

Report of Chief Procurement Officer

Report to Scrutiny Board (Sustainable Economy and Culture)

Date of meeting: 26th January 2012

Subject: Inquiry into how developments in Leeds are bringing skills, training and jobs to local people.

Are specific electoral Wards affected? If relevant, name(s) of Ward(s):	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, Access to Information Procedure Rule number: Appendix number:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

Summary of main issues

1. The report examines the potential available to Leeds City Council to influence and create employment and skills opportunities through the procurement activities that it undertakes.
2. It also examines the existing and emerging legislation that controls the council's ability to create such opportunities through its contracts.
3. The report identifies the council's current practice in relation to the inclusion of employment and skills provisions in its contracts.
4. It also considers the effects on value for money and risk should the council decide to implement policy to include these provisions more widely.

Recommendations

1. A recently launched guide produced by the Local Government Association called 'Buying into communities – Jobs, skills and business opportunities from council contracts' will be made available to elected members and senior officers via the council's intranet in an effort to equip them with the knowledge to provide leadership to the delivery of community benefit through procurement.
2. The development of a toolkit, including guidance and training, to ensure all necessary factors are appropriately addressed, and relevant legislation complied

with when assessing the employment and skills opportunities suitable for particular contracts.

3. It is recommended that employment and skills opportunities should be assessed for every contract valued in excess of £100,000 and included in the tender documents where appropriate.

1 Purpose of this report

- 1.1 This report aims to assist the Sustainable Economy and Culture Scrutiny Board in their inquiry into bringing skills, training and jobs to local people through the specific vehicle of the council's contracting activities. This will be done by identifying methods through which such opportunities can be created that are within the relevant legislative framework, but do not have a damaging effect on value for money to the council.

2 Background information

- 2.1 Procurement is defined as 'the process of acquiring goods, work and services, covering both acquisitions from third parties and from in-house providers. The process spans the whole cycle from identification of needs through to the end of a services contract or the end of the useful life of the asset'.
- 2.2 The council spent in excess of £700 million during 2010-11 on the procurement of goods, works and services as diverse as stationery, vehicles, construction, legal services and social care, and currently is in contract with 1,400 different suppliers.
- 2.3 Public procurement in the UK and EC member states is subject to significant regulatory control. European legislation is set out in two ways, Articles of Treaties which set out matters of general principle which member states must observe, and Directives which are detailed procedures to ensure the treaties are implemented. The Directives are then implemented in local law by member states in the form of regulations, currently enacted in the UK as the Public Contract Regulations 2006.
- 2.4 The purpose of public procurement rules is to open up the market and to ensure free movement of supplies, services and works within the EU in a manner which is non-discriminatory against member states.
- 2.5 There is a widely held belief amongst practitioners in member states that these regulations are a barrier to the inclusion of 'social' conditions in contracts.

3 Main issues

- 3.1 The Public Contract Regulations are based on the fundamental European Law principles of :
 - Equal treatment and non-discrimination
 - Transparency
 - Proportionality and
 - Mutual recognition

- 3.2 Historically the guidance as to whether the inclusion of 'social outcomes' in public contracts was lawful has ebbed and flowed in its opinion. An express restriction on considering 'workforce matters' in awarding contracts was first introduced in the Local Government Act 1988 which provided in section 17 that consideration of 'the terms and conditions of employment by suppliers of their workers or the composition of the arrangements for the promotion, transfer or training of or other opportunities afforded to their workforce' was unlawful. This restriction has since been removed to the extent that such matters are 'relevant to the delivery of best value or for the purposes of a TUPE transfer'. There then followed comprehensive guidance on protection of employment and pension rights following TUPE transfers.
- 3.3 In 1998 HM Treasury advised that it was 'not consistent with value for money policy for public purchasing power to be used to pursue other aims', although this was contradicted later when the OGC/DETR's paper 'Environmental Issues in Purchasing' observed that operational and policy objectives were part of a users needs, and therefore did form part of the 'value for money' decision process. However, they then confused matters by stating that 'departments should not seek to use their purchasing power to pursue wider environmental ends', and specifically that criteria or conditions which are not directly relevant to the product or service should not be used.
- 3.4 Since the publication of the 2006 Regulations the position is significantly clearer. Regulation 39 states that a contracting authority may stipulate conditions relating to the performance of a public contract provided that those conditions are compatible with Community law and are indicated in the contract advertisement and/or the contract documents. Those conditions may include social and environmental considerations. Further clarification is provided at paragraph 33 of Directive 2004/18/EC on the coordination of procedures for the award of public contracts which states that contract performance conditions "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 of young persons...."
- 3.5 If they are to be lawful, those conditions must be contained in the technical specification of the contract, and Regulation 9(4) requires that any 'technical specification' defining the characteristics of the product, works or services must provide equal access to all potential suppliers, and does not create unjustified obstacles to the opening up of procurement to competition.
- 3.6 Furthermore, Regulation 30 sets out that contracts may be awarded on one of two bases, lowest price or most economically advantageous tender (MEAT), and shall use only 'criteria linked to the subject matter of the contract' to determine the offer that is the most economically advantageous. In other words, the criteria for evaluation of tenders must relate to something that is specified in the tender documents.

3.7 The current rules can be summarised in broad terms as follows:

- Any requirements must be related to the subject matter of the contract
- Authorities can pass on, where relevant, obligations they have under legislation (for example Equality requirements)

However the following are generally prohibited:

- Requirements which cannot be justified in public expenditure terms
- Matters not relevant to the subject matter of the contract
- Discrimination on the basis of nationality or locality
- A requirement to provide specific 'local' employment or other opportunities

In circumstances where the Public Contract Regulations do not apply, either in full or in part, the principles of EU law set out in 3.1, and the council's contract procedure rules, must still be observed, which will result in the same approach as described above.

- 3.8 Where a requirement is not being included due to a legal obligation, the authority will require a policy mandate for including them. This is addressed further in paragraph 4.3 of this report.
- 3.9 Whilst there has been clear provision in regulations to incorporate social benefit into public contracts since 2006, and guidance available in the form of the 'Sustainable Procurement Action Plan' (2007) and the 'National Procurement Strategy' (2003), by the time of the final report on the National Strategy in 2008, only 28 per cent of councils included issues of community well-being in their service contracts, 23 per cent in works contracts and 13 per cent for goods. This picture is mirrored across EU states where research suggests only 6.8 per cent of sustainable procurement initiatives relate to social sustainability. The vast majority of effort has been directed to environmental sustainability.
- 3.10 Leeds City Council does not currently have a policy for including employment and skills opportunities within its contracts. However over the past five years many of its high profile contracts have included these provisions, for example, housing repairs and improvements, the construction of Leeds Arena, the Building Schools for the Future programme, Little London, Beeston Hill and Holbeck projects, and through the YORbuild framework refurbishment of Woodhouse Lane car park, Morley Town Hall and Middleton Park Visitor Centre. Provision was also made in the recently awarded Grounds Maintenance contract.
- 3.11 Members of the Scrutiny Board should note the Public Services (Social Value) Bill, currently being processed through parliamentary committee stages before becoming law in 2012. The bill will require that authorities consider how they may promote or improve the economic, social or environmental well-being of an area by means of a service contract.
- 3.12 The lack of clarity and frequent change in guidance and legislation, together with a concern that employment and skills clauses will have an inflationary effect on contracts, has led to many practitioners deciding not to include these initiatives as part of their tender process.

- 3.13 In order for this approach to be effective, it is critical that practitioners have sufficient guidance available to assist them in incorporating the requirement for employment and skills opportunities into contracts lawfully, and then follow that up with monitoring the outputs during the contract management period, as with any other deliverable.
- 3.14 In addition, it is critical that active support is given to the proposals at elected member and senior officer level.

4 Corporate Considerations

4.1 Consultation and Engagement

4.1.1 In preparing this report, consultation has been held with Employment Leeds in their role of supporting business in developing their workforce, to ensure that the recommendations are satisfactory and practical.

4.1.2 The report has been discussed at the management teams of Procurement Unit and Public Private Partnerships Unit.

4.1.3 Key suppliers will also be consulted prior to the drafting of the Employment and Skills through Procurement Toolkit.

4.2 Equality and Diversity / Cohesion and Integration

4.2.1 The recommendations enhance the possibility of creating economic inclusion through access to employment and skills opportunities.

4.3 Council Policies and City Priorities

4.3.1 These proposals represent a contribution to 'Using spending for wider outcomes' (Council Business Plan) 'Create more jobs, improve skills' (Sustainable Economy and Culture City Priorities Plan) and 'Provide education and training to help more people achieve their potential' (Vision for Leeds).

4.3.2 In addition, sustainable procurement is part of the 'Improvement' strand of the council's 2011-15 procurement strategy.

4.3.3 These policy references create the authority to enable the council to include employment and skills requirements in their contracts referred to in 3.9.

4.4 Resources and Value for Money

4.4.1 It is anticipated that some cost will attach to the council for the inclusion of employment and skills opportunities into contracts, for example in developing training material and contract management of the outputs.

4.4.2 It is not always the case that this approach significantly increases the contract price. Some activities, such as school and college visits and workshops and work experience, will be willingly provided under the auspices of supplier's corporate social responsibility activities. Others may attract external funding as in the case of some apprenticeships.

4.4.3 A recent academic study conducted on the employment outputs of the YORbuild construction framework in Yorkshire and Humber estimated £1.5m of social and economic value was generated without a negative effect on cost through the employment of almost 200 apprentices and workless people.

4.4.4 A further study using similar methodology conducted on behalf of Manchester City Council into the benefits achieved through the 'Manchester People into Construction' programme, found that during the three years of the programme, which placed residents into apprenticeships with organisations delivering the city's capital programme, that for every £1 invested in such activities, a return of £4.74 in social and economic value is achieved.

4.4.5 According to research by the Warwick Institute for Employment Research, apprenticeships provide value to employers in that they provide a succession plan for ageing workforces, increase employee loyalty, enhance the company's reputation and provide the foundation to develop future managers thereby enabling continuing workforce development.

4.4.6 Although this requires investment from the employer, it was found that the costs of employing apprentices, including training, supervision and reduced productivity, are recovered in a maximum of four years for those in social care and only two years in construction and business administration.

4.4.7 In future, a cost assessment, taking the above factors into account, will need to be conducted on each occasion before finalising the level of outputs that can be accommodated in any individual contract to ensure appropriate value for money.

4.5 Legal Implications, Access to Information and Call In

4.5.1 By virtue of the relevance of the recommendations to the aspects of council policies and priorities set out above, it is lawful for them to be accepted.

4.5.2 Providing relevant legislation is observed in the manner set out above, the legal implications of such a course of action are limited.

4.6 Risk Management

4.6.1 There is a risk of procurement challenge if the process is not managed in accordance with the guidance in 3.7.

4.6.2 There is a risk that the contract price may increase, and this must be managed in accordance with the guidance in 4.4.7.

4.6.3 In the case of young people participating in work experience and placements, the educational establishment sponsoring their placement and the contractor providing it should conduct a thorough risk assessment before the placement commences.

5 Conclusions

5.1 Provision of employment and skills is an integral part of many existing council policies, and this provides initial legal authority for their inclusion in council contracts.

- 5.2 By examination of current Public Contract Regulations, it is clear that it is lawful to include 'social considerations' in public contracts, providing they are clearly stipulated in the contract documents and are not discriminatory. This means for example that a requirement for a bidder to have local knowledge of the labour market or a local base would be discriminatory and not permitted, however a more general requirement to offer employment and skills would not necessarily be unlawful.
- 5.3 These considerations can then form part of the evaluation criteria for assessing the most economically advantageous tender provided they are linked to the subject matter of the contract.
- 5.4 There may be some additional cost to the council for including these requirements in a contract, but this is best assessed on a tender-by-tender basis as in some cases costs are likely to be modest or capable of being funded through grants.
- 5.5 There are pockets of best practice that exist now, although no explicit council policy or guidance as to how to incorporate employment and skills requirements into contracts currently exists, which is limiting knowledge within the authority.
- 5.6 Due to the wide range of products, works and services referred to earlier in this report, a flexible approach to employment and skills requirements in contracts is required to ensure maximum effect. A 'one size fits all' approach would not achieve this.
- 5.7 To enable officers to assess the suitability of a contract to provide employment and skills opportunities, a toolkit is required which will provide guidance and template documents covering the following aspects of the process;
- Advertising
 - Pre qualification questionnaires
 - Contract terms and specifications
 - Tender evaluation
 - Contract management
 - Post contract review

To ensure maximum flexibility and effect, the toolkit will include a range of activities which support employment and skills development, including school/college workplace visits, entry level skills, work experience, new apprenticeships and employment as well as continuing skills development and safeguarding for existing staff.

- 5.8 Design of the toolkit will have regard to consultation with significant current suppliers, contractors and providers.
- 5.9 There will be provision of training sessions by Procurement Unit to instruct practitioners on the application of the toolkit, consequently contract managers will be responsible for ensuring delivery of the agreed outputs, but will have support available from the Employment and Skills service.
- 5.10 Reviews of the effectiveness of the defined outputs from individual contracts will be undertaken every 6 months by Procurement Unit and Employment and Skills service.

6 Recommendations

- 6.1 The Local Government Association has recently launched a guide for councillors and senior officers called 'Buying into communities – Jobs, skills and business opportunities from council contracts' in an effort to equip its members with the knowledge to provide leadership to the delivery of community benefit through procurement. This will be made available via the procurement 'interest area' on the council's intranet.
- 6.2 The development of a toolkit for officers, including guidance and training, to ensure all necessary factors are appropriately addressed, and relevant legislation complied with when assessing the employment and skills opportunities suitable for particular contracts.
- 6.3 It is recommended that in approving business cases and subsequent decisions that lead to the award of a contract with a value in excess of £100,000, all decision makers assess each contract for appropriate employment and skills opportunities.

7 Background documents

- 7.1 In compiling this report regard has been had to the following.
 - i. Scrutiny Board (Sustainable Economy and Culture) report 22nd September 2011 and 20th October 2011
 - ii. Public Contract Regulations 2006
 - iii. Procurement Policy Guidelines (OGC 1998)
 - iv. Buying into our future: Sustainability Initiatives in Local Government Procurement (IDeA 2003)
 - v. Procuring the future – The Sustainable Procurement Task Force National Action Plan (DEFRA 2006)
 - vi. Sustainable Public Procurement in EU Member States: Overview of government initiatives and selected cases. Final Report to the EU High-Level Group on CSR. (Research Institute for Managing Sustainability 2007)
 - vii. National Procurement Strategy for Local Government (DCLG 2003)
 - viii. National Procurement Strategy for Local Government Final Report (DCLG 2008)
 - ix. Public Services (Social Value) Bill (HL Bill 113)
 - x. YORbuild Construction Framework for Yorkshire and Humber
 - xi. Main Guide to the West Midlands Procurement Framework for Jobs and Skill: Harnessing public and third sector buying power (West Midlands Economic Inclusion Panel 2010)
 - xii. Leeds City Council Business Plan 2011-15
 - xiii. Leeds City Priorities Plan 2011-15
 - xiv. Vision for Leeds 2011-30
 - xv. Leeds City Council Procurement Strategy 2011-15
 - xvi. Exploring the value of investing in a Manchester construction framework (Centre for Local Economic Studies 2011)
 - xvii. The net benefit to employer investment in Apprenticeship Training (Warwick Institute for Employment Research 2008)
 - xviii. Buying into communities – Jobs, skills and business opportunities from council contracts (LGA 2011)