupt, have failed to pay taxes due or have committed acts of "grave misconduct."\(^{\text{81}}\) The New Directive expands these non-mandatory grounds for exclusion.\(^{\text{82}}\)

2.12 If Labour is serious about promoting the nation's "producers" and reining in its "predators," then procurement law is one of the few instruments which already exists to provide an incoming Labour government with enforceable tools allowing Ministers without the need for further legislation - to do just that by excluding predatory suppliers at the pre-qualification stage from being qualified to bid for government contracts at all.

2.13 Given the size and strategic importance of the public sector market place for most businesses (whether domestic or from other EU Member States), we believe that the robust use of these legal powers to exclude suppliers who have behaved unlawfully or against the public interest will act as a powerful incentive for suppliers who have behaved badly in the past to clean up their act if they want government business in the future. We believe that it will also ensure that suppliers who do the right thing are not unfairly disadvantaged against less scrupulous suppliers who are prepared to cut corners in order to win government business.

2.14 We therefore recommend that a future Labour government should take steps to exclude all suppliers who are guilty of any of the mandatory or non-mandatory grounds for exclusion listed in the Old Directive and the New Directive, subject only to a proportionality test.

2.15 The exclusion should apply to serious and proven breaches of laws referenced in the directives, including UK law, foreign laws in the supplier's country of origin, and international laws. The exclusion should apply to breaches of law not only by the bidder but also by any other member of its corporate group. We believe that such an exclusion is legally justified because, under EU case law,\(^{\text{83}}\) a supplier can benefit from the track record of other members of its corporate group in qualifying to bid; it follows that it should also be dis-benefited if other members of its corporate group are guilty of misbehaviour. As former Archbishop Desmond Tutu has said: If a supplier [G4S] is "complicit in violations of international law" running prisons in the West Bank and Israel, why should it be eligible for Government contracts in the UK?\(^{\text{84}}\)

2.16 The exclusion should of course cover all of the unlawful behaviours expressly listed in the old Directive and the New Directive. But it should also include a broad interpretation of "grave misconduct", including (but not limited to) proven cases of black-listing. As in Wales, however, we recommend that this exclusion should be discretionary, and it should be open to the supplier avoid exclusion by demonstrating to the reasonable satisfaction of the contracting authority that it has stopped its unlawful misbehaviour (such as black-listing) and provided adequate redress for its past victims.

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\(^{\text{80}}\) See Paragraph 1.9.

\(^{\text{81}}\) See Paragraph 1.11.

\(^{\text{82}}\) See Paragraph 1.15.

\(^{\text{83}}\) See Beentjes (C-31/87).

\(^{\text{84}}\) See (London) Evening Standard, 5 June 2014, at page 51.
We further recommend that the Labour government should pro-actively take steps to exclude suppliers which have persistently and/or significantly breached previous government contracts, in accordance with the discretionary grounds of exclusion under Article 57(4)(g) of the New Directive (Regulation 57(8)(g) of the 2015 Regulations) at least until they have demonstrated that they have put in place appropriate measures to prevent future breaches as well as providing the tax payer with compensation for past breaches. To give practical effect to this exclusion, we recommend that a Labour government should take steps to ensure that a central database is maintained to collect relevant evidence of poor past performance and is made available to all contracting authorities, rather than relying on self-certification of good past performance.

We recommend that the existing mandatory exclusion of suppliers who have failed to pay their taxes should also be interpreted broadly. Instead of requiring a criminal conviction for failure to pay taxes (which is only rarely obtained), a supplier should be excluded if a tax avoidance scheme which it has promoted over the relevant period has been brought before a tax tribunal and declared to be unlawful - even in the absence of a criminal conviction. We also recommend that contracting authorities should also take advantage of the discretion given to them in the New Directive (see Paragraph 1.20(i) above) to exclude suppliers who are shown to be guilty of aggressive tax avoidance even in the absence of a final and binding tribunal or court decision.

Short-listing Stage

As well as excluding the proven "predators" in assessing eligibility at the pre-qualification stage, existing procurement rules - reinforced by the New Directive - allow contracting authorities to promote suppliers at the short-listing stage who demonstrate socially and environmentally desirable behaviours. For example, provided it was stated in the OJEU Contract Notice, and did not discriminate against suppliers from other Member States, contracting authorities could use scoring mechanisms which shortlist bidders by reference to their proposals for employing unemployed people, retaining employees through good employment practices, providing apprenticeships and other on the job training schemes, complying with more sustainable environmental policies, and conferring community benefits in other demonstrable ways.

While there is some doubt as to how far such criteria can be used on their own to exclude a supplier at the pre-qualification stage, the case law suggests that they can be used to exclude suppliers who are unwilling to commit to meeting community/social/environmental criteria which are to be required as contract conditions. Further short-listing against their outline proposals for meeting these criteria/conditions in the future is also permissible during the award phase, but must be based on the full award criteria and must leave a sufficient number of bidders to make for genuine competition.

Accordingly, we recommend that an incoming Labour government should use the full set of community/social/environmental criteria (which we also recommend below as award criteria and conditions of contract) (a) to exclude suppliers at the PQQ stage who are unable to

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85 See National Audit Office report, Transforming contract management: Home Office and Ministry of Justice (2014) detailing significant overbilling dating back to 2005, principally in the Ministry of Justice’s electronic monitoring contracts with G4S and Serco. Around the same time, the NAO and the MoJ received allegations from a whistleblower about operational practices at G4S.

86 See Paragraph 1.36.

87 See Paragraph 1.31

88 See Paragraph 1.32.

89 See footnote 30.
commit to these criteria/conditions in the contract, and (b) to rank suppliers for selection at the short-listing stage on the basis of their track record for achieving those criteria/conditions in the past. This would enable contracting authorities potentially to de-select those who fall short of the top 3 scores (assuming at least 3 bidders have qualified). We also recommend that further shortlisting against outline proposals for meeting those criteria/conditions in the future should be considered if outline proposals are requested during the award phase, provided that any shortlisting is done against the full award criteria and preserves a sufficient number of bidders for genuine competition.

**Award Criteria and Contract Conditions**

"If you want a major government contract, you must provide apprenticeships to the next generation." Ed Miliband MP, Labour Party Conference, September 2013

2.22 In awarding government contracts, we recommend that an incoming Labour government should take a much broader view of what it is trying to achieve than the traditional "value for money" criteria, which place undue emphasis on lowest price and the technical specification of a bidder's solution. Like the Welsh Government, a Labour government at UK level should develop award evaluation criteria which represent "the optimum combination of whole of life costs in terms of not only generating efficiency savings and good quality outcomes for the organisation, but also benefit to society and the economy, whilst minimising damage to the environment."90 In addition, the "delivery of added value through community benefits policy must be an integral consideration in procurement."91 We recommend that these criteria should then be made enforceable as contract performance conditions.

2.23 We do not believe that there is - or can be - a finite list of the community, social or environmental benefits which a progressive Labour government should aim to deliver through public procurement. These benefits will evolve over time, and will vary according to the subject matter of each contract.92 Moreover, these award criteria and contract conditions are subject to the overriding legal requirement that they (a) must not directly or indirectly discriminate against suppliers from other Member States, (b) must be made transparent in the contract documentation prior to bidding, and (c) must be linked to the subject matter of the contract.

2.24 Subject to these constraints, we recommend that an incoming Labour Government should focus on award criteria and contract conditions which will deliver a new and socially responsible procurement policy reflecting Labour values. These should include:

(a) A duty on the supplier to comply with all applicable environmental, social and labour laws, including but not limited to EU laws, national laws, collective agreements and those international provisions listed in Annex X to the New Directive, such as ILO conventions on forced labour, minimum age, discrimination, equal remuneration, child labour;

(b) For these purposes, compliance with relevant national laws would include equalities legislation, employment legislation, tax compliance, health and safety standards, child protection laws, data protection/privacy requirements;

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91 Ibid.
92 See Paragraph 1.33.
(c) A duty to conduct equal pay audits as evidence of compliance with equal pay obligations post-award.93

(d) A ban on abusive employment practices such as zero-hours contracts and the blacklisting of potential employees on grounds of trade union membership, raising of health and safety issues, and the like over the lifecycle of the contract;

(e) A commitment to offer apprenticeships to all eligible members of the supplier’s total workforce, measured against a benchmark of one apprentice for each £1m of government contract value, coupled with a commitment to provide on-the-job training, apprenticeships or other community benefits to all members of the contract workforce;

(f) A duty on the supplier to comply with UK freedom of information and other human rights legislation in relation to the contract as if it were a public authority;

(g) A commitment to promote family-friendly employment practices, for example by providing child care facilities at work;

(h) A commitment to contribute to the employment of unemployed people who are qualified to work on the contract, including through the use of local recruitment agencies and engaging with local schools to identify future employees;

(i) A commitment to reduce poverty by paying fair wages, including where appropriate the Living Wage; and

(j) A commitment to minimising environmental damage from the activities envisaged by the contract and promoting sustainable and environmentally friendly policies, including requirements for environmental and climate performance levels in relation to the production of goods and performance of services, as well as the environmental characteristics for works, service or supply contracts in terms of their performance or functional requirements.

2.25 At the award stage, some of these criteria (such as compliance with applicable laws) would be considered mandatory, and evaluated on a pass/fail basis. Other criteria (such as a commitment to tackling long-term unemployment) would be considered discretionary, and bids would be evaluated with appropriate weighting to take into account each bidder's proposals for delivering social value and community benefits in the areas listed above; the winning bidder’s proposals could then be made enforceable through contract performance conditions. Care will need to be taken that these criteria do not discriminate against non-local bidders.

2.26 In this way, while stopping short of making the Living Wage mandatory in every contract, we recommend that a Labour Government can and should encourage contractors to pay the Living Wage by making clear (in line with the Scottish Government's approach)94 that, for relevant procurements, their bids will be evaluated with appropriate weighting to take into account their employment policies, including the Living Wage, and by making such policies enforceable through contract performance conditions with appropriate remedies for non-performance.

93 If a bidder has already conducted an audit, this could be scored favourably at short-listing and at award.
We further recommend that it should be incumbent on a prime contractor to ensure that all of its subcontractors and other suppliers in its supply chain comply with applicable national and international laws under Paragraph 2.24(a) and (b) above. A supplier should not be able to avoid liability for breaking UK and international laws merely by employing a subcontractor or other supplier to do so on its behalf. Moreover, this principle should apply to subcontractors in the UK and in any other country, provided that those laws were applicable in that country – for example as a violation of local laws or applicable ILO conventions on the worst forms of child labour.95

Food Procurement

In the context of public contracts for the provision of food, for example in the procurement of school meals, we also recommend that a Labour Government at Westminster should take a leaf out of Scotland’s most recent statute book and require contracting authorities to establish a general policy of how their approach to food procurement will (i) improve the health, wellbeing and education of communities in the contracting authority’s area, and (ii) promote the highest standards of animal welfare.96

Local Government

We recommend that Sections 17(1) and (5) of the Local Government Act 1988 are amended or repealed to make clear beyond any doubt that local authorities are able to have regard to "non-commercial matters" in relation to public supply or works contracts. These provisions in the 1988 Act have been partially repealed by the Public Services (Social Value) Act 2012, and are out of tune with the New Directive and the emerging case law allowing the use of social and environmental criteria in public procurement (see Paragraph 1.51 above).

Section 4: Recommended Procurement Practices

It is one thing to aspire to having a progressive, socially responsible approach to public procurement under the next Labour government, as we do; it is quite another thing to deliver progressive procurement policies on the ground. That is why we recommend that an incoming Labour government should look at introducing radical changes in procurement practices in every department and agency at Central Government level. We would identify three areas of procurement practice which will need to change in order to deliver the procurement policies recommended in this Report: (1) Ministers and Senior Officials must recognise the strategic importance of public procurement in delivering Labour’s manifesto commitments (2) public procurement must be professionally resourced; and (3) government contracting must be made more accessible to SMEs. Additional areas for improving procurement practices are likely to be identified in the annual procurement review recommended above (see Paragraph 2.6).

A strategic approach to procurement

For too long, the procurement function in government – at all levels – has been seen as a way of buying goods and services at the lowest price. Even when more sophisticated procurement processes have been used to take advantage of the freedom given in EU rules to select the "most economically advantageous tender" rather than the "lowest price" tender,97 there has still been a tendency to attach too much weight to price as opposed to

95 See Annex X to Directive 2014/18/EC.
96 See Section 15(5)(c), Procurement Reform (Scotland) Act 2014, reproduced in Appendix D.
97 See Regulation 30(1), Public Contracts Regulations 2006.
value for money, let alone the wider non-economic criteria which we would argue can and should be considered in procuring government contracts.

2.32 To overcome this "lowest price" bias, and to ensure that procurement is used to deliver wider community, social and environmental benefits, we believe it is essential for a culture change to take place in the Government’s whole approach to procurement. The Welsh Labour Finance Minister (Jane Hutt AM) has put it well:

"Procurement should be recognised and managed as a strategic corporate function that organises and understands expenditure; influencing early planning and service design and involved in decision making to support delivery of overarching objectives."98

In Scotland, a strategic approach to procurement has been enshrined in statute, and contracting authorities are required to produce a procurement strategy annually, which must among other things include:

"a statement of the authority’s general policy on—

(i) the use of community benefit requirements,

(ii) consulting and engaging with those affected by its procurements,

(iii) the payment of a living wage to persons involved in producing, providing or constructing the subject matter of regulated procurements,

(iv) promoting compliance by contractors and sub-contractors with the Health and Safety at Work etc. Act 1974 (c.37) and any provision made under that Act, and

(v) the procurement of fairly and ethically traded goods and services,"99

2.33 To bring about such a culture change at the UK level, it is necessary but not sufficient for the procurement function to be professionally resourced (as recommended below).100 In addition, we recommend that Labour’s incoming Ministers should lead the way in championing public procurement as an instrument of social, environmental and political change – no longer denigrated as the exclusive province of value-free "bean counters", but a place where Labour’s ambitions for a better country can be advanced. This means not only formally adopting the progressive procurement policies recommended in this Report, but also appointing a Cabinet Minister with responsibility for public procurement across all departments and agencies who has the political clout to ensure that those policies are actually delivered. A Cabinet Minister for Public Procurement would mirror the "Councillor Champion" recommended by the Local Government Association who can "signal from the top in each council and recognise the strategic importance of procurement" at the political level in local government.101 In addition, as in Wales, it is important that the Government should receive "regular reports of the outcomes achieved through procurement."102

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99 Section 15(5)(b), Procurement Reform (Scotland) Act 2014, reproduced in Appendix D.
100 See Paragraphs 2.27-2.31.
102 Written Statement by the Welsh Government, Maximising the Impact of Welsh Procurement Policy – Wales Procurement Statement, Annex 1, at page 7 (6 December 2012), reproduced in Appendix D.
A professionally resourced procurement function

2.34 Since the Coalition Government took office in 2010, job cuts in the Civil Service have resulted in a substantial hollowing out of its ability to deliver an effective public procurement function. At the same time, more and more public services have been outsourced, mutualised or privatised. As a result, the government's capacity to procure and - just as important - to manage contracts for public services has been attenuated. As the Head of the National Audit Office reported last year:

“For several decades, governments have been increasing their use of contracts with the private sector to provide goods and services. This has produced successes but also thrown up major new challenges, which are not easy to surmount. Not the least of these is the need to build up the commercial skills of contract management staff, both in departments and in the centre, and enhance the status and profile of their role.”

2.35 Moreover, by virtue TUPE, more and more of the procurement professionals who procure and manage these contracts - the so-called "intelligent customer" function - have been transferred to the very suppliers they should be managing, and increasing numbers of external consultants, secondees and contractors from the private sector have been brought in on a temporary basis to replace them. At best, these temporary appointments lack a long term commitment to the public sector; at worst, they are liable to serious conflicts of interest in managing the suppliers from whence they came and to whom they will return.

2.36 These trends must be reversed if an incoming Labour government is to have any hope of delivering a progressive agenda reflecting Labour values through the procurement process. To do so, we recommend that Labour should adopt the Welsh Government's policy on professional resourcing of the procurement function. This states that:

"Procurement expenditure should be subject to an appropriate level of professional involvement and influence, adopting the initial benchmark of a minimum of one procurement professional per £10 million of expenditure.”

2.37 To those who say that government should be reducing its head count rather than increasing it, we would point to the fact that better procurement practice will produce greater procurement savings overall - a classic case of "investing to save". By contrast, cutting the funding of the very function that is there to save public money when the government buys essential goods and services is plainly self-defeating.

2.38 Nor is a professionally resourced procurement function just about the number of procurement professionals in government; it is also about their status. In the past, procurement has been the Cinderella of the civil service. High flyers did policy; the "also rans" bought things. This has got to change. A job in public procurement and contract management has got to be recognised as being of at least equal value as other civil service roles - with the esteem, training opportunities and career progression to match.

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103 Amyas Morse, head of the National Audit Office, 4 September 2014, introducing NAO report on Transforming government's contract management (2014).

104 Written Statement by the Welsh Government, Maximising the Impact of Welsh Procurement Policy – Wales Procurement Statement, Annex 1, at page 4 (6 December 2012), reproduced in Appendix D. We believe this is a good starting point for Central Government too.
Opening up Government contracts to SMEs

2.39 There is widespread agreement across the political parties about the desirability of making it easier for SMEs to win more government contracts. The Coalition Government has set a target of 25% of overall central government contract expenditure going to SMEs by 2015. Ed Miliband has set a similar 25% target, and we recommend that the 25% target should be reiterated for the next 5 years (2015-2020). The issue is not whether securing more government contracts for SMEs is a desirable objective; the issue now is how to achieve that objective.

2.40 The Coalition Government has so far failed to achieve its 25% target. At the mid-way point of the 2010-15 Parliament, the Cabinet Office said that it was "on track" to award 25% of central government business to SMEs by 2015, despite hitting only 10.5% at the midway point. But most commentators predict that the 25% target will not be achieved by 2015, and it is not difficult to see why. The principal instrument of the Coalition Government's policy to achieve its target has been the "disaggregation" of government contracts – splitting up large, single-sourced contracts into much smaller, disaggregated contracts, with multiple suppliers. In theory, SMEs are then better placed to win these smaller contracts. In practice, this has not happened, for two main reasons.

2.41 First, most SMEs we have spoken to do not want to contract directly with government. This is because they have neither the appetite nor the resources to take on the onerous commercial/legal risks which are part and parcel of standard government contracts. Yet the Coalition Government has done nothing to re-write their standard contracts to ameliorate those risks. Secondly, SMEs in our experience are rightly doubtful about the level of cooperation they will receive from other suppliers involved in delivering a single requirement across multiple contracts. Unless government is willing to take responsibility for such cooperation, which the Coalition Government has not done to date, SMEs will feel even more exposed to commercial and legal risk in a multi-sourcing environment. Departments and agencies, too, are struggling to manage these salami-sliced, disaggregated contracts.

2.42 A different approach is required, in our view, to open up government contracts to SMEs. Smaller contracts may be appropriate in some cases, and we recommend that such contracts could be made more attractive to SMEs by reducing the level of commercial and legal risk transferred to contractors.

2.43 But where contracting authorities have a single, integrated requirement, it is still preferable in our view to contract for that requirement through a single prime contract either (a) with a minimum percentage target of SME subcontractors or (b) with a consortium in which there is a minimum percentage target for SME participation.

2.44 These need not be the monolithic prime contracts of old. Instead, we recommend that a Labour government can and should insist upon two mechanisms which will ensure that SMEs have easier access to those prime contracts.

2.45 First, larger suppliers should be encouraged to allow eligible SMEs to join any grouping of suppliers which is created for purposes of bidding. This grouping could comprise either a prime contractor and one or more subcontractors or a consortium comprising a Special

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105 Speech by Francis Maude at Public Sector Show, 13 May 2014.
106 Ed Miliband endorsing the Adonis Review which sets a target for "25% of all government procurement contracts to go to SMEs both directly and through supply chains" (30 June 2014).
Purpose Vehicle with participating shareholders.\textsuperscript{109} This is a feature of the "Alliance Contracting" model successfully used in Australia.\textsuperscript{110} Under this model, larger suppliers are encouraged to invite smaller suppliers to participate in "Alliance" bids on reasonable terms, and it must be open to new entrants to join the Alliance over the lifetime of the Alliance contract.

2.46 Second, further down the supply chain, larger suppliers should be encouraged to open up their supply contracts to SMEs, and again these supply contracts must be accessible to new entrants over time.

2.47 To give them teeth, we recommend that larger suppliers should be incentivised to involve SMEs in consortium-building and in the supply chain through shortlisting and award criteria which favour major suppliers doing business with government who provide an avenue for SMEs to participate in government contracting opportunities. In that way, and only in that way, can we be confident that the target to open up at least 25\% of government contracts to SMEs will in fact become a reality.

\textsuperscript{109} Note that a contracting authority may not insist that a consortium of suppliers has formed a legal entity as a condition of bidding, (see Regulation 28(2)), but it may require them to form a legal entity before entering into, or as a term of, the contract (see Regulation 28(3)).

\textsuperscript{110} See Australian Government, Department of Infrastructure and Transport, "National Alliance Contracting Guidelines" (July 2011).
APPENDICES

A. Terms of Reference

To provide a firm basis of law and policy to empower the next Labour Government to use EU public procurement rules lawfully, but creatively, to promote the Labour Party's wider economic, social, environmental and other policy objectives when awarding public contracts.

B. Task Force Members

Chair

Hamish Sandison, Solicitor and Partner, Field Fisher Waterhouse LLP;
Chair, Fieldfisher Consulting LLP; Member of LFIG Executive Committee.

Members

Stephen Hockman QC, Barrister, 6 Pump Court Chambers;
Former Chair of the Society of Labour Lawyers;

David Offenbach, Solicitor, Simons Muirhead and Burton;
Chair of LFIG;

David Lock QC, Barrister, Landmark Chambers;

Simon Taylor, Barrister, Keating Chambers;

Helen Randall, Solicitor and Partner, Trowers & Hamlins;

Bronwyn McKenna, Assistant General Secretary, Unison;

Allison Roche, Policy Officer, Unison;

David Slack, Swafield Consultancy;

Yatin Mahandru, Vice President, Sogeti UK.

NOTE; Task Force members have participated in a personal capacity and the views expressed in this Report are not necessarily the views of their organisations. Nor do they necessarily represent Labour Party Policy.
C. Relevant EU Guidance

INTERPRETATIVE COMMUNICATION OF THE COMMISSION – on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement – 15 October 2001

COMMISSION INTERPRETATIVE COMMUNICATION – on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement – 4 July 2001


Procurement Reform (Scotland) Act 2014
2014 asp 12

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 13th May 2014 and received Royal Assent on 17th June 2014

An Act of the Scottish Parliament to make provision about the procedures relating to the award of certain public contracts; to require certain authorities to produce procurement strategies and annual reports; and for connected purposes.

PART 1

KEY CONCEPTS AND APPLICATION

Contracting authorities

1 Contracting authorities

(1) For the purposes of this Act, a “contracting authority” is—
(a) a body, office-holder or other person listed in the schedule, or
(b) any other person who is a contracting authority for the purposes of the Public Contracts Regulations and whose functions—
(i) are exercisable in or as regards Scotland, and
(ii) do not relate to reserved matters within the meaning of the Scotland Act 1998 (c.46).

(2) The Scottish Ministers may by order modify the meaning of “contracting authority” for the purposes of this Act.

(3) An order under subsection (2) may amend subsection (1) and the schedule.

Regulated procurements

2 Regulated procurements

For the purposes of this Act, a “regulated procurement” is—
(a) any procedure carried out by a contracting authority in relation to the award of a proposed regulated contract including, in particular—
(i) the seeking of offers in relation to the contract, and
(ii) the selection of economic operators,

(b) the award of a regulated contract by a contracting authority.

Regulated contracts

3 Regulated contracts

(1) A contract is regulated if—
(a) it is a public contract,
(b) the estimated value of the contract (see section 5) is equal to or greater than the contract threshold, and
(c) the contract is not an excluded contract (see section 4).

(2) For the purposes of this Act, the contract threshold is as follows—

Type of contract Threshold
Public contract (other than a public works contract) £50,000
Public works contract £2,000,000

(3) The Scottish Ministers may by order amend the table in subsection (2) so as to substitute for the figures specified there for the time being such other figures as they consider appropriate.

4 Excluded contracts
(1) A contract is an excluded contract for the purposes of section 3 if—
(a) it is a contract of a kind mentioned in paragraph (1) or (2) of regulation 6 of the Public Contract Regulations,
(b) the following conditions apply—
(i) it is for the purpose of acquiring goods, works or services in order to sell, hire or provide them to other persons,
(ii) the contracting authority will not have an exclusive right to sell, hire or provide the goods, works or services, and
(iii) the conditions on which the contracting authority intends to sell, hire or provide them are the same as or similar to the conditions on which another person could sell, hire or provide the same or similar goods, works or services, or
(c) the principal purpose of the contract is to acquire goods, works or services in connection with research or development undertaken by the contracting authority.

(2) The Scottish Ministers may by regulations amend subsection (1) so as to modify the kinds of contracts which are or are not excluded contracts.

5 Estimated value of contract
(1) For the purposes of this Act, the estimated value of a contract is the value of the total consideration (not including value added tax) which the contracting authority expects to be payable under or by virtue of the contract.

6 Framework agreements and call-off contracts
(1) For the purposes of this Act—
(a) a framework agreement is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing public contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged,
(b) a call-off contract is a contract awarded under a framework agreement.

(2) This Act applies to framework agreements and call-off contracts as follows—
(a) a framework agreement is treated as a public contract for the purposes of section 3 (and references to “contract” elsewhere in this Act are to be construed accordingly),
(b) the following provisions do not apply to a regulated procurement in so far as it relates to a call-off contract—
(i) section 8(2),
(ii) section 11,
(iii) section 23(1),
(iv) section 27.

7 Dynamic purchasing systems
(1) The Scottish Ministers may by regulations make provision about dynamic purchasing systems including, in particular, provision—
(a) applying this Act to the establishment and operation of a dynamic purchasing system as it applies to the carrying out of a regulated procurement with such modifications as the regulations may specify,
(b) modifying the application of this Act to a contract awarded under a dynamic purchasing system.

(2) For the purposes of subsection (1), a dynamic purchasing system is an electronic
system—
(a) established by a contracting authority to purchase goods, services or works which are—
(i) commonly used by the authority, and
(ii) readily available on the market, and
(b) which is open to any economic operator who satisfies selection criteria specified by the contracting authority.

4 Procurement Reform (Scotland) Act 2014 (asp 12)
Part 2—General duties and procurement strategies

PART 2
GENERAL DUTIES AND PROCUREMENT STRATEGIES

General duties

15 Procurement strategy
(1) A contracting authority which expects to have significant procurement expenditure in the next financial year must, before the start of that year—
(a) prepare a procurement strategy setting out how the authority intends to carry out regulated procurements, or
(b) review its procurement strategy for the current financial year and make such revisions to it as the authority considers appropriate.

(2) Subsection (3) applies where a contracting authority—
(a) has not, in relation to a financial year, prepared or reviewed a strategy under subsection (1), and
(b) becomes aware of the likelihood of having significant procurement expenditure during that year.

(3) The contracting authority must, as soon as practicable after it becomes aware of the likelihood of having significant procurement expenditure—
(a) prepare a procurement strategy setting out how the authority intends to carry out regulated procurements, or
(b) review its most recent procurement strategy and make such revisions to it as the authority considers appropriate.

(4) An authority has significant procurement expenditure in a year if the sum of the estimated values of the contracts to which its regulated procurements in that year relate is equal to or greater than £5,000,000.

(5) The procurement strategy must, in particular—
(a) set out how the authority intends to ensure that its regulated procurements will—
(i) contribute to the carrying out of its functions and the achievement of its purposes,
(ii) deliver value for money, and
(iii) be carried out in compliance with its duties under section 8,
(b) include a statement of the authority’s general policy on—
(i) the use of community benefit requirements,
(ii) consulting and engaging with those affected by its procurements,
(iii) the payment of a living wage to persons involved in producing, providing or constructing the subject matter of regulated procurements,
(iv) promoting compliance by contractors and sub-contractors with the Health and Safety at Work etc. Act 1974 (c.37) and any provision made under that Act, and
(v) the procurement of fairly and ethically traded goods and services,
(c) include a statement of the authority’s general policy on how it intends its approach to regulated procurements involving the provision of food to—
(i) improve the health, wellbeing and education of communities in the authority’s area, and
(d) set out how the authority intends to ensure that, so far as reasonably practicable, the following payments are made no later than 30 days after the invoice (or similar claim) relating to the payment is presented—
(i) payments due by the authority to a contractor,
(ii) payments due by a contractor to a sub-contractor,
(iii) payments due by a sub-contractor to a sub-contractor,
(e) address such other matters as the Scottish Ministers may by order specify.
(6) The Scottish Ministers may by order modify subsection (4) so as to substitute for the figure specified there for the time being such other figure as they consider appropriate.
(7) In subsection (5)(b)(iii), a “living wage” means remuneration which is sufficient to ensure an acceptable standard of living.

16 Joint strategies
A group of two or more contracting authorities may have a joint procurement strategy for both or, as the case may be, of all the authorities in the group.

17 Compliance with strategy
A contracting authority which is required to prepare or review a procurement strategy in relation to a financial year must ensure that its regulated procurements in that year are, so far as reasonably practicable, carried out in accordance with its strategy.

18 Annual procurement reports
(1) A contracting authority which is required to prepare or revise a procurement strategy in relation to a financial year must prepare an annual procurement report on its regulated procurement activities as soon as reasonably practicable after the end of that financial year.
(2) The report must include—
(a) a summary of the regulated procurements that have been completed during the year covered by the report,
(b) a review of whether those procurements complied with the authority’s procurement strategy,
(c) to the extent that any regulated procurements did not comply, a statement of how the authority intends to ensure that future regulated procurements do comply,
(d) a summary of any community benefit requirements imposed as part of a regulated procurement that were fulfilled during the year covered by the report,
(e) a summary of any steps taken to facilitate the involvement of supported businesses in regulated procurements during the year covered by the report,
(f) a summary of the regulated procurements the authority expects to commence in the next two financial years,
(g) such other information as the Scottish Ministers may by order specify.

19 Publication etc.
(1) A contracting authority must publish—
(a) the procurement strategy prepared under section 15,
(b) any revised strategy prepared under that section,
(c) the annual procurement report prepared under section 18.
(2) Publication is to be in such manner as the authority considers appropriate but must include publication on the internet.
(3) On publishing a document under subsection (1), the authority must notify the Scottish
20 Guidance

(1) The Scottish Ministers must publish guidance on the preparation and publication of procurement strategies and annual procurement reports.

(2) The guidance may, in particular, cover—

(a) consultation to be undertaken in relation to the preparation of a strategy,
(b) the form and content of strategies and reports,
(c) the process by which an authority approves its strategy.

(3) The guidance may include a model procurement strategy and model annual report.

(4) Contracting authorities must have regard to any guidance published under this section.

(5) The Scottish Ministers must lay a copy of any guidance published under this section before the Scottish Parliament.

21 Annual report on procurement activity in Scotland

(1) As soon as reasonably practicable after the end of each financial year, the Scottish Ministers must prepare a report, based on information contained in annual procurement reports published under section 19(1) during that year, on procurement activity in Scotland.

(2) The report must include information about—

(a) regulated procurements that have been completed,
(b) community benefit requirements that contracting authorities consider were fulfilled,
(c) steps taken to facilitate the involvement of supported businesses in regulated procurements.

(3) The report may also contain such other information as the Scottish Ministers consider appropriate.

(4) The Scottish Ministers must—

(a) publish the report in such manner as they consider appropriate,
(b) lay a copy of the report before the Scottish Parliament.

steps—

(a) order the setting aside of that decision or action,
(b) order the contracting authority to amend any document,
(c) award damages to the relevant person who has suffered loss or damage in consequence of the failure of the contracting authority to comply with its duty.

(5) If the breach of the duty by the contracting authority is in relation to a regulated contract which has been entered into, the court may only make an award under section (4)(c).

(6) Nothing in this section affects any power that the court may have by virtue of any other enactment or rule of law.
Scottish Procurement Policy
Note
SPPN 1/ 2015
Date 4 February 2015

Evaluating employment practices and workforce matters, including living wage, in public contracts

Purpose
1. This note provides information on how and when employment practices and ‘workforce matters’, including payment of the living wage, should be considered in the course of a public procurement exercise as a key driver of service quality and contract delivery. It is issued in advance of the full implementation of the provisions of the Procurement Reform (Scotland) Act 2014 and the Statutory Guidance to be published under the Act.

Key Points
☐ A bidder’s employment practices and its approach to its workforce can have a direct impact on the quality of service it delivers and, sometimes, of the goods it supplies and works performed;
☐ Wherever it can be deemed relevant to quality of service or goods or delivery/performance of the contract, it is important to ensure that a bidder’s employment practices and approach to the workforce it will engage to perform the contract is evaluated as part of the procurement exercise;
☐ Fair pay, including payment of the living wage, is one of the ways a bidder can demonstrate that it takes a positive approach to its workforce;
☐ Consideration of the bidder’s approach to employment practices and workforce matters must be proportionate and based on the nature, scope, size and place of the performance of the contract.

Background
2. The Scottish Government values the delivery of high quality services and recognises that service levels are often critically dependent on the quality and engagement of the workforce engaged in delivering public contracts. We expect those who deliver public contracts to adopt fair employment practices for all
workers engaged on delivering the contract. This includes not only workers they
directly employ but workers who they will engage with through, for example,
employment agencies and/or “umbrella” companies. We believe that workers
who are treated fairly, who are well-rewarded, well-motivated, well-led and
who have appropriate opportunities for training and skills development are
likely to deliver a higher quality of service and that good relationships between
the contractor and the workforce contribute importantly to sustainable economic
growth.
3. The Scottish Government considers the payment of the living wage to be a
significant indicator of employer commitment in this regard. The Scottish
Government has obtained clarification from the European Commission that
public bodies are unable to make payment of the living wage a mandatory
requirement as part of a competitive procurement process, (see SPPN 4/ 2012).
It is therefore not possible to reserve any element of the overall tender score
solely to the payment of a living wage. It is, however, possible to encourage
suppliers to pay a living wage as part of a procurement exercise and the Scottish
Government has recently successfully piloted this approach in a tender exercise;
see paragraphs 7 and 8 below.
4. It is right to expect those who deliver public contracts to adopt fair
employment practices. This includes, for example, no inappropriate use of zero
hours contracts and ensuring that workers receive fair terms and conditions and
a fair pay. This also applies where an employment agency is used to supply
workers
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to perform the contract who are employed by an umbrella company. In this
context, an “umbrella” company is one which acts as an employer to agency
workers who work under fixed term contract assignment. Inappropriate use of
an umbrella company could include, but not be limited to, engaging staff
employed by the company to exploit workers through excessive administrative
charges, issuing incomplete or confusing pay slips, moving staff on to the
“umbrella” company without their prior knowledge and consent and using them
as a device to reduce workers’ pay or conditions. The Freelancer & Contractor
Services Association (FCSA) has established a code of conduct which includes
provisions aimed at promoting good practice in this area. Where a contractor
may use agency staff in the performance of the contract, we recommend that
purchasers consider making it a condition of contract that the contractor
complies with FCSA’s code of conduct.
5. The Scottish Government has a range of internal policies in place to support a
well-rewarded, well-motivated, well-led workforce. Details at Annex A include
a pay policy that includes a commitment to supporting the living wage for the
duration of this parliament, fair employment practices, no inappropriate use of
zero hours contracts and the encouragement of staff to join an appropriate Trade
Union and to play an active part in it, making sure their views are represented.
In order to ensure the highest standards of service quality in public service contracts, contractors are expected to demonstrate a similarly positive approach to workforce-related matters as part of a fair and equitable employment and reward package.

6. The Procurement Reform (Scotland) Act 2014 allows Ministers to publish statutory guidance on the selection of bidders and the award of contracts. Scottish Ministers will consult on the content of such statutory guidance including addressing issues associated with fair employment practices and how to promote the living wage in public tender exercises in the context of a package of workforce matters this month. This Scottish Procurement Policy Note (SPPN) is issued pending the commencement of the relevant provisions and publication of statutory guidance, which we expect to publish following consultation with stakeholders in late 2015.

Pilot approach - Workforce Matters Invitation to Tender Question

7. The recent Scottish Government pilot focussed on the use of an Invitation to Tender (ITT) question on ‘workforce matters’ in the tender exercise for catering services on its premises. Following completion of the selection stage of the procurement process, the ITT described the Government’s approach to ‘workforce matters’ and asked bidders to demonstrate their own approach. On this occasion, we reserved 10% of the overall quality scoring for the responses to the question. It is important, however, that the amount of marks allocated is proportionate and takes account of the likely impact on quality for that particular contract. In some cases, e.g. personal social care, the impact on quality will merit a high score. In other cases, where workforce matters may be relatively less important to quality, the amount of marks may need to be lower. Each procurement must be considered on its own merits.

8. In the catering services procurement, evaluations were undertaken on the basis of the comprehensiveness and quality of the overall package of measures (i.e. not focussing solely on one aspect of workforce matters). The award of this contract guarantees that all those working on it will benefit from a package of positive workforce measures, which will include payment of the living wage.

9. The text at Annex A is how we recommend purchasers address workforce matters at the contract award stage of relevant procurement procedures. It has been developed in light of our experience in relation to the catering contract pilot.

Considerations in applying this approach in public contracts

10. Any decision to include a question on ‘workforce matters’ in a tender exercise should be made on a case by case basis and the question should be framed in a way that is consistent with the principles deriving from the Treaty on the Functioning of the European Union: transparency, equal treatment, non-discrimination, proportionality and mutual recognition. The following factors should also be considered:
In a tender exercise the selection and award criterion must be relevant to the subject matter of the contract; therefore it is important to consider the extent to which a contractor’s approach to its workforce is related to the subject matter of the contract;

- Workforce matters are most likely to be relevant in relation to contracts involving services and construction;
- It is right to expect all suppliers who deliver public contracts to adopt fair employment practices;
- When weighting the ‘workforce matters’ question, it is important to be proportionate and take into account the relevance of workforce to the subject matter and quality of the service delivery, goods supplied or the delivery of the contract;
- When evaluating bidders’ responses to this question it is important to take into account the comprehensiveness and quality of the complete package of measures in general and not to treat any individual element more favourably than any other.

11. In deciding whether or not workforce matters are relevant to the quality delivered under a contract, purchasers should consider, for that particular type of contract, whether:
- the purchaser has any previous experience of workforce matters or poor employment practices, including pay and conditions, impacting on the quality of service to be delivered;
- there is any history of low pay in that sector;
- there is a risk that those working on the contract might be exploited in any way, e.g. through the inappropriate use of zero hours contracts or as a result of being employed by an umbrella company;
- contractors might seek to cut their costs through driving down workers’ terms and conditions, including pay;
- the contractor’s workers will be required to interact directly with the public body’s employees and/or members of the public and whether they will spend any time on the public body’s premises.

If the answer to any of the above questions is “yes”, then workforce matters are likely to be a relevant consideration for the contract in question. This is not, though, an exhaustive list and other factors may be relevant depending on the specifics of an individual contract.

Existing contracts
12. Public bodies may have existing contracts where workforce matters are an issue, for example low pay or the inappropriate use of zero hours contracts. In such instances, it may be feasible to address these issues by varying the terms of
the existing contract, but caution should be exercised and account should be taken of a range of factors.

13. Where a contract has been awarded which includes a provision to amend the contract, then provided the variation takes place within the parameters set by the contract there should be little or no risk of legal challenge.

14. Where there is no power to vary the contract, some adjustments may be still possible without risk of challenge, but significant variations to contracts do bring a risk of challenge. Caselaw on this matter (Pressetext Nachrichtenagentur v Republik Osterreich C-454/06) confirms that an amendment of a contract which is significant will amount to the illegal direct award of new contract without competition. Economic advantage given to a contractor as a result of variation will, prima facie, be considered significant as will any amendment which could have distorted competition or have a discriminatory effect and lead to a different outcome in the procurement. A simple obligation on the part of the contractor to make payment of no less that the living wage whilst not making any consequent changes to employees’ contractual terms is unlikely to be controversial in this respect.

15. The new EU Procurement Directive provides what may be described as a “safe harbour” in relation to variations of contract, with an upper limit in relation to variations of not more than 10% by value for services contracts and 15% for works contracts, provided that in each case the value of the variation remains less that the applicable EU threshold value for a contract of the relevant type. Where the contract is below the EU threshold or otherwise exempt, there is likely to be less risk of challenge to any variation.

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16. It should again be emphasised that a contract condition or any other measure that would make payment of at least the living wage mandatory cannot be included as a requirement of a competitive procurement which is subject to EU law.

17. The Scottish Government has recently reviewed its current contracts where the contractor’s workers routinely work on Government premises. In the case of three contracts where not all workers were currently receiving at least the living wage, a variation has been applied to ensure that all individuals performing these contracts on Government premises are to be paid an hourly rate at least equal to the living wage, whilst maintaining other workforce benefits and avoiding any reduction in contract performance standards.

Action Required

18. Public bodies are asked to note the advice in this policy note and are asked to adopt it, wherever it is legally possible to do so, in their own procurement procedures. If you are in any doubt as to whether adopting the measures proposed are legally possible you should take appropriate legal advice.

Dissemination
19. Please bring this SPPN to the attention of all relevant staff, including those in Agencies, Non-Departmental Public Bodies and other sponsored public bodies within your area of responsibility.

Contact
20. If you have any enquiries about this SPPN or would like to discuss the issues it raises, please contact Scottish Procurement mailbox
Scottish Procurement
The Scottish Government
2nd Floor, Europa Building
450 Argyle Street
Glasgow
G2 8LG
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ANNEX A
Workforce Matters Invitation to Tender Question
* In our Catering contract, 10% of the total score available for the Quality aspects of the bids was allocated to workforce related matters. The amount of points allocated by purchasers should be considered on a case by case basis and should be proportionate to the contract in question taking account of the likely impact on the quality of service delivered.

The Scottish Government (SG) is persuaded by evidence which shows that the delivery of high quality public services is critically dependent on a workforce that is well-motivated, well led and has appropriate opportunities for training and skills development. These factors are also important for workforce recruitment and retention, and thus continuity of service. SG itself has adopted workforce policies to meet these requirements. These policies include:

- a pay policy that includes a commitment to supporting the living wage for the duration of this parliament;
- fair employment practices;
- clear managerial responsibility to nurture talent and help individuals fulfil their potential;
- a strong commitment to Modern Apprenticeships and to the development of Scotland’s young workforce;
- support for learning and development;
- no inappropriate use of zero hours contracts;
- no inappropriate use of “umbrella” companies
- flexible working;
- flexi-time; and
- career breaks.

The Scottish Government also attaches importance to ensuring effective consultation and involvement of staff and Scottish Government management work in partnership with the trade union. While it is, of course, a personal decision whether or not to join a Trade Union, the Scottish Government
encourages its staff to join an appropriate Union and to play an active part within it, making sure their views are represented.

In order to ensure the highest standards of service quality in this contract we expect contractors whose workers work alongside ours to take a similarly positive approach to workforce-related matters as part of a fair and equitable employment and reward package.

Workforce Matters (X%*)

Q - Please describe how your organisation proposes to commit to being a best practice employer in this respect in the delivery of this contract. Answers need not be constrained to or be reflective of any of examples given alongside this question.

Good answers will reassure evaluators that your company takes the engagement and empowerment of workers seriously; takes a positive approach to rewarding workers at a level that can help tackle poverty (e.g. through a commitment to paying at least the living wage), adopts fair employment practices, provides skills and training which help workers fulfil their potential, that you do not exploit workers (e.g. in relation to matters such as the inappropriate use of zero hours contracts or “umbrella” companies); and that your company will demonstrate organisational integrity with regards to the delivery of those policies, including having arrangements in place to ensure effective employee representation. This reassurance should be achieved by providing tangible and measurable examples that can be monitored and reported during contract management procedures.

Insert response here
I am today announcing a ‘Wales Procurement Policy Statement’.

In September I welcomed publication of the McClelland review, “Maximising the Impact of Welsh Procurement Policy”, which followed the publication in May of the Enterprise and Business Committee’s Report into “Influencing Modernisation of European Procurement Policy”. Both Reports gave important and constructive messages about a number of areas of Welsh Government policy and practice, and indicated some areas for improvement.

The Wales Procurement Policy Statement clearly sets out the procurement practices and the specific actions that will be required of every public sector organisation in Wales.

There is no doubt that good procurement can drive efficiencies and generate local benefits. I trust this Policy Statement will assist to secure greater levels of both in the future. A debate has been tabled for the New Year by the Welsh Government on “Maximising the Impact of Welsh procurement Policy”.

The Wales Procurement Policy Statement is attached at Annex 1.
Wales Procurement Policy Statement

As a result of the McClelland review, this Wales Procurement Policy has been developed to support implementation of the recommendations of the ‘Maximising the Impact of Welsh Procurement Policy’ report. It clearly sets out the principles against which the Welsh Public Sector, namely Local Authorities, the NHS, Education, Fire and Rescue and Welsh Government Sponsored Bodies should carry out procurement and the expectations for the way that they will do so. Leaders of these organisations should assure themselves that they are compliant and are fully adopting the more detailed guidance and tools referred to within this document and accessed through our web-based Procurement Route Planner.

The National Assembly for Wales’ Enterprise and Business Committee’s inquiry into the modernisation of EU Procurement Policy also highlighted the need for the Welsh Government to develop a clear procurement policy.

The Welsh public sector spends approximately £4.3bn per annum through procurement. This accounts for almost a third of the overall Welsh public sector budget and can, therefore, provide a vital springboard to support economic growth in Wales. We must use innovative, evidence based, approaches to procurement to support the design and delivery of efficient and effective public services and to optimise the added value that is delivered to the economy and communities of Wales.

Added value means that, wherever possible, we will utilise public procurement creatively as a strategic tool to deliver economic benefit to the people and communities of Wales through employment, training and supply-chain opportunities.

Our approach in this important area has been strengthened by the work being undertaken by a specialist Task and Finish Group chaired by Martin Mansfield, and supports the “Tackling Poverty” action plan.

Being strategic involves making early decisions on the best approach to commissioning goods, works and services, including whether grant or procurement is the most appropriate funding mechanism.

Procurement decisions should of course be made on a quality/cost/risk basis but we must also be mindful of the long-term impact. By doing so we are supporting the principles upon which the Sustainable Development Bill will be shaped.

This Policy Statement captures the approaches developed over recent years through consultation and engagement. They are tested and proven to work. There are no reasons or excuses why all organisations cannot fully adopt them and there must be no delay in so doing.

The public sector, including Welsh Government itself, has a collective responsibility to ensure that we use public money wisely, for the benefit of the people of Wales and a duty to ensure the right skills and resources are in place.

It is important that strong dialogue is maintained between the public sector and businesses to ensure continuous mutual improvement. This Policy Statement builds upon ‘Opening Doors, the Charter for SME Friendly Procurement’, and will ensure that public procurement helps to make Wales a good place for doing business, developing a strong supply base, and contributing to a healthy economic infrastructure.
Both the McClelland and Enterprise and Business Committee reviews identify the considerable variability in procurement skills resources, particularly in the local government sector.

In the Spring, a programme of fitness checks will be implemented and will enable all organisations to re-assess their functions and to address any deficiencies. The checks will also identify exemplary practice and allow others to learn and adopt.

I do not consider adoption of this Statement’s policies to be optional and the potential of legislating to ensure the progress the Welsh economy and public services require is being considered.

The Welsh Government will also consider whether it will be beneficial to transpose or regulate for the new European Directives. These EU proposals support many of our policies and provisions that can help to drive progress. If the Welsh Government policies have not been fully embraced we remain prepared to strengthen public procurement duties through additional regulation or legislation.

Adoption of the principles of this Policy Statement will be driven through in partnership with the Minister for Local Government and Communities’ Public Services Leadership Group. Business support for the Policy will be co-ordinated through the Council for Economic Renewal. The Welsh Government’s Value Wales team will oversee the implementation of this Policy and will closely monitor its adoption.

There is no doubt that good procurement can drive efficiencies and generate local benefits. I trust this Policy Statement will assist to secure greater levels of both in the future.

Jane Hutt, AM
Minister for Finance and Leader of the House

December 2012
Definition of Procurement

This policy adopts the Sustainable Procurement Task Force\textsuperscript{111} definition of procurement: “the 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 not only to the organisation, but also to society and the economy, whilst minimising damage to the environment”.

The Principles of Welsh Public Procurement Policy

In carrying out procurement activity the Welsh Public Sector in Wales is expected to adopt the following policy principles:

1. **Strategic** - Procurement should be recognised and managed as a strategic corporate function that organises and understands expenditure; influencing early planning and service design and involved in decision making to support delivery of overarching objectives.

   **How will this be achieved?**

<table>
<thead>
<tr>
<th><strong>Welsh Government will:</strong></th>
<th><strong>The Welsh public sector will:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• set out a ‘maturity model’, against which development of procurement can be measured across the Welsh public sector.</td>
<td>• measure themselves against the maturity model, by undertaking regular Welsh Procurement Fitness Checks and reporting the recommendations and action plan progress to Welsh Government.</td>
</tr>
<tr>
<td>• develop and fund Welsh Procurement Fitness Checks.</td>
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</table>

2. **Professionally resourced** – procurement expenditure should be subject to an appropriate level of professional involvement and influence, adopting the initial benchmark of a minimum of one procurement professional per £10m of expenditure.

   **How will this be achieved?**

<table>
<thead>
<tr>
<th><strong>Welsh Government will:</strong></th>
<th><strong>The Welsh public sector will:</strong></th>
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<tbody>
<tr>
<td>• publish a competency framework setting out qualifications, experience and expertise that will support a structured procurement career.</td>
<td>• ensure adequate skills and resources are in place to carry out effective procurement and contract management.</td>
</tr>
<tr>
<td>• provide routes to training and development, including those which enable public bodies to cultivate professional procurement expertise.</td>
<td>• have a procurement training plan which addresses resource and skills gaps and share this with Welsh Government to support future skills development strategy.</td>
</tr>
</tbody>
</table>

Policy link: [Procurement Training](#)

\textsuperscript{111} Procuring the Future, 2006
3. **Economic, Social and Environmental Impact** - Value for Money should be considered as the optimum combination of whole-of-life costs in terms of not only generating efficiency savings and good quality outcomes for the organisation, but also benefit to society and the economy, whilst minimising damage to the environment.

*How will this be achieved?*

<table>
<thead>
<tr>
<th><strong>Welsh Government will:</strong></th>
<th><strong>The Welsh public sector will:</strong></th>
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</thead>
<tbody>
<tr>
<td>• provide tools such as the Sustainable Risk Assessment to ensure that procurement decisions take account of long-term impact on the combination of benefits.</td>
<td>• apply these tools appropriately in their decision making process.</td>
</tr>
<tr>
<td></td>
<td>• Use the information generated by these tools to inform the annual returns to be required under the Sustainable Development Bill.</td>
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Policy link: [Sustainability Tools](#)

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

*How will this be achieved?*

<table>
<thead>
<tr>
<th><strong>Welsh Government will:</strong></th>
<th><strong>The Welsh public sector will:</strong></th>
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<tbody>
<tr>
<td>• lead on maintaining and strengthening Community Benefits policy; strengthening support available on the ground and challenging the application.</td>
<td>• apply Community Benefits to all public sector procurements where such benefits can be realised.</td>
</tr>
<tr>
<td></td>
<td>• apply the Measurement Tool to all such contracts over £2m to capture and report outcomes to the Welsh Government.</td>
</tr>
</tbody>
</table>

Policy link: [Community Benefits](#) [Wales Infrastructure Investment Plan](#)

5. **Open, accessible competition** – public bodies should adopt risk based, proportionate approaches to procurement to ensure that contract opportunities are open to all and smaller, local suppliers are not precluded from winning contracts individually, as consortia, or through roles within the supply chain.

*How will this be achieved?*

<table>
<thead>
<tr>
<th><strong>Welsh Government will:</strong></th>
<th><strong>The Welsh public sector will:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• provide <a href="http://www.sell2wales.co.uk">www.sell2wales.co.uk</a>, including the SQuID common question set.</td>
<td>• use <a href="http://www.sell2wales.co.uk">www.sell2wales.co.uk</a> to advertise all contracts over £25k.</td>
</tr>
<tr>
<td>• maintain and develop the SQuID approach to supplier selection.</td>
<td>• proactively publish their forward contract programmes.</td>
</tr>
<tr>
<td>• Improve information on forward programmes by maintaining publication of the <a href="#">Wales Infrastructure Investment Plan</a>.</td>
<td>• Ensure that appropriate 'lotting' strategies are used.</td>
</tr>
<tr>
<td></td>
<td>• apply the SQuID approach as standard to supplier selection.</td>
</tr>
<tr>
<td></td>
<td>• encourage main contractors to use the 'Tier1' facility to advertise supply chain opportunities on <a href="http://www.sell2wales.co.uk">www.sell2wales.co.uk</a>.</td>
</tr>
</tbody>
</table>
6. **Simplified Standard Processes** – procurement processes should be open and transparent and based on standard approaches and use of common systems that appropriately minimise complexity, cost, timescales and requirements for suppliers.

*How will this be achieved?*

<table>
<thead>
<tr>
<th>Welsh Government will:</th>
<th>The Welsh public sector will:</th>
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<tbody>
<tr>
<td>• develop and promote simplified approaches to procurement based upon the adoption of common systems and processes, including the Welsh e-procurement service, that reduce the cost of doing business.</td>
<td>• adopt and embed common procurement approaches.</td>
</tr>
<tr>
<td>• monitor the adoption and impact of these approaches.</td>
<td>• Make best use of available e-procurement tools</td>
</tr>
<tr>
<td></td>
<td>• Encourage supplier feedback on ease of process and channel through to Welsh Government</td>
</tr>
<tr>
<td></td>
<td>• Pay all correct invoices on time</td>
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</tbody>
</table>

7. **Collaboration** – areas of common expenditure should be addressed collectively using standardised approaches and specifications to reduce duplication, to get the best response from the market, to embed best practice; and to share resources and expertise.

*How will this be achieved?*

<table>
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<tr>
<th>Welsh Government will:</th>
<th>The Welsh public sector will:</th>
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<tr>
<td>• strengthen vehicles to deliver collaborative procurement.</td>
<td>• commit to participate in collaborative procurement initiatives for the benefit of Wales and their individual organisation.</td>
</tr>
<tr>
<td>• use collective leadership to drive through effective collaboration.</td>
<td>• monitor and report on engagement with collaborative procurement initiatives.</td>
</tr>
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</table>

8. **Supplier Engagement and Innovation** – dialogue with suppliers should be improved to help get the best from the market place, to inform and educate suppliers, and to deliver optimum value for money.

*How will this be achieved?*

<table>
<thead>
<tr>
<th>Welsh Government will:</th>
<th>The Welsh public sector will:</th>
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</thead>
<tbody>
<tr>
<td>• encourage public bodies in Wales to adopt approaches to procurement that are informed and influenced by feedback from the supply chain.</td>
<td>• publish a single electronic point of contact for supply chain dialogue/feedback/queries.</td>
</tr>
<tr>
<td></td>
<td>• ensure de-briefing provides adequate tender feedback.</td>
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<tr>
<td></td>
<td>• use outcome based specifications where appropriate to encourage business innovation</td>
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</tbody>
</table>
9. **Measurement and Impact** – in accordance with good management practice, procurement performance and outcomes should be monitored to support continuous improvement, and examples of good and poor practice openly shared.

*How will this be achieved?*

<table>
<thead>
<tr>
<th><strong>Welsh Government will:</strong></th>
<th><strong>The Welsh public sector will:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• provide a framework of procurement performance measures that are proportionate and help to drive improvement.</td>
<td>• provide Welsh Government with regular reports of outcomes achieved through procurement.</td>
</tr>
<tr>
<td>• Collate information and ask PSLG and Procurement Board to consider performance and assist policy implementation.</td>
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</tbody>
</table>

Policy link: [Procurement Route Planner](#)
The use of blacklists to discriminate against individuals on the grounds of trade union membership and/or activity, or for having reported concerns, for example, regarding health and safety and/or environmental matters, is wholly unacceptable.

I issued a Written Statement in June outlining the Welsh Government’s commitment to use procurement policy to help eradicate the use of blacklists in Wales.

To support this commitment, I have issued advice to every public body in Wales to provide clear guidance on the circumstances where blacklists can be excluded from public procurement. This advice can be found at http://prp.wales.gov.uk/

I will expect that this guidance will be applied to all relevant future contracts to help ensure that any business in receipt of public procurement expenditure does not use blacklists.

I encourage other Governments in the UK to take similar action.
Blacklisting in the Construction Industry

Policy Advice Note (PAN) for the Public Sector in Wales
Introduction

(i) POINTS TO NOTE – please ensure you read this section first

- The information set out in this document is not legal advice and is not intended to be exhaustive – contracting authorities should seek their own independent advice as appropriate. Please also note that the law is subject to constant change and advice should be sought in individual cases. This document reflects the position as at August 2013.

- This Procurement Advice Note (PAN) builds on, and is consistent with, the information available in the Procurement Route Planners (PRPs) on http://prp.wales.gov.uk; the note therefore assumes a certain level of knowledge of public procurement.

- Although this guidance note is primarily written to cover blacklisting in the construction industry, the principles equally apply to other industries / sectors.

(ii) Issues Addressed

This note has been produced by the Welsh Government to inform public sector organisations about the issue of blacklisting / use of prohibited lists concerning individuals within the construction industry (or any other industry). This note details the background to blacklisting / use of prohibited lists, outlines the relevant legislation that applies in this area and provides an update on the current situation. This note will be of specific interest to staff involved in the procurement and delivery of construction activities.

2. What is ‘blacklisting’?

The UK Government defines blacklisting as ‘the systematic compilation of information on individual trade unionists and their use by employers and recruiters to discriminate against those individuals because of their trade union membership or because of their involvement in trade union activity’. Blacklists are referred to in specific blacklisting legislation as ‘prohibited lists’ when concerned with trade union activity. However, a blacklist could potentially contain further details on individuals who have reported concerns, for example, regarding health and safety and / or environmental matters.

Blacklisting can be very damaging to the careers and livelihoods of individuals who have been denied employment opportunities. It is known to have been used by construction companies operating in Wales, and to have involved Welsh construction workers.
The blacklisting of individuals is an unlawful practice and legislation has been put in place to prohibit its use. It is important therefore that public sector organisations are aware of the relevant legislation and how it is applied.

**Background to ‘blacklisting’**

In 2009, the issue of blacklisting in the construction industry came to national prominence. The media widely reported that the Information Commissioner’s Office (ICO) had carried out an investigation into a private business called The Consulting Association (TCA).

The ICO found that TCA had been providing a service to over 40 construction companies, many of them major companies in the construction sector, appraising the suitability for employment of individuals. It found a blacklist and files containing extensive information on more than 3300 individuals across the UK, which was used to vet individuals and deny people employment for reasons including being a member of a trade union or having raised health and safety concerns. It is thought that over 100 of these individuals already identified live in Wales.

An individual who ran TCA was subsequently prosecuted and fined for failing to comply with the Data Protection Act 1998 and register as a data controller.

3. **Legislative Framework**

**UK Legislative Framework relevant to blacklisting**

The issue of blacklisting cuts across several areas of legislation (shown below) but following the TCA investigation, the UK Government deemed these existing provisions insufficient to effectively address the issue. As a result specific Blacklist regulations were built into the Employment Rights Act in 2010. The regulations encourage employers to re-examine whether their data and vetting practices when recruiting are consistent with the law and respect the privacy of individuals.

**The Data Protection Act 1998**

The Data Protection Act controls how personal information is used by organisations, businesses or the government. The ICO has powers to bring about compliance with the Data Protection Act 1998 and related laws. These include criminal prosecution, non-criminal enforcement and audit.

Anyone who processes personal information must notify and register with the ICO as a data controller and comply with the eight principles of the Data Protection Act. The ICO will update the register of data controllers, which is available to the public for inspection.

If an individual has been operating a blacklist, it will have no legitimate reason for processing an individual’s information in this way. By operating such a list, individuals can be prosecuted for failure to comply with the Act and failure to register as a data controller, as was the case with an individual in the TCA.
Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)
The Act, amongst other things, defines trade unions and states that they are the subjects of legal rights and duties. It protects the rights of workers to organise into, or leave, a union without suffering discrimination or detriment.

Section 137 of this Act made it unlawful for employment to be denied on trade union grounds or non-trade union grounds. The blacklisting of workers therefore gives rise to potential claims under Section 137 of the Act.

The Employment Relations Act 1999 (Blacklists) Regulations 2010
The Employment Relations Act 1999 (Blacklists) Regulations 2010 amongst other things:

- Define a prohibited list (eg a blacklist) and prohibit the compilation, dissemination and use of prohibited lists;
- Make it unlawful for organisations to refuse employment, to dismiss an employee or otherwise cause detriment to a worker for a reason related to a prohibited list;
- Make it unlawful for an employment agency to refuse a service to a worker for a reason related to a prohibited list;
- Provide for the employment tribunal to hear complaints about alleged breaches of the regulations; and
- As an alternative, provide for the courts to hear complaints from any persons that they have suffered loss or potential loss because of a breach of the regulations

4. The Situation as at August 2013

Jane Hutt AM, Minister for Finance, issued a Written Statement on 4 June 2013 condemning the use of blacklists and asked the GMB to raise awareness of this statement during the GMB Congress in June. The statement can be accessed at the link below:

http://wales.gov.uk/about/cabinet/cabinetstatements/2013/blacklisting/?lang=en

The Welsh Government is strongly opposed to the use of blacklists and has considered the options available to establish the strongest possible approaches that can be taken through public procurement to address the issues raised by blacklisting in a way that complies with the legal obligations. Guidance is contained within this PAN.

The House of Commons Scottish Affairs Select Committee is holding an inquiry into blacklisting in employment and is taking evidence. The Inquiry has been informed that companies have used blacklists in relation to a series of high profile public projects recently. There is widespread pressure for the UK Government to hold a public inquiry.

The Committee will make recommendations to the UK Government in due course on a number of issues, including whether companies that have been involved in blacklisting be prevented from tendering for public sector contracts in the future and whether existing legislation is sufficient.
Further updated guidance may be released following the conclusion and findings of the Scottish Affairs Select Committee Inquiry and any subsequent actions taken by the UK Government.

4. Addressing Blacklisting through Procurement

Below is an overview of the key legal issues relating to addressing blacklisting through procurement. This information is intended as a guide only and is not a substitute for appropriate legal advice.

Can contracting authorities exclude blacklisters?

In principle, yes, blacklisting can amount to an act of grave misconduct and so could justify exclusion of an economic operator pursuant to Reg. 23(4) of the Public Contracts Regulations 2006. However:

• Exclusion must be proportionate (see below) and considered on a case-by-case basis – a blanket ban would not be lawful;

• Exclusion must be justified on the evidence – for example, an admission of wrongdoing by the operator or a decision of a tribunal, court or other public body exercising similar functions. In theory, it may be possible to rely on other evidence, but in practice it is difficult to envisage circumstances where other evidence will suffice;

• Exclusion is not a means of punishing operators for past wrongdoing, but rather a means of putting right past wrongdoing and ensuring that it does not re-occur (self-cleaning, see below).

When will exclusion be proportionate? The concept of self-cleaning

The concept of self-cleaning originates from competition law and encompasses circumstances in which an economic operator has taken measures to put right its earlier wrongdoing and to prevent it from re-occurring. Where an economic operator has self-cleaned, exclusion would generally be disproportionate.

Self-cleaning entails a four stage process:-

1. Clarification of the relevant facts and circumstances: What are the facts and circumstances of the wrongdoing? When did the wrongdoing take place? Has there been any subsequent wrongdoing?

2. Effective repair of the damage caused: What has the economic operator done to repair the damage caused by its wrongdoing? This could take the form of compensation to the victims of blacklisting but does not entitle the contracting authority to require an apology.
3. Personnel measures: Have any staffing/personnel measures been put in place to avoid reoccurrence?

4. Structural and organisational measures: What structural and organisational measures have been put in place to avoid a re-occurrence?

If, on the basis of this 4 stage assessment, an economic operator demonstrates that they have effectively self-cleaned, then exclusion from a public contract is likely to be disproportionate.

It is not possible to exclude an economic operator solely on the basis that they have not apologised for blacklisting. There may be some scope to consider whether a lack of apology or statement of regret indicates insufficient self-cleaning, but this must be considered carefully on a case-by-case basis.

**What type of information can contracting authorities request?**

The 2006 Regulations allow a contracting authority to request confirmation from an economic operator that there has not been any complaint of blacklisting. Furthermore, the 2006 Regulations also allow the contracting authority to request details of those complaints, and the economic operator’s handling of them.

In the event that there has been an adverse finding by a court or tribunal, it would also be reasonable to request details of the judgement and level of damages awarded.

**Can contracting authorities terminate contracts with an economic operator that has or is engaged in blacklisting?**

There is no automatic right to terminate a contract where an economic operator has been or is engaged in blacklisting. A contracting authority’s ability to take action will depend on the precise wording of the contract terms and the materiality of the blacklisting to the contract. In respect of new public contracts, contracting authorities may wish to consider whether to revise their current contract terms and conditions to include a right to terminate the contract where an economic operator engages in blacklisting.

Action taken under contract terms should be considered on a case by case basis and legal advice obtained.

**6. Guidance and Tools**

Below are some of the policy guidance documents and supporting tools that are available to you for use in your procurement activity (in alphabetical order):

Department for Business, Innovation and Skills - BIS Guidance on Blacklisting (March 2010)

Procurement Route Planner (PRP):-
Selection and Award Criteria Guidance, Value Wales (2010)
http://prp.wales.gov.uk/planners/general/planning/selectioncriteria/

Framework Agreement Guidance, Value Wales (2012)
http://prp.wales.gov.uk/planners/general/planning/

Supplier Qualification Information Database (SQuID), Value Wales (2011)
http://prp.wales.gov.uk/planners/general/planning/selectioncriteria/

Sustainable Risk Assessment (SRA), Value Wales (2006)
http://prp.wales.gov.uk/planners/general/strategy/procstrat/

Should you require further information or have had any experience with blacklisting in your procurements please contact:

Value Wales: vwpolicy@wales.gsi.gov.uk

7. Acknowledgements

Value Wales is pleased to acknowledge that it has drawn upon the following publications and organisations to supplement its own research to produce this note:-

- Department for Business, Innovation and Skills
- The Data Protection Act 1998
- Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)
- The Employment Relations Act 1999 (Blacklists) Regulations 2010
LOCAL AUTHORITIES

The Local Government Association's *National Procurement Strategy for Local Government in England 2014* can be found here:

L14-304 National Procurement Strategy

Here is a link to the Joseph Rowntree Foundation report on *Tackling Poverty through Public Procurement* (March 2014) citing case studies from several local authorities in England, Scotland and Wales:

http://www.jrf.org.uk/publications/tackling-poverty.procurement

London Borough of Enfield

Sustainable Procurement – How this has been implemented in Enfield Council

1. Foreword
Similar to many Local Authorities, Enfield Council faces numerous challenges in maximising and managing its financial resources in the current economic climate. Procurement is one of the core elements in managing these challenges.

The on-going awareness and implementation of Sustainable Procurement demonstrates our commitment to having a positive impact on the environment, local economy and socially through the money we spend.

This paper sets out the steps that Enfield Council has taken to embed Sustainability into the Procurement process, the benefits that this action has achieved to date and what projects are currently being taken forward in order to continue to deliver improved outcomes to the environment, our residents and the local economy.

A summary of benefits achieved to date, as set out in this report are:

- The establishment of the Sustainable Procurement Policy and the Strategic Procurement Board, which underpin and continue to challenge upcoming tenders to ensure that they deliver economic, social and/or environmental benefits where appropriate.

- The development of the Community Benefits Toolkit, and ongoing training of Enfield employees in how to use it.

- The mandation of attaining local quotes for spend on goods and services under £70,000 and works under £100,000

- Spend with local providers is currently running at 19% of Council Spend, across 552 local suppliers.

- E- Tendering mandated for spend over £5,000. This simplifies the tendering process, is transparent and is environmentally friendly.
• Social benefits built into contracts, including the requirement for apprenticeships and training opportunities, where proportionate and relevant.

• Enfield is the first council in the UK to pass a motion to use only cruelty free cleaning products.

2. Background
2.1 What is sustainable procurement and why does it matter?
As part of Enfield’s role in planning and providing services to the community, Sustainable Procurement is a key mechanism through which Enfield Council can address social, economic and environmental objectives. The commitment to Sustainable Procurement directly impacts upon the challenges faced by Enfield (see section 2.3) and enables the Council to deliver tangible improvements to the borough and its residents via the contracts it awards.

Sustainable procurement is defined as:
“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 not only to the organisation, but also to society and the economy, while minimising damage to the environment.”

In short it means buying goods and services in a way that:
• Achieves whole life value for money
• Provides benefits to the local society
• Improves the local economy
• Minimises damage to the environment

Practical examples of how this is demonstrated includes the procurement of environmentally friendly products, requiring local employment generation through our contracts and retaining wealth within the borough through active supply chain management, including the creation of apprenticeships and training opportunities.

Sustainable Procurement supports Enfield Council’s vision is to make Enfield a better place to live and work, delivering fairness for all, growth and sustainability and strong communities.

2.2 Legal context
The Council must comply with the legal framework for Local Authority procurement - the UK Public Contracts Regulations 2006, the Council’s Contract Procedure Rules, the general duty to obtain Best Value (Local Government Act 1999) and also the European Treaty principles of transparency.

112 Enfield Sustainable Procurement Policy
proportionality, non-discrimination of providers in member states and equality of treatment. This therefore regulates how Sustainable Procurement initiatives are implemented in Enfield.

The UK Public Contracts Regulations allow for such environmental and socio-economic considerations to be taken into account; however these must be relevant and proportionate to the contract in question. This is supported by the Public Services (Social Value) Act, which came into force in 2013 requiring contracting authorities to take local wellbeing into account before starting a procurement process.

However the Council must bear in mind that non-commercial considerations such as community benefits, must only be pursued on the basis that they will still achieve value for money (often assessed through tendering via a ‘most economically advantageous’ evaluation model). In addition, Procurement Law is clear that contracting authorities are not permitted to discriminate against non-local organisations when competing contracts.

2.3 Socio–economic context
Enfield Council spends £339m per annum buying in goods and services. Despite this, Enfield faces a number of challenges. Enfield has a lower than average employment rate – 67.7% compared to 69.5% for London and 70.9% for the rest of the UK (as of November 2013). As a result, unemployment is much higher than both the London and UK rates – 10.5% compared to 8.9% and 7.8% respectively113. The recession has had a significant impact in the Borough. Whilst the number of unemployed young people is at the lowest level since December 2008 and JSA claims have decreased in Enfield by 3.9%, unemployment still remains a challenge for the borough. Equally, as Enfield has the 3rd highest proportion of 5 – 19 year olds in London, finding suitable routes to training and employment is essential. Therefore it is critical that the Council make every effort to utilise all available opportunities to retain within the Borough the direct benefits arising from initiatives such as Sustainable Procurement.

2.4 Purpose of this paper
The purpose of this report is to outline the achievements made to date by Enfield Council through implementing Sustainable Procurement initiatives, including:

- Community Benefits Toolkit
- Sustainable Procurement Policy
- Strategic Procurement Board

113 Labour Market Bulletin, November 2013
Examples of activity that supports environmental, economic, social and ethical outcomes through the procurement process.

This paper will also outline planned activity to build on these successes and to continue to deliver improved outcomes to the borough in 2014 and beyond.

3. Benefits Achieved to Date
3.1 Sustainable Procurement Policy
The Council adopted a Sustainable Procurement Policy in January 2012. This has now been fully implemented and underpins all of the positive achievements that are listed in sections 3.2 – 4 of this report.
The Sustainable Procurement Policy and its associated action plan is one of the projects in the Enfield 2020 Programme.

3.2 Community Benefits Toolkit
The Shared Procurement Service with Waltham Forest has developed the Community Benefits Toolkit. The toolkit is a step by step guide to provide officers in both Enfield and Waltham Forest with the necessary guidance with regards to the inclusion of social and community benefits required within a tender exercise. This includes practical advice on how to incorporate requirements on areas such as apprenticeships, training initiatives, work placements, use of local supply chain, recruiting via our named agencies, and developing the workforce.
The toolkit has been rolled out across Enfield and Waltham Forest and is available on both intranets. All Enfield employees are offered Community Benefits training in support of this initiative. The Shared Procurement Service is also reviewing a mandatory training offer, including an eLearning option, for all employees who are engaged in procurement to ensure that expectations are clear and the importance of Sustainable Procurement is emphasised.

3.3 Strategic Procurement Board
The Strategic Procurement Board (SPB) was established in 2011, and oversees all Enfield Council’s high value (above OJEU) procurement activity to make sure it is carried out appropriately, delivers us value for money and tracks our procurement savings.
SPB is mandated to challenge where procurements are proposed which do not demonstrate sustainability to ensure that there is a robust check in place and that community benefit opportunities are not missed. Typical areas of challenge include whether apprentices are being sought, how the local supply chain could be used and whether the procurement is ‘SME friendly’.

3.4 Economical
3.4.1 Local Quotes
Enfield Council is committed to increasing the volume of spend being reinvested in the borough with local suppliers and their supply chains. This has been supported through ensuring that the Contract Procedure Rules (CPRs)
require officers to seek quotes from local suppliers where practicable. It is now expected that spend up to £75,000 for goods and services or £100,000 for works receive at least 1 local quote where practicable. This is tracked through the e-tendering system to ensure compliance.

For larger contracts we can require larger contractors to utilise local suppliers in their supply chain, and practical methods for officers to do this are detailed in the Community Benefits Toolkit. This is currently being progressed as part of an upcoming tender for the building of a new residential care home in the borough.

Spend with local providers is currently running at 19% of Council Spend, across 552 local suppliers.

3.4.2 Meeting with local businesses

The Shared Procurement Service has presented to various local business forums over the past year to explain how the Council contracts for services and how to access these opportunities (with an emphasis on e-Tendering – see section 3.4.3). These opportunities are used to promote sustainability, in particular the use of apprenticeships. Feedback at these events is captured to ensure that future presentations are meaningful and applicable to those local businesses in attendance. In addition we are also working with partners to assist local suppliers take advantage of emerging industries as part of the RetroFit project.

The Shared Procurement Service also take the opportunity to meet with local providers on a one to one basis to better understand the perceived barriers to doing business with the Council so that these can be addressed in future activity. Most recently a local Construction company and the Federation of Master Builders met with the Assistant Director of Procurement to review such barriers. Subsequent actions from this meeting include a Council review of the use of select lists (see section 4.5). This demonstrates an on-going Council commitment to actively seeking and listening to the feedback of local businesses and SMEs to ensure that they are not discriminated against in the procurement process.

3.4.3 e-Tendering and simplified procurement process

e-Tendering is the use of electronic means to conduct a tendering or bidding exercise where suppliers are able to bid, in secure, controlled conditions, for a contract. All Enfield procurement activity over £5000 is now done electronically through the Council e-Tendering portal – Pro contract. Pro-Contract, known as the London Tenders Portal, is used by 18 London boroughs. The London Tenders Portal is free for suppliers to register on. Once registered, suppliers will receive email updates on new contract opportunities issued by the public sector that match the suppliers registered capabilities. This has the duel benefit of allowing providers in Enfield to have visibility of all opportunities to do business with Enfield Council, as well as opportunities in
neighbouring boroughs – therefore encouraging growth of businesses within the borough.

By adopting an electronic tendering process this has enabled the Shared Procurement Service to adopt a more simplified procurement process. This follows extensive feedback from local suppliers and SMEs, who noted the high costs associated with the tender process. This includes the adoption of standard PQQ templates (Nationally for Works and pan London for goods and services) to enable providers to avoid time consuming duplication.

3.5 Social
3.5.1 Training and Employment opportunities

Given the economic downturn it has never been more important to ensure that the Council gets the most value for its money spent with external contractors. This includes ensuring that additional employment and training opportunities are delivered through Council contracts.

The Community Benefits Toolkit provides practical ways for Council officers to establish clauses in contracts to cover both longer term unemployed and the offer of apprenticeships to create training opportunities for local people. As an example, an opportunity which is currently out to tender has used the Community Benefits Toolkit to develop documentation that requires successful contractors to:

- Consider local recruitment when offering employment. Formal evidence of 50% local recruitment will be required.
- Offer one apprenticeship per £1M annual contract turnover.
- Provide additional apprentices as funded by the Council.
- Provide skills training and work experience opportunities and industry insight experiences for young people and for long-term unemployed.
- Source local sub-contractors and suppliers – at least 50% of annual spend.
- Encourage equal opportunities.

A further example of where stipulating these requirements has demonstrated tangible benefits is the ICT contract that Enfield has with Serco, which has delivered 3 local apprentices.

This commitment is also reflected internally within the Council. In 2009 Enfield Council was one of 33 councils who pledged to increase the number of apprentices employed by them and their contractors. The target then was to offer 2,000 apprenticeships by 2012. This target was met ahead of schedule and has been continually built on since.
3.5.2 Support of Voluntary Sector, SMEs, micro providers and diverse suppliers

Through ensuring transparency of opportunities, a simplified process (3.4.3), and training support (at meet the buyer forums – 3.4.2 – as well as direct) Enfield continues to encourage voluntary sector, SME and diverse suppliers to win business with the Council. This is particularly prevalent in Schools & Children’s Services and Housing, Health and Adult Social Care contracts. These providers are expected to deliver a positive contribution to the local communities in which they work on our behalf and, given the nature of their businesses, are well placed to do so.

The Public Contracts Regulations 2006 regulation 8 (12) provide that where the value of a contract (which forms part of a larger contract) for works is less than one million Euros (£869,670), or for supplies of services worth 80,000 Euros (£69,574), that contract may be excluded, even though the directive/regulations would otherwise apply because the total value of relevant contracts under the aggregation rules exceeds the threshold.

The exclusion of small Lots from the OJEU Notice and subsequent procurement procedure creates flexibility for local authorities to address local issues through procurement. This provides an opportunity to consider particular services/supplies/works for smaller businesses including local opportunities. The Council may take advantage of this exemption for contracts worth up to 20% of the total value of the lots.

3.6 Ethical
3.6.1 Use of blacklists

A number of construction companies have been challenged about allegations of supporting the existence of and subscribing to unlawful Construction industry ‘blacklists’, which detail covertly gathered information on construction trade unionism, militant tendencies, trouble making, etc. Blacklisting is an unacceptable practice and cannot be condoned.

Enfield Council will not contract with companies who use ‘blacklists, in support of the commitment to Fairness for All, and the provision of job opportunities for everyone.

The Shared Procurement Service have therefore amended the PQQ documentation accordingly to request bidders to confirm that they do not subscribe to the use of unlawful construction industry ‘blacklists’ and will exclude tenderers who refuse to do so.

3.7 Environmental
3.7.1 Government Minimum Buying Standards
In adopting the Sustainable Procurement Policy the Council has committed to adopting the Government Minimum Buying Standards. These standards provide minimum environmental criteria to be applied when procuring goods and services ranging from ICT to paper, through to building projects.

A quick win, which was implemented by the Shared Procurement Service, is the switch to 100% recycled paper. This has obvious environmental benefits but is also estimated to save the Council approximately £30,000 per year.

The Community Benefits Toolkit also gives officers practical ways to incorporate environmental considerations into the product and service selection process.

3.7.2 E – tendering
As highlighted in 3.4.3 e- Tendering has been adopted by Enfield Council. The benefits to both organisation and suppliers in terms of efficiencies and transparency must be noted. However there is a further environmental benefit due to reduced paperwork.

3.7.3 Cruelty Free Cleaning Products
Enfield has developed an innovative approach to developing the supply chain which has resulted in the supply of ‘cruelty free’ (BUAV) cleaning products being developed by a local company and supplied through our existing supply chain.

The end result is that Office Depot is trialling BUAV approved products, produced by a local supplier, through their catalogue. BUAV products are now being used in Enfield Civic Centre and by the Council’s cleaning contractor Enfield Norse. Office Depot is also now promoting the product to their other customers, one of which is a large high street brand. As Office Depot is a framework provider to many public sector bodies this has opened up significant opportunities for them in supplying ethical products and also for the manufacturer.

Enfield is the first council in the UK to pass a motion to use only cruelty free cleaning products. This prompted enquiries from other councils to see what we had done to implement this motion. As the opportunity developed we kept them informed of progress. This has led to another council speaking to Office Depot and the local supplier about supply of these products.

4. Going Forward
Enfield Council remains committed to driving Sustainable Procurement, and so is keen to continue to build on the positive actions listed above. It is important that the foundations have been established in order for this to happen – and the Sustainable Procurement Policy and Community Benefits Toolkit will continue to be reviewed in order to ensure they are meaningful and ambitious to support future activity.

4.1 Business Charter
The Shared Procurement Service is keen to work with Business Engagement teams in Enfield and Waltham Forest in order to explore the development of a Business Charter.

A best practice example is the Birmingham Business Charter, which is a set of guiding principles to which Birmingham City Council (BCC) will adhere to and to which it will invite its contracted suppliers, the wider business community, other public sector bodies (including schools), and third sector organisations (including grant recipients), to adopt. Charter signatories will consider how they can improve the economic, social and environmental well-being of Birmingham and describe the social outcomes that will result from their activities including indirect outcomes through commissioning and procurement. BCC wants to work with suppliers and partners who can make a positive contribution to the city and its residents. Future commissioning and contracting decisions will take account of the principles of this charter and (when adopted) it will form part of the terms of new BCC contracts, and Conditions of Grant Aid (COGA).

A Business Charter would have the benefits of making a clear transparent statement of the expectations of Enfield Council it its’ own actions and the wider Enfield Business Community. This would complement the work of the North London Chamber of Commerce, who are developing an ‘Enfield Business Growth Charter’, which will demonstrate a commitment by the private and public sector to work together to create a climate for business Growth in the borough. The Charter being considered by the Shared Procurement Service (which has a focus on the economic, social and environmental wellbeing of the borough) would sit beside the Growth Charter to demonstrate a wider commitment to the development of Enfield by the Council and the business community.

4.2 Apprentices
Due to the introduction of the Community Benefits Toolkit there are an increasing number of contracts that require the delivery of apprenticeships as part of their delivery. It is now important that processes are put in place to capture and track these benefits.

Therefore the Shared Procurement Service is working with Enfield’s Democratic Services to develop the Report Writing Guidance so that Apprenticeships achieved through Procurement exercises are captured in DARS. This will enable further transparency and the ability to monitor arrangements.

It is also intended that future market engagement events for up-coming procurement opportunities will also include a section on sustainable procurement expectations, so that there is clarity at tender stage on what will be required from providers in terms of the delivery of community benefits (including Apprenticeships).

4.3 Section 106
Strategic Planning are represented at SPB, and the synergy between local labour initiatives through Sustainable Procurement and the requirements placed on developers through the section 106 agreements must be noted. A section 106 (S106) agreement is an enforceable legal agreement negotiated between the Local Planning Authority and a developer in the context of some planning applications. S106 can be used, for example, to secure non-monetary benefits such as business and employment initiatives. These can include:

- Local labour initiatives including local labour in construction
- Employment skills training
- Apprenticeships
- Job brokerage

Where applicable, the developer will be required to support local labour in construction projects and will be expected to submit a Local Employment Strategy for approval by the Council to set out how they will engage with local contractors/subcontractors, how many trainees will be employed on site and how many weeks training will be provided per trainee.

Similarly, monies can be collected in lieu for employing trainees on site, which are then pooled to fund Enfield JOBSnet (or other similar services) which supports the work placement of trainees in the construction industry. The S106 is now under review following the introduction of the Community Infrastructure Levy (CIL) to ensure Enfield is achieving maximum benefits for the borough. However it is likely that s106 requirements for business and employment initiatives will remain. Therefore this is an opportune time for Corporate Procurement and Strategic Planning to work together to agree a more robust method of capturing and monitoring community benefits, such as the number of apprenticeships achieved through contracts let and s106s.

4.4 New Directions

Enfield Council in partnership with the Centre for Research on Socio-Cultural Change (CRESC) have highlighted the need to work jointly on issues of economic renewal. The shared interest in new national and local policies has led to a collaboration that brings together CRESC’s expertise on job creation in the national and local economy with Enfield’s commitment to the role of ‘Co-ordinating Council’ which provides place based community leadership. This project has been called ‘New Directions’.

The objectives of the New Directions work are to:

- Reinforce Enfield’s role as a coordinating council in building a strong local economy.

- Develop a series of new economic strategies to build a sustainable economy in Enfield.
• Develop new proposed policy directions for local, regional and national Governments leading to reindustrialisation and therefore stimulate growth and economic stability delivering new jobs and creating the conditions for distributing prosperity more widely.

The scope of the project includes Corporate Social Responsibility initiatives, building sustainable Economy initiatives and regeneration of the industrial projects in the Borough. There are a number of projects that will facilitate the development of Enfield’s new thinking, these are:

• Big Business and Corporate Social Responsibility (CSR) – working with businesses in Enfield to support reinvestment for jobs and growth in the local community.

• Purchasing and Collaboration – working with small and medium businesses to investigate central and collaborative purchasing to reduce costs and helping business to grow.

• Financial Strategies – pension funds, including the release of (where lawfully able to) for reinvestment in social and economic regeneration.

Working with Banks to deliver benefits for residents

4.5 Consolidation Centre

Enfield is working with Camden, Waltham Forest and Camden’s project partner, the Institute of Sustainability (IFS) on the Consolidation Centre project. This is in order to help the Councils’ meet one of its core objectives to reduce harmful emissions, road accidents, noise and congestion in relation to road freight in the capital.

In July 2013, LB Camden undertook a procurement exercise in partnership with the other authorities in order to appoint a consolidation centre provider for the concept trial period. The Consolidation Centre trial, provided by DHL, is located in Edmonton, which is centrally located between the partner Boroughs. This is an additional benefit to the borough.

The concept trial will comprise of undertaking the delivery of good received from four Council suppliers and delivering them to partner Council sites. The four suppliers in the concept trial are Office Depot, Bunzl Greenham, Janitorial Express, and Banner, two of which are shared by all three partner Boroughs.

A consolidation centre for Enfield, Camden and Waltham Forest’s supplies of goods and associated services is expected to deliver the following benefits:

• Reduce the number of vehicles delivering supplies to Enfield, Camden and Waltham Forest’s sites.

• Reduce the total distance travelled in bringing supplies from manufacturer to Enfield, Camden & Waltham Forest’s sites.

• Reduce congestion levels created by Enfield, Camden and Waltham Forest’s supply vehicles.
• Improve air quality by exploring the use of electric vehicles.
• Reduce Cost - generate purchase saving costs from reduced supply distances.
• Introduce added value services to Council departments and sites.
• Contribute to improving road safety in the geographical area.
• Contribute towards improving air quality.
• Contribute towards reducing the impact of transport noise.

A review will take place following the pilot to decide the long term strategy.

4.6 Review of select lists

The Council currently uses a national select list to get quotes from a list of pre-qualified providers for Works under the EU thresholds. This is positive as it allows providers to tender for works without duplicating activity in completing PQQs for each opportunity. It also benefits the authority as it is efficient, whilst still ensuring a robust and compliant process is followed.

However there are various select lists available for the Council to use and therefore a review of this is currently taking place to ensure the list used is the most appropriate in terms of supporting local SMEs to bid for opportunities. This is being done in consultation with local suppliers.

4.7 London Living Wage

Enfield is an accredited London Living Wage Council. The accreditation is from the Living Wage Foundation, an organisation which campaigns for basic wages in London. Enfield Council has paid its direct employees the London Living Wage since February 2012.

As a further commitment the Council will consider (to the extent permitted by law) whether London Living Wage should be included at contract renewal. In the social care field it is recognised that this may be problematic due to personalisation.

Well in advance of the re-tender of each contract, work will be undertaken to assess the potential financial impact of introducing this into the process.

London Living Wage has already been achieved in a number of Enfield contracts including the Cleaning Contract, Leisure Services Contract, Highways Maintenance Contract, Honeysuckle House Care Home and Parkview Care Home.
Therefore the Shared Procurement Service is now working with Enfield Legal and Finance to ensure that the Community Benefits Toolkit and tender documents are updated accordingly.

4.8 Retro Fit

Retrofit London will provide a support package of 12 hours to 175 SMEs (employing <250 staff) located in Enfield, Haringey, Waltham Forest and Lewisham. SMEs take part in the project will include those with PAS2030, those that would like to secure PAS2030 and micro SMEs that can join regeneration supply chains.

Councils taking part in the project will use their influence and relationship with: Green Deal Providers, Energy Companies, framework contractors and other regeneration clients to open-up supply chain opportunities for SMEs and in-turn safeguard 35 jobs and create 25 new jobs.

The Shared Procurement Service is supporting the retro fit project by ensuring officers are trained to include community benefits in their tenders, including the use of local supply chain. In addition we will be working with Sustainability colleagues and Regeneration colleagues to assist SMEs engage with the programme and secure support so that they become accredited to supply services to meet future demand.

4.9 Changes to EU Legislation

The European Parliament is set to approve new directives covering the way that public sector bodies carry out procurement activity. We already have to comply with procurement legislation as set out in the Public Contracts Regulations 2006 (as amended) but the new directives will radically change the way that we undertake this activity.

Once the directives have been approved in Brussels each Member State has up to 2 years to implement the changes in domestic law. The UK Government has already stated that it wishes to implement the changes sooner than that and the expectation is that this will be in late 2014.

In readiness for this a number of staff from the Shared Procurement Service will be receiving training from the Cabinet Office and then rolling out that training to other public sector bodies. This will ensure that Enfield procurement staff are at the forefront of the new rules and will be proficient in them. Training and awareness sessions will be arranged for the wider organisation later in the year.

The new Directives support Sustainable Procurement and the building of increased innovation into procurement, some examples being:
• Division of contracts into lots

Contracting authorities will have to explain in the tender documents or in a contract report on the award procedure, why it has decided not to split a contract into lots. Where contracts are divided into lots then it will be permitted to limit the number of lots to be awarded to one tenderer provided that the maximum number of lots per tenderer is stated in the contract notice or invitation to confirm interest. There is also an optional provision which will permit contracting authorities to consider tenders for combined lots. This means that contracts must be broken down to further enable SME bids.

• Electronic procurement

There are now mandatory requirements for the transmission of notices in electronic form and electronic availability of the procurement documents and submission of tenders. This supports Enfield’s environmental commitments.

• Selection stage and selection criteria

A new European Single Procurement Document (ESPD) is to be introduced. This is a self-declaration form which contracting authorities must accept at the request to participate stage (or on submission of tenders in an open procedure) in lieu of certificates relating to the grounds for exclusion, trade or professional registers and other specified documentation. Contracting authorities can request the certificates or other documents at any later stage in the process.

This will be less expensive and time consuming for SME providers, and will simplify the tendering process.

5. Conclusion

With all of the positive activity outlined above, it is important that this information is captured in a transparent, meaningful and track-able way. Therefore this must be an area of development moving forward. Corporate Procurement will work with Commissioners, Democratic Services, Legal Services, Accountancy Service and Contract Managers to ensure that:

• Tenders include community benefits, with a more simplified and robust Community Toolkit
• Consideration is given to a mandatory % of the evaluation criteria being put against community benefits.
• Spend with local suppliers continues to increase, with an aspiration of 25%.
• Contracts are written in a robust way that reflects the community benefits included in tenders
• Contract Managers are skilled in monitoring and ensuring contract delivery, with consideration to further (potentially mandatory) training.

• The financial impact of any changes relating to the development of sustainable procurement can be taken account of when developing the Council’s Medium Term Financial Plan.

Part of this activity will include agreement on where this information is held corporately, so that there is clarity on what Enfield contracts are delivering and the outcomes that are being achieved. The responsibility to provide this information must sit with the Contract Manager(s) but be reported on corporately on a quarterly basis. There must also be an agreement to what data is captured, though to is likely to cover the community benefits listed in 3.5.1.

That said, this report demonstrates the ongoing achievements of Enfield Council to enable and embed Sustainable Procurement initiatives in order to continue to deliver improved outcomes to the environment, our residents and the local economy.
ISLINGTON BOROUGH COUNCIL
DOMICILIARY CARE SERVICES INFORMATION BRIEF
MARCH 2014 BACKGROUND

Islington currently commissions approximately 500,000 hours of home care per year delivered by 4 external providers, at a cost of £6.3m per year. Current services provide a broad range of care and support options that include personal and domestic care, respite, day and night sitting services, waking nights, escorting and activities support. Services are delivered across all client groups.

Current contracts expire in May 2014 and the Council has taken this commissioning opportunity to refocus the borough’s response to meeting the need for home care services within the current national and local context. Following the re tender of services in 2013, three new contracts will deliver commissioned services that will commence in June 2014.

KEY OBJECTIVES AND STRATEGIC FIT

To drive up quality in delivery by providing good quality jobs in an industry that is historically low paid and undervalued by incorporating recommendations of Islington’s Fairness Commission. Consideration is given to working in partnership with providers to develop investment in local workforce recruitment, workforce career progression and implementing the London Living Wage for contracted employees (recommendation 6 - Corporate Social Responsibility)

To offer opportunities for procuring services that facilitate the Council’s requirement to develop the personalised offer to Islington’s residents through self-directed support by remodelling the way services are currently commissioned.

To improve quality and continuity of care by incorporating the recommendations of the Unison Ethical Care Charter to improve working conditions, skill and motivation in the workforce.
http://www.unison.org.uk/upload/sharepoint/Research%20Material/Final%20Ethical%20Care%20Charter%20PDF.pdf

COMMISSIONING APPROACH
Delivery Model, Management Controls and Implementation

Delivery Model

The delivery model is based on a ‘Personalised Homecare Criteria’ that moves away from traditional time and task delivery. It introduces the support planning element to contractors where referrals are based on weekly hours of support rather than a timetabled plan to be delivered. Service users develop outcome based support plans with their providers based on the broad outcomes generated by the Council’s needs profile. Users can choose their hours of delivery with the option to bank and roll over hours within a four week period. A tolerance level for agreed maximum flexible hours is set by Council practitioners, as is the support plan when developed by the user and provider to safeguard the health and welfare of users.
SOCIALLY RESPONSIBLE PROCUREMENT

A Manifesto for Labour