

*ARE CONTRACTING AUTHORITIES TOO
RISK AVERSE WHEN PURSUING
OPPORTUNITIES FOR LOCAL
SUPPLIERS AND COMMUNITY
BENEFITS? HOW DO YOU BALANCE
LOCAL OBJECTIVES WITH THE RULES
AND ACHIEVE YOUR AIM?*

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Are contracting authorities too risk averse when pursuing opportunities for local suppliers and community benefits?

How do you balance local objectives with the rules and achieve your aim?

THE BASICS

Above-threshold (PCSR) contracts

- Regulation 19 principles
- Especially equal treatment and non-discrimination
- Breaches of those principles will expose a procurement to challenge risk
- Asking businesses to do things locally may be low risk, depending on the type of contract
- Requiring them to be local is not permitted

THE BASICS

Procurement Reform (Scotland) Act 2014

8 General duties

(1) A contracting authority must, in carrying out a regulated procurement—

- (a) treat relevant economic operators equally and without discrimination,
- (b) act in a transparent and proportionate manner.

(2) A contracting authority must also comply with the sustainable procurement duty.

(3) However, a contracting authority must not do anything in pursuance of subsection (2) that would conflict with its duty under subsection (1).

(4) A relevant economic operator is an economic operator who is a national of, or is established in, the United Kingdom or Gibraltar.

(5) Subsection (1) does not apply in relation to a higher value regulated procurement.

THE BASICS

Procurement Reform (Scotland) Act 2014

9 Sustainable procurement duty

- (1) For the purposes of this Act, the sustainable procurement duty is the duty of a contracting authority—
- (a) before carrying out a regulated procurement, to consider how in conducting the procurement process it can—
 - (i) improve the economic, social, and environmental wellbeing of the authority's area,
 - (ii) facilitate the involvement of small and medium enterprises [...] in the process [...], and
 - (b) in carrying out the procurement, to act with a view to securing such improvements identified as a result of paragraph (a)(i).
- (2) The contracting authority must consider under subsection (1) only matters that are relevant to what is proposed to be procured and, in doing so, consider the extent to which it is proportionate in all the circumstances to take those matters into account.

LOCAL SUPPLIERS

Some thoughts

- Lots will facilitate the involvement of SMEs
 - “splitting larger requirements into smaller lots [makes] it easier for smaller firms to bid for work” – Scottish Government guidance under the 2014 Act
- SMEs *may* correlate with local suppliers
- Lots are the default option in the PCSRs
 - Reg 47 – reasons for not awarding a contract in the form of separate lots must be given in the procurement documents or regulation 83 report
 - Can limit the number of lots secured by any given supplier
- Below-threshold contracts = internal rules only
 - Best value?
- Consider selection criteria – turnover thresholds, experience of other contracts, insurance levels
 - Are they stricter than they need to be?
 - Would they put off smaller / more local suppliers?
 - Are you willing to accept more contract / project risk in order to increase the chances of awarding to smaller / more local suppliers?

COMMUNITY BENEFITS

- How to deliver wider social, economic, environmental (etc.) benefits to a community, beyond the core subject matter of the contract
- How do public contracts achieve benefits for the locality?
 - Contract goods, services or works themselves
 - Keeping spend on contracts down means more money for other things
 - Contract award criteria
 - Additional specifications: minimum “value add”

COMMUNITY BENEFITS

Procurement Reform (Scotland) Act 2014

24 Community benefit requirements

For the purposes of this Act, a community benefit requirement is a contractual requirement imposed by a contracting authority—

(a) relating to—

(i) training and recruitment, or

(ii) the availability of sub-contracting opportunities, or

(b) which is otherwise intended to improve the economic, social or environmental wellbeing of the authority's area in a way **additional to the main purpose of the contract** in which the requirement is included.

COMMUNITY BENEFITS

Types of community benefit

- Employment and training: targeted recruitment, apprenticeships, work placements, graduate opportunities
- Supply chain: sub-contracting opportunities for SMEs and social enterprises
- Fair work: payment of the real Living Wage, fair work practices
- Environmental: carbon reduction commitments, biodiversity enhancements
- Community engagement: educational outreach, community facility improvements, volunteering

COMMUNITY BENEFITS

Procurement Reform (Scotland) Act 2014

25 Community benefit requirements in major contracts

(1) This section applies where a contracting authority proposes to carry out a regulated procurement in relation to which the estimated value of the contract is equal to or greater than £4,000,000.

(2) The contracting authority must, before carrying out the procurement, consider whether to impose community benefit requirements as part of the procurement.

(3) The contracting authority must, in the contract notice relating to the procurement, include—

- (a) a summary of the community benefit requirements it intends to include in the contract, or
- (b) where it does not intend to include any such requirements, a statement of its reasons for not including any requirements.

(4) Where community benefit requirements are included in a contract, the contracting authority must include in the award notice a statement of the benefits it considers will be derived from those requirements.

COMMUNITY BENEFITS

Scottish Government guidance (per s.26 of the 2014 Act)

- “requirements must be compatible with the procurement principles, equal treatment and non-discrimination and transparency and proportionality.”
- “Community benefit requirements will not be relevant and proportionate to all contracts and frameworks.”
- “The [2014 Act] aims to achieve the maximum use of these requirements in public contracts and framework agreements.”
- Presumption of appropriate requirements where opportunity arises
- Case-by-case assessment
- Robust, relevant and proportionate requirements, judged on objective and measurable outcomes

COMMUNITY BENEFITS

Scottish Government guidance (per s.26 of the 2014 Act)

- Avoid discrimination “in the wording of requirements”(!)
- “use of community benefit requirements may also demonstrate compliance with the sustainable procurement duty”
- Procurement strategy should include policy on community benefit requirements
- Majority of community benefits are likely to come from higher value and longer term contracts
- Stakeholder consultation
- “In some instances social, economic and environmental considerations will be so integral to the requirement that it may be difficult to separate them out.”
- Take care in prescribing what counts as relevant experience

COMMUNITY BENEFITS

As evaluation criteria

- **Regulation 67**
 - “*must identify the **most economically advantageous tender** on the basis of the best price-quality ratio, which must be assessed on the basis of criteria **linked to the subject-matter of the public contract in question**”*
 - MEAT and subject-matter link also apply to 2014 Act procurements, per SG guidance
- Link to the subject matter of the contract
 - Relationship to how the contract is delivered? e.g. apprenticeships, use of SMEs in the supply chain
 - Relationship to what the contract is for? e.g. a works contractor on a hospital contract funding a local health charity
 - Cash donations? Ringfenced vs non-ringfenced

COMMUNITY BENEFITS

As contract conditions

- **Regulation 70**
 - A contracting authority may lay down special conditions relating to the performance of a contract, provided that they are [...] linked to the subject-matter of the contract [...]; and indicated in the call for competition or in the procurement documents.
 - Such conditions may include economic, innovation-related, environmental, social or employment-related considerations.
- Can include community benefits as part of the contract itself, without evaluation
 - But still risk challenge if requirements are not connected to the subject-matter, or otherwise contrary to the equal treatment / non-discrimination principles

COMMUNITY BENEFITS

“Fair work first” criteria

- As contract award criteria or as minimum contract requirements?
- Equal treatment issues with the Real Living Wage in particular
 - *Dirk Ruffert v Land Niedersachsen (C-346/06)*
 - Bidders required to sign an undertaking to pay the same wage as laid down in a collective agreement in force in the place of performance
 - If all bidders were required to pay higher wages then suppliers based in other Member States could lose the competitive advantage of paying lower wages in their home country
 - Such a requirement would constitute a disproportionate and unlawful restraint on freedom of movement of services
 - But also reads across to equal treatment and non-discrimination principles
 - *Bundesdruckerei v Stadt Dortmund (C- 549/13)*
 - Can oblige suppliers to pay minimum wage imposed by law
 - But only if it applies solely to workers who need to be physically located where the obligation applies
 - See also *RegioPost GmbH & Co KG v Stadt Landau (C-115/14)*
- Restrict to personnel connected (exclusively?) with the performance of the contract – “linked to the subject-matter”
 - Easier for ‘on the ground’ delivery (e.g. works and ‘hands on’ services) than contracts that can be fulfilled from anywhere (e.g. supplies and ‘remote’ services)

COMMUNITY BENEFITS

How to apply

- Community benefits as a contract award criterion
 - How much weighting?
 - Less than 10% might just be ignored, or be unlikely to make a difference to the result
 - More than 10% dislodges weighting that could be allocated to factors more central to the proper performance of the core specification, or to price
 - 10% the “goldilocks” zone?
- How to evaluate community benefits?
 - Should be qualitative not quantitative, or the contract can be “bought” by larger suppliers who find it easier to offer apprenticeships or donations
 - Community benefits “menu”? Points based?
- How to contractualise?
 - Set as KPIs?
 - Ongoing monitoring?
 - Remedies for non-performance? Unlikely to terminate contract so payment reductions / liquidated damages may be more useful

COMMUNITY BENEFITS

Community Wealth Building (Scotland) Act 2026

- **Section 5**

- *“(1) Each local authority, working jointly with the relevant public bodies relating to it, must prepare a community wealth building action plan for the area of the local authority in question within the period of 3 years beginning with the day on which this section comes into force.*
- *[...]*
- *(6) A community wealth building action plan must set out the measures the community wealth building partnership is taking, or intends to take, to facilitate and support the generation, circulation and retention of wealth in the local economy.*
- *(7) The measures referred to in subsection (6) may include—*
 - *(a) using public procurement and commissioning to facilitate or support such generation, circulation and retention,”*

- But does not override procurement principles

LOCAL SUPPLIERS AND COMMUNITY BENEFITS

Final thoughts

- Inherently case-by-case issue – what is consistent with the law depends on what is being bought
- Resources needed to consider case-by-case – often a ‘one size fits all’ approach is taken instead
 - Start early – engage with stakeholders at design stage
- Be realistic – procurement can help achieve wider benefits but the primary reason is still the good/service/work being bought and procurement cannot solve every problem (or even most problems)
 - Recognise there are no solutions, only trade-offs
- Be fair – you can aim to get benefits to the community including local supply chains, but can’t discriminate in favour of specific local businesses
 - Criteria should be objective and capable of being met by any supplier

LOCAL SUPPLIERS AND COMMUNITY BENEFITS

Final thoughts

- What's your risk appetite?
 - Are you a Lord Hermer or a Suella Braverman?
- Tension between local suppliers and community benefits?
 - Community benefits will often be a cost to the supplier – can smaller / more local suppliers afford them?
 - Do local suppliers have a competitive advantage on wages, which you might eliminate by requiring payment of higher wages?
 - Are they less likely to have staff dedicated to public sector contracts?

