



the **CAN DO** toolkit

Targeted Recruitment
and Training for social
landlords

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IMPORTANT: All three resources that make up the Can Do Toolkit provide advice in general terms only.
Readers should seek legal advice before use.

For advice on including social inclusion measures in public sector contracts please
contact the Value Wales Policy 'One Stop Shop' at vwpolicy@wales.gsi.gov.uk

Section 1: Introduction

This section will outline:

- what the Targeted Recruitment and Training (TR&T) **Can Do toolkit** is
- how to use this toolkit Resource No.2 – **the comprehensive guide**
- what **community benefits** are
- the **key questions** to consider before you start using the toolkit

1.1 The Can Do Toolkit

This toolkit has been produced for social landlords in Wales that wish to achieve wider social inclusion through their improvement and investment programmes. The main drivers behind this work are:

- the determination of the Welsh Assembly Government to get the maximum added value out of public and private sector investment in Wales
- the pioneering work done by Value Wales in developing the Community Benefits step-by-step guide (1)
- the increasing commitment by social landlords to the WHQS plus (2) objectives developed by **i2i** – inform to involve – to ensure that housing investment also delivers local regeneration and community ownership of housing
- the potential for the wider social landlord sector to deliver more in terms of regeneration on the back of the Essex Review of affordable housing in Wales (3)

This toolkit aims to support social landlords to include '**targeted recruitment and training**' (TR&T) requirements in WHQS contracts.

The Toolkit is divided into three linked resources:

Resource 1 – an introductory guide provides key information on using TR&T as core requirements throughout the procurement process and the issues to be considered by potential users

Resource 2 – this comprehensive guide containing detailed information on legal and policy matters and supply-side support available for downloading on the i2i website www.whq.org.uk/i2i in a PDF format

Resource 3 – a series of templates to be downloaded and adapted from the i2i website www.whq.org.uk/i2i in a Microsoft Word format

The tools discussed throughout this guide are flexible and while the focus is the Welsh Housing Quality Standard (WHQS), the processes can be adapted for use throughout housing and other sectors. In addition, whilst TR&T is the primary focus of the toolkit, other community benefits may be pursued through WHQS and similar contracts.

This guide will help social landlords to achieve social inclusion by:

- understanding the **legal basis** for TR&T (section 2)
- understanding the **policy basis** for TR&T (section 3)
- incorporating social inclusion throughout the **procurement process** (section 4)
- developing effective **supply side actions** (section 5)
- using **development agreements** (section 6)
- identifying **model materials** to support TR&T

The tools laid out in this document, as well as resource 3, will enable users to take an effective leadership role in the sustainable development of their organisations and the communities they serve. The tools are flexible, and can be used in ways that are:

- capable of being adapted to suit specific circumstances and the preferences of the officers involved;
- compatible with competitive tendering processes and the market allocation of resources;
- compatible with the legal framework governing the procurement activities of the users, and with best procurement practice; and
- capable of allocating the costs involved to the most appropriate sources (which is often a combination of the employer, the public sector and industry training bodies).

1.3 Understanding Community Benefits



The above hierarchy may be helpful in understanding this emerging field of policy and activity:

- **TR&T** is one element in a wider range of community benefits that needs to be seen within the wider context;
- **Sustainable Development** is about integrating our social, economic and environmental objectives to improve well being now and in the future
- **Sustainable Procurement** is a way of delivering an over-arching Government objective – Sustainable development;
- **Social issues in Purchasing** are a way of including social considerations into procurement in line with legal and policy framework of value for money and EU rules;
- **Community Benefits** in procurement is about ensuring that wider social and economic issues are taken into account when negotiating contracts to maximise the investment as widely as possible;
- **TR&T** is one of the elements in a wide range of community benefits that could include small business start-ups, community consultations, business / education partnerships etc;

As can be seen from 3.2 below, the Welsh Assembly Government's Sustainable Development Strategy¹ gives emphasis to the social justice elements of sustainable development.

The legal framework discussed in this toolkit applies to all aspects of sustainable procurement including social clauses, community benefits and TR&T, with the critical variation being the way the requirements are specified and delivery is measured and monitored. However, the activities required may not be the critical issue: tensions and resistance can arise from the process of innovation.

¹ The Sustainable Development Scheme, 2004-2007, Welsh Assembly Government, Crown Copyright 2004

For example, the procurement of training by a local authority (say from a college or private training provider) may be a 'social issue' but is not difficult or novel because it is part of what it conventionally purchases. On the other hand the purchase of the same training as part of a works contract for housing renewal would be considered a 'community benefit' and could be problematic, in particular because it is new to the officers involved.

Innovation is, therefore, a key distinguishing feature of social issues and social requirements. The following definition may be useful:

"Social requirements provide a method of including social and economic matters into contracts for the supply of goods, services or works that do not conventionally have these requirements as defined or measured outcomes."

Social clauses, such as TR&T offer:

- consistency and transparency: the opportunity for the purchaser to identify need and convert this into a specification that each bidder has to deliver;
- the opportunity to focus on measurable outputs rather than the delivery process;
- an approach that can be the subject of comparative evaluation which will help secure value for money; and
- the opportunity to include monitoring information as a part of the specification, which will enable the purchaser to ensure that they receive the service they pay for.

In relation to innovation the problems can be separated into:

- those related to the pursuit of new requirements, such as providing disabled access to public buildings or new environmental standards; and
- those related to the context in which the social requirements are being introduced, such as vocational training being included in a works contract.

The 'innovation' may be new to the organisation, or it may be new to the procurement officers and their external advisors. It is hoped that this toolkit will provide materials and confidence that will help organisations and individuals innovate around the inclusion of TR&T in procurement in a safe and efficient manner.

1.4 The Key Question

In the past the conventional wisdom has been that community benefits could not be included in public procurement because it might not be legal, would produce poor value for money and/or was not affordable. Since the publication of *Achieving Community Benefits Through Contracts* in 2002 there has been a significant development of experience in the use of TR&T in public procurement, most notably in the Value Wales and Scottish Procurement Directorate's pilot programmes. So now the question has become: **'how do we include community benefits in a way that is legal, achieves value for money and is affordable?'** The answer to this question lies in the drafting of the requirements and how these are integrated into the procurement process. The remainder of this guide provides practical advice on how to deliver the social inclusion outcomes you require through procurement.

2 The scope for using social clauses in UK public procurement to benefit the UK manufacturing sector, Report for the Manufacturing Forum (DTI), Anthony Collins Solicitors, July 2006

Section 2: Legal Basis for Targeted Recruitment and Training (TR&T)

This section will outline:

- The extent to which **local authorities** and RSLs can use social **requirements within contracts**
- The **Welsh Assembly Government's** powers to promote **sustainable development**
- **EU** Procurement Rules
- **Case Law** concerning social clauses

2.1 Legal Parameters for UK Public Bodies

The extent to which public bodies and contracting authorities can include social requirements into their contracts depends on:

- whether or not they have the legal powers to do so (or whether or not there are any limitations on their powers which inhibit them from so doing); and
- whether there are sufficient policy grounds for them to do so.

Contracting authorities such as local authorities and non-departmental public bodies (NDPBs) have their powers for the most part set out in statute. Government departments and devolved administrations like the Welsh Assembly Government (WAG) have a mixture of powers derived from statute and the royal prerogative (for the relevant Secretary of State). In considering whether a contracting authority is able to promote social policy initiatives, the following issues have to be addressed:

- does the contracting authority at first sight have the necessary powers, express or implied, to pursue such matters in the cause of the exercise of the functions?
- are there any express prohibitions, which prevent the exercise of such powers?
- are there any conditions set out in legislation to be satisfied if such matters were to be pursued lawfully?
- has the contracting authority followed the appropriate procedures? - in particular any procedures that it has adopted itself?
- has the contracting authority taken into account all the matters it should take into account (the 'Wednesbury' principle)?

Government departments generally have **full scope** to pursue such policies as their relevant Secretary of State chooses to adopt in support of sustainable procurement – the main concern here is the apparent lack of a clear and consistent process for adopting policies that are then implemented in procurement practice.

The Welsh Assembly Government and local authorities are subject to a statutory framework that is worth considering in a little more detail given their purchasing strengths.

2.2 Local Authorities

Local authorities may use only those powers conferred upon them by statute, and may use those powers only for the purposes contemplated by the statute. In England and Wales they have an express power to support sustainability under the **Local Government Act 2000** (commonly known as the “well-being” power)³.

Under Section 2(1) Local Government Act 2000:

“Every local authority are to have power to do anything which they consider is likely to achieve any one or more of the following objects:

- the promotion or improvement of the economic well-being of their area;*
- the promotion or improvement of the social well-being of their area; and*
- the promotion or improvement of the environmental well-being of their area.”*

This power can be exercised

“in relation to or for the benefit of:

- the whole or any part of a local authority’s area; or*
- all or any persons resident or present in a local authority’s area”¹*

The power under Section 2(1) Local Government Act 2000 does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made).

Until 2002 local authorities in Wales⁴ could not promote labour issues in their procurement without potentially falling foul of Part II Local Government Act 1988. Under section 17(5) of the Local Government Act 1988 labour force matters were to be treated as non-commercial considerations which could not be considered in local authority procurement activity.

However, Welsh local authorities now have the benefit of the Local Government Best Value (Exclusion of non-commercial considerations) (Wales) Order 2002 (the “2002 Order”). The 2002 Order ameliorated the impact of section 17(5) provision by dis-applying it to:

- 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; and
- the conduct of contractors or workers in industrial disputes between them or any involvement of the business activities of contractors in industrial disputes between other persons.⁵

The above may therefore be considerations in the course of a Welsh local authority’s procurement activity.

The matters listed in section 17(5) not dealt with by the 2002 Order described above remain non-commercial considerations that must be disregarded by local authorities in their procurement exercises.

3 Under Part 3 Local Government in Scotland Act 2003 a Scottish local authority has an express power to do anything that it considers likely to achieve the well being of the whole or any part of its area and/or all or some of the persons within that area.

4 In England the equivalent change was introduced in March 2001.

5 Sections 17(5)(a) and (d) of the Local Government Act 1988.

In summary, therefore:

- local authorities now have a sustainability function encapsulated in their “well-being” power under Part I Local Government Act 2000;
- local authorities can include training, employment and workforce matters within the requirements of their procurement;
- local authorities should audit trail their policies for social issues/community benefits in their community strategies, best value plans and procurement strategies; and
- local authorities should use the best practice procurement processes applying to all public bodies (including explicit mention of social requirements in OJEU notices).

2.3 RSLs and non-departmental public bodies

The legal framework for RSLs will depend largely on their legal structure. As RSLs are not “public” bodies as such (although note the application of the EU procurement rules to RSLs), their powers are not set out in statute in quite the same way, and their legal structures can vary. Most often RSLs will be companies limited by guarantee, although some are industrial and provident societies. Most RSLs in Wales are also charitable.

Many RSLs and public bodies have broadly framed ancillary or subsidiary powers to their main functions. It is the policies they adopt which will therefore be of critical importance in setting the scope for procuring sustainability in its widest context.

Case Study

Extract from RCT Homes Limited Community Housing Mutual Rules of Association

Objects

The objects of the Community Mutual are to benefit people in need by reason of poverty, age, disability or illness in the community, directly or through Local Groups by...

- 3.3 community development through training and the provision of information
- 3.5 delivering strategies in partnership with the Local Authority for the well-being of the community
- 3.7 carrying out any other charitable objective that can be carried out by an Industrial and Provident Society registered as a social landlord with the National Assembly for Wales.

Powers

The Community Mutual shall have power to do anything that a natural or corporate person can lawfully do which is necessary or expedient to achieve its objects, except as expressly prohibited in these Rules.

2.4 The Welsh Assembly Government

Under section 121 of the Government of Wales Act 1998 ("GoWA 1998"), the National Assembly for Wales was given a duty to promote sustainable development in the exercise of its functions. GoWA 1998 also required the Assembly to make a sustainable development scheme setting out how it proposed to act on this duty. The Welsh Assembly Government were given the responsibility to implement this scheme and to draw up an action plan. These provisions were satisfied by "Learning to Live Differently" and later "Starting to Live Differently" (the sustainable development scheme), and by the "Sustainable Development Action Plan 2004 – 2007".

The relevant provisions of GoWA 1998 were repealed by the Government of Wales Act 2006 ("GoWA 2006"), which established the Welsh Assembly Government ("WAG"), including the First Minister and the other Welsh Ministers. Under section 60 of GoWA 2006, **the Welsh Ministers may do anything which they consider appropriate to achieve the promotion or improvement of the economic, social or environmental well-being of Wales.** This power can be exercised in relation to or for the benefit of the whole or any part of Wales, or all or any persons in Wales.

Section 60 in effect grants to the Welsh Ministers the same well-being powers as are granted to local authorities under the Local Government Act 2000. This is in contrast to the position in England, where Central Government lacks the power or duty to focus on the well-being of its area (or the whole of England) in the same way.

Under section 79 of GoWA 2006 the Welsh Ministers must make a scheme setting out how they propose, in the exercise of their functions, to promote sustainable development. This in effect replaces the sustainable development scheme under section 121 GoWA 1998.

2.5 Government departments

Many UK Government departments, such as the Department of Work and Pensions, still have a key role to play in Wales. The powers of Government departments to include social and environmental requirements in their procurements are relatively broad and are rooted in the Royal Prerogative. It is the process by which they establish social and environmental policies which requires further clarification. It is not a huge leap for Government departments to embrace in their procurements not only the aims of environmental sustainability but also the tackling of poverty, the alleviation of unemployment or the provision of training. **The subject matter of a contract is determined by what the authority is actually buying. The extent to which social and environmental factors are a part of this process will in part depend on the particular purchase, and the priorities of the relevant department.**

2.6 The EU Policy and Legal Framework

Much of the legislation governing the use of competitive processes by public authorities in their procurement derives from **European Union law**, which is based on the fundamental principles of:

- Equal treatment and non-discrimination: giving everyone the same chance to win the contract irrespective of their nationality or whether they are familiar to the contracting authority or not;
- Transparency: stating requirements and award criteria up front and sticking to them;
- Proportionality: setting requirements with reference to the needs of the contract in question;
- Mutual Recognition: giving equal validity to qualifications and technical standards of other member States, where appropriate.

These principles are intended to **remove barriers** to trade between the Member States and create a free internal market within the EU by facilitating contractors from all over the EU to bid for the same public contracts. These aims are balanced increasingly with other objectives including the protection of the environment, combating social exclusion and deprivation, and consumer protection.

The EU public procurement legal framework consists of:

- **certain provisions of the Community Treaties, most importantly Articles 28 (free movement of goods), 43 (freedom of establishment) and 49 (freedom to provide services) of the EC Treaty; and**
- **EU procurement directives which regulate award procedures with regard to contracts above a certain value. These are implemented in Wales by way of statutory instrument laying down regulations governing the procurement of works, goods and services. In particular, Directive 2004/18/EC, often referred to as the 'Consolidated Directive' because it replaced three separate directives on works, supplies and services, was implemented in Wales by the Public Contracts Regulations 2006, on 31st January 2006.**

The EU procurement rules operate principally at three levels:

- requirements for the advertising across the European Union of contracts for works, goods and services (this is done by placing a contract notice in the Official Journal of the European Union);
- the encouragement of the use of technical standards and approvals which are of application across the EU or the recognition of technical standards and approvals in force in another member State where these are of a similar standard to those in force in the UK; and
- requirements for objective and open criteria for evaluating tenders and selecting contractors.

The EU procurement rules cover a wide range of bodies and contracts. 'Contracting authorities', the term used in the rules, includes central government departments, local authorities and non departmental public bodies, but also 'bodies governed by public law', a term which covers organisations established to meet needs in the general interest, not having an industrial or commercial character, and which are either:

- financed wholly or mainly by another contracting authority;
- subject to management supervision by another contracting authority; or
- more than half the board of directors or members of which is appointed for another contracting authority.

As they provide social housing, RSLs are regarded as **'meeting needs in the general interest' and 'not having an industrial or commercial character'**. As of 2004, the UK Government has accepted that the Housing Corporation (itself a contracting authority) has sufficient power over RSLs to constitute 'management supervision'. This has the effect that RSLs are deemed to be **'bodies governed by public law'** and, therefore, contracting authorities.

The rules cover all contracts over a specified threshold⁶ except for contracts for 'Part B' services, which includes such things as legal services, educational services, and social services. Contracts for Part B services should still, however, be let in a manner which is transparent, fair, and does not disadvantage bidders from other EU Member States. Case law has indicated that this will generally require a need to advertise, albeit that the full EU procurement process need not be undertaken.

2.7 The Consolidated Directive

As stated in the Office of Government ("OGC") guidance **"Social Issues in Purchasing"**, the Consolidated Directive **"makes explicit the scope to take social and environmental issues into account at the relevant phases of the procurement process"**. The Consolidated Directive says much more on the subject of social and environmental considerations than its preceding directives, both in its non-binding but influential recitals and its articles.

Recital 1 of the Consolidated Directive states:

"This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with [Treaty Obligations]".

There are recitals which support other environmental and social issues, such as sheltered workshops, including eco-labels in specifications and the involvement of small and medium-sized undertakings in the public contracts procurement market. In addition, there are articles which govern sheltered workshops and environmental requirements. Most specifically in the context of this paper, Recital 33 states:

"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 Recital 46 there is the following acknowledgement:

"In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs - defined in the specifications of the contract - of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong."

⁶ The thresholds for EU procurement purposes are currently set at:

- Supplies: £139,893 (€206,000)
- Services: £139,893 (€206,000)
- Works: £3,497,313 (€5,150,000)

Article 26 of the Consolidated Directive has this express provision:

"Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications.
The conditions governing the performance of a contract may, in particular, concern social and environmental considerations."

This is translated in the Public Contracts Regulations 2006 by regulation 39 which states:

- (1) 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:
 - (a) the contract notice and the contract documents; or
 - (b) the contract documents.
- (2) The conditions referred to in paragraph (1) may, in particular, include social and environmental considerations.

There have been some important European Court of Justice cases concerning social clauses in public contracts which have had a bearing on the Consolidated Directive and which continue to develop the shape of the law as it is interpreted by the courts. These are summarised in the table below.

Not all the cases are easy to reconcile with each other or with current European Commission guidance but they do establish some important principles that are relevant to the inclusion of TR&T and other social matters in procurement by contracting authorities, including:

- it is possible to include TR&T requirements in public procurement provided that the drafting and the process does not disadvantage non-local bidders, for example by requiring them to have local labour market knowledge, or a local base, or use local material;
- environmental and (by implication) social requirements that address a policy objective of the purchaser are permissible: they do not need to provide an economic benefit to the purchaser; and
- all requirements must be capable of measurement and verification.

Case Study

Local authorities are still subject to case law about the purposes for which they can exercise their powers. The question of 'proper purposes' was raised in *R v Lewisham LBC, ex p Shell UK*. In that case the local authority had adopted a policy of refusing to purchase the products of Shell UK where equivalent products were available elsewhere on reasonable terms. The reason for the policy was Shell UK's membership of a multi-national group of companies with trading links with South Africa (although Shell UK itself did not trade in South Africa). The Court indicated that the policy would have been lawful had it been adopted solely from a desire to promote good race relations within the area since there is a legal requirement to consider the need to promote good relations between persons of different racial groups. However, the policy had also been influenced by the desire to put pressure on Shell to cease its trading links with South Africa, and this the Court held to be an "extraneous and impermissible purpose".

The Court did not, however, make it clear exactly what secondary considerations are prohibited. The Shell case appears to permit the use of procurement in pursuit of any policies entrusted to the authority by other legislative provisions, even if the possibility of using its contracting processes to support such policies is not expressly contemplated.

Table 1: Brief Guide to Relevant European Procurement Case Law

Case Name	Case Reference	Key Points to Remember
Beentjes	Gebroeders Beentjes B.V. v The State (Netherlands) (C31/87)	A contract condition that the Contractor must employ long-term unemployed persons can be compatible with the rules, so long as general EU Treaty principles are adhered to.
Nord-Pas-de-Calais Region	Commission v the French Republic (C225/98)	A 'local labour' award criterion can be applied as an 'additional' criterion where the MEAT assessment of bids on a purely economic basis has revealed "two or more economically equivalent tenders". NB: This case should be treated with caution.
Finnish Buses	Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v (1) Helsingin Kaupunki (2) HKL–Bussiliikenne (2002) (C-513/99)	Contracting authorities are entitled to include environmental (and, by implication, social) considerations in their award criteria. These need not be purely economic in nature. They need to: <ul style="list-style-type: none"> • be linked to the subject matter of the contract; • not confer an unrestricted freedom of choice on the authority; • be expressly mentioned in the contract documents or tender notice; and • comply with all the fundamental principles of community law, in particular the principle of non-discrimination.
EVN	(1) EVN AG (2) Wienstrom GMBH v Republic of Austria (2003) (C-448/01)	The accuracy of the information sought from tenderers in relation to environmental (and, by implication, social) requirements must be capable of being verified. Award criteria that are not linked to the subject matter of the contract are not permissible.
Insalud	Contse SA v Insalud (Now Ingesa) (2005) (C-234/03)	A pre-qualification requirement for a contractor to have premises within a particular geographical area was held to be discriminatory and unjustified.
De Pont de Nemours Italiana and Laboratori Bruneau	Du Pont de Nemours Italiana SpA v Unità Sanitaria Locale No. 2 Di Carrara [1991] 3 CMLR 25 and Laboratori Bruneau Srl v Unità Sanitaria Locale RM/24 De Monterotondo [1991] 1 CMLR 707	It was discriminatory to require bidders to obtain a set portion of their supplies from a specified region.
Commission v Italy	EC Commission v Italy [1991] 2 CMLR 115	It was discriminatory to require contractors be chosen from only companies in which all or a majority share of share capital was in public ownership.

This section will outline:

- UK guidance on **social issues** in purchasing
- WAGs **Sustainable Development Policy**
- **Governance** and **regulation** of RSLs
- How to approach **Community Strategies**
- The difference between **Value for Money** and **Affordability**

3.1 UK Guidance – ‘Social Issues in Purchasing’

In February 2006 the Office for Government Commerce issued its guidance **Social Issues in Purchasing (the “Social Note”)**, designed to further understanding of how such issues can be legitimately incorporated into the purchasing cycle. It reinforces good practice in procurement emphasising that:

- social issues must be relevant to the subject matter of the contract;
- actions must be consistent with government procurement policy based on value for money; and
- sustainable procurement must be approached from a whole life cost prospective.

The Social Note covers a wide range of social issues, including: community benefits; core labour standards; disability and equality issues; employment and training issues; fair trade; gender equality; race equality; SMEs; workforce skills (including adult basic skills).

The Social Note is more positive than earlier drafts, with a number of positive actions set out for incorporating social issues into procurement at the different stages of a purchasing process, covering: strategic context; business case development; specification; selections; tender evaluation; and contract management. Noteworthy is the acceptance that:

“a **core requirement** can be defined as an **essential** part of the contract, and this should be reflected both in the **specifications** and the **conditions** of the contract ... In this context it is possible for a social issue to be a **core** requirement provided it is central to the subject of a procurement and consistent with the rule ...”.

So the critical question to be answered in any procurement is **when a social objective is an essential element of a contract**. This is for the purchaser to decide on the basis of their powers and policies. As can be seen from Section 2 above, the Welsh Assembly Government and local authorities in Wales have the powers as part of the ‘well-being’ provisions, and it is anticipated that most RSLs will have broad regeneration and community development objectives included in their constitutions. In this context a decision to include TR&T or other community benefits as a core requirement of a procurement depends on the purchaser’s adopted policies.

This principle has been applied by the UK Government; there are a number of areas in which social policy requirements have been incorporated into public procurement and contract documentation or suggested in Government guidance. Examples include the pursuit of the Two-Tier Workforce Code (with template documentation having been produced by 4Ps / I&DeA); better race relations and equality issues (by the CRE); detailed template specifications produced by the Public Sector Food Procurement Initiative (DEFRA); and template documentation for dealing with environmental factors from various government/other network bodies.

3.2 Welsh Assembly Government Sustainable Development Policy

As discussed above, there is a requirement for the Welsh Assembly Government and the Welsh Ministers to produce a sustainable development scheme. This does not appear to have been published for the period from 2008 onwards. However, a scheme for 2004 – 2007 under previous legislation and a related action plan, remain in place. In this scheme, the Welsh Assembly Government explains that:

"the principles and vision of the Sustainable Development Scheme will drive everything we do. We will integrate these into our work and actively require or influence others, for example local authorities, public bodies, business, the voluntary sector and communities, to do the same to deliver change. We will seek to enable them to do so".

The above statement provides a broad policy basis for encouraging Welsh local authorities and other public bodies to incorporate sustainable development principles into all of their activities. It is also clear that the aims of sustainable development include social justice and skill development; objectives that the use of TR&T in procurement are aiming to achieve:

"The Assembly will pursue, on an effective partnership basis, a sustainable future for Wales based on:

- promoting a diverse, competitive, high added-value economy, with high skills and education, that responds to sustainable development opportunities, minimises demands on the environment and maximises the distribution of the benefits;
- action on social justice that tackles poverty, poor health, and consequences of disadvantage and provides people and their communities with the means to help themselves break out of the poverty trap...;
- valuing everyone in society and promoting equality of opportunity."

The 2004-07 Sustainable Development Action Plan acknowledges the need to address issues of social inclusion and social justice:

"the economy is doing well but too many people are still workless and suffering deprivation"⁷

"The future of both our economy and society rests with our people and our places – people with skills, places that people find attractive to live and work in, and an environment that encourages businesses to prosper."⁸

The Welsh Assembly Government's stance on social inclusion and social justice, as illustrated in the Sustainable Development Action Plan and Scheme, gives a broad policy basis for public bodies and others in Wales to include issues of social inclusion in their procurement, including TR&T.⁹

7 The Sustainable Development Action Plan 2004-2007, Welsh Assembly Government, Crown Copyright 2004 page 5

8 Ibid page 10

9 Starting to Live Differently: The Sustainable Development Scheme, Welsh Assembly Government, Crown Copyright 2004, page 5

3.3 Welsh registered social landlords

The investment in WHQS provides an important opportunity for RSLs to implement the Welsh Sustainable Development Strategy and Action Plan. The commitments made in this may be considered sufficient as a policy basis for including TR&T in their procurements. However, it can be anticipated that many will have social inclusion as part of their objectives and suite of policy documents, including their procurement strategy, or may wish to see this explicitly included as these documents are developed.

The Welsh Assembly Government's Regulatory Code for Housing Associations Registered in Wales¹⁰ makes it clear that Welsh RSLs are encouraged to consider matters of sustainability in their activities. Under the key expectation 1.1.2, the Regulatory Code states :

"When providing new homes, are the principles of sustainable development also extended to the whole community and surrounding environment?"¹¹

One of the key expectations relating to Equal Opportunities is:

"2.3.1 Associations should actively promote:

- respect for diversity;
- equality of opportunity;
- the elimination of discrimination in all their activities; and
- good relations between people of different racial groups."¹²

Extract from United Welsh Housing Association's Corporate Strategy

3.1.2 Objective: Support growth by investing in our communities

Targets:

- For all new development schemes review opportunities for adding value through community investment work looking at social inclusion and sustainability alongside the financial appraisal;
- Develop and implement robust social inclusion clauses for all new development contracts;
- Respond pro-actively to non-housing activities within the Heads of the Valleys;
- Promote, through integrate, the developer of local trade skills.

¹⁰ Regulatory Code for Housing Associations Registered in Wales, Welsh Assembly Government, March 2006.

¹¹ Ibid, page 4.

¹² Ibid, page 15.

3.4 Community Strategies

All local authorities are expected to work with partners (including local and/or regional RSLs) to produce a community strategy. These vary in style and content between authorities; however they are not usually drafted as a basis for supporting the inclusion of targeted recruitment and training matters in the partners' procurements or other agreements. This may arise because a range of partners are involved in the drafting process, including some (e.g. Jobcentre Plus, the Learning and Skills Council and Connexions) to whom the approach is not relevant, and some to whom it is not a current priority (e.g. NHS Trusts – even though TR&T would help reduce demand for their services).

RSLs are often involved with local authorities in developing the community strategy and the following text could be considered for inclusion in order to provide a policy underpinning for the inclusion of TR&T and other social issues in their procurement contracts and other agreements:

"The Partners will continue to use all of their powers, wherever they can, to do anything they consider will promote or improve the well-being of the area. Steps to be taken include:

- securing representation for black and ethnic minority communities in employment at all levels that is equivalent to their representation in the local population;
- developing a workforce that is highly skilled and well motivated and can truly meet the skill needs of the economy;
- ensuring that employers maximise their local recruitment, including the provision of training and support to new entrants and returners to the labour market; and
- providing residents with the skills to compete for the employment created by new investment in public services and private enterprise, and enabling them take up sustainable employment opportunities.

3.5 Value for Money

Definition of Value for Money	Definition of Best Value
... the optimum combination of whole-life costs and quality (or fitness for purpose) to meet the user's requirement. (OGC 1998)	... make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to combination of economy, efficiency and effectiveness (1999 LGA s.3(1))

Value for money (VfM) is one of the core requirements of good procurement set down by Government. 'Best Value' introduces an additional dynamic for local authorities: their procurement is expected to produce 'continuous improvement'. The question of whether a tender provides VfM (or best value) has to be judged against the requirements in the specification, and those alone. So if TR&T requirements are included in the procurement process because this part of the 'quality' the purchaser is seeking then they should form a part of the tender appraisal, even if this is given a low weighting.

Conversely, if TR&T requirements are not included in the Contract Notices and the specification they should not form any part of the award process.

3.6 Affordability

The questions of affordability and VfM (or best value) are therefore different. However, both are best addressed through an early consideration of what TR&T requirements should be included in order to meet the purchaser's policy objectives – including social policies and service improvement policies – and how these can be designed so they fit with the resources available.

There may be an assumption that including TR&T requirements in development agreements will deter private sector investment. This is based on an assumption that these requirements will add to the developer's costs. This need not be the case. Indeed, the expansion of the construction labour market will help contain construction costs and encourage development: if costs rise faster than the property prices then developers will delay their investment.

Until the Community Benefit in Procurement pilot study there was not sufficient evidence of the impact of including TR&T requirements in a contract on VfM. However, based on scoring of 344 PQQs and 84 TR&T Method Statements, the Glasgow Housing Association case study indicates that:

- the inclusion of TR&T requirements at all stages of the procurement did not deter bidders;
- the bidders with the highest scores overall – at both PQQ and tender stage – were those that also scored highest on the TR&T requirements.

In each case the community benefits requirements helped the contracting authorities to achieve their policy objectives without additional cost to the contracts.

Source: 'Community Benefits in Public Procurement', the Scottish Government, Edinburgh 2008, page 22.

This section will outline:

- How to approach developing a **Procurement Strategy**
- How to include TR&T requirements throughout the **procurement process** (including **model text** that can be used)
- How to **set** and **monitor** targets
- Employing a **Champion** to ensure TR&T requirements are met

4.1 Introduction

This section provides guidance on using TR&T requirements throughout the procurement process, from the initial policy path route map through to the monitoring and evaluating role.

It is recommended that TR&T (and other social issues) in a specification/contract should be part of the '**core elements**' of what is being purchased. This is a matter for the purchasing authority to decide on the basis of its powers and policies, but note that the core elements **must be referred to in the Contract Notices** (see below), and the requirements should not be drafted in a way that disadvantages non-local bidders, for example by requiring 'local' recruitment or supplies.

It is important that each purchaser decides if and how to include social issues in their procurement through each of the following steps:

- adoption of clear policies;
- creating a budget for the activity, that could cover facilitation and advice, monitoring and progress-chasing, and contributions to training costs;
- the business case for the procurement;
- the OJEU Contract Notice;
- the Prequalification Questionnaire;
- the Specification and the Invitation to Tender/Negotiate/Participate in Dialogue;
- the Contract Conditions;
- the award process (where the social issues are core requirements); and
- Contract implementation (including monitoring).

There may be circumstances where TR&T is included as a non-core element, for example because reference was not included in Contract Notices already issued, or because the purchaser has concerns about compatibility with standard documentation. In these circumstances the TR&T and other social issues can be included in the specification and contract conditions but should not be considered in the award of the contract. It is legitimate to include questions relating to TR&T at the PQQ stage where TR&T is a contract condition: the purchaser needs to know that the contractor is capable of delivering the contract conditions. For situations where TR&T has not been incorporated into the procurement process, template 5 in Resource 3 provides a non-contractual protocol that can be used to obtain voluntary commitments.

Most case law on social issues in procurement relates to the question of how far a non-core matter can influence the award of a contract. The best advice is that it should not. Case law supports the approach that it is for a purchaser to select the core requirements of the contract, based on their powers and policies, provided that these are not drafted so that they disadvantage non-local bidders.

The RCT Homes 'Hard Wired' Inclusion Programme

RCT Homes is seeking to achieve its social inclusion commitments through the supply-chain to its contractors – both works subcontractors and manufacturing/service suppliers. Its intention is to maximise the involvement of local employers in the delivery of its capital investment programme: employers that can offer sustained employment to local people.

The approach relies on two promises of cooperation:

- main contractors and suppliers agree to recruit local social enterprises and SMEs to deliver the works and manufactured supplies; and
- local social enterprises and SMEs agree to recruit, train and employ long-term unemployed local residents to help deliver the RCT-linked contracts – working with the Heads of the Valleys Construction Jobmatch (see below).

RCT Homes has made a commitment that 15% of the workforce engaged in its supply-chain and delivery of works will be new entrants into the construction sector. The tender evaluation criteria placed 15% of the available marks on contractors' proposals for social inclusion.

The tender process has been designed to ensure that local companies can compete fairly with larger concerns by removing traditional obstacles, such as turnover tests, and by allowing contractors to bid for work according to their size rather than the overall volume of work required.

A programme of mobilisation of the local supply-chain was undertaken, that included:

- awareness events to 'ready' contractors and introduce them to support agencies;
- introductions to the main contractors;
- training on 'open book accounting';
- engagement with local training providers; and
- monitoring and reporting arrangements

The mobilisation programme resulted in 144 expressions of interest from contractors, of which 90 submitted PQQs and 41 were invited to tender. At all stages the representation of locally based businesses was between 30 and 60%, demonstrating that the design and management of the process successfully created a 'level playing field' where smaller, local contractors could compete purely on quality and price.

£97m of contracts have been awarded under open book, PPC2000 frameworks. A special SPC2000 contract has been devised to protect subcontractors and enshrine the principles of partnering within the supply chain. Contractors have commenced on site and are currently undertaking pilot schemes ahead of the full programme, due to commence at the end of July 2008.

The majority of work has been awarded to locally based companies with a locally oriented supply chain being adopted by the strategic partners. Five of the six appointed strategic partners are local, with the sixth setting up a new Welsh base and having a commitment to use 70% local subcontractors. So the RCT Homes approach to supply chain development has secured a fully-localised supply chain, including:

- favourable pricing and warranties on goods supplied to local merchants;
- guaranteed merchant development and support;
- a proposal – currently under consideration - to establish a locally based kitchen assembly unit;
- new branches to be opened by two building and electrical component suppliers and expansion within other pre-existing merchants operations; and
- work-based training opportunities for apprentices.

120 new construction-related jobs (24 apprenticeships and 96 other jobs) are expected to be created through the first phase of the major works: strategic partnering contractors will provide 59 opportunities, and the supply-chain 61 opportunities.

The open book approach makes fully transparent all investment in training, employment and social benefits.

Contact: Andrew Lycett, Chief Executive, RCT Homes, Ty Pennant, Mill Street, Pontypridd, CF37 2SW, Tel. 01443 494406, Email: AndrewL@rcthomes.co.uk

4.2 Procurement Strategy

The following provides text that could be included in a procurement strategy or corporate strategy. It should be noted that there is no specific reference to the locality from which the beneficiaries will be drawn, but it is legitimate for a public body to have a policy of producing local benefits from its procurement and other activities provided that the actions it takes do not disadvantage non-local companies and do not breach UK equal opportunities legislation.

Targeted Recruitment and Training and Supply-chain Opportunities

[.....] (enter name) is committed to achieving economic, social and environmental well-being for its residents and implementing the Community Strategy so as to ensure a better quality of life for everyone, now and for generations to come. To achieve this it commits to the following actions to the fullest extent possible within the relevant legal and policy frameworks and the available funding:

- I. to consider what recruitment and training, equal opportunities and supply-chain opportunities could be obtained from each works contract with an estimated value exceeding [£...m] and each services contract with an estimated value exceeding [£.....];
- II. to include training, equal opportunities and recruitment requirements, and supply-chain opportunities in its service requirements, where it considers this appropriate;
- III. to include other social and environmental matters in its service requirements, where it considers this appropriate; and
- IV. to use these requirements in all stages of the selection and contract award process, and as contract conditions.

The threshold values mentioned at point I above have been introduced as a guide to client officers. They should be expected to consult with the purchaser's training and employment officers and other parties in relation to all contracts over these values. The focus should be on larger contracts that will maximise the community benefits from the officer time invested.

The proposed text is intentionally non-specific in the benefits that will be sought. For example, it does not specify that the purchaser will seek to obtain opportunities for specific communities – long-term unemployed, young people, ex-offenders, refugees or people living in particular areas. This is because the strategy should be durable: it should be capable of lasting for a long time without needing to be amended as priorities change.

4.3 Procurement Process

Stage 1: Business Case

To be able to justify a business case fully, a contracting authority should draft a **high-level definition of its project requirements to ensure that there is a clear and agreed understanding of the business goals and what is required of contractors to meet those goals.**

Before embarking on a procurement strategy a contracting authority should assess the extent to which the procurement could deliver TR&T and other social benefits (as a contribution to the purchaser's policies and strategies) and work this into the business case for the procurement.

In preparing a business case a contracting authority must consider many issues, including:

- confirming that it has the powers and policies to undertake the procurement, including the desired social issues;
- ensuring that financial provisions are made for the entire project, including social outcomes such as training needs;
- ensuring that all of its social objectives can be quantified and measured, which will help evaluate how far they represent value for money; and
- identifying the intended beneficiaries of the TR&T requirements and at what scale, and checking that the requirements can be delivered in the context of the supply-side resources and the facilitation and monitoring arrangements.

Once a business case has been developed, a contracting authority should be able to appreciate all the issues involved and what will be required of a contractor.

Once a contracting authority has prepared its business case for procurement, it must be able to confirm that the case is robust and feasible. For social considerations this will mean ensuring that it is sufficient to achieve the contracting authority's objectives (including any social or environmental issues) and that it is affordable and deliverable.

Stage 2: OJEU Contract Notice

The use of social considerations in contract conditions by a contracting authority must be mentioned in any OJEU Contract Notice. The following model wording is suggested, typically under the section in the OJEU Contract Notice headed "Additional Information".

"Under this [procurement / project] the [contractor / developer] is required to participate actively in the economic and social regeneration of the locality of and surrounding the place of delivery for the [procurement / project]. Accordingly contract performance conditions may relate in particular to social and environmental considerations."

Stage 3: PQQ

In any pre-qualification questionnaire the following questions can be used in the section of the questionnaire that assesses technical capacity and ability:

Targeted Recruitment and Training and Supply-chain Opportunities

1 Please give examples of your involvement in each of the following:

generating employment and training opportunities for long-term unemployed people;
providing training opportunities for young people and retaining them after the completion of training;
promoting supply-chain opportunities to new and small enterprises;
the development of trade skills in your existing workforce; and
equal opportunities recruitment procedures.

What was your exact involvement in each of the above activities?

2 Which of the examples you have cited have been more successful, and which have been less successful, and why?"

Stage 4: Specification

The specification sets out the detailed requirements for the contract, including the social/community benefits (ideally based on the business case). Examples of possible text for inclusion in the specification are included as templates 1-4 in Resource 3.

While the details will vary from contract to contract there are a number of common elements that are included in 'community benefit' specifications. These include:

- some reference to the policy or legal underpinning for the requirements;
- measurable performance indicators either within the specification or in an addendum, relating to:
- the required outputs, and/or
- a recruitment process that has to be followed (e.g. for site vacancies);
- monitoring and performance review requirements; and
- a disclaimer to protect the client from 'claims' relating to any supply-side interventions they make.

As with all other elements of the specification, care will need to be taken in determining **what training and employment (or wider community benefit) requirements are appropriate and deliverable**. These need to be drafted into clauses that are unambiguous and provide a 'level playing field' in the tendering process for contractors. A key element of achieving this 'level playing field' may be the availability of supply-side agencies that can ensure equal access to appropriate trainees, employees and small firms for contractors, wherever the latter are based.

Stage 5: Award Process

It is good practice to ask bidders to submit with their tender (or response to an invitation to negotiate/participate in dialogue) a **method statement setting out how they will achieve the social requirements. Where the TR&T or other social issues are core elements of the procurement this method statement can be scored, and this score included in the qualitative assessment of the tender.** Where the social requirements are non-core elements the method statement should be disregarded in the award process but can be used in pre-appointment clarification where implementation is a contract condition.

Where the social/TR&T elements are to be scored a scoring framework should be used to ensure a robust and fair evaluation of method statements. This should be developed by or with people with good knowledge of training and recruitment matters; these should also form part of the tender evaluation team.

A scoring framework:

- lists the subjects where a response from the bidder was expected, with each subject given a weighting (number of points); and
- lists the types of actions that were expected to be offered under each subject, with each action then being given a weighting – a breakdown of the points available for that 'subject'.

A suggested template is provided at template 6 in Resource 3.

The scoring framework should be tested by the evaluation team and then used to score each tender submitted. The resulting scores are then incorporated into, say, a 30% 'quality' element of the evaluation. In procurements undertaken by Glasgow Housing Association social requirements contributed 5% of the quality tender evaluation scores – roughly 1.5% of the overall score. RCT Homes¹³ has argued that to influence bidders' behaviour the weighting needs to be higher: the employment and supply chain opportunities were 15% of the overall award scores for their initial procurements.

Whichever method is used pro-forma method statements should be issued to ensure that all bidders answer the same questions and provide the same core information. This helps ensure a level playing field is put in place between bidders and reinforces the message that these are not voluntary or "best endeavours" elements of the contract, but contractual requirements.

Stage 6: Contract Conditions

Specific contract conditions can be developed on a project by project basis. In procurement processes that allow scope for negotiation (for example on the basis of a service delivery plan or method statement) specific clauses can be incorporated into contract documentation to tie the contractor/developer to specific targets and outcomes.

The model clauses in template 7 of Resource 3 can be used as a starting position for all procurements, including those covered by the EU rules. They are drafted on the basis that the contractor will have supplied a service delivery plan/ method statement satisfactory to the employer concerning how it will generate employment opportunities.

¹³ RCT Homes is the RSL established by a stock transfer from Rhondda Cynon Taf County Borough Council

4.4 *Setting and monitoring targets*

Considerable thought needs to be given to what TR&T requirements are included in the procurement process – ideally at the business case stage. The key questions in determining this should be:

- what is the minimum size (in terms of duration and value) of contract where TR&T outcomes will be sought?
- what are the priority 'community benefits' that can be addressed through this particular contract?
- what are the cost implications of including different community benefits, and different output targets, and how are these costs to be met?
- what community benefits can be included without putting at risk other key priorities (such as value for money, quality and the timetable for completion)?
- what is the best way of measuring the community benefit requirements – for both target setting and monitoring?
- and how will the client team manage monitoring information and who will undertake progress-chasing on the community benefit elements?

Appropriate Beneficiaries

Most contracts are complex and multi-faceted. The TR&T requirements add to this complexity and if they are going to receive due consideration – from both the contractor and the client officers – they need to be few in number and well focussed. There are three questions to ask:

- who are the intended beneficiaries and what are their needs?
- which of these needs can be met through this particular contract?
- is there a balance to be struck between the needs of the beneficiaries (e.g. for training and support) and the number of trainees that can be employed on the contract?

A common issue is that the priority beneficiaries for public bodies involved in the local 'supply' of trainees and job-seekers may not have the skills or aptitude required if the contractor/supplier is going to integrate significant numbers into their workforce. The best mix of beneficiaries may include both school and college leavers and long-term unemployed adults that have been through pre-recruitment training.

In the approach set out in Resource 3 it is left to the contractor to obtain information on the supply of training and trainees and other job-seekers, and then put together a mix that will deliver the employer's requirements in an affordable way. The employer's influence on the mix of beneficiaries is limited to the provision of 'supply-side' information, seeking 'clarification' in the pre-contract discussions or negotiating changes after appointment. This 'hands-off' approach is necessary to protect the purchaser from financial claims related to the recruitment of the target beneficiaries by the contractor, but it may not be fully understood by the supply-side agencies.

Controlling Costs

The cost of incorporating TR&T requirements – to the contractors and therefore often to the client – will vary with the requirements. Key variables include:

- whether the beneficiaries have to be employed or just accommodated for unpaid work experience or a work trial;
- whether employed beneficiaries can be recruited from a scheme that includes a funding package, vocational training provisions, training management and trainee support;
- the degree of pre-site training that has been completed;
- access to industry training resources for apprentices and workforce training;
- the provision of good contacts or good quality information about the training, support and funding that is available from public and industry sources to help the contractor deliver the requirements; and
- the way the requirements are phrased: are the bidders given the opportunity to price for the TR&T elements – and if so is this the net cost after deducting grants etc. – or are they told that they must find any additional resources?

Good contractors should know about the training regimes in their industry through the relevant Sector Skills Council or other sources and have contacts with colleges and other training providers, and should therefore be in the best position to access the resources they need.

Setting Targets

To get acceptance of TR&T targets it is important that members of the procurement team are involved in setting them. This will help them to assess the risk to other key requirements like quality, timely completion and cost.

It is possible to use quantity-surveying techniques and industry indices to estimate the capacity of a contract to absorb trainees. Building surveyors will be able to advise on the approximate cost of each new development and the proportion of this cost that will be spent on labour. The latter will vary between types of building and between trade areas. By dividing this value by an assumed average weekly labour cost it is possible to calculate (roughly) the number of person-weeks required to deliver the contract. From this one can see the implications of requiring a certain percentage of the total person-weeks to be delivered by new trainees.

Involving the purchaser's surveyor in this calculation will ensure that they understand how any target has been arrived at.

A more sophisticated database model has been developed by Davis Langdon Management Consulting amongst others and can be obtained under licence.¹⁴ However, at present this has not been developed for WHQS work, and it may therefore be appropriate for a forecasting model for this type of work to be commissioned.

The key advantage of the forecasting model is that it gives a breakdown of person-weeks between trade/skill areas. This allows a more sophisticated consideration of targets. For example, in a 'trade' activity one apprentice may absorb 'new trainee weeks' for several years, which impacts on the number of people that would be recruited. In some activities the workload may be relatively small and the trainee-weeks have to be disregarded because they would provide little value for a new trainee. On the other hand it may be possible to identify a work activity where it is possible to get opportunities for a significant numbers of beneficiaries, for example by providing limited-duration employment for trainees that have completed a bespoke pre-recruitment training programme, perhaps as a general operative. So the more detailed the information the easier it is to work out how to set achievable targets.

¹⁴ The Davis Langdon Skills Forecasting Model. Contact David Crossthwaite on 020 7061 7840

Using a formula or database to forecast the likely opportunities that would arise from a contract also provides the option to set the targets as a number of weeks' employment rather than just a percentage of total weeks. This has advantages in the deposit sum approach (see Resource 3) and can make monitoring easier.

The above discussion relates to the capacity of the contract to take on the target beneficiaries, especially new entrants. However, it is also necessary to consider the supply of suitable beneficiaries:

- are there sufficient people from the target communities that want to be engaged? and
- are there the training and facilitation resources to enable contractors to deliver this volume and type of output?

Measuring Community Benefits

The primary need for an appropriate 'measure' is in the setting of TR&T targets and the monitoring of the contractor's performance in recruitment, training and providing supply-chain opportunities. It aids the adoption and delivery of community benefit / TR&T requirements if these requirements can be specified in a clear way and be easily monitored. Numerical targets are the easiest to monitor. Requirements need to be capable of verification to be permitted under EU law.

Targets can be set in a number of ways, including the following:

- a percentage of the total labour time required to deliver the contract;
- a specified number of beneficiaries (for example, employees, trainees, work placements, additional suppliers);
- a specified number of weeks of engagement in the contract for beneficiaries;
- all opportunities to be made available to named agencies;
- a specified number of beneficiary-weeks per a specified amount in contract value;
- a specified number of beneficiary-weeks per unit of housing or square metre of commercial floor space.

Glasgow Housing Association (GHA)

GHA is investing roughly £200m per year in Decent Homes works through framework contracts. These contracts include the following condition that must be delivered in a cost-neutral way:

10% of the person-weeks required to complete all of the works (including those delivered by subcontractors) is to be delivered by new entrants that have an apprenticeship, trainee or employment contract with the contractor or a subcontractor and are engaged in a training programme that is accepted by GHA.

To monitor this requirement GHA set up a database that records the total person-weeks utilised by each contractor, the person-weeks delivered by 'new employees, and the proportion of these that are delivered by people that are 'new start trainees' - split between apprentices and others. GHA requires every worker to be registered at the commencement of their engagement using a pro-forma, and then a weekly listing of the time each registered worker is on site. This data allows GHA to run detailed reports on the outcomes for each contractor, and undertake detailed analysis of the beneficiaries (e.g. by area of residence, personal characteristics, trade, or training being undertaken).

After 30 months GHA has achieved the outcomes shown in the table below. The outcomes are all close to, or above, the 10% 'new entrant trainee' target set, and two activities are 50% above the targets. The fact that nearly 80% of the 13,000 beneficiary-weeks are provided by apprentices (rather than general construction operatives and short-course trainees) may be the result of the 'cost-neutral requirement', as there are established funding routes for apprentices but not for other new entrants.

GHA New Entrant Trainee Outcomes June 2008 (All figures are in person-weeks of employment).

Contract Name	Employee	New Starts*	Apprentice	Trainee	Total New Entrants	% New Entrants
			(A)	(B)	(A + B)	
Electrical Rewiring – Domestic	24,141	8,281	1,842	364	2,206	9.14%
Environmentals	4,157	891	28	602	630 1	5.16%
Kitchens & Bathrooms	34,675	9,089	4,508	809	5,317	15.33%
Roofing & Cladding	40,434	7,159	4,021	867	4,888	12.09%
Total	103,407	25,420	10,399	2,642 1	3,041	12.61%

Source: GHA July 2008 Contact: Helen Jackson, Programme Coordinator, Regeneration Team, Glasgow Housing Association, Third Floor, 177 Trongate, Glasgow G1 Tel 0141 274 6491 E-mail Helen.Jackson@gha.org.uk

Benchmarks

There is limited robust information on the outcomes from contracts with TR&T requirements to be able to report reliable benchmarks. This is in part because of the varied approaches that have been used to both specifying requirements and measuring outcomes. Some useful, indicative, outcomes are given below:

- At Glasgow Housing Association nearly 15% of the time required to deliver their social housing Decent Homes standard investment is being delivered by new entrant trainees, against a 10% target, at no cost to the client;
- GM Procure has a target of 52 weeks' employment for a new trainee for each £1m in contract labour cost on Decent Homes standard framework contracts, and is on target to achieve this in the second year of contract delivery – equivalent to about 10% of the total labour requirement;
- A study of five construction projects in north east England that had used contractual leverage identified an average of one new trainee per £750,000 on construction spend (Amion Consulting for the National Employment Panel);
- In Stirling the Raploch Urban Regeneration Company obtained 104 weeks' site experience for eight trainees on a £1.3m new road contract (roughly 10% of the labour usage) – the trainees were 'free on site' but received on-site and off-site training;
- In the early 1990's at Waltham Forest Housing Action Trust 20% of the person-weeks required to deliver new-build social housing was being delivered by new trainees recruited from the Estate where the works were being carried out;
- At Kings Cross Central, a twelve-year mixed commercial and residential development the developer has accepted a Planning Agreement requirement that 7.5% of the total construction labour requirement will be delivered by new trainees recruited from a named source.

On the basis of this data a minimum target of 52 new entrant trainee-weeks per £1m in construction spend would seem appropriate for the WHQS work, with the potential to push this up to 78 weeks per £1m spend for new build work. These targets need to be increased where the contract is principally for labour, for example where the main components are being purchased by the client rather than the contractor.

Setting and monitoring the number of 'new jobs' in construction is problematic because many jobs on site are of short duration and it is difficult to distinguish between existing employees – including those that are self-employed - transferred to the site and workers recruited to the site, especially by subcontractors. It is recommended that targets be set as 'person-weeks of work' rather than jobs.

GM Procure 2007/08 Key Performance Indicators

Increased Sustainable Employment		Annual Target:	Actual to January:
GM Procure Programme Contractors recruit new employees	Number of employees recruited per programme	2 per £1m labour contract (target 07/08 = 54)	55
To ensure new employees are retained by the employer	% retention over an 18 month period	80%	94%
Quality of Employer and Training Outcomes		Target:	Actual:
New employees work towards an appropriate qualification	% of trainee workforce working towards a minimum NVQ Level 2	100%	100%
New employees develop broader skills and attributes	An appropriate post-NVQ 2 personal development plan (PDP) is in place for each trainee	100%	100%
<p>Source: GM Procure, Manchester. 2008</p> <p>Contact: Mike Brogan, GM Procure, Orchard Court, Orchard Place, Timberley, WA15 7XH Tel. 0161 968 0377</p> <p>E-mail Mike.Brogan@gmprocure.com</p>			

Monitoring & Progress-chasing

Monitoring requirements need to take account of:

- how the TR&T requirements are specified and measured;
- the requirements of external resource providers; and
- the resources available for checking and progress-chasing.

The monitoring requirements should therefore be considered early – ideally at the business case stage and when targets are being set, and they should be included in the specification to give the client the right to the information. The provision of data that the client does not intend to use should not be required from the contractor.

The following points should be considered when monitoring TR&T elements in contracts:

- how the monitoring of data can be verified, especially in the context of the Data Protection Act 1998 that may limit the 'personal information' that an employer can provide to a third party like their client¹⁵.
- in a small one-off contract it is relatively easy to monitor the outcome, but for an extensive programme of works the issue of monitoring is of quite a different order and may require investment in a bespoke database system that produces management reports on the overall performance and the performance of each contractor. This would produce robust output information.
- it is important that the client or their agent responds to the monitoring information – or the lack of information. Contractors and suppliers will respond to the priority that their client gives to different elements of the contract. A degree of attention to TR&T requirements will be given by the client's team through site meetings etc., but this will be constrained by other concerns they have, for example on quality or speed of progress etc. It is important that progress-chasing on TR&T is done by a person for whom this is the main priority.

A Systems Response

There are benefits in adopting a systematic approach to incorporating TR&T. These include:

- it helps ensure compliance with procurement frameworks and good practice;
- the procurement team will develop skills in setting appropriate targets and scoring responses in the award process;
- an appropriate output monitoring and reporting arrangement can be set up and resourced; and
- external funding and services can be arranged so that contractors are better able to deliver the requirements at little cost to the client.

The Construction Employment Integrator (CEI)

Ten local authorities in north east England have developed the CEI as a systematic approach to obtaining construction jobs and training opportunities from major developments in their areas. This was developed as a pilot by the National Employment Panel (NEP) - sponsored by the Department of Work and Pensions - and is now being rolled-out across the UK by Working Ventures UK, the NDPB successor body to the NEP.

The CEI has a multi-agency board that includes representation from construction firms, Construction Skills, local authorities, Jobcentre Plus, the Learning and Skills Council and other partners. This aims to provide strategic direction and ensure that training and job-matching provisions are tailored to the needs of upcoming construction work.

The CEI has access to a number of tools which are used by its team, economic development staff and 'contract gatekeepers'. These include:

- a construction skills forecasting system;
- a toolkit that provides the legal information and model clauses for including TR&T requirements in procurement of contracts, development agreements and planning agreements; and
- a job-matching and beneficiary tracking database.

The regional CEI operates with four staff, who work in partnership with the employer liaison officers of the participating authorities.

¹⁵ The individual needs to give their employer permission to share personal information with the client.

The initial evaluation of the approach for the NEP by Amion Consulting demonstrated good value for money, with the average cost per additional job (for a DWP claimant) of £2,775, which compares well with other DWP initiatives. However, implementation has required changes in policy and practice, particularly within local authority planning and procurement functions, and these have inevitably occurred at different rates in different authorities.

Contact: Rod Varley, Project Manager, North East Construction Employment Integrator, Hartlepool Enterprise Centre, Brougham Terrace, Hartlepool TS24 8EY. Tel 07776 235520 E-mail rodneymarley@aol.com

4.5 *A TR&T Champion: the critical component*

A key element of the system is a champion for the community benefits or TR&T requirements who knows what can be expected and routinely supports the work of the procurement team, the contractors and the community benefits "supply chain" to ensure that the requirements are met.

The decision to include TR&T requirements (and what to include and at what scale) will rest with the officers of the client body. The key issue in obtaining leverage over works contracts is therefore the support of the client officers. This will take time to achieve and needs to be approached systematically, prioritising:

- the purchasers with the largest annual expenditure on appropriate works,
- the contracts that are most suitable for trainees and new entrants;
- 'term contracts' since these can provide longevity; and
- contracts that have the closest policy fit e.g. neighbourhood regeneration and housing.

It can take time to access the right person and win their support. It will be necessary to address legitimate concerns about the potential impact on cost, quality, timetables, and contract monitoring and management. It will be important for the champion to focus efforts on the most willing participants, and then use success with these partners to obtain the interest of others. Mutual benefit is an important outcome for most purchasers. This might include addressing their concerns about the availability of skills to carry out and then maintain their works, or the opportunity to achieve additional policy outcomes at no additional cost to their budgets. The work involved in obtaining and sustaining the goodwill of purchasers should not be underestimated. Given other errors in the documents, it is unclear whether or not this editing is intentional.

United Welsh Housing Association has engaged a Workplace Coordinator to undertake this role.

Job Description of the Work Placement Co-ordinator at United Welsh Housing Association

Work Placement Co-ordinator

Responsible to: Director of Development
Overall purpose: To co-ordinate construction skilled work placements and work-based training opportunities with United Welsh contractors and supply chain.

Duties

Sourcing the Beneficiaries

1. To identify work based training and development projects/suppliers
2. To develop working relationships and plans for placements with work based training and development projects
3. To identify and advise training and development projects on appropriate training routes and assessment criteria for beneficiaries
4. To liaise with training and development projects in the resolution of any issues arising from the beneficiary, including beneficiary attendance and performance
5. Ensure that each beneficiary meets the criteria agreed with the training and development project
6. To secure any additional support services required for beneficiary progression

Providing and developing the workplace experience

7. To identify and develop plans for placement opportunities for beneficiaries with contractors and the supply chain within Heads of the Valleys
8. To promote the support services, such as JobMatch Learn2Live project to United Welsh supply chain (contractors and material suppliers) and external employers where appropriate.
9. To liaise with United Welsh contractors to identify skills gaps within various construction sectors
10. In conjunction with the contractor, co-ordinate health and safety compliance and checks
11. To ensure that an appropriate induction programme is developed by our supply chain and contractors for use on the placements
12. To liaise with the contractor in the resolution of any issues arising from the placement, including beneficiary attendance, training support and performance.

Co-ordination and Marketing of Service

13. Ensure up to date records and data is kept of placements secured and beneficiary performance and support
14. To prepare and provide regular monthly reports to Director of Development on beneficiary progress
15. To identify and develop opportunities to market United Welsh as a training opportunity to potential beneficiaries, including job fairs
16. Work with Marketing and Communication manager to promote the opportunities available
17. Manage the budget allocated to this function
18. Comply with United Welsh's Equality and Diversity Policy and all other policies and procedures.
19. Carry out any other duties as required by the Director of Development

Contact: **Michelle Smith**, United Welsh Housing Association. Ty Cennydd, Castle Street, Caerphilly, CF83 1NZ.
Tel. 02920 858100 e-mail msmith@UWHA.co.uk

4.6 Summary

- The client should decide whether the TR&T and supply-chain requirements are core elements of the contract, based on their powers and policies;
- wherever possible these requirements should be 'core' and should be referred to in the contract notices (for example, a contract would be described as being for 'upgrading to kitchens and relevant training and employment'), and reflected in the Pre-qualification Questionnaire (PQQ)
- the TR&T and supply-chain requirements should be ideally considered at the business case stage;
- the selection of the TR&T and supply-chain requirements should take account of:
 - the capacity of the contract to absorb trainees and provide the community benefits;
 - the resources available for training and other 'supply-side' support;
 - the resources available for monitoring and progress-chasing; and
 - the needs of the target beneficiaries;
- include the provision of monitoring information in the specification and provide resources for handling and responding to this;
- develop a standardised 'system' that contractors and suppliers can get used to delivering; and
- identify or engage a 'project champion' to drive the approach.

This section will outline:

- The importance of **engaging** with supply-side organisations
- The **support** that they can provide to your organisation
- The importance of the **facilitation role** throughout the procurement process
- The **monitoring outcomes** of using TR&T

5.1 Importance

'Supply-side arrangements' include trainee management and support, recruitment and job-matching services, access to funding for training, and supply-chain information. These arrangements are very important for the inclusion of TR&T in contracts and other agreements because:

- they can eliminate or very significantly reduce the cost of implementing the requirements: costs that are otherwise borne by the client for the works or the vendor of property under a development agreement;
- the potential that the requirements can be delivered in a cost-neutral way makes it much easier to obtain support for the proposals from the 'gatekeepers' to the contracts and agreements;
- ensuring that the recruitment of workers, trainees or additional suppliers is done through agencies that focus on recruitment from local communities provides a means of targeting the benefits without specifying 'local' recruitment; and
- good supply-chains for people from the target communities will make it easier for contractors to deliver their obligations, which will improve outcomes.

Local Supplier Development Project (LSDP) & Contract Shop

The aim of LSDP is to assist Welsh-based SMEs to win contracts. It can play a critical 'supply-side' role in assisting RSLs and LAs in Wales to target the supply-chain opportunities that arise from their procurement.

This can work through two mechanisms. First an LSDP 'supplier champion' will organise 'meet the buyer' events and provide 'how to tender' workshops for local companies to help them bid for contracts and subcontracts. Secondly, they encourage Welsh SMEs to register with their website www.contractshop.co.uk. Developers and main contractors looking for a local supply-chain can then register their contract/supply opportunities with Contract Shop and these will be automatically notified to suitable firms that are registered on the site.

In its first four years LSDP has held over 250 events, been in contact with over 20,000 businesses, and played a role in over £70m in business won by Welsh firms. Contact: info@contractshop.co.uk

5.2 Supply-side Services

The availability of supply-side services should be one factor influencing the TR&T requirements that are put into contracts and agreements. To specify outcomes for which there are poor supply-side arrangements and therefore potentially greater cost implications will make it more difficult to obtain 'gatekeeper' support for the requirements and less likely that the contractor will succeed in delivering the requirements.

For each route into the training or work it is important to ensure that each step on the ladder is in place and resourced.

Steps on the ladder	Possible Actions
Initial recruitment and assessment	Outreach work. Taster sessions. Work with schools. Skill assessments. Profiling possible supply-chain companies, including their speciality, capacity and financial strength.
Pre-recruitment training	Short-course training, including bespoke training for employers' needs. College NVQ 1 courses. Intermediate labour market employment and training. Tendering advice for small firms
Job-matching and supply-chain contacts	Pre-selecting candidates for employers to select from. Work trials. Support for candidates coming off benefits. Support for employer and employee to sustain the job. Providing supply-chain contacts to contractors.
Employment	Continued in-service training. Training management services. Provision of training and accreditation. On-site assessment and recording for NVQ. Grants to cover time off for continued training (e.g. from Construction Skills Wales). Support for employer and employee to sustain the job.
Progressions	Facilitating the placement of trainees with new employers if the first employer is not providing the required training or experience, or if it ceases. Advice on self-employment.

Some of the contracts and agreements will last for several years and the stability of the supply side arrangements is very important.¹⁶

In this context an RSL or local authority seeking to implement the contractual approach to securing TR&T needs to take a lead in the provision of supply-side services. It can work in partnership with other public agencies, but it must ensure that the step-ladder to employment is maintained for its 'priority communities' and that the services are employer-focussed. Part of this role will be to put together additional funding to 'top-up' and under-write the services provided from time to time by other public agencies. This may require a commitment of main-stream RSL or local authority funding and seeking contributions from others to the cost of service provisions; and of course the contractor/supplier may also be able to access industry training funds that are not available to public bodies.

¹⁶ For example, a local authority in Essex is entering into a development agreement that includes TR&T with a 20 year delivery programme.

The JobMatch Model

JobMatch is an employability initiative, originally piloted for Blaenau Gwent in 2004 and extended to Merthyr, Rhondda Cynon Taff, Caerphilly and Torfaen in 2007. It is a partnership arrangement between the local authorities and partners such as JobCentre Plus where individuals (regardless of the benefits they receive) can sign up with JobMatch and receive additional support to help them move into employment.

JobMatch aims to engage with 14,000 people through partnership arrangements and outreach services in communities and to work with employers to offer 10,000 people employment by 2012.

The model deals with people who are not ready for work by ensuring consistent and regular contact with outreach workers. Once engaged, people are encouraged into a variety of pre-employment training aimed at improving employability skills and confidence / motivation.

The next stage is moving work-ready people through an action planning phase to identify their skills, strengths and work parameters and ensuring that they have relevant and up to date skills, training and qualifications. The model offers a free recruitment service to businesses and provides support during the interview and selection process.

Once an individual has moved into work JobMatch supports the business and the employee for 12 months. In addition to career development, Jobmatch also supports the employee financially up to the value of £900 if they are in receipt of basic minimum wage.

Employment Routes

For a small minority of those people who are not immediately work-ready, only an extensive period of time and concentrated support will help them move into work. For these people, who are likely to have significant and multiple barriers to work, an 'Employment Route' is available. For up to 12 months an individual receives basic minimum pay whilst gaining employment experience, plus the opportunity to overcome and manage their barriers (whatever they are) and to undertake training, underpinning knowledge and providing an NVQ2 qualification. This period of time is used to ensure that the person is work-ready, and is followed by concentrated help to become employed. This in turn is followed by 12 months in work support as described above.

Establishing an Employment Route requires the buy-in of a business. The Employment Route designer negotiates with the business to become a host and provide a host environment for the life of the Route. This process helps to identify key skill and training needs for their sector and sets the goals, communication and monitoring processes and the outcomes expected by end of the Route.

Construction JobMatch

Construction JobMatch was launched as part of the Welsh Assembly Government Heads of the Valleys Initiative in 2006. It aimed to focus on the construction sector and make the most of the opportunities expected as a result of the many regeneration activities including WHQS activity. The initiative aims to:

- provide developers/contractors with a toolkit to help them fulfil their obligations;
- source and manage trainees;
- provide appropriate training, job-matching, monitoring and reporting;
- fund trainees 'wherever possible'; and
- provide general recruitment information and support to employers.

Construction JobMatch engages with people who want to work within the construction sector and links with JobMatch to assist with up-skilling and re-skilling potential employees. JobMatch then continues to offer in-work support including career development and mentoring for up to 12 months after employment has started.

Contact Information: Construction Training & Employment Manager, Heads of the Valleys Programme Team, Project office, Ebbw Vale Works, Steelworks Road, Ebbw Vale, NP23 6AA.

5.3 Facilitation

Success in achieving TR&T relies on good facilitation at both the tender/award stage and the contract delivery stage. The facilitator is likely to be from an economic development, regeneration or community development team. This is where the commitment is likely to be strongest; there is knowledge of what training and recruitment outcomes are required, and knowledge and contact with the supply-side (for example, training and job-matching agencies). It is also important that the facilitator has experience of the sector, its contracting processes and training arrangements.

There are six elements to the facilitation role:

- prior to the tendering process, working with the client and the procurement team to identify the approach to incorporating TR&T that they want to adopt, helping them identify appropriate targets, and helping them adopt/develop appropriate wording for the documents;
- evaluating information on training and recruitment provided by potential bidders e.g. in response to a PQQ and providing input into the selection of the firms invited to tender;
- during the tender period, providing briefing to bidders on the TR&T requirements and supply-side resources in an even-handed way;
- setting up a scoring framework for the bidders' responses to the TR&T requirements (the method statements), scoring these and taking part in the award process;
- progress-chasing when the contractor is on site to make sure that there is a good relationship with supply-side agencies and that action on TR&T starts early;
- setting up and managing a monitoring and reporting service for the purchaser; and
- routinely receiving and responding to monitoring information on behalf of the client, including attending site meetings to discuss any problems with the TR&T delivery.

From the above list it can be seen that the lack of the facilitation resources could limit the scope for the proper delivery of TR&T. The facilitation resource may need to be expanded in line with the number of active contracts. It is likely that one facilitator could eventually manage 10-15 contracts with some administrative support. To maximise the benefits it is important to target the facilitation resources at large and longer-running contracts. However, the capacity to service many contracts will significantly reduce if the facilitator also has to do extensive work with training and job-matching agencies to ensure the availability of suitable services for the contractor(s).

5.4 Monitoring, Verification & Reporting

Monitoring and verification are critical issues when TR&T requirements are included as contract conditions. It is important for the client to know what is being delivered, especially where they are paying for the outcomes. Monitoring refers to the supply of information on performance. Verification aims to provide the client with a means of checking the monitoring information.

In a contracting context there is no point in specifying outcomes that cannot and will not be monitored and verified. This risks diverting the effort of the client team and the contractor for little measurable, and probably little actual, gain. **So the decision about what requirements to include in the specification must be influenced by the systems and resources available for the monitoring and verification of outcomes.** This requires choices to be made, and the choices depend on priorities. It is better to include a few requirements and know these are being delivered than to be over-sophisticated in setting targets and then not be able to monitor and verify the outcomes.

To reduce costs a database system could be developed where contractors' monitoring information is fed in electronically, aggregated, and then used to provide site output reports for the client site meeting and for the facilitation officers. If participating RSLs and local authorities can agree on a relatively narrow range of TR&T requirements then it would be possible to develop a central service that receives monitoring data from all participating sites and provides outcome reports to clients, contractors and national bodies. This would also help to develop benchmarks that will increase purchasers' confidence in the targets they are setting. This would have an additional benefit in that contractors would soon get used to the operation of the system.

The monitoring system should include a means of verification. This is much easier to achieve for new trainees from named sources than the notification of all vacancies to named agencies. With new trainees verification can be obtained from the named source and since the numbers are likely to be relatively modest it is possible to require every new trainee to be registered with the monitoring agency. The verification of the vacancies notified may be possible from the named agency, but it is very difficult to know how many vacancies are just filled from other sources and claimed to be existing workers being transferred to the job.

The Data Protection Act 1998 and confidentiality policies in large bodies may prevent some named supply agencies providing any verification information. In this context the purchaser or their agent should make sure they collect the data themselves – see template 1 in Resource 3.

5.5 Summary

- good supply-side services will reduce the cost to both client and contractor and facilitate the delivery of the TR&T and supply-chain requirements;
- supply-side services need to provide comprehensive routeways to training, jobs and contracts for the target beneficiaries;
- clients need to take an active leadership role in establishing and maintaining the supply-side services they require;
- facilitation of the process is critical for obtaining opportunities and maximising benefits; and
- monitoring and verification information must be obtained by the client (or their agent) and responded to; a database system can improve the efficiency of this process.

This section will outline:

- The problem with positive covenants
- A recommended approach to dealing with positive covenants

6.1 Introduction

Development agreements occur when public bodies (and potentially RSLs) enter into agreements with third parties (for example, private sector development companies) to undertake the development of a site or neighbourhood. Typical examples would be the development of commercial or mixed-use sites after public sector clearance, decontamination, reclamation and 'land assembly', or the sale of social housing sites for redevelopment with a mix of social and affordable housing. In these situations the building contracts and end-user leases (in relation to commercial property) will be issued by the new developer, not by the public body. In some cases the party to the initial contract with the public body will sell on their interest in the site to other developers, or they may be restructured or taken over.

There will be occasions where the public body that owns the land or undertakes the initial investment needed to make it suitable for development will wish to ensure that its social priorities (for example, TR&T) are delivered by the developers and end-users of the sites. The disposing body can use a development agreement to tie the developers and/or subsequent site occupiers to achieving the community benefits they regard as necessary.

In this context a key concern in drafting the development agreement is to provide durability in a context where there can often be no assumption about who will develop and who will occupy the development site, or when the development will go ahead.

Most of the obligations under a development agreement are relatively short term, and will be fulfilled by the original landowner and developer. Unless the agreement provides otherwise, the obligations in the agreement will only be enforceable between the two original contracting parties.¹⁷ Problems of enforcement can arise where one party is able to dispose of their contractual obligations by way of assignment, or where one contracting party gets another party to perform their obligations, for example through a subcontractor.

6.2 The Problem of "Positive Covenants"

Most development agreements will have obligations in them dealing with the disposal of land whether by outright sale or by lease. If a public body is selling land and wants to include a 'community benefit' covenant, it faces a problem where these covenants are positive (as a rule of thumb a positive covenant is a covenant which requires someone to spend some money), which may be the case for TR&T. The general rule is that the burden of a positive covenant will not bind anybody who subsequently buys that land.

¹⁷ The old general rule that only a party to a contract can sue on it ('Privity of Contract') is now reversed by the Contracts (Rights of Third Parties) Act 1999, but in practice most contracts reinstate the old rule. It follows that strangers to a contract cannot have obligations imposed on them to which they are not parties.

6.3 A Recommended Approach

In this context there are three recommended approaches to achieving community benefits or TR&T through development agreements and land disposals:

- the land-holder enters into a conditional contract to sell the land, but retains their freehold interest until the TR&T requirements have been achieved;
- the contract to sell the land/buildings includes a requirement that the first purchaser makes a joint application (with the vendor) to the Land Registry to enter a restriction that no disposition is to be registered without the vendor having certified that it has received an executed Deed of Covenant (relating to the community benefits) in its favour;
- the contract to sell the land/buildings includes a requirement that the first developer provides a financial 'deposit sum' on signing of the development agreement (or on a phased basis), which they receive back with interest as the TR&T requirements are delivered.

The latter two have been implemented in a number of contexts in Scotland and England, and appears to be the most acceptable to the officers implementing the schemes, in part because the operation of such 'bonds' is commonplace in development. This is the recommended approach and an example is provided as template 3 (as an addition to templates 1 and 2) in Resource 3.

7. Introduction to the Model Material in Resource 3

To illustrate how TR&T can be included in contracts and development agreements through procurement, model clauses have been developed by Anthony Collins Solicitors LLP. These are included within Resource 3 as a series of templates. These are also available in a format that can be downloaded from www.whq.org.uk/i2i and adopted for use by RSLs in specific contracts. However, care should be taken to ensure that the materials are:

- **compatible with the powers and policies of the procuring organisation;**
- **suitable to the contract;**
- **affordable; and**
- **deliverable from the available target sources/communities.**

The table below sets out the templates included in Resource 3 :

Model Material	Description
1	Basic TR&T requirements suitable for the procurement of a stand-alone contract
2	Basic pro-forma TR&T method statement for tenderers to complete
3	Adaptations to template 1 to incorporate a ' deposit sum ' approach
4	Adaptations to templates 1 and 2 for use in a framework agreement , or for adaptation for use for group purchasing
5	Model TR&T protocol to run parallel to existing contracts, or those in a later stage of the procurement process
6	Model scoring framework
7	Model contract clauses