

## Small and Medium-Sized Enterprise (SME) Participation in Public Procurement

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## Dedication

For Shane and Diarmuid.

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## Plagiarism Declaration

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of Ph.D. in Law, is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

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## Abbreviations

BCC	Belfast City Council
CIC	Community Interest Company
CLG	Company Limited by Guarantee
CPD	Construction and Procurement Delivery ( <i>post 2018</i> )
CPD	Central Procurement Directorate ( <i>pre 2018</i> )
DCC	Dublin City Council
DPS	Dynamic Purchasing System
ESPD	European Single Procurement Document
NCH	National Children's Hospital
NPHDB	National Paediatric Hospital Development Board
NPS	National Procurement Service
OGP	Office of Government Procurement
PCP	Pre-commercial Procurement
PIN	Prior Indicative Notices
SBIR	Small Business Innovation Research
SBRI	Small Business Research Initiatives
SRPP	Socially Responsible Public Procurement
VfM	Value for Money

## Abstract

Small and medium-sized enterprises (SMEs) dominate the Single Market contributing to local employment generation and innovative supplies and services development. Yet, SMEs are continuously disproportionately underrepresented in public markets. On average EU member states spend approximately 14% of their gross domestic product (GDP) concluding public supplies, services and works contracts. EU rules aim to promote cross-border trade in the Single Market by removing the barriers faced by suppliers when tendering for public contracts. This research questions whether the inclusion of social criteria and innovative procedures facilitates SME participation in public contracts. The research questions what impact “the division of large contracts into small ‘lots’; the use of community benefit clauses; the use of subcontractor considerations; and the use of pre-commercial procurement (PCP) procedures” has on SME participation. A cross-border comparative case-study approach is adopted to examine the inclusion of social criteria and innovative procedures in four case studies. The case studies scrutinise the inclusion of social criteria in; a €1.7 billion works contract for the construction of a New Children’s Hospital in Ireland, a £27 million catering, cleaning and ancillary services contract conducted by Northern Ireland’s Central Procurement Directorate, and two PCP competitions conducted by Smart Dublin and Smart Belfast. The findings show how; the use of community benefit clauses and the use of lots facilitated a social enterprise in winning a proportion of a £27 million services and supplies contract; the use of subcontractor considerations resulted in the awarding of €500,000 of subcontracts to SMEs on a €1.7 billion contract within six months of contract commencement, and the use of PCP facilitated the participation of nine SMEs in public contracts. The thesis argues that public procurers should not to treat SMEs as a homogenised group and should design appropriate and proportionate policies for different forms of businesses, including social enterprises and innovative start-ups.

## Chapter One: Introduction

### 1.1 Overview

Public procurement is fast becoming a key instrument used to achieve smart, sustainable and inclusive growth in the European Single Market.<sup>1</sup> The EU public procurement market accounts for approximately € 2 trillion per annum, representing 14% of EU gross domestic product (GDP).<sup>2</sup> Public procurement should be used to secure high-quality public services and goods while ensuring the efficient use of public finances.<sup>3</sup> It may be used to drive innovative, energy-efficient, and socially-inclusive economies.<sup>4</sup> This research is interested in the latter objective, the pursuit of socially-driven public procurement practices. One way this is achieved is through the facilitation of small and medium-sized enterprises (SMEs) participation in public contracts. SMEs account for two-thirds of overall employment in the EU and are the primary generators of innovative supplies and services.<sup>5</sup> Facilitating SME participation in public procurement would yield a positive impact on employment creation, innovation generation and economic growth.<sup>6</sup> The research questions to what extent the inclusion of social criteria and innovative procedures in public procurement facilitates SME participation. The EU Directives on

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<sup>1</sup> Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC (2014) OJ L 94/65 (Public Sector Directive), recital 2.

<sup>2</sup> See Commission, *'Making Public Procurement work in and for Europe.'* (Communication) COM (2017) 572 final.

<sup>3</sup> See Commission, *'Single Market Act II Together for new growth.'* (Communication) COM (2012) 0573 final.

<sup>4</sup> See COM (2017) 572 final.

<sup>5</sup> See Commission, *'Annual Report on European SMEs 2017/2018. SMEs Growing beyond borders.'* (2017) 031. The definition of an SME covers all enterprises with less than 250 employees and equal to or less than either €50million turnover or €43million balance sheet total. Micro-enterprises are the smallest category of SME, with less than ten employees and a turnover or balance sheet total equal to or less than €2million. See Commission 'Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422)' (2003) OJ L 124/36, annex 2.

<sup>6</sup> See SIGMA, *'Small and Medium-sized Enterprises in Public Procurement.'* (2017) Brief 33, OECD Publishing, Paris.

Public Procurement and supporting policies include provisions to support SME participation; including the division of large contracts into smaller lots, use of proportionate financial and selection criteria, and the use of open, straightforward and electronic procedures.<sup>7</sup> A cross-border comparative case study approach is adopted to analyse what impact the inclusion of social criteria has on SME participation in public contracts, either as a main contractor or as a subcontractor. The research will support current literature by demonstrating that the use of social criteria, namely “the division of large contracts into smaller ‘lots’; the use of community benefit clauses; the use of subcontractor considerations; and the use of pre-commercial procurement procedures” facilitated SME participation in each of the case studies. The thesis contributes to existing research by emphasising the importance of not treating SMEs as a homogenised group, and by exploring what impact the inclusion of social criteria has on sub-forms of SMEs, such as social enterprises and innovative start-ups. The purpose of this chapter is to establish a context for the research topic, research question and research objectives.

## 1.2 Introduction

Public bodies spend billions of Euro annually purchasing works, goods and services, thus making procurement an important lever for achieving societal goals and fostering competitive markets.<sup>8</sup> Public procurement is defined as an activity which involves the disbursement of public money aimed at the acquisition of works, supplies and services for consideration.<sup>9</sup> The definition extends to acquisitions, whether under formal contract or not, of goods, services and construction contracts concluded by public bodies.<sup>10</sup> Public procurement operates at centralised or decentralised levels, with a wide variety of central government bodies, regional and

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<sup>7</sup> Public Sector Directive, recital 78.

<sup>8</sup> Public Sector Directive, recital 2.

<sup>9</sup> Public Sector Directive, art 1(2).

<sup>10</sup> S. Arrowsmith, *The law of public and utilities procurement.* (3rd edn, Sweet & Maxwell, London) 388.

local authorities and semi-state bodies procuring various public contracts.<sup>11</sup> It is an operational task that ensures the efficient management of the state; for example, ensuring hospitals have medical equipment, local authorities have access to water treatment services, and central government departments have adequate ICT services.<sup>12</sup> Public procurers are expected to behave in a manner that is honest, fair and achieves value for taxpayers' money, with all spending activities subject to audit and scrutiny.<sup>13</sup>

Public procurement is regulated to prevent public procurers purchasing in a reckless or discriminatory manner. It was not until the early 1970s that regional regulation of government purchasing was adopted, with the EU creating a series of rules governing public purchasing to integrate and promote regional trade.<sup>14</sup> The US adopted similar practices in the 1980s<sup>15</sup> and plurilateral world trade agreements were adopted globally in the early 1990s.<sup>16</sup> The public procurement rules have been revised to ensure the efficiency of public spending and to facilitate smart, sustainable and inclusive growth, which includes the facilitation of SME participation.<sup>17</sup> The Directives are ultimately underwritten by a series of fundamental freedoms and principles derived from the *Treaty of the Functioning of the European Union* (TFEU).<sup>18</sup> Even though the TFEU does not explicitly refer to procurement, all Member States' contracting authorities must comply with the internal market's fundamental freedoms, namely the free

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<sup>11</sup> See Commission, '*Proposal for a Directive of the European Parliament and of the Council on Public Procurement.*' (2011) COD 0438.

<sup>12</sup> While there is a consensus on what procurement entails, debate remains as to whether '*public procurement*' is defined as a profession. See R.E. Lloyd, and C. P. McCue, '*What is public procurement? Definitional problems and implications.*' (2004) 3 International Public Procurement Conference Proceedings 2. See also K.V. Thai, '*Public procurement re-examined.*' (2001) 1(1) Journal of Public Procurement 9.

<sup>13</sup> Public sector employees responsible for procuring public contracts will be subject to various public and administrative requirements under domestic law.

<sup>14</sup> Commission Directive 70/32/EEC of 17 December 1969 on provision of goods to the State, to local authorities and other official bodies [1970] O.J. L13/1.

<sup>15</sup> Title 48 of the Code of Federal Regulation. Parts 1 through 53 (1984).

<sup>16</sup> See the WTO plurilateral Agreement on Government Procurement (1994) art I – XII.

<sup>17</sup> Public Sector Directive, recital 2.

<sup>18</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.

movement of goods,<sup>19</sup> persons,<sup>20</sup> services,<sup>21</sup> and capital<sup>22</sup> and the prohibition of anti-competitive measures.<sup>23</sup> Member States' public bodies must conform to the principles derived from the fundamental freedoms, including the principles of transparency,<sup>24</sup> mutual recognition,<sup>25</sup> proportionality,<sup>26</sup> non-discrimination,<sup>27</sup> and equal treatment.<sup>28</sup>

The research questions to what extent the inclusion of social criteria and innovative procedures in public procurement facilitates SME participation. While SMEs represent 99% of all businesses in the EU, SMEs are disproportionately underrepresented in public markets.<sup>29</sup> SMEs are faced with administrative and financial barriers when competing for public contracts.<sup>30</sup> The Public Sector Directive includes several provisions which encourage small business participation, such as the permissible division of large contracts into smaller lots, use of proportionate non-economic criteria and use of open and electronic procedures.<sup>31</sup> The

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<sup>19</sup> See TFEU, art 34.

<sup>20</sup> See TFEU, art 45.

<sup>21</sup> See TFEU, art 56.

<sup>22</sup> See TFEU, art 63.

<sup>23</sup> See TFEU, arts 101 – 109.

<sup>24</sup> Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745.

<sup>25</sup> Case T-258/06 *Federal Republic of Germany v European Commission* [2010] ECR-2027.

<sup>26</sup> Case C-376/08 *Serrantoni Srl i Consorzio stabile edili Srl v. Comune di Milano* [2009] ECR I-12169.

<sup>27</sup> Case C-225/98, *Commission v France* (“Nord-pas-de-Calais”) [2000] ECR I-7445.

<sup>28</sup> Case C-13/63, *Italy v Commission* [1963] ECR 165 at paragraph III, (4)(a); Case C-306/93, *SMW Winzersekt v Land Rheinland-Pfalz* [1994] ECR I-5555 at paragraph 30.

<sup>29</sup> See Commission, ‘*Evaluation of SMEs' access to Public Procurement Markets in the EU.*’ (2010) Final Report.

<sup>30</sup> See Commission, ‘*SMEs' access to public procurement markets and aggregation of demand in the EU 2014.*’ (2014) Final Report.

<sup>31</sup> In particular the research is interested in the study of the following articles of the Public Sector Directive;

Art. 18(2) Mandatory social clause;

Art. 20 Reserved contract;

Art. 40 Preliminary market consultations;

Art. 42(1) Technical specifications and accessibility requirements;

Art. 43 Labels;

Art. 46 Division of contracts into lots;

Art. 56 Choice of participants and award of contracts;

Art. 57 Exclusion grounds;

Art. 67 Contract award criteria;

Art. 69 Abnormally low tenders;

Art. 70 Conditions for performance of contracts;

Art. 71 Subcontracting.



research investigates the extent to which the inclusion of social criteria in public contracts facilitates SME participation. Improving the relationship between SMEs and public procurement is intended to bring about increased value to the European economy, stimulate higher growth and increase job opportunities.<sup>32</sup>

One aim of the research is to address the problems faced by public bodies in facilitating SME friendly policies in their tendering practices. Additionally, the research aims to contribute to the level of understanding of the strategic role of European procurement to both academics and practitioners. Public procurement is one of the key market instruments of the Europe 2020 Strategy which supports smart, sustainable and inclusive economic growth.<sup>33</sup> EU Public Procurement Directives were revised and adopted in 2014 in response to the adoption of the Single Market Act.<sup>34</sup> The updated Directives encourage the use of environmental and social purchasing and have simplified procurement procedures for contracting authorities, thus providing easier access for SMEs.<sup>35</sup> Public procurement law is a form of economic law, and as some of the revisions made to the rules were of a socially-centred nature, it is crucial that the research questions what are the objectives of the legislation?<sup>36</sup> Are the rules economically or socially driven, and how can these two often contradictory objectives be harmoniously achieved?

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<sup>32</sup> G. de Wit and J. de Kok, *'Do Small Businesses Create More Jobs? New Evidence for Europe'* (2014) 42(2) *Small Business Economics* 283; P. McCann and R. Ortega Argiles, *'Smart Specialisation, Entrepreneurship and SMEs: Issues and Challenges for a Results-Oriented EU Regional Policy'* (2016) 4(4) *Small Business Economics* 537.

<sup>33</sup> See Commission, *'Europe 2020: A strategy for smart, sustainable and inclusive growth.'* (2010) COM 2020 final.

<sup>34</sup> Public procurement was identified as one of the twelve levers to boost growth. See Commission, *'Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth"'* (Communication) COM (2011) 0206 final.

<sup>35</sup> See Commission, *'Proposal for a Directive of the European Parliament and of the Council on Public Procurement.'* (2011) COD 0438.

<sup>36</sup> Trepte contends that it is difficult to understand what the true objectives of the 2014 Directives are and questions the purpose of including secondary social objectives. See P. Trepte, *'Forward to the Second Edition in A. Sánchez Graells Public procurement and the EU competition rules'* (2nd edn Bloomsbury Publishing 2015) xii.

On the one hand, the government is participating in the market as a purchaser with a tight budget, and on the other hand, the government must regulate the market with its purchasing power to advance conceptions of social justice.<sup>37</sup> Literature differs on what the purpose of procurement legislation should be, with some contending the correct application of the rules should foster competition to secure economic efficiencies and should not incorporate any non-economic criteria which would distort the market place.<sup>38</sup> A competing argument asserts that the rules are indeed concerned with promoting competitive cross-border trade, but additionally acknowledge that public procurement can contribute to the development of a smart, inclusive and innovative Single Market.<sup>39</sup> The research works towards defining a middle ground between the two opposing arguments by investigating the extent to which the inclusion of social criteria in public contracts facilitates SME participation.

SMEs play a fundamental role in the European Single Market, SMEs are the primary drivers for generating local employment, sustaining local economies and promoting entrepreneurship and business risk-taking in all areas of society.<sup>40</sup> The research aims to identify the barriers facing SMEs selling into the public market and questions whether the use of social criteria and innovative procedures would improve participation in the marketplace. The thesis will identify the extent to which the use of social criteria helped to address market gaps in SMEs' access. Current literature, as we will see in '*Chapter 3 SMEs and Public Procurement*', acknowledges that there are a number of hurdles which SMEs must overcome to enter the public market. SMEs struggle to find and effectively compete for relevant sized-contracts. Onerous bidding documents which

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<sup>37</sup> C. McCrudden, '*Buying Social Justice. Equality, Government Procurement and Legal Change.*' (2007) Oxford University Press.

<sup>38</sup> A. Sánchez Graells, '*Public procurement and the EU competition rules*' (2nd edn, Bloomsbury Publishing 2015) 121.

<sup>39</sup> G. Piga and T. Tátrai, '*Public procurement policy*' (Routledge, Abingdon, Oxon; New York, NY, 2015) 11.

<sup>40</sup> D. Floyd and J. McManus, '*The role of SMEs in improving the competitive position of the European Union.*' (2005) 17(2) *European Business Review* 144; See also See Commission, '*Annual Report on European SMEs 2017/2018. SMEs Growing beyond borders.*' (2017) 031.

set high selection and qualification criteria limit SME participation as the criteria can only be met by large organisations. Public procurement policies tend to offer supports to SMEs, which have the ability to compete for advertised contracts and offers assistance on how to ease the tender requirements and experience for SMEs. Procurement dedicated policies encourage public procurers to conduct open, electronic and proportionate tender competitions. Procurers are encouraged to include relevant and fair selection and award criteria and to offer unsuccessful tenderers sufficient information to help the SMEs to understand why their bids were rejected. This research offers a broader perspective; it assesses how different criteria assists SMEs entering contracts which they are normally excluded from, such as large contracts and assists SMEs in entering the public market for the first time. The research does not focus primarily on improving SMEs' tendering skills and abilities and focuses on how public procurers can design more inclusive and socially conscious procurement practices to facilitate SME participation. This research contributes to the current literature by assessing how the inclusion of community benefit clauses, subcontractor considerations, PCP practices and the division of larger contracts into smaller lots assists all forms of SME participation in public procurement.

The research adopts a socio-legal approach, relying on cross-national comparative case studies. The mixed-method triangulation approach allows for the research to examine the impact of including social criteria in public contracts.<sup>41</sup> A primarily qualitative approach is adopted, interviews with key public procurers and small businesses were conducted to gain a practical understanding of the issues facing the inclusion of social criteria in public contracts. The research explores four comparative case studies, two from Ireland and two from Northern Ireland. Two of the case studies analyse the use of social criteria in high-value contracts, the other set of comparative studies explore the procurement processes for low-

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<sup>41</sup>Multiple research methods were employed to deepen the researcher's knowledge of the topic. See D. Watkins and M. Burton eds., *Research methods in law* (2nd ed., Routledge, 2017) 5; The research methodology is discussed in Chapter 4.

value public contracts.<sup>42</sup> Each case study examines whether the inclusion or use of the following social criteria and procedures facilitates SME participation in public procurement;<sup>43</sup>

- Division of large contracts into smaller “lots.”
- The inclusion of Community Benefit Clauses - For example, encouraging winning contractors to employ long-term unemployed people through the use of targeted recruitment and training clauses (TR&T)<sup>44</sup>
- Use of Subcontractor Considerations - Allowing SMEs to gain a proportion of a large contract
- Use of Pre-commercial Procurement (PCP) - Allowing SMEs to prepare for tender competitions and to inform public buyers of any new innovative good or service

For the high-value case studies, a €1.7 billion construction contract for the New Children’s Hospital in Dublin 8 is reviewed. This contract is compared to £27mn ‘Cleaning, Catering and Ancillary Services’ contract procured by Northern Ireland’s Central Procurement Directorate and the Buy Social Unit. For the low-value case studies, pre-commercial tendering practices of Dublin City Council and Belfast City Council are reviewed. These case studies review a contract procured by Dublin City Council’s ‘*Smart Cities*’ initiative and a contract procured by the Belfast City Council’s ‘*Smart Belfast*’ counterpart. The value of the contracts ranged from €12,500 to €50,000.

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<sup>42</sup> When referring to ‘*high-value*’ and ‘*low-value*’ sized contracts, the research is referring to contracts which fall above or below the financial thresholds. See Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU in respect of the application thresholds for the procedures for the award of contracts.

<sup>43</sup> These criteria were identified during the literature review, Chapter Two and Three explore the reasons for choosing these criteria in detail.

<sup>44</sup> This form of social criteria is particularly suitable for facilitating social enterprise participation. The research does not treat SMEs as a homogenised group, and studies what impact the inclusion of social criteria has on different types of SMEs. Community benefit clauses are discussed in detail in Chapter Two and Three.

Ireland and Northern Ireland have similar public procurement regulations and expenditure and have adopted resembling SME friendly policy goals.<sup>45</sup> Both states have adopted policies which aim to improve suppliers' access to public contracts, deliver financial savings and promote the use of environmental purchasing.<sup>46</sup> SMEs are the backbone of both the Irish and Northern Irish economies,<sup>47</sup> and efforts have been made by both states to ease the financial and administrative burdens associated with tendering for public contracts.<sup>48</sup> Recently, Northern Ireland introduced socially-centred policies, encouraging contracting authorities to include community benefit clauses in certain high-value public works and services contracts.<sup>49</sup> Cross-border procurement is of significant importance to the two countries, SMEs based on the island of Ireland tender easily and freely for public contracts. This research aims to further support the facilitation of SME participation in both public markets to support the sustainable and competitive development of the all-island procurement market.

The case study findings allow for the research to establish a framework for analysing the impact of the inclusion of social criteria in public contracts on SME participation. The research will improve understanding of public procurement and public administrative management. It assesses the impact the Public Sector Directive has on national strategic procurement policies. This is of crucial importance to Ireland as national public procurement regulations and policies are heavily influenced by the Public Sector Directive and tend to favour rule-based decision-making,

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<sup>45</sup> The *European Union (Award of Public Authority Contracts) Regulations 2016* (SI No. 284 of 2016) implements Directive 2014/24/EU into Irish law. The *Public Contracts Regulations 2015* (SI No 205 of 2015) implement in England, Wales and Northern Ireland Directive 2014/24/EU.

<sup>46</sup> See Office of Government Procurement, '*National Public Procurement Framework*'. (2017) Ireland; Department of Finance and Personnel and the Central Procurement Directorate '*Northern Ireland Public Procurement Policy*' (2014) Version 11.

<sup>47</sup> British Irish Governmental Strategy Study on All Island Economy '*Comprehensive study on the All-Island economy*' (Intertrade Ireland, 2018) 45.

<sup>48</sup> Including the promotion of e-procurement using the centralised advertising platforms; eTenders.gov.ie and eTendersni.gov.uk.

<sup>49</sup> Procurement Guidance Note (PGN) 01/13 *Integrating Social Considerations into Contracts* is applicable to all Northern Ireland Public Procurement Policy (NIPPP) users.

and do not adhere to using procurement as a strategic tool to achieve socio-economic improvements.<sup>50</sup>

The research understands the need for businesses and society to engage together to foster feasible and practical solutions to global sustainable and financial challenges.<sup>51</sup> The challenges need to be addressed in a multidisciplinary manner, recognising the economic, legal and political components of smart, inclusive and sustainable public procurement markets.<sup>52</sup> The research findings are used to draft a policy blueprint for public bodies. The blueprint offers public procurers advice on how to promote the participation of all forms of SME participation in both high and low-value contracts.

### 1.3 Terminology

While the next chapter discusses the objectives of public procurement law, it is timely to offer a brief definition of the commonly used terms in the research. Since the definitions of contracting authorities, contracting entities, public procurers and public bodies often overlap and refer to the same government-controlled or funded entities, it is important to state when they will be used or referred to in this thesis. Several definitions of socially-driven public procurement practices are used in the literature, EU policy and in national policy. This section signposts when each term will be used throughout the thesis.

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<sup>50</sup> However, it should be noted that in December 2018 the Office of Government Procurement published an information note on '*Social Considerations in Public Procurement*.' The note is not a policy document and does not direct contracting authorities to purchase in a socially-centred manner, however, it offers advice to contracting authorities on how to incorporate social considerations in procurement competitions.

<sup>51</sup> United Nations '*Transforming our World: The 2030 Agenda for Sustainable Development*' A/RES/70/1 (2015).

<sup>52</sup> This involves viewing procurement beyond just a tendering task. For a more detailed discussion on the use of strategic procurement see H. Good, '*Making public procurement strategic*' (2015) 44(2) *The Public Manager* 9.

### 1.3.1 Contracting authorities, contracting entities, public bodies, public procurers

When referring to the general functions and capacity of a public unit, the research will refer to the unit as a '*public body*' and will refer to the unit as a '*contracting authority*' when discussing its procurement functions and responsibilities.<sup>53</sup> The term '*public procurer*' is used when referring to contracting authorities and entities.<sup>54</sup> However, the research focuses on *contracting authorities* and not on *contracting entities*.<sup>55</sup> This research does not focus on the Utilities,<sup>56</sup> Concessions<sup>57</sup> or Defence Directives<sup>58</sup> on public procurement. The primary changes introduced to the 2014 Directives supporting SME participation were introduced to the Public Sector Directive, hereinafter, it will be referred to as 'the Directive.'

Irish and Northern Irish policies on SME participation are generally only applicable to public works, supplies and services contracts conducted by contracting authorities.<sup>59</sup> The research does not review the Concessions Directive as there is limited information available in Ireland to review and compare with other jurisdictions.<sup>60</sup> Additionally, SME friendly public

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<sup>53</sup> Public Sector Directive art 2(1) defines '*contracting authorities*' as State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.

<sup>54</sup> While the term is used interchangeably in literature and policy, the term is not used in the Public Sector Directive nor is it used in the implementing Regulations in Ireland and in the UK.

<sup>55</sup> Directive 2014/25/EU art 4(1) defines '*contracting entities*' as entities which are contracting authorities or public undertakings, and which pursue one of the utilities activities referred to in Articles 8 to 14.

<sup>56</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (2014) OJ L 94/243 (Utilities Directive).

<sup>57</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (2014) OJ L 94/1 (Concessions Directive).

<sup>58</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (2014) OJ L 216/76.

<sup>59</sup> See Office of Government Procurement, '*National Public Procurement Framework*'. (2017) Ireland; Department of Finance and Personnel and the Central Procurement Directorate '*Northern Ireland Public Procurement Policy*' (2014) Version 11.

<sup>60</sup> Directive 2014/23/EU was transposed late by the European Union (Award of Concession Contracts) Regulations 2017 (SI No. 203 of 2017) (the Concessions Regulations) in Ireland. The majority of the research for this thesis was being gathered at the time the Concession Regulations were being implemented into Irish law. Future

procurement policies focus on the impact SMEs can have in contracts conducted by central government departments, local and regional authorities and other bodies procuring public supplies, services and works contracts. Additionally, the research does not analyse contracts which fall within the light regime,<sup>61</sup> services of general interest<sup>62</sup> or state aid.<sup>63</sup>

### 1.3.2 Social criteria, social considerations and social clauses

This thesis is concerned with the use and impact of socially-driven public procurement practices. *Chapter Two: Public Procurement Law and Objectives* analyses the debate surrounding the use of social objectives, questioning the permissible use and remit of social goals. However, it is useful at this stage to offer a definition of socially responsible public procurement (SRPP).<sup>64</sup> SRPP refers to public procurement activities which incorporate a social objective.<sup>65</sup> Social objectives may refer to sustainable environmental goals, living standard targets, facilitating SME participation and promoting innovative public services.<sup>66</sup> There is no unified definition of what comprises a ‘social objective.’<sup>67</sup> It is an evolving term, which allows public bodies to use public procurement to help address existing or emerging societal challenges. There are individual

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work may assess what impact the Concession Regulations have on SME engagement in the market.

<sup>61</sup> Public Sector Directive, annex XIV.

<sup>62</sup> See Commission, ‘*A Quality Framework for Services of General Interest in Europe*’ (Communication) COM (2011) 0900 final.

<sup>63</sup> See TFEU, arts 107 – 109.

<sup>64</sup> This is also referred to as ‘*socially sustainable procurement*.’ However, this term is mainly used in private procurement literature, and ‘*socially responsible procurement*’ is used in public procurement literature. See T.N. Gladwin, T.S. Krause, and J.J. Kennelly, ‘*Beyond eco-efficiency: Towards socially sustainable business*’ (1995) 3(1) Sustainable Development 35; A. Semple *Socially Responsible Public Procurement (SRPP) under EU Law and International Agreements* (2017) 12 European Procurement and Public Private Partnership Law Review 293.

<sup>65</sup> H. Walker and S. Brammer, ‘*Sustainable procurement in the United Kingdom public sector*’ (2009) 14(2) Supply Chain Management: An International Journal 128; V. K. Malolitneva, and Institute of Economic and Legal Researches of the NAS of Ukraine, ‘*Horizontal objectives in Public Procurement*’ (2018) 1 Economics and Law 15.

<sup>66</sup> See Commission, ‘*Buying Social A Guide to Taking Account of Social Considerations in Public Procurement*’ (Guide) SEC (2010) 1258, final.

<sup>67</sup> For a wider discussion on the design of social policy objectives see; S.L. Wartick, and P.L. Cochran, P.L., ‘*The evolution of the corporate social performance model*’ (1985) 10(4) Academy of management review 758; S. Hilgartner and C.L. Bosk, ‘*The rise and fall of social problems: A public arenas model*.’ (1988) 94(1) American Journal of Sociology 53; P.J. May, ‘*Policy learning and failure*’ (1992) 12(4) Journal of Public Policy 331.



streams of SRPP studies, including the study of sustainable public procurement (SPP),<sup>68</sup> green public procurement (GPP)<sup>69</sup> and public procurement of innovation.<sup>70</sup> This thesis adopts the broadest definition of SRPP used in the European Buying Social guide.

Furthermore, the term '*social criteria*' is used throughout this thesis to describe the inclusion of a social objective in public procurement. The term is used to encompass the terms '*social considerations*' and '*social clauses*'. It is essentially an umbrella term which is used when referring to both *mandatory social clauses* and *voluntary social considerations*. In the literature, the term '*social clauses*' generally refers to contractual social benefit clauses.<sup>71</sup> Commonly used social clauses in the UK and Ireland, tend to be '*community benefit clauses*'.<sup>72</sup> Such clauses impose mandatory socially-focused obligations onto contractors; such as '*targeted recruitment and training requirements*.' These clauses are used

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<sup>68</sup> '*Sustainable Procurement*' has been defined by the UK Sustainable Procurement Taskforce as a '*process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment.*' Procuring the Future – The Sustainable Procurement Task Force National Action Plan (DEFRA, London, 2006).

<sup>69</sup> Green public procurement often overlaps with sustainable procurement. While sustainable procurement is concerned with social, environmental and economic aspects of procurement decisions, green public procurement is generally associated with environmental aspects. Fisher comments that green public procurement is more widely accepted than other socially-responsible public procurement practices. See E. Fisher, '*The Power of Purchase: Addressing Sustainability through Public Procurement*' (2013) 8 Eur Procurement & Pub Private Partnership L Rev 2.

<sup>70</sup> The different forms of innovative public procurement are discussed in Chapter Two and Chapter Three. Innovative public procurement refers to the use of innovative procurement procedures or the use of public expenditure to purchase innovative solutions. See L. Hommen and M. Rolfstam, '*Public procurement and innovation: towards a taxonomy*' (2009) 9(1) Journal of Public Procurement 17.

<sup>71</sup> See T. Schulten, K. Alsos, P. Burgess and K. Pedersen, '*Pay and other social clauses in European public procurement. An overview on regulation and practices with a focus on Denmark, Germany, Norway, Switzerland and the United Kingdom.*' Study on behalf of the European Federation of Public Service Unions (EPSU) (EPSU, Düsseldorf, 2012); J. Bernete Garcia, '*Social Clauses in Public Procurement: New Tools to Promote Local Employment*' (2013) 26(1) Cuadernos De Trabajo Social 85; C. Barnard, '*To boldly go: social clauses in public procurement*' (2017) 46(2) Industrial Law Journal 208.

<sup>72</sup> Two of the research case studies assess the impact of the inclusion of community benefit clauses on SME participation in the Irish and Northern Irish public markets.

to promote the employment of disadvantaged people or people with disabilities.<sup>73</sup>

This research will use the term '*social clauses*' when discussing socially driven *mandatory* clauses. These types of clauses are generally included as weighted award criteria in a procurement competition and subsequently included as contractual performance clauses during the contract execution stage.<sup>74</sup> Non-compliance with contractual performance clauses can be subject to contractual enforcement or penalties.<sup>75</sup> This research will refer to the term '*social considerations*' when discussing socially driven *voluntary* objectives. Contracting authorities may ask contractors to take into account the contracting authority's environmental or socially sustainable policies and objectives when compiling their tender submission or performing their awarded contractual duties.<sup>76</sup> Contracting authorities may ask tenderers to consider developing a sustainable supply chain by subcontracting with SMEs.<sup>77</sup> In general, non-compliance with social considerations cannot be subject to contractual enforcement or penalties.

The next chapter spends more time discussing the remit of the social objectives of public procurement. It reviews definitions set out in the

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<sup>73</sup> See; Social Value Act (UK), 2012; Procurement Reform (Scotland) Act, 2014; Northern Ireland's CPD Policy Government Note, '*Integrating Social Considerations into Contracts*' (2016) PGN 01/13. Also note that a draft proposal for a Northern Irish Buy Social Value Act has been put on hold since the collapse of the government in 2017.

<sup>74</sup> Social clauses may be included as contractual performance clauses once they are proportionately linked to the subject matter of the public contract. The clauses must comply with the TFEU principles and must not confer unrestricted freedom on the contracting authority. Public Sector Directive, arts 67 and 70.

<sup>75</sup> However, as we will see in the case study chapters, contracting authorities are not applying penalties for non-compliance with the community benefit clauses and instead, are focussing on building close relationships with the contractors to encourage and monitor compliance with the social targets.

<sup>76</sup> See Commission, '*Buying Social A Guide to Taking Account of Social Considerations in Public Procurement*' (Guide) SEC (2010) 1258, final; Commission, '*Buying Green! A handbook on green public procurement. Third Edition (Guidance)*' (2016) COM 179

<sup>77</sup> See Department of Finance and CPD Northern Ireland *Public Procurement Policy* (2014); Version 11. Available at; <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/ni-public-procurement-policy-version-11-august-2014.pdf> Last accessed 25/04/2019; Office of Government Procurement, '*National Public Procurement Framework' Public Procurement Guidelines for Goods and Services.*' (2019). Version 2.1 Accessible at this link; <https://ogp.gov.ie/national-public-procurement-policy-framework/> Last accessed 2<sup>nd</sup> June 2019.

Directive, regional and national policy documents, decided judgments and peer-reviewed literature.

## 1.4 Structure of the thesis

The research is divided into nine chapters. *Chapter Two* and *Chapter Three* offer an analysis of current legislation and academic literature. *Chapter Four* sets out the research methodology. *Chapters Five to Eight* review the selected case studies, and *Chapter Nine* concludes the thesis by offering a summary of the research findings.

### 1.4.1 Chapter Two

Chapter Two offers an analysis of the European rules governing public procurement.<sup>78</sup> The chapter concentrates on analysing the two fundamental and often competing objectives of the rules; the economic objectives and the social objectives. The underpinning objective of the EU public procurement rules is to curb protectionist purchasing and to foster competitive cross-border trade. The economic objective of the rules is to achieve cost-savings through competitive cross-border tendering and price convergence.<sup>79</sup> While some academics maintain that the economic objectives of the rules are the sole goal of the market-based instruments,<sup>80</sup> an alternative more dominant argument accepts that the economic objectives of the rules have been developed since the 1970s to include social objectives.<sup>81</sup> The 2014 Directives were modernised to ensure the efficiency of public spending, the facilitation of SMEs and to support common societal goals.<sup>82</sup> The research accepts that the pursuit of both social and economic objectives is permissible under the Directives. The

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<sup>78</sup> The research focuses on the Public Sector Directive.

<sup>79</sup> C. Bovis, *Research handbook on EU public procurement law* (Edward Elgar Publishing, 2016) ix.

<sup>80</sup> A. Sánchez Graells, *Public procurement and the EU competition rules* (2nd edn Bloomsbury Publishing 2015) 9.

<sup>81</sup> S. Arrowsmith and P.F. Kunzlik, *Social and environmental policies in EC procurement law: new directives and new directions* (Cambridge University Press, Cambridge; New York, 2009) 100.

<sup>82</sup> See Commission, *Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market* COM (2011) 15/47.

chapter identifies social and innovative criteria which have the potential to encourage SME participation in public markets, such as the division of large contracts into smaller lots, procedure and award criteria choice, the use of community benefit clauses, the use of subcontractor considerations, and the use of innovative processes.<sup>83</sup> The chapter concludes by summarising how the Directives are implemented in the case study countries, Ireland and Northern Ireland.<sup>84</sup>

### 1.4.2 Chapter Three

Chapter Three offers a discussion on the relationship between SMEs and public procurement. The prime purpose of this chapter is to identify the key factors which impact SME participation in EU public markets. Firstly, the chapter reviews the significance of the role SMEs play in the Single Market, highlighting their importance in driving employment and generating innovative supplies and services.<sup>85</sup> Attention is then placed on the reasons as to why SMEs are hindered from successfully bidding for public contracts and continues to identify which factors are conducive to supporting SME participation. Factors which both hinder and support SME participation include; type of procuring body, size and value of the

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<sup>83</sup> Public Sector Directive;  
Art. 18(2) Mandatory social clause;  
Art. 20 Reserved contract;  
Art. 40 Preliminary market consultations;  
Art. 42(1) Technical specifications and accessibility requirements;  
Art. 46 Division of contracts into lots;  
Art. 56 Choice of participants and award of contracts;  
Art. 57 Exclusion grounds;  
Art. 67 Contract award criteria;  
Art. 70 Conditions for performance of contracts;  
Art. 71 Subcontracting;

<sup>84</sup> The European Union (Award of Public Authority Contracts) Regulations 2016 (SI No. 284 of 2016) implements Directive 2014/24/EU into Irish law. The Public Contracts Regulations 2015 implement in England, Wales and Northern Ireland Directive 2014/24/EU.

<sup>85</sup> See J. de Kok, P. Vroonhof, W. Verhoeven, N. Timmermans, T. Kwaak, J. Snijders, F. Westhof, 'Do SMEs create more and better jobs?' (2011) EIM Report 6. Available at: [http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2012/do-smes-create-more-and-better-jobs\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2012/do-smes-create-more-and-better-jobs_en.pdf) Last accessed 2<sup>nd</sup> June 2019.

public contract, type of procurement procedure and award criteria used in tender competitions.<sup>86</sup>

#### 1.4.3 Chapter Four

The research methodology is discussed in detail in Chapter Four. A cross-border comparative case study is adopted. Four comparable case studies were identified in Ireland and Northern Ireland. The two countries were selected for many reasons; for example, their public market size and structure is comparable, SMEs are dominant in both markets and face similar hurdles in participating in public procurement.<sup>87</sup> Both countries have recently adopted ‘*Smart Cities*’ initiatives, using PCP practices to drive social goals and improve urban living standards in cities.<sup>88</sup> Similarly, both states have recently incorporated community benefit clauses into large public contracts. An overview of how the case studies were selected, conducted and analysed is additionally offered.

#### 1.4.4 Chapter Five

Chapter Five offers an analysis of a €1.7 billion works contract for the construction of the New Children’s Hospital in Dublin. The central aim of this chapter is to scrutinise what impact the inclusion of social criteria had on SME engagement.<sup>89</sup> Three measures were assessed, the division of the contract into smaller lots, the use of community benefit clauses and

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<sup>86</sup> See Commission ‘*SMEs’ access to public procurement markets and aggregation of demand in the EU 2014.*’ (2014) Final Report.

<sup>87</sup> See R. Fee, A. Erridge and S. Hennigan, ‘*SMEs and government purchasing in Northern Ireland: problems and opportunities*’ (2002) 14(5) *European Business Review* 326; A. Flynn, and P. Davis, ‘*The policy–practice divide and SME-friendly public procurement*’ (2016) 34(3) *Environment and Planning C: Government and Policy* 559.

<sup>88</sup> Smart Cities initiatives are being implemented globally, public authorities are forming partnerships with citizens, academia and private sector bodies to develop internet data infrastructures to improve urban living. See D. McLaren and J. Agyeman, ‘*Sharing cities: a case for truly smart and sustainable cities*’ (MIT Press, 2015).

<sup>89</sup> SMEs are normally ‘*locked out*’ of large contracts, this case study assesses if the use of social criteria facilitates SME participation in the contract as a main contractor or as a subcontractor. See Commission, ‘*SMEs’ access to public procurement markets and aggregation of demand in the EU 2014.*’ (2014) Final Report.

subcontractor considerations.<sup>90</sup> The chapter opens with a review of the development of the socially conscious procurement procedure, reviewing the design of the individual clauses and considerations included in the request for tender and contractual performance clauses. Research was gathered for this case study by reviewing the request for tender (RFT) documentation and conducting interviews with key members of the procurement team.<sup>91</sup> The findings offer convincing evidence that the inclusion of the social criteria resulted in the facilitation of SMEs in the supply chain. The use of voluntary subcontractor considerations resulted in the awarding of subcontracts to local SMEs within six months of contract commencement. The estimated value of the subcontracts is €500,000. In contrast to this finding, the community benefit clauses have not yet created an entry route for SMEs to enter the market.<sup>92</sup> The concluding section of the chapter offers an analysis of the verifiable research findings.

#### 1.4.5 Chapter Six

Chapter Six analyses the first comparative Northern Irish case study. The case study involves the study of a £27 million public supplies and services contract conducted by Northern Ireland's Central Procurement Directorate (CPD) and the Buy Social Unit.<sup>93</sup> While the contract conducted was for the supply and operations of a cleaning, catering and ancillary services, it included comparable social criteria with the National Children's Hospital works contract. The contract included mandatory community benefit clauses, voluntary subcontractor considerations and the contract was divided into smaller lots. The core objective of this chapter is to assess the extent to which the inclusion of the comparable

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<sup>90</sup> Similar social criteria were included in the Northern Irish case study example.

<sup>91</sup> Research for this case study was gathered from 2016 – 2018.

<sup>92</sup> These findings are also discussed in Chapter Nine; Conclusions and Discussion

<sup>93</sup> While the Central Procurement Directorate (CPD) is now known as the 'Construction and Procurement Delivery' (CPD), the case study chapters will continue to refer to the CPD as the Central Procurement Directorate. This is the title used in all of the call for competition and contracts notices reviewed for this thesis.

social criteria in the public services contract facilitated SME participation. This contract was the first large scale services contract to incorporate social criteria in Northern Ireland.<sup>94</sup> The social criteria used in this contract resulted in the awarding of one of the contractual lots to a consortium partnership comprising of one large organisation<sup>95</sup> and one social enterprise.<sup>96</sup> A subcontract was also awarded to a B-corporation.<sup>97</sup> In a similar fashion to the National Children’s Hospital case study, the request for tender (RFT) document was reviewed, and interviews were conducted with the public officials and awardee companies.

There are several similarities between this case study’s findings and the National Children’s Hospital case study’s findings. Firstly, the findings indicate that subcontractor protection considerations encourage SME participation. Secondly, the findings indicate that the successful implementation of socially responsible public procurement practices is driven by dedicated and trained public officials, who maintain a connection between the tendering and contract performance stages. Thirdly, the findings commonly suggest that there is a need for public authorities to refrain from treating SMEs as a homogenised group.<sup>98</sup> Public authorities are encouraged to introduce additional measures to encourage social enterprise participation in the public market, particularly

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<sup>94</sup> In particular, this contract is noted as the first services contract to include targeted recruitment and training clauses. Community benefit clauses are routinely included in works contracts. See CPD and Department of Finance *Sustainable Procurement in Construction; Sustainability Requirements; Model Contract Clauses and Guidance* (2019).

<sup>95</sup> The contract was awarded to G4S and Loaf Catering, operating under the Now Group. G4S is a large organisation that employs over 34,000 people in the UK and Ireland. See; [www.g4s.ie](http://www.g4s.ie) Last accessed 30<sup>th</sup> April 2019.

<sup>96</sup> Loaf Catering is a small social enterprise employing 14 people. See more about the company at; <https://www.loafcatering.com/our-team> Last accessed 30<sup>th</sup> April 2019.

Kerlin defines a social enterprise as a company operating with a goal to generate profits, and a second goal to use the profits generated to address societal challenges, such as the employment of disadvantaged groups or environmentally sustainable goals. See; J.A. Kerlin, ‘*Social enterprise in the United States and Europe: Understanding and learning from the differences*’ (2006) 17(3) *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 246.

<sup>97</sup> Ingeus, a B-corporation was awarded a subcontract. B-corporations are generally a registered company, not a charity, which have formally registered a social target in their articles of association. B-corporations require independent certification and annual audits. See B. Cummings, ‘*Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*’ (2012) 112 *Columbia Law Review* 578.

<sup>98</sup> These findings are discussed in detail in Chapter 9 Conclusions and Discussion.

in contracts which include community benefit requirements. However, this case study differs from the National Children’s Hospital case study as the inclusion of mandatory community benefit clauses facilitated social enterprise participation in the main contract. The community benefit clause included in the National Children’s Hospital contract did not facilitate any form of SME participation.

#### 1.4.6 Chapter Seven

The purpose of Chapter Seven is to review the impact the use of a low-value PCP had on SME engagement. This chapter reviews a ‘*Small Business Innovation Research*’ (SBIR)<sup>99</sup> PCP competition conducted by the Smart Dublin programme.<sup>100</sup> There was an overriding social objective of the contract. The competition sought to increase the number of cyclists in Dublin city by 25%.<sup>101</sup> The chapter reviews the procurement documents used in carrying out the competition. Interviews were conducted with the procuring officer and awardee companies to assess the impact of the use of the procedure. The results of this case study show that socially responsible procurement practices can encourage start-up growth. Five companies were awarded a contract with Dublin City Council through the Smart Dublin programme, four of which were successful in bidding for a second contract with the public body. Post completion of the public contract, two of the four companies were successfully awarded contracts with other public bodies nationally and internationally.

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<sup>99</sup> SBIR is defined as a partnership between a public body and a private entity or entrepreneur, where the public body funds the private sector R&D projects. See A. Link and J. Scott, ‘*Government as entrepreneur: Evaluating the commercialization success of SBIR projects*’ (2010) 39(5) Research Policy 589.

<sup>100</sup> Smart Dublin was established in 2016 and aims to develop partnerships with industry, academic and the community to develop innovative solutions to solve societal challenges.

<sup>101</sup> See <http://smartdublin.ie/challenges/> For an overview of the recent challenges conducted by the programme. Last accessed 7<sup>th</sup> June 2019.



#### 1.4.7 Chapter Eight

Chapter Eight compares a similar PCP activity conducted by the Smart Belfast programme.<sup>102</sup> Similarly, to the other case studies, this research was conducted over three years, the request for tender and sample contracts were reviewed, and interviews were conducted with the lead project manager and with an awardee company. The case study findings show that small businesses are at the forefront of developing innovative solutions to public challenges. Four small companies were awarded £5,000 at phase one of the competition, and two companies were awarded £50,000 at phase two to prototype and test the proposed solutions. One of the awardee companies identified approximately £0.5million of unpaid business revenue rates for the Council, and subsequently used the experience gained from the contract to win a further six PCP contracts. One of which was awarded by Smart Dublin. The initial results indicate that the use of PCP procedures by smart cities initiatives encourage SME participation in the public market.

#### 1.4.8 Chapter Nine

Chapter Nine summarises and discusses the case studies findings. The findings indicate that the use of lots, community benefit clauses, subcontractor considerations and use of PCP facilitate SME participation in public procurement. These measures facilitated SME engagement when they were supported and driven by motivated public-sector officials, who were committed to implementing effective change in the organisation.<sup>103</sup> National and internal public body policies supported the successful

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<sup>102</sup> The Belfast Smart City objectives were formalised in the Belfast City Council ‘*Supporting Urban Innovation - The Smart Belfast Framework 2017 to 2021.*’ The framework was adopted to support the implementation of the *Belfast Agenda*. The *Belfast Agenda* is the city’s first community plan, developed by city partners, residents and community organisations. It sets out long-term priority goals for the city. See *The Belfast Agenda*;  
<https://www.belfastcity.gov.uk/council/Communityplanning/BelfastAgenda.aspx> Last accessed 16th May 2019.

<sup>103</sup> The findings support arguments raised that the implementation of public sector change is dependent on the commitment of motivated champions. See; S. Fernandez and H.G. Rainey, ‘*Managing successful organizational change in the public sector.*’ In *Debating Public Administration* (Routledge, 2017) 7.

implementation of the socially driven practices in the case studies.<sup>104</sup> However, the research concludes that while the inclusion of the social criteria supported SME engagement in public procurement, treating SMEs as a homogenised group limits the prospects of different forms of businesses such as social enterprises and start-ups in bidding for public contracts.<sup>105</sup> The thesis concludes by suggesting that public bodies should adopt specific policies to promote the facilitation of all forms of SMEs into the market place. The research also recognises that the success of socially responsible public procurement practices is dependent on the establishment of a working relationship between the public body and the contractor.

## 1.5 Conclusion

The purpose of this chapter was to offer an introduction to the research topic and question. Public procurement is an important market tool which can be used to promote cross-border trade in the Single Market and to support the Europe 2020 goals at a local and national level. SMEs play an essential role in supporting a more inclusive, innovative and sustainable Europe. SMEs dominate the Single Market and are the key market players in developing innovative supplies and services and are essential generators of local employment. However, SMEs are disproportionately underrepresented in public markets. This chapter explored the fundamental objective of this thesis to question whether the inclusion of social criteria in public procurement facilitates SME participation. In answering this question, a cross-border comparative case study approach is adopted to analyse what impact the inclusion of social criteria has on SME participation in public contracts, either as a main contractor or as a subcontractor. The thesis now continues by identifying and investigating

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<sup>104</sup> See Northern Ireland's CPD Policy Government Note, '*Integrating Social Considerations into Contracts*' (2016) PGN 01/13; The Irish Office of Government Procurement, '*Social Considerations in Public Procurement.*' OGP. (2018). Accessible at this link; <https://ogp.gov.ie/information-notes/> Last accessed 16<sup>th</sup> May 2019.

<sup>105</sup> The barriers faced by innovative start-ups and small social enterprises will differ greatly from a medium-sized enterprise.

the applicable rules on public procurement, analysing how provisions set out in the rules and policies support SME engagement in public contracts.

## Chapter Two Public Procurement Law and Objectives

### 2.1 Introduction

The Single Market Strategy supports the free movement of people, services, goods and capital, and creates competitive business opportunities for European companies.<sup>1</sup> Public procurement is identified as an important market-based instrument to drive cross-border trade in the European ‘*Single Market*.’<sup>2</sup> The Single Market refers to the single market where the European Member States, citizens, and economic operators can trade goods and services and move freely without any internal borders or other regulatory obstacles. Public procurement directives were introduced to support the harmonisation of procurement procedures and redress opportunities between the Member States.<sup>3</sup> The 2014 Directives mark a significant change in the underpinning objectives, diluting the dominant economic goals and introducing socially focussed economic targets.<sup>4</sup>

The specific objective of this chapter is to examine the changing objectives of public procurement legislation, questioning the permissible use of SME friendly provisions. The academic literature on public procurement has revealed the emergence of two contrasting themes. The first theme accepts and supports the use of socially responsible public procurement practices (SRPP) while the second theme dismisses the adoption of any objectives which diminish the core economic functions of the rules.<sup>5</sup> The research traces how the original economic objectives have been extended to include socially driven criteria. An analysis of the

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<sup>1</sup> See Commission, ‘*A Single Market Strategy for Europe - Analysis and Evidence*. Accompanying the document Upgrading the Single Market: more opportunities for people and business’ SWD (2015) 202 final.

<sup>2</sup> See Commission, ‘*White Paper for the completion of the Internal Market*’ COM (1985) final, 85-310.

<sup>3</sup> See Commission, ‘*Proposal for a Directive of the European Parliament and of the Council on Public Procurement*’ COD (2011) 1585 final.

<sup>4</sup> C. Barnard, ‘*To boldly go: social clauses in public procurement*’ (2017) 46(2) *Industrial Law Journal* 208.

<sup>5</sup> O. Martin-Ortega., O. Outhwaite., and W. Rook, ‘*Buying power and human rights in the supply chain: legal options for socially responsible public procurement of electronic goods*’ (2015) 19(3) *The International Journal of Human Rights* 341.

different stages of public procurement legislation is offered, summarising the main changes and developments introduced in each revision of the rules.

Upon analysing the two contrasting themes, the research accepts that public procurement not only allows for the use of non-economic criteria but also encourages contracting authorities to use public procurement to develop smart, sustainable and inclusive economies. The research concentrates on assessing the use of socially responsible practices which have the potential to encourage SME participation in public procurement. Chapter Three continues this discussion by determining whether the social criteria included in the Directive and the implementing statutory instruments in Ireland and the UK address the constraints faced by SMEs when bidding for public contracts.

## 2.2 Economic and Social Objectives

Public procurers purchase works, goods and services within a set budget. Like their private-sector procuring counter-parts, public procurers must engage with the market to secure high-quality products and services at a reasonable cost.<sup>6</sup> Procurers should have a working knowledge of the target market.<sup>7</sup> If procurers have a good understanding of the marketplace, they will adopt procurement procedures which are best suited to fostering competition amongst the suppliers.<sup>8</sup> Unlike, their private-sector counterparts, public procurers are not driven by the need to secure financial profits for shareholders. Public procurers are driven by the need

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<sup>6</sup> A. Erridge, and J. McIlroy, 'Public Procurement and Supply Management Strategies' (2002) 17(1) Public Policy and Administration 52.

<sup>7</sup> O. Mamavi, H. Nagati, F. Wehrle, and G. Pache, 'Out of sight, out of mind? Supplier spatial proximity in French public procurement' (2014) 27(6) International Journal of Public Sector Management 486.

<sup>8</sup> If a contracting authority seeks to purchase a generic product from a market dominated by suppliers, such as the supply of dry food products, the contracting authority would be best suited to conducting an open or restricted procurement procedure. However, if a contracting authority seeks to purchase a complex integrated ICT service from a market dominated by few suppliers, the authority should consider adopting a competitive dialogue or competitive procedure with negotiation. See Case C-84/03 *Commission v Spain* [2005] ECR I-00139.

to secure ‘value for taxpayers’ money.<sup>9</sup> The term ‘value for money’ (VfM) has many definitions, to some VfM means purchasing on the basis of lowest cost, and to others, VfM means securing the optimum combination of whole life costs and quality.<sup>10</sup> Public procurement legislation prevents public purchasers from purchasing in a preferential manner, requiring purchasers to conduct competitive procedures to secure their perceived conception of VfM.<sup>11</sup> To secure the optimum combination of whole life costs and quality, procurers may consider the environmental or innovative characteristics linked to the product or service. Furthermore, public procurers may consider the wider societal impact of the procurement activity.<sup>12</sup>

Facilitating SME participation in public procurement assists public bodies in achieving VfM. Increasing SME participation increases the number of bidders which in turn improves the quality of the services and goods offered and enhanced competition results in reduced tendered prices.<sup>13</sup> Additionally, improving SMEs access to finance supports SME growth which in turn leads to the creation of new jobs.<sup>14</sup> Contracting authorities can encourage SME participation in procurement competitions by using proportionate procedures, appropriate selection and award criteria and by dividing large contracts into smaller lots.<sup>15</sup>

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<sup>9</sup> N. Dimitri., ‘“Best value for money” in procurement.’ (2013) 13(2) Journal of Public Procurement 149.

<sup>10</sup> This phrase has been adopted from the archived UK National Audit Office’s ‘Setting Value for Money from Procurement – How auditors can help guide?.’. <https://webarchive.nationalarchives.gov.uk/20130802191146/http://www.nao.org.uk/wp-content/uploads/2013/02/vfmprocurementguide.pdf> Accessed 20th April 2019.

<sup>11</sup> This thesis is primarily concerned with EU public procurement law and pays particular attention to the application of the Public Sector Directive.

<sup>12</sup> Public Sector Directive, recital 93.

<sup>13</sup> L. Preuss, ‘On the contribution of public procurement to entrepreneurship and small business policy’ (2011) 23(9-10) Entrepreneurship & Regional Development 787.

<sup>14</sup> C. Deijl, J. de Kok, and V. V. Essen., ‘Is small still beautiful? Literature review of recent empirical evidence on the contribution of SMEs to employment creation.’ (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH 2013) 29.

<sup>15</sup> See Commission Implementing Decision C(2016) 63 final of 18.01.16 on the adoption of the work programme for 2016 and the financing for the implementation of the Programme for the Competitiveness of Enterprises and small and medium-sized enterprises.

A large and growing body of literature differs on how public bodies should achieve VfM. Debate centres on whether the rules prioritise economic objectives over social objectives. One interpretation suggests that the central aim of the rules is to promote cross-border trade using transparent, fair, non-discriminatory, proportionate and competitive procedures.<sup>16</sup> This approach argues that the fundamental purpose of the rules is to prevent preferential treatment, to remove barriers to trade for suppliers and to support the sustainability of competitive public markets.<sup>17</sup> This view is supported by the judgment of the *Gemeente* case, where the Court concluded that;

*The purpose of coordinating at Community level the procedures for the award of public service contracts is to eliminate barriers to the freedom to provide services and therefore to protect the interests of economic operators established in a Member State who wish to offer goods or services to contracting authorities in another Member State.*<sup>18</sup>

A contrasting interpretation of what the ‘*economic objectives*’ of the rules entail is put forward by Sánchez Graells, who argues that the ‘*ultimate*’ purpose of the rules is to secure ‘*economic efficiency from undistorted competition*’.<sup>19</sup> This interpretation argues that competition orientated public markets result in the minimum distortion of private sector activities, which allows for tenderers to submit competitive costs.<sup>20</sup> This approach rejects the inclusion of non-economic selection or award criteria in procurement competitions. Instead, VfM is achieved when fair,

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<sup>16</sup> S. Arrowsmith and P.F. Kunzlik, ‘*Social and environmental policies in EC procurement law: new directives and new directions*’ (Cambridge University Press, Cambridge; New York, 2009) 100.

<sup>17</sup> A. Cox. and P. Furlong, ‘*Cross-border trade and contract awards. The intellectual myopia at the heart of the EU procurement rules*’ (1997) 3(1) *European Journal of Purchasing & Supply Management* 9.

<sup>18</sup> Case C-360/96 *Gemeente Arnhem v BFI Holding BV* [1998] ECR I-6821, para 41.

<sup>19</sup> A. Sánchez Graells, ‘*Public procurement and the EU competition rules*’ (2nd edn Bloomsbury Publishing 2015) 9.

<sup>20</sup> Case C-240/83 *Waste oils* [1985] ECR 531 9; Case C-55/06 *Arcor v Germany* [2008] ECR I-2931 Opinion of Advocate General Poires Maduro, para 49.

competitive tendering results in reduced costs and maximises public procurer operating efficiencies.<sup>21</sup>

However, the difference between the two approaches is the emphasis Sánchez Graells, in particular, places on obtaining economic efficiency through the promotion of competition. Sánchez Graells disputes a claim made by Arrowsmith that his argument is attempting to rely ‘*on competition*’ as a tool for replicating the private sector market in the public procurement setting. Support for Sánchez Graells’s argument can be found in the ruling of *Bundesdruckerei*, where the CJEU concluded that

*the ultimate objective of the internal market rules and the EU public procurement directives is to allow all the economic operators involved to achieve economic efficiency derived from competition strategies unaffected by restrictive procurement decisions.*<sup>22</sup>

It should be noted that this judgment was an interpretation of the 2004 Directives, and the recent *RegioPost* judgment has somewhat diminished its relevance.<sup>23</sup> Sánchez Graells argues that Article 18(1) of Directive 2014/24/EU consolidates the principle of competition as an additional fundamental principle of the rules.<sup>24</sup> The article requires contracting authorities to treat economic operators ‘*equally and without discrimination*’ and to act in a ‘*transparent and proportionate*’ manner.<sup>25</sup> If this article is to be interpreted to have introduced a new fundamental principle of competition, the economic objective of the rules could be

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<sup>21</sup> J.M Fernandez Martin, ‘*The EC Public Procurement Rules: A Critical Analysis*’ (Oxford: Clarendon Press 1996) 33; S. Domberger and P. Jensen, ‘*Contracting out by the public sector: theory, evidence and prospects*’ (1997) 13(4) Oxford Review of Economic Policy 67.

<sup>22</sup> Case C-549/13 *Bundesdruckerei* [2014] *pub. electr.* EU:C:2014:2235.

<sup>23</sup> Case C-115/14 *RegioPost v Stadt Landau* [2015] *pub. electr.* EU:C:2015:566.

<sup>24</sup> The importance of ‘*competition*’ above other procurement objectives is evident in; Joined Cases C-285/99 and C-286/99 *Impresa Lombardini v AMAS* [2001] ECR I-09233; Case C-247/02 *Sintesi* [2004] ECR I-9215. These judgments adopted a stricter view of the earlier rulings of *Mannesmann*, *BHI Holding* and *Cambridge*, which emphasised the importance of opening up competition in the marketplace. C-44/96 *Mannesmann Anlagenbau Austria AG v Strohal Rotationsdruck GesmbH* [1998] ECR I-00073; Case C-360/96 *Gemeente Arnhem v BFI Holding BV* [1998] ECR I-6821; Case C-380/98 *R v HM Treasury ex parte University of Cambridge* [2000] ECR I-08035.

<sup>25</sup> Public Sector Directive, art 18(1).



interpreted as the promotion of cross-border trade to achieve economic efficiency. Arrowsmith criticises the approach and counter-argues that Article 18(1) does not elevate ‘*competition*’ to a fundamental principle of the rules, that the article should be interpreted as a manifestation of the equal treatment principles, preventing contracting authorities from favouring one economic operator over another.<sup>26</sup>

Sánchez Graells argument further calls for the Directive to align with competition law to strengthen the operation of the Single Market.<sup>27</sup> Competition law and public procurement law are traditionally separate doctrines. Competition law is more concerned with economic efficiency than public procurement law. To fully achieve economic efficiency in public markets, his argument calls for competition law to be widened beyond the rules set out in Articles 101 to 109 of the TFEU. This would mean extending out the rules beyond mergers control or antitrust to include the operation of public sector purchases further.<sup>28</sup> The promotion of competition within the Single Market is embedded in the TFEU, which prohibits anti-competitive agreements, cartels, and outlines permissible use of mergers and state aid provisions and sets rules for the purchases of public services of general interest.<sup>29</sup> While the doctrines may sit separately, private and public markets have standard features including

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<sup>26</sup> S. Arrowsmith, ‘*The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies*’ (2012) 14 Cambridge Yearbook of European Legal Studies 1.

<sup>27</sup> Sánchez Graells (n 19) 223.

<sup>28</sup> A. Sánchez Graells, ‘*Competition and Public Procurement*’ (2018) 9(8) Journal of European Competition Law & Practice 551.

<sup>29</sup> Art 101- 109 TFEU. For a summary of the meaning and interpretation of the articles see L. Peepkorn and V. Verouden in editor, J. Faull, A. Nikpay and D. Taylor, ‘*The EU law of competition*’ (Third edn, Oxford University Press, Oxford, United Kingdom 2014) I. General Principles; A. Jones and B. Sufrin, ‘*EU competition law: text, cases, and materials.*’ (Oxford University Press 2016) 91.

demand and supply conditions.<sup>30</sup> The primary difference between the two markets is the pursuit of public interests versus the pursuit of profits.<sup>31</sup>

Bovis makes the central distinction between competition and public procurement regulation, summarising that competition regulations are underpinned by a principle of uniformity and possess a corrective characteristic whereas public procurement regulations allow for Member State discretions and have an underlying convergence character.<sup>32</sup> The convergence nature of public procurement seeks to harmonise ‘*behavioural norms*’ including legal efficiency, simplification, cross-border trade through the use of harmonised procedures and rules.<sup>33</sup> Bovis additionally notes that public procurement ‘*serves as negation agent to state aid and competition regulation.*’ which is firstly concerned with the promotion of a cross-border competition by respecting the fundamental freedoms and principles.<sup>34</sup> Therefore, it is difficult to review public procurement through the lens of competition regulations alone.

There is an underlying socio-economic basis to the 2014 Directives. This research adopts the approach put forward by Arrowsmith, accepting that economic objectives aim to promote cross-border trade in an open, non-discriminatory manner, as is stated several times through the Directive,<sup>35</sup>

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<sup>30</sup> C. Bovis, ‘*The social dimension of EU public procurement and the ‘social market economy’*’ in D. Ferri and F. Cortese, ‘*The EU social market economy and the law: theoretical perspectives and practical challenges for the EU*’ (Routledge, Abingdon, Oxon [UK], New York, 2018) 105; A. Heinemann, ‘*Social Considerations in EU competition law: the protection of competition as a cornerstone of the social market economy*’ in D. Ferri and F. Cortese, ‘*The EU social market economy and the law: theoretical perspectives and practical challenges for the EU*’ (Routledge, Abingdon, Oxon [UK], New York, 2018) 129.

<sup>31</sup> J. Stentoft Arlbjørn and P. Vagn Freytag, ‘*Public procurement vs private purchasing: is there any foundation for comparing and learning across the sectors?*’ (2012) 25(3) *International Journal of Public Sector Management* 203.

<sup>32</sup> C Bovis (n 30), A. Heinemann (n 30).

<sup>33</sup> C Bovis (n 30). See also; P. Trepte, ‘*Regulating procurement: Understanding the ends and means of public procurement regulation*’ (Oxford University Press, Oxford, 2004) 123.

<sup>34</sup> C Bovis (n 30) 106.

<sup>35</sup> Public Sector Directive, recital 1, arts 18(1), 43, 46, 56, 58, 68.

CJEU rulings<sup>36</sup> and in supporting European policy documents.<sup>37</sup> The Directive sets out rules on how contracting authorities should conduct competitive procedures. Importantly, the rules do not dictate ‘*what*’ contracting authorities should purchase. Member States enjoy the discretion to pursue their perceived conception of VfM.<sup>38</sup> Additionally, the research adopts arguments made by Heinemann and Bovis, outlining the differences between competition law and public procurement law; the principle of uniformity underpins competition regulations whereas public procurement regulations include Member State discretions such as the promotion of SME friendly criteria.<sup>39</sup> Article 18(2) does not create a new principle of competition. The provision is concerned with socio-economic objectives which is achieved through the promotion of competitive cross-trade created by respecting the fundamental TFEU freedoms and principles.<sup>40</sup> The purpose of this research is to assess what impact the rules and similar policies on public procurement have on SME engagement in public markets. This research relies on the case studies’ findings to demonstrate the ability of public procurement to achieve socially driven objectives competitively at a national level, particularly the promotion of SME participation. However, in answering this question, the research must ask what effect the varying definitions of economic objectives have on daily procurement procedures.

At an operational level, economic objectives may be interpreted in several ways. By following the rules laid out in the Directive and upholding the fundamental principles, contracting authorities support the economic

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<sup>36</sup> Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands*, [1988] ECR 4635; Case C-243/89 *Commission v Denmark* (“*Storebaelt*”) [1993] ECR I-3353, para 33; Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, para 54; Case C-225/98 *Commission v France* (“*Nord-pas-de-Calais*”) [2000] ECR I-7445; Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* (“*Concordia Buses*”) [2002] ECR I-7213; Case C-448/01, *EVN AG and Wienstrom GmbH v Austria* (“*EVN*”) [2003] ECR I-14527.

<sup>37</sup> Commission, ‘*Single Market Act II Together for new growth*’ (Communication) COM (2012) 0573 final; See Commission, ‘*Making Public Procurement work in and for Europe*’ (Communication) COM (2017) 572 final.

<sup>38</sup> While upholding the fundamental principles and not distorting market competition. See Case C-448/01 *EVN* [2003].

<sup>39</sup> C Bovis (n 30), A. Heinemann (n 30).

<sup>40</sup> S. Arrowsmith, ‘*The law of public and utilities procurement*’ (3rd edn, Sweet & Maxwell London 2012) 631.

objective of allowing for and encouraging cross-border trade. Contracting authorities may consider the economic efficiency argument by adopting a price-dominant competition to prevent market distortions and secure best value for taxpayers' money.<sup>41</sup> Generally, there are three permissible award criteria which contracting authorities can rely on; lowest cost, *best price-quality* ratio and a life-cycle costing approach. When transposing the Directive, Member States had the choice to restrict contracting authorities' discretion to use the lowest cost approach. However, the lowest cost approach does not necessarily mean that contracting authorities are adopting the economic efficiency approach as set out by Sánchez Graells. The lowest cost approach may be adopted in repeat purchases procured using a framework agreement,<sup>42</sup> a dynamic purchasing system<sup>43</sup> or through the use of electronic auctions or electronic reverse auctions<sup>44</sup> at the end of a competitive procedure. For each of these circumstances, the contracting authority may have assessed non-economic criteria such as quality, environmental characteristics or delivery services during the earlier tender selection and award stages.<sup>45</sup>

Contracts awarded on the basis of lowest costs may be suitable in cases where contracting authorities are purchasing routine, low-value supplies or services. An argument can be made suggesting that contracting authorities who purchase on the lowest cost award basis alone are trading

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<sup>41</sup> It is estimated that 55% of all above threshold contracts concluded by European contracting authorities are evaluated using a lowest-cost price criterion. See Commission, '*Making Public Procurement work in and for Europe.*' (Communication) COM (2017) 572 final.

<sup>42</sup> Public Sector Directive, article 33(1) defines a framework agreement as an arrangement between one or more contracting authorities and one or more economic operators, '*the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.*'

<sup>43</sup> Public Sector Directive, article 34(1) requires dynamic purchasing systems to be conducted electronically and openly, allowing any economic operator that satisfies the selection criteria to join the system at any time. A dynamic purchasing system is a procurement tool which allows for contracting authorities to continuously purchase from the selected economic operators over the duration of the public contract.

<sup>44</sup> Public Sector Directive, article 35(1) defines an electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling tenderers to be ranked using automatic evaluation methods.

<sup>45</sup> *McLaughlin and Harvey Ltd v Department of Finance and Personnel* (No.2) [2008] NIQB 91 and [2011] NICA 59.

long-term socially sustainable markets for short-term economic gains.<sup>46</sup> Economic gains can still be achieved alongside the assessment of non-economic award criteria.<sup>47</sup> The most economically advantageous tender approach set out under the new *best price: quality ratio* still allows for contracting authorities to set weightings disproportionately in favour of costs.<sup>48</sup> Again, this does not necessarily mean that heavily weighted costs restrict the achievement of non-economic objectives; for example, in one of the case studies reviewed for this research, a £27 million catering, cleaning and ancillary services contract had a cost weighting of 70% and was still able to incorporate social criteria into the contract. The contract was awarded to a consortium comprising of one large organisation and one small social enterprise.<sup>49</sup> However, contracting authorities should be cautious on when they use price dominant competitions, as such approaches can result in ‘*race to bottom*’ tendencies by interested economic operators.<sup>50</sup> This occurs in circumstances where tenderers reduce their tendering costs significantly to win the advertised contract.<sup>51</sup>

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<sup>46</sup> H. Boes and A. Dorée, ‘*Public procurement of local authorities in the Netherlands: a case of breaking tradition for a more strategic approach*’ (2009) 10 Proceedings of RICS COBRA Research Conference, University of Cape Town; J Yeow and J. Edler, ‘*Innovation procurement as Projects.*’ (2012) 12(4) Journal of Public Procurement 472; R. Eadie, M. Browne, H. Odeyinka, C. McKeown and S. McNiff, ‘*BIM implementation throughout the UK construction project lifecycle: An analysis*’ (2013) 36 Automation in construction 145; N. Obwegeser and S.D. Müller, ‘*Innovation and public procurement: Terminology, concepts, and applications.*’ (2018) 74 Technovation 1.

<sup>47</sup> Trepte, P., ‘*Regulating procurement: understanding the ends and means of public procurement regulation*’ (Oxford University Press, New York 2004) Ch 2.

<sup>48</sup> Public Sector Directive, art 67.

<sup>49</sup> This is discussed later in Chapter Six Buy Social Case Study.

<sup>50</sup> Case C-377/17 *European Commission v Federal Republic of Germany* [2017] *pub. electr.* EU:C:2019:163 Opinion of Advocate General Szpunar, paras 76 and 96. See also; J. Howe and I. Landau, ‘*Using public procurement to promote better labour standards in Australia: a case study of responsive regulatory design.*’ (2009) 51(4) Journal of Industrial Relations 575; Harrison, K. ed., ‘*Racing to the bottom?: provincial interdependence in the Canadian federation*’ (UBC press 2011) 8; E. Overbye, ‘*Globalisation and the design of the welfare state*’ in D. Pieters, ‘*European Social Security and Global Politics*’ (London: Kluwer Academic Press, 2013) 145; G. Czerniawski, ‘*A race to the bottom—prison education and the English and Welsh policy context*’ (2016) 31(2) Journal of Education Policy 198.

<sup>51</sup> Contracting authorities are required to investigate tenders which they deem to be ‘*abnormally low*’. If the economic operator cannot provide evidence of the company’s ability to submit the low price, the contracting authority should reject the tenderer’s bid. Public Sector Directive, art 69. See also; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, para 51; Case T-495/04 *Belfass* [2008] ECR II-781, para 100; Case C-292/07 *Commission v Belgium* [2009] I-59, para 159; Case T-638/11 *European Dynamics Belgium and Others v EMA* [2013] ECR 530; Case C-599/10 *Slovensko* [2011] ECR I-10873 paras 30 and 34. See also; *NATS (Services) Ltd*

In certain circumstances, tenderers cannot complete the contract within the submitted costs, which results in cost over-runs and operational inefficiencies.<sup>52</sup>

The Directive strongly encourages contracting authorities to consider using the *Best price: quality ratio* or a life-cycle approach.<sup>53</sup> These approaches do not restrict contracting authorities' abilities to achieve economic gains from limiting the inclusion of non-economic criteria. The research acknowledges that the economic objectives of the rules are concerned with promoting cross-border competition by requiring tender procedures to be conducted in open, non-discriminatory and proportionate manners which may consider non-economic award criteria.<sup>54</sup> While the economic efficiency objectives remain stagnant for competition law, public procurement law has developed to reflect the overall movement of the EU. Article 9 of the TFEU requires the Union in carrying out policies;

*[shall] take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.*

Article 9 does not provide a legal base for social policy, but it attests that '*social objectives are equivalent to economic objectives within EU primary law.*'<sup>55</sup> This interpretation is in stark contrast with Sánchez

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*v Gatwick Airport Ltd* [2014] EWHC 3728 (TCC); *SRCL v NHSE* [2018] EWHC 1985 (TCC).

<sup>52</sup> While, contracting authorities are required to investigate any tender which they consider to be abnormally low, it is difficult to identify abnormally low tenders if all tenderers are caught in a race to the bottom. Not only do abnormally low tenders increase the risk of default and costs, there is additional risks of avoidance of environmental, social and labour requirements and risks of reduced quality supplies or services. See; A. Calveras, J.J. Ganuza and E. Hauk, '*Wild bids. Gambling for resurrection in procurement contracts*' (2004) 26(1) *Journal of Regulatory Economics* 41.

<sup>53</sup> Public Sector Directive, art 67. For a discussion on the development of the award criteria see; E. Van den Abeele, '*Integrating Social and Environmental Dimensions in Public Procurement: One Small Step for the Internal Market, One Giant Leap for the EU?*' (2014) ETUI Working Paper 2014.08.

<sup>54</sup> C-324/14 *Partner Apelski Dariusz* [2016] *pub. electr.* EU:C:2016:214, para 60; C-387/14 *Esaprojekt* [2017] *pub. electr.* EU:C:2017:338, para 35.

<sup>55</sup> TFEU, art 9. See also, B. De Witte, '*Forward*' in D. Ferri and F. Cortese, '*The EU social market economy and the law: theoretical perspectives and practical challenges for the EU*' (Routledge, Abingdon, Oxon [UK], New York, 2018) xi.

Graells's lack of acceptance of any non-economic objective in public procurement regulations. The need to support a competitive Single Market remains a steadfast fundamental objective of the EU. But it is clear that this is no longer an isolated goal. In the current *'Future of Europe'* debates, the EU is pushing for the commitment of the Member States to avoid harmful tax evasion, government subsidiaries and social dumping activities.<sup>56</sup> The EU calls for further investment in sustainable, inclusive and innovative economic growth.<sup>57</sup>

In light of the development of the EU's commitment to upholding these goals, it is becoming more difficult to assess the economic objectives in isolation. A significant proportion of the current literature is dedicated to analysing the role public procurement plays in achieving socio-economic objectives.<sup>58</sup> Such socio-economic objectives range from the promotion of employment opportunities, decent work opportunities, compliance with social labour rights, promotion of social enterprises and SMEs, and the inclusion of accessibility criteria, corporate social responsibility, fair trade and the protection of human rights.<sup>59</sup>

### 2.3 Use of Social Public Procurement

The primary EU guidance document on socially conscious public procurement, the *'Buying Social'* document offers a non-exhaustive list of examples of social criteria, including the use of labour standards,

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<sup>56</sup> See Commission, *'White Paper on the Future of Europe - Reflections and scenarios for the EU27 by 2025'* (White Paper) COM (2017) 2025.

<sup>57</sup> Promoting a balance between free trade and the pursuit of social goals is a contested topic. For a broader discussion on the topic see; R. Claassen, R. Gerbrandy, A. Princen, and M. Segers, *'Rethinking the European Social Market Economy: Introduction to the Special Issue'* (2019) 57(1) JCMS: Journal of Common Market Studies 3.

<sup>58</sup> For example, see C. McCrudden, *'Buying social justice: equality, government procurement, and legal change'* (Oxford University Press, New York; Oxford 2007); G. Piga and T. Tátrai, *'Public procurement policy'* (Routledge, Abingdon, Oxon; New York, NY, 2015); B. Sjøfjell and A. Wiesbrock, eds., *'Sustainable public procurement under EU law: new perspectives on the state as stakeholder'* (Cambridge University Press, 2015).

<sup>59</sup> Social criteria may be included as contractual performance clauses once they are proportionately linked to the subject matter of the public contract. The criteria must comply with the TFEU principles and must not confer unrestricted freedom onto the contracting authority. Public Sector Directive, arts 67 and 70.

sustainable practices, innovative and inclusive requirements.<sup>60</sup> The promotion of employment opportunities extends to the inclusion of ‘*employment opportunities for the long-term unemployed*’, including policies and employment opportunities ‘*for persons from disadvantaged groups*’, ‘*youth unemployment*’ and for ‘*people with disabilities*’.<sup>61</sup> In relation to the promotion of decent work, procurers are required to comply with core labour standards and are encouraged to promote ‘*decent pay*’,<sup>62</sup> ‘*access to training*’ and ‘*gender equality and non-discrimination*’.<sup>63</sup> Promotion of compliance with social and labour rights requires contracting authorities to ensure that contractors comply with national laws including occupational health and safety laws. Public procurers are encouraged to include mandatory ‘*accessibility and design for all*’ technical specifications to ensure persons with disabilities have access to the goods and services been provided.<sup>64</sup> Furthermore, the guide requests procurers to consider including ‘*ethical trade*’ considerations into the technical specifications and to encourage contractors to voluntarily adopt

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<sup>60</sup> See Commission, ‘*Buying Social A Guide to Taking Account of Social Considerations in Public Procurement*’ (Guide) SEC (2010) 1258, final.

The Buying Social document is currently being updated, it is reflective of the now replaced Directive 2004/18/EC.

<sup>61</sup> It should be noted that the rules do not extend to employment opportunities See C-260/17 *Anodiki Services EPE* [2018] *pub. electr.* EU:C:2018:864.

<sup>62</sup> The CJEU is reluctant to accept any mandatory requirements which go beyond statutory labour standards. See, Case C-549/13 *Bundesdruckerei* [2014] *pub. electr.* EU:C:2014:2235. See also; M. Doherty, ‘*W(h)ither social Europe? Labour rights in a social market economy*’ in D. Ferri and F. Cortese *The EU social market economy and the law: theoretical perspectives and practical challenges for the EU* (Routledge, Abingdon, Oxon [UK], New York, 2018) 91.

<sup>63</sup> Contracting authorities are prohibited from discriminating tenderers on the grounds of age, disability, race, and gender. Additionally, contracting authorities are required to comply with ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise; ILO Convention 98 on the Right to Organise and Collective Bargaining; ILO Convention 29 on Forced Labour; ILO Convention 105 on the Abolition of Forced Labour; ILO Convention 138 on Minimum Age; ILO Convention 111 on Discrimination (Employment and Occupation); ILO Convention 100 on Equal Remuneration; ILO Convention 182 on Worst Forms of Child Labour. See also; T. Medina-Arnáiz, ‘*Integrating gender equality in public procurement: the Spanish case*’ (2010) 10(4) *Journal of Public Procurement* 541; K. Jaehrling, ‘*The state as a ‘socially responsible customer?’*’ *Public procurement between market-making and market-embedding* (2011) 21(2) *European Journal of Industrial Relations* 14.

<sup>64</sup> Contracting authorities are required to comply with the United Nations Convention on the Rights of Persons with Disabilities. See also; C. Easton, ‘*Website accessibility and the European Union: citizenship, procurement and the proposed Accessibility Act*’ (2013) 27(1-2) *International Review of Law, Computers & Technology* 187.



‘*Corporate Social Responsibilities*’ (CSR) measures.<sup>65</sup> Finally, the guidance encourages procurers to level the playing field for SMEs.<sup>66</sup>

While governments are free to adopt these social criteria, national governments face many issues when implementing socially-driven practices. Arrowsmith elaborates a detailed taxonomy of how social policies can be incorporated into public procurement activities.<sup>67</sup> The taxonomy is based on three key distinctions. The first distinction identifies policies that ‘*are limited to securing compliance with a legal requirement and those that go beyond such requirements*’.<sup>68</sup> For the first distinction, Arrowsmith notes that certain policies are only concerned with ensuring compliance with legislation; for example, minimum wage legislation, whilst others go beyond such requirements and in this example would request the supplier to provide employees with a ‘*fair wage*’. The fair wage may be higher than the national minimum wage and may include additional employment benefits.<sup>69</sup>

The second distinction identifies policies applied only to contract award and those that go beyond it. The policies identified in this category are

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<sup>65</sup> Furthermore contracting authorities are required to comply with Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention); Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention); Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols. For a discussion on CSR in the public sector see; L. Albareda, J.M. Lozano, and T. Ysa, ‘*Public policies on corporate social responsibility: The role of governments in Europe*’ (2007) 74(4) *Journal of Business Ethics* 391; R. Steurer, ‘*The role of governments in corporate social responsibility: Characterising public policies on CSR in Europe*’ (2010) 43(1) *Policy sciences* 49.

<sup>66</sup> L. Preuss, ‘*On the contribution of public procurement to entrepreneurship and small business policy*’ (2011) 23(9-10) *Entrepreneurship & Regional Development* 787; M.V. Kidalov and K.F. Snider, ‘*US and European public procurement policies for small and medium-sized enterprises (SME): a comparative perspective*’ (2011) 13(4) *Business and Politics* 1; K. Loader, ‘*SME suppliers and the challenge of public procurement: Evidence revealed by a UK government online feedback facility*’ (2015) 21(2) *Journal of Purchasing and Supply Management* 103-112; A. Flynn, and P. Davis, ‘*The policy-practice divide and SME-friendly public procurement*’ (2016) 34(3) *Environment and Planning C: Government and Policy* 559.

<sup>67</sup> S. Arrowsmith, ‘*Horizontal policies in public procurement: a taxonomy*’ (2010) 10(2) *Journal of Public Procurement* 149.

<sup>68</sup> See Arrowsmith (n 67).

<sup>69</sup> Case C-549/13 *Bundesdruckerei* [2014] *pub. electr.* EU:C:2014:2235; Case C-115/14 *RegioPost v Stadt Landau* [2015] *pub. electr.* EU:C:2015:566.

only concerned with the performance of the contractual requirements. This model is used successfully in the private sector, particularly in the purchase of sustainable raw products; for example, FSC certified timber. The third distinction identifies nine different mechanisms by which strategic policies are implemented in public procurement operations. The different mechanisms look at contracts which are reserved solely for certain groups of companies including sheltered workshops or social enterprises, contracts which give credit or merit to tenderers for the environmental or social benefit aspects of their tenders.<sup>70</sup> SME friendly criteria can be applied at all stages of a procurement competition; pre-tender stage, tender stage and contract performance stage. At the pre-tender stage, contracting authorities should conduct market research activities to gain an understanding of what services or goods are available on the market, to gauge the level of current competition and to identify the market value of the products and services.<sup>71</sup> Upon completion of the market research, contracting authorities should select an appropriate electronic competitive procedure which would encourage competition amongst *all* forms of companies in the market place.<sup>72</sup> Contracting authorities should consider splitting large contracts into smaller lots. Selection and award criteria should be set proportionately.<sup>73</sup> Once the submitted tenders have been evaluated, feedback should be offered to unsuccessful tenderers outlining the reasons as to why the tenders were not selected.<sup>74</sup> Providing information to unsuccessful SMEs will assist the companies in reviewing and improving their tendering skills and abilities.<sup>75</sup> The contracting authority can further promote SME

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<sup>70</sup> Public Sector Directive, art 20. See also; Arrowsmith, (n 66); Case C-70/95 *Sodemare* [1997] ECR I-03395; Case C-113/13 *Spezzino* [2014] *pub. electr.* EU:2014:2440.

<sup>71</sup> Case T-403/12 *Intrasoft International v Commission* [2015] *pub. electr.* EU:T:2015:774.

<sup>72</sup> Case C-16/98 *Commission v France* [2000] ECR I-08315.

<sup>73</sup> Case C-368/10 *Commission v. Netherlands* [2012] *pub. electr.* EU:C:2012:284.

<sup>74</sup> Directive 2007/66/EC, (*Remedies Directive*), art 2(a). See also; Case T-57/09 *Alfatar Benelux SA v Council of European Union* [2011] *pub. electr.* EU:T:2011:609.

<sup>75</sup> D. McKeivitt and P. Davis, 'Microenterprises: How they interact with public procurement processes' (2013) 26(6) *International Journal of Public Sector Management* 469.

engagement during the contract performance stage by requesting the main contractor to consider subcontracting to SMEs.<sup>76</sup>

A European Commission Report on the strategic use of public procurement assessed the use of socially-driven public procurement. The report provides a comprehensive overview of Member States' experiences of integrating social criteria into procurement policy. The report examined the extent of the use of Green Public Procurement (GPP), SRPP and the promotion of innovative goods, services or works.<sup>77</sup> The Report found that GPP is gaining momentum, with 20 Member States adopting specific non-binding National Action Plans (NAP). However, Member States are reluctant to introduce SRPP specific action plans, favouring to adopt socially-conscious policies into the GPP national plans or existing procurement policies.<sup>78</sup> The most commonly adopted SRPP criteria include ILO core labour standards, reservations for SMEs, social enterprises and sheltered workshops and reservations for social inclusion and equal opportunity.<sup>79</sup>

Some Member States are becoming pro-active in regulating social criteria. The UK is a prime example of this.<sup>80</sup> The UK Government passed the *Public Services (Social Value) Act 2012* into law on March 8, 2012.<sup>81</sup> The Act requires UK procurers to consider the socio-economic impact of their procurement activities in their local vicinity. Henty recognises that the Act essentially applies in pre-procurement situations of services contracts and

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<sup>76</sup> Public Sector Directive, art 71. See also, Case C-406/14 *Wrocław - Miasto na prawach powiatu* [2015] *publ. electr.* EU:C:2015:761 Opinion of Advocate General Sharpston.

<sup>77</sup> See Commission, 'Study on "Strategic use of public procurement in promoting green, social and innovation policies"'(2015) 572 final.

<sup>78</sup> While Member States adopted GPP policies more readily than SRPP specific action plans, Amann et al.'s empirical research findings demonstrate that public procurement is more effective in influencing socially driven goals than environmental goals. See M. Amann, J. Roehrich, M. Essig and C. Harland, 'Driving sustainable supply chain management in the public sector: The importance of public procurement in the EU' (2014) 19(3) *Supply Chain Management: An International Journal* 351.

<sup>79</sup> C. Furneaux and J. Barraket, 'Purchasing social good (s): a definition and typology of social procurement.' (2014) 343(3) *Public Money & Management* 265; A Semple, 'Socially Responsible Public Procurement (SRPP) under EU Law and International Agreements' (2017) 12 *Eur. Procurement & Pub. Private Partnership L. Rev* 293.

<sup>80</sup> See the (UK) *Modern Slavery Act 2015* (c.30).

<sup>81</sup> See the (UK) *Public Services (Social Value) Act 2012*.

requires public procurers and suppliers to re-consider the social, environmental and economic outcomes of their actions.<sup>82</sup> The Scottish government are also active in this area, allowing for the inclusion of specific community benefit clauses in public contracts.<sup>83</sup> The clauses include targeted recruitment and training requirements, small business and social enterprise provisions and community engagement considerations. A government Guidance note was originally published in 2008 following the successful completion of a pilot programme that examined these issues in a practical context.<sup>84</sup> Building on the success of the Guidance Note, a more comprehensive plan on the strategic use of social procurement was adopted in 2016.<sup>85</sup>

One of the greatest criticisms of the inclusion of social criteria in public procurement is the associated risk of increased costs.<sup>86</sup> Tenderers will include the costs of complying with the social criteria in the submitted tender price.<sup>87</sup> Contracting authorities may incur administrative costs through the incorporation of additional criteria in the competition.<sup>88</sup> However, regular inclusion of social criteria will reduce the administrative and operational costs incurred by both public bodies and suppliers.<sup>89</sup> Suppliers will overtime view social criteria as ‘*commercial*’ costs, knowing that the company could be locked out of public markets if it refuses to comply with the social objectives.<sup>90</sup> Original costs associated

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<sup>82</sup> P. Henty, ‘*Social responsibility in public procurement: Public Services (Social Value) Act 2012*’ (2012) 4 Public Procurement Law Review 193.

<sup>83</sup> Scotland’s *Procurement Reform (Scotland) Act 2014*.

<sup>84</sup> Scottish Government ‘*Community Benefits in Public Procurement*.’ (Edinburgh, 2008) 7.

<sup>85</sup> Scottish Government, ‘*Scottish Model of Procurement*.’ (2016); Government of Scotland ‘*The Public Procurement Reform Programme 2006-2016 Achievements and Impacts*.’ Available at: <http://www.gov.scot/Publications/2016/11/9873>. Last accessed 31 May 2019.

<sup>86</sup> O. Mont and C. Leire, ‘*Socially responsible purchasing in supply chains: drivers and barriers in Sweden*’ (2009) 5(3) Social Responsibility Journal 388.

<sup>87</sup> D. Finon and Y. Perez, ‘*The social efficiency of instruments of promotion of renewable energies: A transaction-cost perspective*’ (2007) 62(1) Ecological Economics 77.

<sup>88</sup> M.A. Corvaglia, ‘*Public procurement and labour rights: towards coherence in international instruments of procurement regulation*’ (Bloomsbury Publishing, 2017) 73.

<sup>89</sup> G. Piga and T. Tátrai, ‘*Public procurement policy*’ (Routledge, Abingdon, Oxon; New York, NY, 2015) 18.

<sup>90</sup> A. Erridge and J. McIlroy, ‘*Public procurement and supply management strategies*’ (2002) 17(1) Public Policy and Administration 52; H. Walker and S. Brammer,

with the introduction of social criteria should be offset against the long-term socio-economic benefits, such as the facilitation of SME growth, compliance with social and labour rights and the protection of human rights. Although, it should be recognised that contracting authorities do not have unrestricted freedom on what social targets they can pass onto tenderers. The Directive and CJEU case law set parameters on how social criteria can be incorporated into public procurement competitions.

The objectives of the *acquis* of the Procurement Directives have developed over time to include socially-driven goals. The original 1970s Directives focused on achieving economic efficiencies by preventing preferential treatment and opening cross-border trade. It was not until the 2004 Directives that these objectives were widened. The 2004 Directives, for the first time, explicitly permitted the use of social and environmental considerations in procurement practices. The Directives offered scope for taking account of social considerations provided they are linked to the subject matter of the contract and are proportionate to its requirements.<sup>91</sup>

This research is concerned with how contracting authorities can include non-discriminatory, proportionate and relevant criteria into their procurement procedures which will encourage SME participation. This thesis examines the development of European public procurement legislation and identifies four stages of growth. There has been a gradual development of the legislation over the last five decades, with each revision and modification of the legislation reflecting the political and economic landscape of the time. The first set of Directives were born in the era of early European integration. The primary objective of the rules was to encourage cross-border trade in the Community.<sup>92</sup> Throughout the 1980s a period of consolidation occurred, expanding the coverage and

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*'Sustainable procurement in the United Kingdom public sector'* (2009) 14(2) Supply Chain Management: An International Journal 128.

<sup>91</sup> Directive 2004/18/EC, art 26.

<sup>92</sup> J.F. Riga, *'Recent Council Directives and Commission Proposals Affecting Public Procurement in the European Communities'* (1989) 12 BC Int'l & Comp. L. Rev 387

applicability of the rules.<sup>93</sup> The Single Market was created in 1993, transforming the way suppliers could trade goods between the Member States.<sup>94</sup> The procurement rules were eventually overhauled in 2004 to reflect the changing socio-economic European developments.<sup>95</sup>

The comprehensive set of rules introduced modernised public procurement procedures allowing contracting authorities to award contracts using social and environmental award criteria.<sup>96</sup> Cross-border trade remained at the heart of the 2004 Directives. Contracting authorities were required to publish notices adequately, and the rules included measures preventing contracting authorities from discriminating in favour of domestic suppliers.<sup>97</sup> Within a couple of years of the introduction of the rules, Europe was faced with a financial crisis. Public funds were limited, and there was a growing need to foster innovative and sustainable growth in the Single Market.<sup>98</sup> In responding to the political and economic needs of the Member States, the Commission conducted a review of the public procurement rules.<sup>99</sup> In 2014, the rules were revised, allowing contracting authorities to conduct more straightforward and electronically driven procedures.<sup>100</sup> In contrast to the earlier sets of Directives, the Commission promoted the use of public procurement expenditure to achieve social and

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<sup>93</sup> J.A. Winter, 'Public Procurement in the EEC.' (1991) 28(4) Common Market Law Review 741.

<sup>94</sup> Further promoting market efficiencies, social protection and equality. See F.W. Scharpf, 'The European social model' (2002) 40(4) JCMS: Journal of Common Market Studies 645.

<sup>95</sup> J.M. Hebly, 'European Public Procurement: Legislative History of the 'Classic' Directive 2004/18/EC.' (Kluwer Law International BV 2007).

<sup>96</sup> S. Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41(5) Common Market Law Review 1277.

<sup>97</sup> Y. Allain, 'The new European Directives on public procurement: change or continuity' (2005) 35 Pub. Cont. LJ 517.

<sup>98</sup> Commission, 'Single Market Act II Together for new growth.' (Communication) COM (2012) 0573 final.

<sup>99</sup> Also responding to changes introduced by Lisbon Treaty. See H. Handler, 'Strategic Public Procurement: An Overview' (2015). Available at SSRN: <https://ssrn.com/abstract=2695546>. Last accessed 25<sup>th</sup> April 2019.

<sup>100</sup> The revisions sought to ease administrative tendering burden for both economic operators and contracting authorities.

environmental policy goals whilst achieving financial savings by encouraging competitive cross-border trade.<sup>101</sup>

## 2.4 Stages of Social Development

### 2.4.1 Stage One – Introduction

Prior to the 1970s, European Member States were responsible for the regulation of domestic public procurement expenditure. Member States enjoyed a wide degree of discretion in regulating public procurement practices through administrative-legal mechanisms.<sup>102</sup> States had the freedom to utilise procurement expenditure to purchase from domestic suppliers.<sup>103</sup> During this period, the EEC introduced regulations and directives to abolish trade barriers within the regional market. The EEC developed two underlying strategic plans to facilitate economic integration. The first plan sought to adopt measures aiming at the abolition of all tariff and non-tariff barriers to cross-border trade and the second plan established an undistorted regime of competition within the common market.<sup>104</sup> Public procurement was identified as a barrier to cross-border trade as preferential purchasing was the norm in most Member States. In 1962, the Council of Ministers adopted the *General Programmes* which envisaged the abolition of national quotas and restrictions in public procurement. A Directive was adopted in 1966, preventing contracting authorities from prohibiting foreign companies tendering for public works contracts.<sup>105</sup> The founding public procurement Directive 70/32 was

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<sup>101</sup> See Commission, ‘*Proposal for a Directive of the European Parliament and of the Council on Public Procurement.*’ (2011) COD 0438. The 2014 rules went beyond what was already stated in the 2004 Directives. The most notable addition is Art 18(2) which requires tenderers to comply with social, environmental and labour law.

<sup>102</sup> D.G. Morgan and G.W. Hogan, ‘*Administrative law in Ireland*’ (3rd edn, Sweet & Maxwell, Dublin, 1998).

<sup>103</sup> S. Martin, K. Hartley and A. Cox, ‘*Public procurement directives in the European Union: a study of local authority purchasing*’ (1999) 77(2) *Public Administration* 387.

<sup>104</sup> D. Miron, ‘*European Union Trade Policy*’ In A.M. Dima, ed *Doing Business in Europe Economic Integration Processes, Policies, and the Business Environment* (Springer, Cham, 2018) 51.

<sup>105</sup> Commission Directive 66/683/EEC of 7 November 1966 eliminating all differences between the treatment of national products and that of products which, under Articles 9

published in 1969, incorporating the rules outlined in the General Programmes and Directive 66/683.<sup>106</sup> This initial Directive 70/32 sought to encourage trade by imposing obligations on the Member States to publicise invitations to tender regionally.<sup>107</sup>

The main purpose of the secondary sources of procurement legislation was to apply the Treaty principles in the internal market and to facilitate cross border trade.<sup>108</sup> The original Works Directive in applying the Treaty principles sought to prohibit national discrimination by introducing measures that promoted the free movement of goods. Rules relating to the procurement of supplies played a subordinate role until the late 1970s. The original Works Directive sought to open trade within the European market place, to increase import penetration of goods into the public sector, thus resulting in significant savings and price convergence.<sup>109</sup> However, the rules failed to achieve their economic objectives as the rules did not address disparities in national legislation, and an updated co-ordination Works Directive was adopted in 1971.<sup>110</sup> The updated Works Directive further outlined the circumstances where a contracting authority was required to apply the rules. The Works Directive required contracting authorities to adequately advertise public contracts and prohibited the use of technical specifications that had a discriminatory effect on economic operators from the other Member States.<sup>111</sup>

The updated rules imposed further obligations on contracting authorities to publish contract notices in the Official Journal. Contracting authorities

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and 10 of the Treaty, must be admitted for free movement, as regards laws, regulations or administrative provisions prohibiting the use of the said products and prescribing the use of national products or making such use subject to profitability – Directive 62/427/EEC OJ 18633/64 / Directive 64/429/EEC OJ 1880/64.

<sup>106</sup> Directive 70/132 [1970] OJ L13/1.

<sup>107</sup> C. Bovis, *Research handbook on EU public procurement law* (Edward Elgar Publishing, 2016) 1; J.A., *Winter Public Procurement in the EEC* (1991) 28(4) Common market law review 741.

<sup>108</sup> Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889. Opinion of Advocate General Lenz, para 47.

<sup>109</sup> See J.A. Winer (n 107).

<sup>110</sup> Directive 71/304 [1971] OJ L 185/1; Directive 71/305/EEC [1971] OJ L185/5. See also; S. Martin, K. Hartley and A. Cox (n 103).

<sup>111</sup> Directive 71/304, recital 3.



were required to publish any technical specifications of the contract in the supplementary documentation to allow interested economic operators to assess whether or not to submit a tender response.<sup>112</sup> The consolidated rules made specific reference to the permissible use of European Standards in the technical specifications of the contract, further applying the Treaty principles of equal treatment and non-discrimination.<sup>113</sup> This provision would be further expanded in the coming years to comply with the new WTO Agreement on Government Procurement (GPA).<sup>114</sup>

A further consolidative Directive was adopted in 1976 to cover public supplies contracts.<sup>115</sup> The Supplies Directive was comprised of provisions similar to that of the Works Directive. The two Directives placed similar procedural obligations on contracting authorities; the only substantive difference was the use of a higher financial threshold for advertising works contracts.<sup>116</sup> A European assessment report was conducted in 1985, examining the impact of the two Directives.<sup>117</sup> The Report concluded that the rules failed to achieve the two main legislative objectives of opening trade in the common market and allowing contracting authorities to achieve value for money in public supplies and works contracts. The report identified three distinct causes for the ineffectiveness of the rules. The first issue identified that the application of excessively high advertising thresholds aided protectionist purchasing. Contracting authorities easily ignored the requirement to advertise contracts regionally, by under-evaluating contract costs and dividing contracts into

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<sup>112</sup> Directive 71/304, recital 9.

<sup>113</sup> Directive 71/305, recital 3.

<sup>114</sup> See the WTO plurilateral Agreement on Government Procurement (1994) art I – XII.

<sup>115</sup> Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts [1977] OJ L 13/1.

<sup>116</sup> This is reflected in the current Public Sector Directive. See also; Appendix A for a list of the advertising thresholds as set out by; Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU in respect of the application thresholds for the procedures for the award of contracts.

<sup>117</sup> See Commission of the European Communities, *‘The Cost of Non-Europe, Basic Findings, Vol.5, Part A; The Cost of Non-Europe in Public Sector Procurement’* (Official Publications of European Communities, Luxembourg 1988).

smaller lots. Short submission time-frames limited non-national economic operators' ability to submit a completed bidding document.<sup>118</sup>

The second major error identified a substantive problem with the scope of the rules. The Directive only covered goods and limited services contracts. The rules did not apply to defence contracts, public utility contracts and the vast majority of service contracts.<sup>119</sup> Procedural weaknesses were present, the rules did not require contracting authorities to account fully for their actions, and there were no obligations placed on contracting authorities to offer reasons or explanations of their choice to unsuccessful aggrieved tenderers. The third error referred to the lack of substantive appeal provisions, and redress rules differed significantly between the Member States increasing the difficulty for non-national tenderers to understand the redress rights available under each national system.<sup>120</sup>

#### 2.4.2 Stage Two - Consolidation

The rules were updated a series of times over the late 1980s and early 1990s to correct failings of the previous texts.<sup>121</sup> Two Directives were introduced to cover additional public services contracts and the previously excluded public utilities sector. Directive 89/665 of 21 December 1989 and Directive 92/13 of 25 February 1992 were introduced to harmonise

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<sup>118</sup> See Commission, *'The Cost of Non-Europe'* (n 117).

<sup>119</sup> See the Cechinni Report 1992 *The European Challenge* (Aldershot: Wildhouse, 1998).

<sup>120</sup> Directive 80/723 [1980] OJ L 195/35  
Directive 88/295/EEC [1988] OJ L 127/1  
Directive 89/440/EEC [1989] OJ L 210/1  
Directive 89/665/EEC Remedies Directive [1989] OJ L 395/33  
Directive 90/531 [1990] OJ L 297/71  
Directive 91/308 [1991] OJ L 166/77  
Directive 92/13/EEC [1991] OJ L 76/7  
Directive 92/44/EEC [1992] OJ L 165/27  
Directive 92/50/EEC [1992] OJ L 209/1  
Directive 93/36/EEC [1993] OJ L 199/1  
Directive 93/37/EEC [1993] OJ L 199/54  
Directive 93/38/EEC [1993] OJ L 199/84  
Directive 97/52/EC [1997] OJ L 328.

<sup>121</sup> Directive 88/255 of 22 March 1988 amended Directive 77/62. Directive 88/255 introduced a more comprehensive set of rules on supplies contracts. Directive 89/440 of 18 July 1989 amended Directive 71/305 on the procurement of public works contracts.

and improve procurement redress rights for unsuccessful tenderers. Three further consolidating texts were adopted in 1993 to enhance harmonisation of public procurement for supplies contracts, for works contracts and the formally excluded utilities sector.<sup>122</sup> Each of the Directives further clarified the use of permissible procedures for awarding contracts, including the use of prior information measures, quality criteria and outlined the availability of redress processes. Economically driven principles motivated the implementation of the consolidation Directives, the rules sought to increase cross-border procurement by removing discriminatory barriers to trade. The removal of trade barriers yielded trade benefits for purchasers; in this case, procurers benefitted from the use of economies of scale and increased competition.<sup>123</sup>

A number of transformative European Treaties were adopted in rapid succession over the next two decades accumulating in the creation of the European Union.<sup>124</sup> The adoption of the Treaties and the creation of the Single European Market had a significant impact on the purpose and role of public procurement rules. Public procurement operations were the focus in two historically important documents, in the 1985 White Paper document on the creation of the Single Market and in the 1986 Commission Communication.<sup>125</sup> It was hoped that the creation of the Single European Market (SEM) would combat the economic threat to Europe posed by the high technology developments in the US and Japan and newly industrialising states in assembly industries.<sup>126</sup> The SEM focused on removing the formal and informal barriers to cross-border trade in the region, including the removal of physical barriers associated

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<sup>122</sup> Directive 93/36/EEC [1993] OJ L 199/1 Covering Supplies Contracts  
Directive 93/37/EEC [1993] OJ L 199/54 Covering Works Contracts  
Directive 93/38/EEC [1993] OJ L 199/84 Covering Utilities Contracts

<sup>123</sup> See Commission, '*White Paper for the completion of the Internal Market*' (White Paper) COM (1985) 85-310 final.

<sup>124</sup> Treaty on European Union (1992) (Maastricht Treaty); EU Treaty (2001); Accession Treaty (2003); Treaty on the Functioning of the European Union (2008) (TFEU) (formerly the EC Treaty); Treaty of Lisbon (2009).

<sup>125</sup> See COM (1985) 85-310 final.

<sup>126</sup> See Commission, '*Removing the Legal Obstacles to the Use of the ECU. Commission White Paper for the Council.*' (White Paper) SEC (1992) 2472.

with state frontier inspections and the removal of technical barriers to ease the harmonisation of legal and regulatory measures.<sup>127</sup>

One of the subsidiary goals of the SEM was to create an active single European public procurement market. In 1988 an official report was commissioned to investigate the economic justification for completing the internal market. The significant '*Cecchini Report*' described the regional public market during this period as '*closed*' and '*generally uncompetitive*'. Attention was paid to the failings of the public market with the report concluding that governments were distorting the market place through the overuse of government subsidiaries and the use of multiple national standards for the ICT and utilities sector. The report found that most states were effectively excluding all non-domestic suppliers from public procurement competitions by dividing contracts into smaller lots to avoid the publication thresholds and by incorrectly classifying contracts as '*continuations*' or '*emergencies*' to avoid the full application of the rules regardless of the purpose of the contract.

The SEM introduced a climate of openness and fairness by encouraging contracting authorities to advertise contract notices and specify objective award criteria which do not discriminate in favour of domestic suppliers.<sup>128</sup> The harmonisation of design standards in high technology sectors resulted in improved efficiencies in the utilities sector.<sup>129</sup> The SEM successfully paved the way for the creation of strong European companies. The EU experienced enhanced cross-border trade and witnessed the reorganisation of high technology industries capable of competing with their US and Japanese counterparts.<sup>130</sup> An SEM evaluation report congratulated public procurement legislation for facilitating and levelling the playing field for high technology industries whilst also recognising

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<sup>127</sup> See Commission '*The Single Market Review Dismantling of Barriers Public Procurement.*' (1997) 3(2) Kogan Space Earth Scan 44.

<sup>128</sup> See C. Bovis (n 107) 4.

<sup>129</sup> K.A. Armstrong, S.J. Bulmer, '*The governance of the single European market*' (Manchester University Press, 1998).

<sup>130</sup> For a wider discussion on the improvement of the utilities sector see; T. Jamasb, and M. Pollitt, '*Electricity market reform in the European Union: review of progress toward liberalization & integration*' (2005) *The Energy Journal* 11.

that the legislation should be further expanded to support the innovative ICT sector.<sup>131</sup>

The later adoption of the Treaty on European Union (TEU) further recognised the importance of promoting trade in the Single Market, while additionally emphasising the need to develop sustainable growth in the market.<sup>132</sup> The Treaty of Amsterdam significantly extended the scope of the social dimension of the Union, insisting on future policies to take into account social objectives that promote employment, living and working conditions. These developments cemented the Union's move away from introducing regional regulation based on purely economic objectives. Against the backdrop of a modernising Union, the primarily economically driven public procurement Directives appeared outdated. A series of evaluating reports were commissioned to assess the use of public procurement to promote economic and social growth in the Member States.<sup>133</sup>

#### 2.4.3 Stage Three Modernisation

The Directives were once more amended in 2004 to address the changes made by the Treaties, to codify Court of Justice case law and to modernise and simplify the existing rules. The amendments resulted in the consolidation of one single directive for the procurement of works, supplies and services contracts.<sup>134</sup> The changes introduced aimed to enhance contracting authority's flexibility by providing new provisions on framework agreements, the introduction of a new competitive dialogue procedure and facilitating the use of electronic procurement. The rules codified CJEU case law, by requiring the disclosure of weightings for

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<sup>131</sup> See Commission, *'The Single Market Review Dismantling of Barriers Public Procurement.'* (1997) 3(2) Kogan Space Earth Scan 44.

<sup>132</sup> B. Sjäfjell and A. Wiesbrock, eds., *'Sustainable public procurement under EU law: new perspectives on the state as stakeholder'* (Cambridge University Press, 2015) 10.

<sup>133</sup> C. McCrudden, *'Buying Social Justice. Equality, Government Procurement and Legal Change'* (Oxford University Press, New York, Oxford 2007).

<sup>134</sup> Directive 2004/17/EC (Utilities Directive) [2004] OJ L 358/35; Directive 2004/18/EC (Public Sector Directive) [2004] OJ L 134/1.

award criteria, by making substantial changes to the scope of specifications and allowing for the use of particular environmental criteria.<sup>135</sup>

Additionally, Directive 2007/66/EC was introduced on the 11th December 2007 to improve the efficiency of the redress procedures for aggrieved unsuccessful tenderers.<sup>136</sup> The Remedies Directives aim to protect tenderers' redress rights by imposing a '*standstill period*' and stringent rules against illegal direct awards. The standstill period refrains contracting authorities from concluding the contract for a period of fourteen to sixteen days after the selection of the preferred tenderer.<sup>137</sup> The standstill period should give unsuccessful tenderers sufficient time to assess whether it is appropriate to initiate a review procedure.<sup>138</sup> In the case where a review proceeding is initiated, the procurement process becomes automatically suspended and cannot be completed until the review has been addressed and completed.<sup>139</sup> The Remedies Directives aim to maintain integral and ethical procedures by imposing strict rules against illegal direct awards and providing for national courts to hold such awards as '*ineffective*'.<sup>140</sup> The revision of the redress rules represents the completion of the harmonisation of procurement procedures, which is thought to make cross-border tendering more accessible for SMEs.<sup>141</sup>

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<sup>135</sup>Codified cases included; Case C-380/09, paragraph 34., Case C-237/99 1 February 2001., Case C-300/07 11 July 2009. and Case C-44/96 15 January 1998.

<sup>136</sup> The Directive replaces and makes substantial changes to the previous Remedies Directives, Remedies Directive for Utilities Sector (Directive 92/13/EEC) and the Remedies Directive for the Public Sector (Directive 89/665/EEC).

<sup>137</sup> The standstill period should last at least 15 days if the notification letter is posted and at least 10 days if the letter is delivered by electronic means. Remedies Directive, art 2(a).

<sup>138</sup> Unsuccessful tenderers must also receive sufficient information regarding the reasons as to why their tender was rejected. See Case T 667/11 *Veloss International SA and Attimedia SA v European Commission* [2015] *pub. electr.* EU:T:2015:5.

<sup>139</sup> Remedies Directive, art 2(d). See; *American Cyanamid Co (No 1) v Ethicon Limited* [1975] UKHL 1.

<sup>140</sup> Remedies Directive, art 2(d). This is the first Directive to impose the remedy of *ineffectiveness*; previously the highest remedy available was the declaration of *voidness* of contracts found to be illegally awarded.

<sup>141</sup> This comment refers to procedural harmonisation only and does not extend to use of the SRPP or compliance with the Directives.

#### 2.4.4 Stage Four Maturity

The changes brought about by the Lisbon Treaty had a significant impact on public procurement, further supporting the use of social and environmental criteria in the awarding public contracts.<sup>142</sup> The Lisbon Treaty introduced Article 3 to the TEU, clearly stating that the internal market policies and regulations shall promote the attainment of sustainable economic growth.<sup>143</sup> Internal market policies should assist in the creation of a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. This interpretation of the social economy is in stark contrast to the former Article 4(1) in the TEC.<sup>144</sup> The former article sets out the basis for a free market economy, implying a strict focus on the matter of competition only with minimum influence and control by public regulatory authorities.<sup>145</sup> The principles of a free market economy do not promote the achievement of social or environmental goals outside the economic scale.<sup>146</sup> The original public procurement rules were based on free-market goals. However, the emphasis on designing rules around purely economic objectives has been diminished dramatically in recent years.

Public procurement procedures may focus on achieving non-economic objectives, while also adhering to Article 119 paragraph 1 of the TFEU, which prohibits the distortion of competition in the internal market.<sup>147</sup>

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<sup>142</sup> For a wider debate on the development of a socio-sustainable Europe see; L.F. Besselink, *'National and constitutional identity before and after Lisbon'* (2010) 6 *Utrecht L. Rev* 36; S. Gstöhl and D. Hanf, *'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context'* (2014) 20(6) *European Law Journal* 733.

<sup>143</sup> TEU, art 3. See also; A. Dimopoulos, *'The effects of the Lisbon treaty on the principles and objectives of the common commercial policy.'* (2010) 15(2) *European Foreign Affairs Review* 153; AG Cruz Villalón in Case C-515/08 *Santos Palhota* ECLI:EU:C:2010:245, para 51.

<sup>144</sup> Former TEC, art 4(1).

<sup>145</sup> D. Ferri and F. Cortese, *'The EU social market economy and the law: theoretical perspectives and practical challenges for the EU'* (Routledge, Abingdon, Oxon [UK], New York, 2018) 129.

<sup>146</sup> O. Odudu, *'The Boundaries of EC Competition Law; The Scope of Article 81'* (Oxford University Press, 2006) 9.

<sup>147</sup> TFEU, art 119(1).

This is evident in the Directives, which allow for the use of sustainable environmental award criteria that are relative to the subject matter of the contract and do not distort competition. In particular, contracting authorities are required to follow the test for the use of non-economic criteria set out in ‘*Concordia Bus*’ and ‘*Wienstrom*’ judgments.<sup>148</sup> The cases established four separate criteria which must be present for environmental award criteria to be declared compatible with European law. For environmental and social award criteria to be deemed compatible, the criteria must be linked to the subject matter of the contract, it may not confer an unrestricted freedom of choice on the contracting authority, it must be expressly mentioned in the tender notice and must comply with all the fundamental principles of Community law.<sup>149</sup>

The transformation of the Union from an economic trading block to a Union which supports the development of innovative, digitalised and sustainable economies, is evident by the adoption of the Single Market Act in 2011.<sup>150</sup> The Act set out twelve levers to boost growth and strengthen confidence in economies, ranging from access to finance for SMEs, development of a digital Single Market, supporting social entrepreneurship, business environments and social cohesion.<sup>151</sup> One of the twelve levers directly refers to the operation of public procurement markets. The lever proposed to revise the 2004 Directives to make procurement ‘*more efficient, flexible and user-friendly*’, by reducing the administrative burden on suppliers, supporting the use of e-procurement and allowing for greater use of environmental, innovative and social considerations.<sup>152</sup> Specifically, the lever outlined an objective to improve

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<sup>148</sup> Case C-513/99 *Concordia Bus*, [2002] ECR I-7213, para 81; Case C-4481/01 *EVN* [2003] ECR I-14527.

<sup>149</sup> Case C-368/10 *Commission v Netherlands* [2012] *pub. electr.* EU:C:2012:284.

<sup>150</sup> See Commission, ‘*Single Market Act II Together for new growth.*’ (Communication) COM (2012) 0573 final.

<sup>151</sup> See Commission, ‘*Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth"*’ (Communication) COM (2011) 0206 final.

<sup>152</sup> COM (2011) 0206 final.



SMEs access to public procurement by prohibiting disproportionate financial specifications in tender competitions.<sup>153</sup>

Whilst researchers disagree on the effectiveness and implementation of the European social economy goals, public procurement is recognised as a practical tool for delivering the regional socio-economic aims at a local level.<sup>154</sup> In supporting the public procurement lever of the Single Market Act, the 2004 Public Procurement Directives were overhauled to allow contracting authorities to support the development of inclusive, innovative and sustainable public markets.<sup>155</sup> Bovis concludes that the 2011 Single Market Act established and directly promoted a ‘*liberalised and integrated*’ public procurement region.<sup>156</sup> The Directives do not impose specific policies on the Member States and instead focus on eliminating barriers to participation and extending contracting authorities’ freedom to include social, environmental and innovative purchasing criteria. Thus, achieving the wider harmonised goals of the Single Market Act.

## 2.5 2014 Directives

The new rules were initially proposed in early 2011 and agreed with the Council in June 2013.<sup>157</sup> The European Parliament voted to accept three new EU Directives; Public Sector Procurement Directive,<sup>158</sup> Utilities Sector Procurement Directive<sup>159</sup> and a Procurement of Works and Services Concessions Directive.<sup>160</sup> The new Directives replaced Directive 2004/17/EC co-ordination of Utilities sector procurement and Directive

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<sup>153</sup> COM (2011) 0206 final.

<sup>154</sup> For a debate on the development of the social economy market see F.W. Scharpf, ‘*The asymmetry of European integration, or why the EU cannot be a ‘social market economy’*’ (2010) 8(2) Socio-Economic Review 211.

<sup>155</sup> See Commission, ‘*Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market*’ COM (2011) 15/47.

<sup>156</sup> C. Bovis, ‘*The social dimension of EU public procurement and the ‘social market economy’*’ in D. Ferri and F. Cortese, ‘*The EU social market economy and the law: theoretical perspectives and practical challenges for the EU*’ (Routledge, Abingdon, Oxon [UK], New York, 2018) 104.

<sup>157</sup> COD (2011) 0438.

<sup>158</sup> Directive 2014/24/EU (Public Sector Directive).

<sup>159</sup> Directive 2014/25/EU (Utilities Directive).

<sup>160</sup> Directive 2014/23/EU (Concessions Directive).

2004/18/EC. Overall, the Directive clarifies when contracting authorities can include economic, innovation-related, environmental, social or employment-related considerations and contractual performance clauses in tender competitions.<sup>161</sup>

The updated rules allow public bodies to best use their limited resources without being unduly burdensome. Public bodies can include economic, innovation-related, environmental, social or employment-related contractual performance conditions, provided that they are linked to the subject-matter of the contract and indicated in the call for competition documents.<sup>162</sup> Revised rules on tender submissions are thought to make it less administratively difficult and easier for SMEs to compete for public contracts. A new Regulation on the access of third-country suppliers and service providers to EU Member States' public markets was also adopted. The Directive for the first time makes numerous references to the importance of supporting SME participation in public contracts. Contracting authorities are encouraged to divide large contracts into lots and to use proportionate, inclusive and innovative criteria and procedures.

## 2.6 Main Changes

### 2.6.1 Division of contracts into lots

SMEs generally do not have the financial or operational capability to carry out large contracts.<sup>163</sup> SMEs are thereby locked out of large contracts which are often conducted at a centralised level and are awarded to a sole supplier or a number of large economic operators.<sup>164</sup> Sub-dividing large

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<sup>161</sup> Public Sector Directive, art 70.

<sup>162</sup> Public Sector Directive, art 70.

<sup>163</sup> A company's survival, growth and profitability prospects are intrinsically linked to the size of the company. See T. Beck, Demirgüç, A. Kunt, and V. Maksimovic, 'Financial and legal constraints to growth: does firm size matter?' (2005) 60(1) *The Journal of Finance* 137.

<sup>164</sup> H. Walker and L. Preuss, 'Fostering sustainability through sourcing from small businesses: public sector perspectives' (2008) 16(15) *Journal of Cleaner Production* 1600; D. Pickernell, A. Kay, G. Packham and C. Miller, 'Competing agendas in public procurement: an empirical analysis of opportunities and limits in the UK for SMEs.' (2011) 29(4) *Environment and Planning C: Government and Policy* 641; K. Loader, 'SME suppliers and the challenge of public procurement: Evidence revealed by a UK government online feedback facility' (2015) 21(2) *Journal of Purchasing and Supply*

contracts into manageable sections offer SMEs the opportunities to bid for a lot of the overall contract. Recital 78 the Directive specifically requests contracting authorities to ‘make use’ of the ‘*European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts*’, by dividing large contracts into smaller lots on a quantitative or qualitative basis to facilitate SME participation. When splitting contracts on a quantitative basis, contracting authorities should ensure that SMEs would have the capability to bid for appropriately sized lots.<sup>165</sup> When dividing the contracts on qualitative basis procurers are encouraged to consider the specific sectors in which SMEs operate, to assist SMEs in competing for the specialised lots or project phases.<sup>166</sup> Public procurers retain the freedom to define the size and subject matter of the contract and maintain the discretion to use lots in contracts which fall outside the remit of the Directives.<sup>167</sup>

Furthermore, contracting authorities have the discretion to limit the number of lots that may be awarded to one tenderer.<sup>168</sup> Equally, tenderers should enjoy the freedom to bid for each of the advertised lots.<sup>169</sup> Contracting authorities considering limiting the number of lots tenderers may bid for and win should firstly conduct market analysis to ensure that there is sufficient competition in the market to secure value for money by adopting this approach.<sup>170</sup> Spagnolo and Yukins declare that the use of lots

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Management 103; A. Flynn and P. Davis, ‘*The policy–practice divide and SME-friendly public procurement*’ (2016) 34(3) *Environment and Planning C: Government and Policy* 559.

<sup>165</sup> Public Sector Directive, art. 46(1).

<sup>166</sup> P. Morand, ‘*SMEs and public procurement policy*’ (2003) 8(3) *Review Economic Design* 301.

<sup>167</sup> SMEs find it easier to compete for and effectively manage below threshold contracts. See R. Fee, A. Erridge and S. Hennigan, ‘*SMEs and government purchasing in Northern Ireland: problems and opportunities*’ (2002) 14(5) *European Business Review* 326.

<sup>168</sup> Public Sector Directive, art 46(2).

<sup>169</sup> Public Sector Directive, recital 38 and art 46(2).

<sup>170</sup> Thus preventing a situation where suppliers enjoy the possibility of ‘*sharing*’ or fixing the contracts they bid for, this form of bid rotation would in fact reduce rather than foster competition. For further discussion on bid rotation see S. Weishaar, ‘*Cartels, competition and public procurement: Law and economic approaches to bid rigging.*’ (Edward Elgar Publishing, 2013); T. Søreide, ‘*Corruption in public procurement. Causes, consequences and cures.*’ (Chr. Michelsen Institute, 2002).

is a key determinable in opening competition in public procurement.<sup>171</sup> SMEs will benefit from the use of lots when the divisions are proportionate in number, size, geographical dispersion and specialisms, allowing for SMEs to bid for manageable contracts in relative proximity to their place of business.<sup>172</sup> Limiting the number of lots tenderers can bid for may unintentionally curb competition for the contracting authority.<sup>173</sup> Suppliers should be given the opportunity to bid for each lot which the supplier believes it can effectively compete. This places the responsibility onto public procurers to base their decisions on a detailed understanding of the current marketplace and knowledge of economic operators. Contracting authorities should consider limiting the number of lots that can be awarded to one tenderer in circumstances where the contracting authority has a need to 're-buy' a standard good or service on a continuous basis.<sup>174</sup> By limiting the number of lots, one tenderer may be awarded increases the number of suppliers engaged in the public market, which in turns contributes to competition in the private market. When the contracting authority tenders for the contract again, the authority should reap the benefits of a competitive market.

One of the more progressive provisions of the rules is the requirement for contracting authorities to outline their reasons for not dividing above-

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<sup>171</sup> This view is supported by Albano and Sparro who submit that the use of aggregated centralised contracts lead to reduced number of competitors. The use of centralised contracts strengthens the buying power of the public body, which in turn encourages suppliers to aggressively compete in public competitions by offering lower prices. Public bodies benefit from economies of scale and reduced duplication of transactions costs. Although, Albano and Sparro support Spagnolo's argument, by concluding that the use of centralised approaches can have a negative impact on the distribution of the market shares of suppliers. See G. Albano and M. Sparro, 'Flexible Strategies for Centralized Public Procurement' (2010) 1(2) Review of Economics and Institutions; G. Spagnolo and C. Yukins, 'Lots – the Economic and Legal challenges of centralised procurement'. Colloquium in G. Piga and T. Tátrai, 'Public procurement policy' (Routledge, Abingdon, Oxon;New York, NY, 2015) 61.

<sup>172</sup> V. Grimm, R. Pacini, G. Spagnolo and M. Zanza, 'Division in Lots and Competition in Procurement' in N. Dimitri, G. Piga, G. Spagnolo, eds., *Handbook of Procurement* (Cambridge University Press, 2006).

<sup>173</sup> L. Carpineti, G. Piga, and M. Zanza, 'The Variety of Procurement Practice: Evidence from Public Procurement' in N. Dimitri, G. Piga, G. Spagnolo, eds., *Handbook of Procurement* (Cambridge University Press, 2006).

<sup>174</sup> D. McKeivitt, A. Flynn, and P. Davis, 'Public buying decisions: A framework for buyers and small firms' (2014) 27(1) International Journal of Public Sector Management 94.

threshold contracts into proportionate lots.<sup>175</sup> This requirement may cause legal uncertainty for the Member States which have chosen not to transpose the mandatory requirement to sub-divide large contracts into smaller lots. There is confusion over the judicial remit of this provision, concerns have been expressed regarding to whom the contracting authority is responsible and what form of penalties can be applied for non-compliance with the requirement. Sánchez Graells goes as far as suggesting that the ‘*divide or explain*’ requirement should be subject to judicial review.<sup>176</sup> Trybus contends this interpretation, concluding that procurers are required to offer an ‘*explanation*’ not a ‘*justification*’ of their decision not to use lots, and as such ‘*explanations*’ are not subject to judicial review.<sup>177</sup> Despite the lack of regulatory certainty, contracting authorities are required to consider their decisions to divide large contracts into smaller lots.

Furthermore, recent research completed by Trybus indicates that this provision will not improve SME participation as it does not differ substantially from the provision contained in the 2004 Directive.<sup>178</sup> The new explanation requirement is the core difference between the 2004 Directive provisions and the 2014 Directive provisions. This is particularly relevant for the Member States which have not implemented the mandatory division requirements. Trybus argues that this new requirement for public procurers to note their decisions not to divide large contracts will not by itself increase SME participation. However, it is clear that the 2014 Directive has promoted the use of lots as a useful mechanism to facilitate SME participation. Trybus further notes that the use of lots

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<sup>175</sup> Public Sector Directive, art. 46(2).

<sup>176</sup> A. Sánchez Graells, ‘*Public procurement and the EU competition rules*’ (2nd edn, Bloomsbury Publishing 2015) 347.

<sup>177</sup> M. Trybus, ‘*The Division of Public Contracts into Lots under Directive 2014/24: Minimum Harmonisation and Impact on SMEs in Public Procurement?*’ (2018) 43(3) *European Law Review* 313. See also; Zimmermann M, ‘*Economic Efficiency and the Division of Large Procurement Contracts Into Lots: An Analysis*’ (2017) 12 *Eur Procurement & Pub Private Partnership L Rev* 422.

<sup>178</sup> Trybus (n 177).

has the potential to increase micro-enterprises participation in low-value contracts which fall outside the remit of the Directive.<sup>179</sup>

### 2.6.2 Considerations for Persons with Disabilities, Unemployed Persons and Disadvantaged Persons

Member States were required when implementing the Directive to take into account the United Nations Convention on the Rights of Persons with Disabilities.<sup>180</sup> The Directive requires contracting authorities to ensure that they consider the Convention when selecting the means of communications, technical specifications, award criteria and contract performance conditions.<sup>181</sup> Technical specifications must refer to any mandatory accessibility requirements which have been adopted by a legal act of the EU.<sup>182</sup>

The revised rules aim to contribute to the integration of disabled<sup>183</sup> and disadvantaged persons '*such as the unemployed members of disadvantaged minorities or otherwise socially marginalised groups*' into the workplace.<sup>184</sup> One of the provisions contained in the rules allows for contracting authorities to set-aside certain contracts for sheltered

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<sup>179</sup> See J. Murray, '*Public procurement strategy for accelerating the economic recovery*' (2009) 14(6) *Supply Chain Management: An International Journal* 429; C. Perry, '*Supporting SMEs access to public procurement opportunities*' (2011) 12(1) *Research and Information Service Research Paper* 12; L. Knight, C. Harland, and J. Telgen, '*Public procurement in perspective Public Procurement*' (Routledge, 2012) 44; K. Loader, '*SME suppliers and the challenge of public procurement: Evidence revealed by a UK government online feedback facility.*' (2015) 21(2) *Journal of Purchasing and Supply Management* 103.

<sup>180</sup> Convention on the Rights of Persons with Disabilities (CRPD), art 1.

<sup>181</sup> Approved by Council Decision 2010/48/EC of 26 Nov 2009 concerning the conclusion, by the European Community of the United Nations Convention on the Rights of Persons with Disabilities (OJ L 23, 27.1.2010, p.35).

<sup>182</sup> It should be noted that there are some limits to this provision. For example, this provision is supported by Section 27 of the Irish '*Disability Act 2005*'. Section 27 requires contracting authorities to ensure that public services are accessible for people with disabilities. However, contracting authorities are not required to comply with this requirement if it is too costly to include accessibility criteria or if it would cause an unreasonable delay.

<sup>183</sup> Art 2 of the CRPD offers the definition of disability relied on by the Directive. The definition explains that persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. Member States should also take into account the definitions of disabled worker, disadvantaged worker and sheltered employment set out in Art. 2(3), 2(4), 2(100) Regulation (EU) 651/2014.

<sup>184</sup> Public Sector Directive, recital 36.

workshops or economic operators which aim to promote the long-term employment of disabled and disadvantaged persons.<sup>185</sup> This can be achieved through the use of sheltered workshops.<sup>186</sup> While the terminology is outdated and fails to reflect the diverse development of the social enterprise sector, this clause will benefit many social enterprises.<sup>187</sup> Social enterprises are companies which pursue both social and economic goals with an entrepreneurial spirit.<sup>188</sup> The enterprise is required to demonstrate that at least 30% of its employees are disadvantaged workers or people with disabilities.<sup>189</sup>

Furthermore, Article 20 provides for contracting authority to reserve contracts or certain ‘lots’ of contracts for sheltered employment programmes. Current literature is quiet on this aspect of the rules. However, this provision has the potential to support the inclusion of community benefit clauses into public works and supplies contracts without distorting market competition; for example, if a contracting authority plans to include a ‘*targeted recruitment and training clause*’ in a public contract, the authority can choose to set the clause aside in a separate lot of the contract. This might be an appealing approach for both for-profit SMEs and social enterprises.<sup>190</sup> SMEs are generally driven by profit and may not have the capability or interest in the community benefit clause.<sup>191</sup> If the community benefit clauses were isolated in a separate lot of the contract, this would not hinder SME participation as SMEs could

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<sup>185</sup> Member States when implementing policies on the use of this provision should take Council Decision (EU) 2018/1215 of 16 July 2018 *on guidelines for the employment policies of the Member States* into consideration.

<sup>186</sup> Public Sector Directive, recital 36 and art 20(1) Contracting authorities in carrying out a competition relying on Art 20 should observe Art 77 which outlines permissible public contracts and economic operators.

<sup>187</sup> Particularly enterprises engaged with the employment of disadvantaged, marginalised or unemployed persons.

<sup>188</sup> OECD, ‘*The Social Enterprise Sector: A Conceptual Framework.*’ Available online <https://www.oecd.org/cfe/leed/37753595.pdf> Last accessed 19<sup>th</sup> May 2019.

<sup>189</sup> This requirement has been reduced from 50% in Directive 2004/18/EC.

<sup>190</sup> The ‘*for-profit*’ wording is crude and suggests that social enterprises are not concerned with profits. However, the thesis continues to use this phrase when referring to all forms of registered SMEs who are primarily set up to make a profit and do not actively pursue a social objective.

<sup>191</sup> This is not always the case as noted in; L. Spence and R. Rutherford, ‘*Social responsibility, profit maximisation and the small firm owner-manager*’ (2001) 8(2) *Journal of Small Business and Enterprise Development* 126.

bid for the operational element of the contract. Likewise, social enterprises which focus on promoting employment of people with disabilities and disadvantaged people can bid for the element of the contract which is of most interest to the enterprises, i.e. the social clauses lot.

This approach may only be suitable for certain types of public works and services contracts,<sup>192</sup> and the lot should include elements of the subject matter of the contract; for example, if a contracting authority sought to tender for a catering and ancillary services contract, the contract could be divided into heterogeneous sub-lots. One hypothetical lot may require ad-hoc catering services for events and a second lot may require the operation of a small office café. If the contracting authority wishes to include targeted recruitment and training requirements in a contract, the authority could isolate this community benefit clause to the small café lot.<sup>193</sup> The ad-hoc catering services lot would not include the community benefit requirements.

In this scenario, the contracting authority could rely on Article 20 to set-aside the lot for a sheltered workshop or economic operators which aim to promote the long-term employment of disabled or disadvantaged people. Interested economic operators would need to demonstrate that 30% of their employees are disadvantaged or unemployed persons. Contracting authorities may isolate the social clause to the individual lot, which has the greatest potential to generate jobs and will not distort market competition. Two different arguments may refute this approach. One argument might suggest the inclusion of the social clause alone distorts competition and a second opposing argument might suggest that this approach limits the effectiveness of the social clause by only applying the clause to one lot of the contract.<sup>194</sup>

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<sup>192</sup> This approach is generally suitable for contracts which are large enough to generate employment growth.

<sup>193</sup> The contracting authority may follow this approach if it supports local government or national employment and inclusivity policies.

<sup>194</sup> A. Sánchez Graells, *'Truly competitive public procurement as a Europe 2020 lever: what role for the principle of competition in moderating horizontal policies?'* (2016) 22(2) European Public Law 377.



The isolation of social benefits in a single lot will not maximise employment opportunities nor will it promote pure economic efficiency, however, it creates an opportunity for contracting authorities to pursue social objectives in a manner which will facilitate SMEs and social enterprises, and, in a manner, which would not significantly distort competition. While this approach is set out in the Recitals of the Directive, it is rarely used in the two case studies countries. Irish and Northern Irish public bodies, as we will see, are extremely reluctant to rely on the provision to set aside contracts for sheltered workshops.

### 2.6.3 Innovation

The socio-economic dimension of the rules is further evident in the promotion of innovative public procurement practices. Recital 47 calls for public procurers to ‘*make the best strategic use of public procurement to spur innovation*’ to secure the key Europe 2020 objectives of promoting smart, sustainable and inclusive economic growth.<sup>195</sup> Contracting authorities are encouraged to purchase innovative supplies and services to achieve eco-growth and social innovation.<sup>196</sup> The recitals encourage the use of innovative procurement to address ‘*major societal challenges*’, whilst simultaneously securing value for taxpayers’ money and supporting innovative business growth. The rules suggest that this can be achieved through the use of PCP and by the use of the ‘*innovation partnership*.’ The recital makes specific reference to the PCP model established and set out in the Commission Communication ‘*Pre-commercial Procurement*’ which may be used by procurers in the procurement of research and development (R&D) services.<sup>197</sup> R&D activities refer to any actions taken

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<sup>195</sup> See Commission, ‘*Europe 2020: A strategy for smart, sustainable and inclusive growth*.’ (2010) COM 2020 final.

<sup>196</sup> This viewpoint has been previously encouraged by J. Edler and L. Georghiou, ‘*Public procurement and innovation—Resurrecting the demand side*’ (2007) 36(7) *Research Policy* 949; L. Hommen and M. Rolfstam, ‘*Public procurement and innovation: towards a taxonomy*’ (2009) 9(1) *Journal of Public Procurement* 17; V. Lember, T. Kalvet and R. Kattel, ‘*Urban competitiveness and public procurement for innovation*’ (2011) 48(7) *Urban Studies* 1373.

<sup>197</sup> See Commission, ‘*Pre-commercial Procurement: driving innovation to ensure sustainable high-quality public services in Europe*’ (Communication) COM (2007) 0799 final.

normally by companies to develop new supplies or services. The Communication is applicable for contracts which fall outside the remit of the Directive. PCP involves the successive development of innovative solutions with risks and benefits shared between economic operators and a public body under market conditions.<sup>198</sup>

Full tender competitions for the purchase of the commercialised solutions can follow the completion of the pre-commercial stage.<sup>199</sup> This demand led activity offers procurers greater choice to define and design required solutions by interacting closely with a range of tenderers. Contracting authorities do not enjoy the freedom to interact with interested economic operators when the tender competition is ongoing.<sup>200</sup> This process provides start-ups and innovative companies an opportunity to work with public bodies. PCP involves procuring activities which fall for the most part outside of the Directive and require low sums of investment from public procurers.<sup>201</sup>

For innovative R&D contracts falling within the remit of the Directive, contracting authorities are encouraged to use the new '*innovation partnership*' procedure. This procedure assists procurers in purchasing innovative solutions which require significant sums of public investment.<sup>202</sup> The innovation partnership procedure is suitable for contracting authorities which require the design and development of an innovative product or service which is not commercially available on the market.<sup>203</sup> The procedure allows contracting authorities to establish a long-term partnership with economic operators for the development and subsequent purchase of the commercialised products or services. The

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<sup>198</sup> J. Edler and L. Georghiou, '*Public procurement and innovation—Resurrecting the demand side*' (2007) 36(7) *Research Policy* 949.

<sup>199</sup> See COM (2007) 0799 final. This process is discussed in more detail in Chapter Three SMEs and Public Procurement.

<sup>200</sup> Joined Cases C-21/03 and C-34/03 *Fabricom SA v Belgian State* [2005] ECR I-1559.

<sup>201</sup> Public Sector Directive, recital 47.

<sup>202</sup> M. Andhov, '*Innovation Partnership in the New Public Procurement Regime – A Shift of Focus from Procedural to Contractual Issues?*' (2015) 2 *Public Procurement Law Review* 18.

<sup>203</sup> E. Iossa, F. Biagi and P. Valbonesi, '*Pre-commercial procurement, procurement of innovative solutions and innovation partnerships in the EU: rationale and strategy*' (2018) 27(8) *Economics of Innovation and New Technology* 730.

innovation partnership is based on the procedural rules that apply to the competitive process with negotiation.<sup>204</sup> Contracts awarded under this procedure must be evaluated on the basis on *Best Price: Quality Ratio*.<sup>205</sup> The new procedure encourages contracting authorities to make purchases that improve the efficiency and quality of public services while addressing major societal challenges.<sup>206</sup>

Questions have been raised by Arrowsmith around the risk of preferential treatment associated with PCP procedures.<sup>207</sup> Companies which have completed the development and prototyping stages may have an unfair competitive advantage at the full tender stage. Perceived favouritism between the contracting authority and contracted companies may deter additional suppliers from bidding for the contract, believing that they do not have the same knowledge or experience that the other companies may have gained from the earlier development stage.<sup>208</sup> The new innovation partnership aims to reduce these concerns, as it combines the R&D and commercial purchase stage in one overall procedure.<sup>209</sup> However, a full tender process, as required, for an innovation partnership encompasses the traditional tendering and legislative barriers for SMEs.<sup>210</sup>

While there are some concerns around the risk of preferential treatment with PCP procedures, Edler and Georghiou suggest that procurers can prevent monopolistic structures in later procurement contracts by involving more than two competitors in the process.<sup>211</sup> Procurers may conduct initial solution design contracts with multiple suppliers which they can remove from the competition at different stages of the procedure.

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<sup>204</sup> The procedure for conducting a Competitive procedure with Negotiation is set out in art 29 of the Public Sector Directive.

<sup>205</sup> Public Sector Directive, art 67.

<sup>206</sup> As most Member States transposed the Directive into national law in or after 2016, there are limited resources available assessing the use and effectiveness of the new procedure.

<sup>207</sup> S. Arrowsmith, *The law of public and utilities procurement* (3rd edn, Sweet & Maxwell, London) 1054.

<sup>208</sup> S. Arrowsmith (n 207) 1047.

<sup>209</sup> This process may take place over successive stages. Public Sector Directive, art 31(2).

<sup>210</sup> Including problems finding and accessing tenders and meeting the financial and professional criteria.

<sup>211</sup> J. Edler and L Georghiou (n 198).

By working with several companies may reduce the risk of preferential treatment. This approach also encourages competition amongst all forms of small companies. PCP offers an easier route for start-ups, academics, non-profits, entrepreneurs to work with the public sector.<sup>212</sup> It is not clear at this stage if the same can be said about innovative partnerships. Limited research is available assessing the impact of the innovation partnership on SME participation.

The Directive includes additional measures for contracting authorities to incorporate innovative criteria in traditional procurement procedures, such as the use of variants.<sup>213</sup> Contracting authorities are encouraged to carry out pre-market consultations to make themselves aware of relevant technological advances or innovative changes in the market place. Pre-market consultations will aid procurers in designing appropriate and relevant innovative selection and award criteria.<sup>214</sup> Contracting authorities are required to disclose the process and content of the consultations.<sup>215</sup>

#### 2.6.4 Subcontracting

Another aspect of the rules encourages contracting authorities to take subcontractor considerations into account.<sup>216</sup> Large contracts are dominantly awarded to large enterprises.<sup>217</sup> SMEs can access large

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<sup>212</sup> Y. Myoken, 'Demand-orientated policy on leading-edge industry and technology: public procurement for innovation' (2010) 43(1-3) *International Journal of Technology Management* 196; A. Apostol, 'Pre-commercial procurement in support of innovation: regulatory effectiveness' (2012) 21(6) *Public Procurement Law Review* 213; J. Rigby, 'Review of pre-commercial procurement approaches and effects on innovation' (*Manchester Institute of Innovation Research: Manchester, 2013*); V. Lember, R. Kattel and T. Kalvet, 'Public procurement and innovation: Theory and practice' (2014) *Public Procurement, Innovation and Policy* 13; C. Edquist and J. Zabala-Iturriagoitia, 'Pre-commercial procurement: a demand or supply policy instrument in relation to innovation?' (2015) 45(2) *R&D Management*.

<sup>213</sup> Public Sector Directive, recital 48.

<sup>214</sup> D. McKeivitt and P. Davis, 'How to interact, when and with whom? SMEs and public procurement' (2015) 35(1) *Public Money & Management* 79.

<sup>215</sup> Public Sector Directive, arts 40-42.

<sup>216</sup> Public Sector Directive, art 71. See Case C-176/98 *Host Italia* [1999] ECR I-8607 paras 26 and 27; Case C-126/03 *Commission v Germany* [2004] judgment of 18 November 2004.

<sup>217</sup> This is mainly due to the large companies' capacity, resources and market dominance. See R. Berrios, 'Government contracts and contractor behaviour' (2006) 63(2) *Journal of Business Ethics* 119.

contracts through the supply chain as subcontractors.<sup>218</sup> In general, SMEs do not have the financial requirements and operational capability to carry out large contracts, and subcontracts offer SMEs a share of the public contract. The Directive includes several subcontractor provisions. Contracting authorities may ask tenderers in their submissions to indicate any plan it may have to subcontract to third parties.<sup>219</sup> Contracting authorities may make direct payments to subcontractors for works completed on awarded public works, supplies or services contracts.<sup>220</sup> In these circumstances, contracting authorities may allow the main contractor to object to the direct payments.<sup>221</sup>

In public works and related services contracts, contractors are required to provide the contracting authority with information on all subcontractors used throughout the contract. Contractors are required to provide the name, contact details and legal representatives of its subcontractors.<sup>222</sup> Contracting authorities may require subcontractors to submit certificates and supporting documents to declare their suitability and capability to carry out the proportion of the public contract.<sup>223</sup> Additionally, the contracting authority may restrict the main contractor from subcontracting vital elements of the contract, requiring the contractor to perform the specified works, supplies or services.<sup>224</sup> Although, this approach may hinder SMEs from bidding for contracts as SMEs may rely on

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<sup>218</sup> A. Berry, '*SME competitiveness: The power of networking and subcontracting*' (Inter-American Development Bank 1997); L. Preuss, '*Buying into our future: sustainability initiatives in local government procurement*' (2007) 16(5) *Business Strategy and the Environment* 354; K. Loader, '*The challenge of competitive procurement: value for money versus small business support*' (2007) 27(5) *Public Money and Management* 307; K. Loader, '*Is public procurement a successful small business support policy? A review of the evidence*' (2013) 31(1) *Environment and Planning C: Government and Policy* 39.

<sup>219</sup> Public Sector Directive, art 71(2) See Case C-314/01 *Siemens AG Österreich, ARGE Telekom & Partner and Hauptverband der österreichischen Sozialversicherungsträger*, judgment of 18 March 2004.

<sup>220</sup> Public Sector Directive, art 71(7) This provision was at the discretion of Member States.

<sup>221</sup> Public Sector Directive, art 71(3).

<sup>222</sup> Public Sector Directive, art 71(5).

<sup>223</sup> Contracting authorities should in particular assess whether there are any grounds for the exclusion of subcontractors pursuant to Article 57.

<sup>224</sup> Public Sector Directive, art 63(2).

subcontractors' qualifications, experience, financial capabilities to meet the minimum selection criteria set out in the tender document.<sup>225</sup>

Alternatively, interested economic operators can form a consortium to pool their resources to meet the minimum selection, and qualification criteria set out in the contract. There is no requirement for the consortium to establish a separate legal entity.<sup>226</sup> However, Trybus raises an argument that SMEs do not wish to enter the public market as subcontractors or as part of a consortium as they do not want another enterprise controlling and managing their operational choices.<sup>227</sup> Whilst this is a valid concern, this research accepts that SMEs can enter public markets via subcontracts.

#### 2.6.5 Conditions for the performance of the contract

The rules expressly allow for the inclusion of economic, environmental, social, innovative or employment-related contractual performance conditions. This extends to measures which relate to the production process, such as the use of targeted recruitment and training of disadvantaged or unemployed persons.<sup>228</sup> This form of community benefit clause is a permissible form of award criteria, once the clause is directly related to the works, supplies or services contract. Thus, the social requirements must be directly related to the subject matter of the contract and can be fulfilled during the production process.<sup>229</sup> The use of targeted recruitment and training clauses have become popular with Irish and Northern Irish public bodies, particularly in the use of large works

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<sup>225</sup> See Case C-389/92 *Ballast Nedam Groep* which concerned the reliance on third-party resources within a group company structure and Case C-176/98 *Holst Italia* which concerned the reliance on third-party resources in the context of joint venture arrangements.

<sup>226</sup> Case C-94/12 *Swm Costruzioni 2 and Mannocchi Luigino* [2013] *pub. electr.* EU:C:2013:646 Opinion of Advocate General Jaaskinen, para 33 paras 29 and 33; Case C-324/14 *Partner Apelski Dariusz* [2016] *pub. electr.* EU:C:2016:214.

<sup>227</sup> M. Trybus, 'The Promotion of Small and Medium Sized Enterprises in Public Procurement: a Strategic Objective of the New Public Sector Directive?' in F. Lichère, R. Caranta and S. Treumer (eds.) 'Modernising Public Procurement: The New Directive; (Djøf: Copenhagen, 2014) 255.

<sup>228</sup> Contracting authorities may additionally request tenderers to show compliance or equivalent compliance with specific environmental or social 'labels.' These requirements may be included in the technical specifications, the award criteria or the contract performance conditions, once they are proportionate and relevant to the subject-matter of the contract. See Public Sector Directive, art 43.

<sup>229</sup> Public Sector Directive, recital 99.

contracts.<sup>230</sup> This is a contentious area of public procurement law with multiple layers of arguments supporting and criticising the use of socially-related contractual performance conditions.

Firstly, as mentioned already, theoretical arguments question the legality and purpose of pursuing social objectives. Sánchez-Graells and Telles contest the legality of such objectives, claiming that such measures distort market competition.<sup>231</sup> While McCrudden argues that public procurement should be used by public procurers to pursue their perceived conceptions of social justice.<sup>232</sup> Secondly, arguments have been raised around the actual benefits achieved from the use of social criteria.<sup>233</sup> Baden et al.'s empirical evidence finds that SMEs are not in favour of community benefit clauses, as the clauses lead to increased operational costs and inefficiencies. The research further argues that the use of targeted recruitment and training clauses can demotivate contractors' permanent employees due to the constant rotation of new staff employed to meet the targets set out by the social clause.<sup>234</sup> Although Tátrai argues that when social clauses become embedded in procurement practice, they will not lead to increase tendering or operational costs.<sup>235</sup>

Loosemore adds another layer to this argument, suggesting that the inclusion of targeted recruitment and training clauses encourages social

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<sup>230</sup> The legislative developments in Ireland and in Northern Ireland will be discussed in further detail later in this chapter, in Chapter Three *SMEs and Public Procurement* and in Chapter Five *the National Children's Hospital Case Study* and in Chapter Six *the Buy Social Case Study*.

<sup>231</sup> A. Sánchez-Graells, '*Distortions of Competition Generated by the Public (Power) Buyer: A Perceived Gap in EC Competition Law and Proposals to Bridge It*' (2009) University of Oxford, Center for Competition Law and Policy, CCLP (L) 23; P. Telles, '*The Good, the Bad, and the Ugly: The EU's Internal Market, Public Procurement Thresholds, and Cross-Border Interest*' (2013) 43 Pub. Cont. LJ 3.

<sup>232</sup> C. McCrudden, '*Buying Social Justice. Equality, Government Procurement and Legal Change*' (Oxford University Press, New York, Oxford 2007).

<sup>233</sup> R. Eadie and S. Rafferty, '*Do corporate social responsibility clauses work? A contractor perspective*' (2014) 7(1) *International Journal of Procurement Management* 19.

<sup>234</sup> D. Baden, I. Harwood and D. Woodward, '*The effects of procurement policies on 'downstream' corporate social responsibility activity: Content-analytic insights into the views and actions of SME owner-managers*' (2011) 29(3) *International Small Business* 259.

<sup>235</sup> The costs will be viewed as operational costs by the interested economic operators. See; G. Piga and T. Tátrai, '*Public procurement policy*' (Routledge, Abingdon, Oxon; New York, NY, 2015) 18.

enterprise participation in public procurement.<sup>236</sup> Social enterprises which prioritise the employment and training of people with disabilities and for people at risk of gaining long-term employment can act as useful partners or subcontractors on large works or services contracts that incorporate social clauses. Social enterprises are in a prime position to carry out the social requirements which a partnering or main contractor may find unappealing.<sup>237</sup>

#### 2.6.6 Compliance with Social and Labour Laws

Arguably, one of the most progressive social provisions of the Directive is the requirement to ensure that contractors are compliant with applicable obligations in the fields of environmental, social and labour law. Article 18(2) requires contracting authorities to take relevant measures to ensure the procured service provider or contractor complies with the social and labour laws that apply in the Member State where the services are provided or where the works are conducted.<sup>238</sup> Contracting authorities are specifically required to ensure that the procurement requirements are conducted in accordance with Directive 2018/957 concerning the posting of workers.<sup>239</sup> Non-compliance with social and labour requirements is

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<sup>236</sup> A social enterprise is defined as an enterprise whose ownership structure reflects the enterprise's mission to promote social justice. See Commission, *'Social Business Initiative Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation'* (Communication) COM (2011) 0682 final. See also; M. Loosemore, *'Building a new third construction sector through social enterprise'* (2015) 33(9) *Construction Management and Economics* 724.

<sup>237</sup> Loosemore (n 236) See also; S. Munoz, *'Social enterprise and public sector voices on procurement'* (2009) 5(1) *Social Enterprise Journal* 69; A. Erridge and S. Hennigan, *'Sustainable procurement in health and social care in Northern Ireland'* (2012) 32(5) *Public Money and Management* 363; A. Argyrou, *'Providing Social Enterprises with Better Access to Public Procurement: The Development of Supportive Legal Frameworks'* (2017) 12 *Eur. Procurement & Pub. Private Partnership Law Rev* 310.

<sup>238</sup> Contracting authorities are not permitted to rely on this provision to violate Art 56 TFEU. Contracting authorities can rely on Art 18(2) to assess economic operators' compliance with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X. Art 18(2) is supported by recital 37, 38 and 39; art 56(1) on awards of contracts; art 57(4) on exclusion criteria and art 69(3) on abnormally low tenders.

<sup>239</sup> Directive (EU) 2018/957 OJ L 173 amends Directive 96/71/EC concerning the posting of workers in the framework of the provision. See also; Public Sector Directive, recital 98.



considered a grave form of misconduct and may result in the economic operator being excluded from the procurement process.<sup>240</sup>

In relation to discretionary exclusions contracting authorities may exclude economic operators from participation in a procurement procedure;<sup>241</sup>

- where the contracting authority can demonstrate that an economic operator violates any obligations in the fields of social, labour and environment law referred to in Annex X;
- where the operator is bankrupt or is in the process of winding-up proceedings, or is the subject of insolvency;
- where the economic operator is guilty of grave professional misconduct;
- where the economic operator has engaged in activities aimed at distorting competition;
- where a conflict of interest exists;<sup>242</sup>
- where an economic operator has participated in market consultations, and participation in the tender would distort competition;<sup>243</sup>
- where the economic operator has performed poorly in previous public contracts which led to the early termination of the contract or the application of sanctions or other comparable sanctions;
- where the economic operator has made serious misrepresentations in relation to the selection criteria;
- and where the economic operator has unduly influenced the awarding process or has received confidential information about the bidding process.

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<sup>240</sup> However, the grounds for misconduct must be proportionate to the overall nature of the contract. See Case C-171/15 *Connexion Taxi Services BV v Staat der Nederlanden, Transvision BV and others* [2016] *pub. electr.* EU:C:2016:948, para 44.

<sup>241</sup> As listed in the Public Sector Directive, art 57(4).

<sup>242</sup> As laid out in Public Sector Directive, art 24.

<sup>243</sup> This should only be used as a last resort and in circumstances where the inclusion of the economic operator would result in a breach of the fundamental principles.

Contracting authorities may exclude economic operators at any stage of the competition for engaging in any of these activities before or during the competition.<sup>244</sup>

Although, a contracting authority shall not exclude such economic operators if the economic operator has fulfilled its payments or has entered into an arrangement to pay any outstanding tax or social contributions.<sup>245</sup> In exceptional circumstances, contracting authorities are not required to exclude economic operators for violations of environmental, social and labour law, if there any overriding public policy considerations.<sup>246</sup> Similarly, contracting authorities are not required to exclude such economic operators if the violations against social, labour or environmental law are minor and disproportionate to the size of the contract.<sup>247</sup>

Contracting authorities retain the *discretion* not to exclude any economic operator for engaging in these activities in circumstances where; the economic operator provides evidence showing that it has paid or has undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct concerned or has offered a valid explanation for its actions or has introduced technical, organisational and personnel measures to prevent further offences.<sup>248</sup> If the contracting authority considers the steps taken to be insufficient, they must offer the economic operator a statement summarising the rationale of their reasons for rejecting the bidder.<sup>249</sup>

Contracting authorities are required to exclude economic operators from competitions if the authority is aware that the economic operator has been convicted of any the offences listed below or if the authority has verified the information in accordance with Articles 59, 60 and 61 of the Directive.

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<sup>244</sup> Public Sector Directive, art 57(5).

<sup>245</sup> Public Sector Directive, art 57(3).

<sup>246</sup> Public Sector Directive art 57(2).

<sup>247</sup> Public Sector Directive arts 57(2) and 57(3).

<sup>248</sup> Public Sector Directive, art 57(6).

<sup>249</sup> See Case C-391/15 *Marina del Mediterraneo and Others* [2017] *pub.electr.* EU: C:2017:268; *Varney v Hertfordshire County Council* [2010] EWHC 1404.

Offences include; participation in a criminal organisation, engaging in corrupt or fraudulent activities, engaging in terrorist offences or offences linked to terrorist activities, engaging in money laundering or terrorist financing, or participation in child labour or other forms of trafficking of human beings.<sup>250</sup> The provision relies on definitions established for each of these activities in Council Framework Decisions,<sup>251</sup> the Convention on the protection of the European Communities' financial interests<sup>252</sup> and definitions set out in Directives.<sup>253</sup> If the contracting authority is aware that a person convicted of any of these offences is a member of the administrative, management or supervisory body of the economic operator or maintains a decision making, representative or controlling position within the company, the contracting authority shall exclude that economic operator from the competition.<sup>254</sup> Economic operators found guilty of any of the mandatory exclusion offences and have not engaged in any self-cleaning measures shall be excluded from procurement competitions for five years from the date of conviction.<sup>255</sup>

Van den Abeele notably comments that these provisions, and in particular Article 18(2) '*introduces a minimum core of social and environmental*' requirements in public contracts.<sup>256</sup> Not only does the Directive promote compliance with applicable social, labour and environmental law, the Directive additionally aims to prevent social dumping in the Single

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<sup>250</sup> Public Sector Directive, art 57(1).

<sup>251</sup> Including; Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002, p. 3; Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192 p. 54; Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300, 11.11.2008, p. 42.

<sup>252</sup> Including; the Convention on the protection of the European Communities' financial interests OJ C 316, 27.11.1995, p. 48; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309, 25.11.2005, p. 15.

<sup>253</sup> Including; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1.

<sup>254</sup> Public Sector Directive, art 57(2).

<sup>255</sup> Public Sector Directive, art 57(7).

<sup>256</sup> E. Van den Abeele, '*Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?*' (2014) ETUI Working Paper.

Market.<sup>257</sup> Social dumping in public procurement can occur in situations where economic operators tendering for a public contract in another Member State submit low tender costs by relying on lower wages and working conditions, relative to the levels set out by the Member State where the public work is to be carried out.<sup>258</sup> The economic operator can reduce its overall tender cost as its labour-costs will be lower than those economic operators who are complying with the relevant labour laws where the public work will be conducted.<sup>259</sup> There are a number of reasons why social dumping practices should be discouraged, such practices erode workers' rights and result in tenderers submitting abnormally low tenders, which leads to cost overruns and in some cases non-completion of public contracts or non-completion of elements of the public contract.<sup>260</sup>

An alternative argument disputes these claims, arguing that economic operators' ability to rely on lower labour costs in its base Member State is advantageous to the business and increases its competitiveness when bidding for public or private contracts.<sup>261</sup> Recent CJEU judgments differ on the permissible use of public procurement to advance contracting authorities' perceptions of labour equality.<sup>262</sup> This is discussed in the next section of the chapter. The labour-law related provisions reduce the incentives for tenderers to submit abnormally low tenders, which may

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<sup>257</sup> This provision supports the often-contentious Posted Workers Directive. See J. Cremers, J. Dølvik and G. Bosch, '*Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU*' (2007) 38(6) *Industrial Relations Journal* 524.

<sup>258</sup> J. Alber and G. Standing, '*Social dumping, catch-up or convergence? Europe in a comparative global context*' (2000) 10(2) *Journal of European Social Policy* 99.

<sup>259</sup> M. Bernaciak, '*Social Dumping: Political Catchphrase or Threat to Labour Standards?*' ETUI Working Paper 2012/06. (Brussels: European Trade Union Institute 2012); E. Bengtsson, '*Social dumping cases in the Swedish Labour Court in the wake of Laval, 2004–2010*' (2016) 37(1) *Economic and Industrial Democracy* 23.

<sup>260</sup> M. Gunduz and H. Karacan, '*Assessment of abnormally low tenders: a multinomial logistic regression approach*' (2017) 23(6) *Technological and Economic Development of Economy* 848; T. Hanak, I. Marovic and N. Jajac, '*Effect of Electronic Reverse Auctions on Competition and Abnormally Low Bids in Public Construction Procurement*' (2018) 25(1) *Tehnicki vjesnik - Technical Gazette* 144.

<sup>261</sup> C. Thörnqvist and C. Woolfson, '*When tender turns tough: posted workers and the tendering regime in the Swedish construction industry*' (2012) 30(7) *Construction Management and Economics* 525.

<sup>262</sup> Case C-549/13 *Bundesdruckerei*; Case C-115/14 *RegioPost* [2015].

level the playing field for SMEs and reduce incidents of cost over-runs associated with abnormally low tenders.<sup>263</sup>

#### 2.6.7 Procedural

There are several procedural provisions included in the Directive which make it easier for procurers to promote competition by upholding the fundamental principles. The rules require contracting authorities to include financial and professional selection criteria which are proportionate to the subject matter of the contract.<sup>264</sup> In particular, the minimum turnover required should not exceed twice the estimated contract value.<sup>265</sup> The Directive encourages the use of a '*European Single Procurement Document*' (ESPD) which allows suppliers to upload certificates and financial documents to an online procurement account. This eases SMEs burden in producing this documentation every time they submit a tender response.<sup>266</sup> Reducing the administrative burden associated with tendering makes it easier for SMEs to bid for public contracts.

Member States are encouraged to increase the use of electronic procurement strategies to increase efficiency and transparency.<sup>267</sup> Electronic procurement (e-procurement) refers to any procurement process which is completed through the use of electronic means by the contracting authority.<sup>268</sup> The European Commission has called on the Member States to increase their use of e-procurement to generate significant savings for European taxpayers and to encourage SME

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<sup>263</sup> G. Skovgaard Ølykke, '*The provision on abnormally low tenders: a safeguard for fair competition?*' In G Skovgaard Ølykke and A. Sanchez-Graells eds. '*Reformation or deformation of the EU public procurement rules.*' (Edward Elgar Publishing 2016) 146.

<sup>264</sup> Public Sector Directive, art 58(3) prevents contracting authorities from setting financial criteria which exceeds two times the estimated contract value, except in duly justified cases.

<sup>265</sup> Public Sector Directive, recital 83.

<sup>266</sup> Public Sector Directive, recital 84.

<sup>267</sup> S. Croom and A. Brandon-Jones, '*Impact of e-procurement: experiences from implementation in the UK public sector*' (2007) 13(4) *Journal of Purchasing and Supply Management* 294.

<sup>268</sup> N. Panayiotou, S. Gayialis and I. Tatsiopoulou, '*An e-procurement system for governmental purchasing*' (2004) 90(1) *International Journal of Production Economics* 79.

participation.<sup>269</sup> The Commission reports that public entities that have implemented e-procurement report savings of between 5% and 20% of their procurement expenditure.<sup>270</sup> The current EU public procurement market is estimated to be more than €2 trillion and a 5% reduction in the budget would result in about €100 billion of savings per year.<sup>271</sup> The promotion of e-procurement is a prime feature in the Digital Agenda for Europe, and the rules included an ambitious transition towards e-procurement in the EU.<sup>272</sup> However, this is not a new development; similar targets were set by the *Manchester Ministerial Declaration* of 24 November 2005, requiring for at least 50% of above-threshold public procurement procedures to be carried out electronically by 2010.<sup>273</sup> The use of e-procurement has clear and tangible benefits for SMEs, by increasing transparency and access to tender competitions and by reducing administrative costs.<sup>274</sup>

## 2.7 Public Procurement activities outside the remit of the rules

SMEs are more successful in winning public contracts which fall below the Directive's thresholds.<sup>275</sup> The research must now question if the social and economic objectives are still applicable to below-threshold contracts. The Directive is only applicable to high-value contracts. The rules were put in place to promote cross-border trade by harmonising open and fair procedures across Member States. To achieve these goals, the Directive is

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<sup>269</sup> Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement Text with EEA relevance OJ L 133/1.

<sup>270</sup> See Commission, '*A strategy for e-procurement*' (Communication) COM (2012) 0179 final.

<sup>271</sup> The French central purchasing body, UGAP (Union des Groupements d'achats publics) estimated that the switch to e-procurement practices reduced the administrative burden for buyers by 10%. The Welsh e-procurement programme 'XchangeWales' delivered benefits of £58million within three years of its implementation. See Commission, '*A Strategy for e-Procurement*' (Memo) 20 April 2012 .

<sup>272</sup> See Commission, '*A Digital Single Market Strategy for Europe*' (Communication) COM (2015) 0192 final.

<sup>273</sup> See *Manchester Ministerial Declaration* 2005.

<sup>274</sup> COM (2012) 0179 final. See also; H. Walker and S. Brammer, '*The relationship between sustainable procurement and e-procurement in the public sector*' (2012) 140(1) *International Journal of Production Economics* 256.

<sup>275</sup> See Commission, '*Evaluation of SMEs' access to Public Procurement Markets in the EU.*' (2010) Final Report.

only applicable to public contracts which have the potential to create cross-border trade. The European Commission calculates the value of public contracts which generate cross-border trade, this value is set as the monetary ‘*threshold*’ for the rules.<sup>276</sup> Public works, supplies and services contracts whose estimated value meets or exceeds this threshold must adhere to the procedures set out in the Directive.<sup>277</sup> The financial thresholds are revised every two years to reflect market conditions.<sup>278</sup> Different thresholds are set for central government departments, local and regional authorities and the utilities sector, to reflect the differences in market competition. Similarly, a higher threshold is set for social, health and education services contracts.<sup>279</sup>

Member States retain the discretion to regulate below threshold contracts. However, contracting authorities must comply with the *fundamental principles* in circumstances where the public contract has the potential to generate cross-border trade regardless of the value of the contract.<sup>280</sup> Contracting authorities are required to adhere to the principles of transparency, equal treatment, non-discrimination and proportionality whenever they conclude public procurement contracts that fall outside the remit of the Directives.<sup>281</sup> The principle of transparency imposes an obligation on the contracting authority to conduct procurement procedures

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<sup>276</sup> Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU in respect of the application thresholds for the procedures for the award of contracts.

<sup>277</sup> Public Sector Directive, art 4. See also; D.C. Dragos and R. Vornicu, ‘*Public Procurement below Thresholds in the European Union - EU Law Principles and National Responses*’ (2015) 10 Eur Procurement & Pub Private Partnership L Rev 187.

<sup>278</sup> Public Sector Directive, art 6. The thresholds are revised every two years to correspond to the thresholds established in the WTO ‘*Agreement on Government Procurement*’ (GPA). See; Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU in respect of the application thresholds for the procedures for the award of contracts.

<sup>279</sup> Public Sector Directive, art 74 as supported by recital 114 establishes the procedures for social, health and educational services contracts which are listed in Annex XIV. These provisions only apply to contracts which have a value of €750,000 or higher. The listed social, health and educational services contracts by their very nature will dominantly generate domestic competition.

<sup>280</sup> Case C-59/00 *Vestergaard* [2001] ECR I-9505.

<sup>281</sup> Case C- 264/03 *Commission of the European Communities v French Republic* ECR I – 8852 paras 33-34.

openly.<sup>282</sup> The principle requires the contracting authority to publish or advertise a notice of a proposed contract;

*...for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed.*<sup>283</sup>

Contracting authorities are at a minimum required to advertise notice of a proposed contract, for all contracts that may be of commercial interest to suppliers operating in any other Member State. Although, contracting authorities will not need to advertise the contract where there is only a very modest economic interest at stake. It is best practice for contracting authorities to publish contract award notices post completion of the tender stage. Commonly used means of publication include; online notices on the contracting authorities' own website and on tender specific portal websites; National Official Advertising journals; local means of publication such as advertisements in newspapers or noticeboards; and voluntary advertising on the OJEU.<sup>284</sup>

The advertisement should provide enough information to allow for a reasonable economic operator to decide whether to express its interest in obtaining the contract.<sup>285</sup> A contracting authority may conclude a tender competition without publishing an advertisement notice in cases concerning situations of extreme urgency due to unforeseeable events and for contracts connected with the protection of exclusive rights.<sup>286</sup> The call for competition should clearly outline the selection and award criteria. Contracting authorities are required to apply the stated criteria at the

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<sup>282</sup> Case C-6/05 *Medipac-Kazantzidis AE v. Venizelio-Panania* [2007] ECR I-4557.

<sup>283</sup> Case C-324/98 *Telaustria*, para 62.

<sup>284</sup> See Commission, '*Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives*' (Communication) 2006 OJ C 179.

<sup>285</sup> Case C-19/00 *SIAC Construction* [2001] ECR I-7725, para 35. The advertisements may also be referred to as '*call for competitions*' or '*request for tenders*'.

<sup>286</sup> Case C-231/03 *Consorzio Aziende Metano "(Coname)" v Padania Acque SpA* [2005] ECR I-7287, para 40.



evaluation stage.<sup>287</sup> As with above-threshold contracts, contracting authorities enjoy the freedom to include social criteria in the selection and award criteria, once the criteria do not purposely distort competition. Contracting authorities are not prohibited from dividing contracts into smaller lots, using community benefit clauses, subcontractor considerations and innovative criteria. Importantly, the contracting authorities must ensure that these clauses are outlined in the call for competition notices and are designed in a non-discriminatory manner.<sup>288</sup>

The principle of non-discrimination prohibits contracting authorities from rejecting tenders on the basis of nationality.<sup>289</sup> Furthermore, contracting authorities must accept equivalent technical specifications, checks, diplomas, certificates and qualifications requirements.<sup>290</sup> The principle of proportionality requires contracting authorities to use relevant and appropriate selection and award criteria. Contracting authorities should not impose technical, professional or financial conditions that are excessive and disproportionate to the overall procuring goal.<sup>291</sup> This means that contracting authority may request tenderers to demonstrate compliance with EU eco-labels or equivalent certifications or qualifications.<sup>292</sup>

There are no set procedures which should be followed for below-threshold contracts. Financial and selection criteria should be set proportionately and should be conducted electronically, where possible to facilitate SME

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<sup>287</sup> *Word Perfect Translation Services v. Minister for Public Expenditure and Reform* [2018] IECA 35.

<sup>288</sup> See Commission, 'Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives' (Communication) 2006 OJ C 179.

<sup>289</sup> Case T-258/06 *Federal Republic of Germany V European Commission* [2006] *pub. electr.* EU:T:2010:214.

<sup>290</sup> Contracting authority are required to give reasons for rejecting equivalent technical and functional qualifications, certificates or labels. See the opinion of AG Sharpston in case Case C-6/05 *Medipac-Kazantzidis* at para 77.

<sup>291</sup> When designing the financial and selection criteria, contracting authorities should apply the test of suitability and necessity, see TEFU, arts 49 and 56. See also Case C-324/93, *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and MacFarlan Smith* ("Evans Medical") [1995] ECR I-563.

<sup>292</sup> The first international standard on sustainable procurement, 'ISO 20400-2017' was adopted in 2017. See ISO 20400:2017, Sustainable procurement — Guidance.

participation.<sup>293</sup> Contracting authorities enjoy a high degree of flexibility in managing procedures at this level and can take measures to limit the number of applicants participating in a competition.<sup>294</sup> The authorities can consider using qualification systems where a list of qualified operators is compiled using an advertised, transparent, competitive procedure.<sup>295</sup> Contracting authorities can request future tender bids from the list of registered operators on a rotational basis. The principles must be fully observed at the contract award stage, particularly in circumstances where negotiation is permitted with shortlisted tenderers.<sup>296</sup>

If a contracting authority believes that the contract award would not create a cross-border economic-interest, the principles do not apply. The CJEU concluded that in such cases;

*...the effects on the fundamental freedoms are... to be regarded as too uncertain and indirect” to warrant the application of standards derived from primary Community law.*<sup>297</sup>

Contracting authorities should assess whether a cross-border interest exists by reviewing the subject matter of the contracts, its estimated value, the structure of the market and geographic location of the place of contract performance.<sup>298</sup> Technically, in these exceptional circumstances, contracting authorities may directly award contracts to SMEs. However, this will only occur in limited circumstances, and Member States generally regulate below-threshold contracts in some manner.<sup>299</sup>

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<sup>293</sup> Joined Cases C-523/16 *MA.T.I. SUD* [2018] *pub. electr.* EU:C:2018:135.

<sup>294</sup> Contracting authorities are required to comply with the Member State’s individual administrative rules.

<sup>295</sup> Commission, ‘*Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives*’ (Communication) 2006 OJ C 179.

<sup>296</sup> Case C-234/89 *Commission v Denmark* [1993] ECR I-3353.

<sup>297</sup> Case C-231/03 *Coname*, para 20.

<sup>298</sup> Case C-45/87 *Commission v Ireland* [1988] ECR 4929.

<sup>299</sup> This is namely due to the geographical proximity of states and close trading relationships, see; Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, para 31; Case C-484/17 *Olympus Italia* [2017] *pub. electr.* EU:C:2017:899 paras 17-22.

The Commission can initiate infringement proceedings under Article 258 TFEU against contracting authorities which fail to comply with the fundamental freedoms and principles in circumstances where a genuine cross-border interest in the contract award existed.<sup>300</sup> Contracting authorities are therefore required to comply with the fundamental principles and freedoms for certain below threshold contracts and enjoy the freedom to pursue economic and social objectives once they do not favour economic operators or distort competition.<sup>301</sup> If contracting authorities choose to implement social criteria in their below threshold contracts, they must clearly refer to the selection and award criteria in the call for competition notices. Overall, as with the above threshold procurement, contracting authorities retain the freedom of choice to pursue economic and non-economic criteria. The principles are concerned with levelling the playing field for all economic operators and opening cross-border trade. Member States retain the discretion to use below-value procurement purchases to achieve their individual perceived conceptions of VfM.

This research examines four individual case studies, two of which fall above the thresholds and two of which are contracts which fall below the advertising thresholds. The case studies examine how the use of social criteria or the use of innovative processes facilitate SME participation in public contracts of all sizes. The contracts examined were concluded by city-county councils and central government departments in Ireland and Northern Ireland.

The legislation is no longer focused on securing economic objectives alone and contains provisions which promote the use of environmental, social and innovative related provisions. The promotion of cross-border trade in the Single Market still lies at the heart of the rules. However, the

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<sup>300</sup> For a debate on the effectiveness of Art 258 TFEU see; S. Treumer, *'Enforcement of the EU Public Procurement Rules: The State of Law & Current Issues.'* (Denmark: DJÓF Publishing, 2011) 17; M. Schmidt and P. Bogdanowicz, *'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU'* (2008) 55(4) Common Market Law Review 1061.

<sup>301</sup> Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 35.

rules now aim to promote sustainable economic growth. The Directive reflects the current economic and political landscape of the EU.<sup>302</sup> Since the rules were revised in 2011, there have been a number of important communications adopted by the EU, which further demonstrate the commitment to the development of an inclusive, innovative and sustainable Single Market. In particular, the adoption of the ‘*Single Market Act II — Together for new growth*’ promotes the inclusion of social entrepreneurship and the development of a *Digital Single Market* (DSM).<sup>303</sup> The DSM Strategy aims to improve public services and business operations through the use of e-government and supporting innovative business growth.<sup>304</sup> Further European support for the pursuit of socio-economic goals in public policy is evident in the adoption of the *European Pillar of Social Rights* in 2017.<sup>305</sup> The adoption of the Pillar demonstrates the commitment of the Union to move away from austere financial measures to support a socially conscious and sustainable Single Market.<sup>306</sup>

This section offered an overview of the context of the European public procurement rules, and it identified what rules exist and when they need to be applied. While this research claims the public procurement legislation has ‘*matured*’ to include non-economic objectives, this term would not be universally accepted by other researchers. Trepte concludes that ‘*there is confusion over the purpose of the directives and what they can be used to achieved.*’<sup>307</sup> Trepte argues that there are two core reasons for this confusion, the first reason he argues is due to the lack of clarity in

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<sup>302</sup> See Commission ‘*Europe 2020: A strategy for smart, sustainable and inclusive growth.*’ (2010) COM 2020 final.

<sup>303</sup> See Commission, ‘*Single Market Act II Together for new growth.*’ (Communication) COM (2012) 0573 final.

<sup>304</sup> See Commission, ‘*A Digital Single Market Strategy for Europe*’ (Communication) COM (2015) 0192 final.

<sup>305</sup> The *European Pillar of Social Rights* sets out a number of key principles and rights to support fair and well-functioning labour markets and welfare systems. See Commission, ‘*Establishing a European Pillar of Social Rights*’ (Communication) COM (2017) 0250 final. See also; Commission, ‘*White Paper on the Future of Europe - Reflections and scenarios for the EU27 by 2025*’ (White Paper) COM (2017) 2025.

<sup>306</sup> K. Lörcher and I Schömann, ‘*The European pillar of social rights: critical legal analysis and proposals*’ (ETUI Research Paper-Report, 2016) 139.

<sup>307</sup> P. Trepte Forward to the Second Edition in A. Sánchez Graells, ‘*Public procurement and the EU competition rules*’ (2nd edn Bloomsbury Publishing 2015) xii.

the drafting of the Directives and the second reason relates to the ‘*incrementalism of regulatory intervention*’.<sup>308</sup> He argues that the Directives are ‘*appearing more like Regulations*’ with each review.<sup>309</sup>

However, Trepte amongst others accepts that there are two broad sets of objectives that European regulations can be seen as serving, a set of social objectives and a set of economic objectives.<sup>310</sup> Social objectives can range from utilising procurement to promote VfM targets, including using it as a tool to encourage labour equality, environmentally friendly purchases and the facilitation of SMEs in public contracts.<sup>311</sup> The second set of economic goals see governments using procurement to achieve competitive markets, economies of scale and financial savings.<sup>312</sup> Key CJEU judgments offer further guidance on the parameters of the use of social criteria in public procurement.

## 2.8 CJEU Jurisprudence

The overhaul of the complete suite of the Directives reflected the jurisprudence of the CJEU up until 2011. The CJEU has adopted both a flexible and restrictive view in public procurement rulings.<sup>313</sup> In older cases, the Court took a more restrictive approach, consistently maintaining the importance of the economic approach to the regulation of public contracts, while more recent judgments have adopted a flexible approach in allowing contracting authorities to include non-economic objectives in their award criteria.<sup>314</sup> The exception to this is the judgments assessing the

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<sup>308</sup> P. Trepte (n 307) vii.

<sup>309</sup> P. Trepte (n 307) vii.

<sup>310</sup> P. Trepte, ‘*Regulating procurement: Understanding the ends and means of public procurement regulation*’ (Oxford University Press, Oxford, 2004) 123; S. Arrowsmith, S. and P. Kunzlik, ‘*Social and environmental policies in EC procurement law: new directives and new directions*’ (Cambridge University Press, 2009); C. Bovis, ed. ‘*Research handbook on EU public procurement law*’ (Edward Elgar Publishing, 2016).

<sup>311</sup> S. Arrowsmith, ‘*The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies*’ (2012) 14 Cambridge yearbook of European legal studies 1.

<sup>312</sup> P. Trepte, ‘*Regulating procurement: Understanding the ends and means of public procurement regulation*’ (Oxford University Press, Oxford, 2004) 123.

<sup>313</sup> C. Bovis, ‘*EU public procurement law*’ (Edward Elgar Publishing, 2012) 6.

<sup>314</sup> The importance of economic considerations is evident in; Case C-44/96; *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotainsdurck GesmbH*, [1998] ECR 73, para 33; Case C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV* [1998] ECR

permissible use of labour-related conditions in public contracts. One of the earliest and most prominent cases that adopted a flexible approach to public procurement is the *Beentjes*<sup>315</sup> case, where the Court held that the inclusion of a specific award condition relating to the employment of long-term unemployed was permissible, provided that the condition was notified to potential tenderers in the tender notice.

*...in order to meet the directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts. ...the condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenders from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.*<sup>316</sup>

While the *Beentjes* judgment acknowledged the role of social procurement, it did not greatly extend the contracting authority's flexibility in designing contract award criteria. The ruling at its core re-emphasised the economic objectives of the legislation, paying attention to the importance of complying with the principles of transparency and non-discrimination.<sup>317</sup>

Over 30 years ago, the *Beentjes* case clarified that public procurers maintain the authority to include non-economic criteria in tender documents, such as social or environmental criteria, once the published criteria are related to the subject matter of the contract and are consistent with all the fundamental principles of Community law and the Treaty provisions. Shortly after the *Beentjes* ruling, the ECJ took a primarily

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6281 paras 42 and 43; Case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge* [2000] ECR 8035 para 17.

<sup>315</sup> Case C-31/87 *Beentjes* [1988] ECR 4929.

<sup>316</sup> *Beentjes*, para 21.

<sup>317</sup> J. Chave, 'EU public procurement takes on a greener hue: Developments in the application of social and environmental factors in public procurement' (2003) 24(1) *Business Law Review* 2.

flexible legal approach on the permissible use of environmental award criteria. In the *Concordia Bus Finland* case,<sup>318</sup> the Court considered the legitimacy of the use of environmental award criteria in a tender competition for the outsourcing of an urban transport bus network of the Municipality of Helsinki. The tender was evaluated using the most economically advantageous tender award criteria. The contracting authority awarded marks for the overall price of the operation, the quality of vehicles and the supplier's quality and environmental policies.<sup>319</sup> *Concordia Bus*, similar to the applicants in the *Beentjes* case, submitted the lowest-cost bid. The contract was awarded to another supplier who submitted a higher price but was received higher marks on the two environmental criterions.<sup>320</sup>

*Concordia Bus* contended that the contracting authority had acted in a discriminatory manner by including restrictive environmental criteria. The company argued that the minimum criteria set to evaluate the quality of vehicles could realistically only be met by one sole supplier, the supplier who was subsequently awarded the contract.<sup>321</sup> The ECJ did not accept *Concordia Bus*'s argument, concluding that public procurement legislation did not preclude contracting authorities from including environmental award criteria when assessing most economically advantageous tender<sup>322</sup>. The contracting authority in this case, by allowing suppliers to submit a range of environmental certifications had observed the Treaty principles of non-discrimination and equal treatment.<sup>323</sup> The Court once more reiterated the test established by *Beentjes*, that any environmental considerations included must be directly connected to the subject matter of the contract. This is the first case where you can see the

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<sup>318</sup> Case C-513/99, *Concordia Bus*, [2002] ECR I-7213, para 81.

<sup>319</sup> Case C-513/99 *Concordia Bus*, paras 50-52.

<sup>320</sup> Case 513/99 *Concordia Bus*, para 26.

<sup>321</sup> In this case the Court was satisfied that the circumstances were different to that of Case 45/87 *Commission v Ireland* [1988] and found that the criteria selected was not discriminatory in nature and did not seek to favour one supplier. See *Concordia Bus* (n 320) para 76.

<sup>322</sup> Neither did the Court find that the use of ecological criteria violated the fundamental principle of equal treatment. See *Concordia Bus* (n 320) para 86.

<sup>323</sup> The list of most economically advantageous tender criteria is not exhaustive. See Case C-19/00 *SIAC Construction* [2001] ECR I-7725, para 35.

depreciation of the importance of cost-driven award criteria. The judgment, contrasting to the *Beentjes* judgment offers greater flexibility to contracting authorities to utilise award criteria for the benefit of public interest.<sup>324</sup>

The rule arising from the case law indicates that social criteria may be inserted in public procurement contracts as far as they do not hamper competition rules and are relevant to the subject matter of the contract. The difficulty for contracting authorities lies in defining the subject matter of a public contract. A public contract is defined as a;

*contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.*<sup>325</sup>

This definition implies that strictly speaking everything that is not necessary for the execution of works, the supply of products or provision of services is a *secondary consideration*.<sup>326</sup> Contracting authorities must decide whether sustainable requirements are considered a *primary consideration* required for the execution of the public contract; for example, a contracting authority may need to purchase timber. If the contracting authority states that it needs to purchase Forest Stewardship Council (FSC) approved timber, then the subject matter of the contract is to purchase FSC timber.<sup>327</sup> The sustainability clause in this instance is a *primary consideration*, and there is no need for *secondary considerations*.

However, if the contracting authority adopts a formalistic approach, it would assess if it is necessary to request FSC approved timber. If a strict approach is adopted, the contracting authority would assess whether it is

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<sup>324</sup> See also, to that effect, Case C-4481/01 *EVN*.

<sup>325</sup> Public Sector Directive, art 2(1)(5).

<sup>326</sup> C. McCrudden, '*Buying Social Justice. Equality, Government Procurement and Legal Change*' (Oxford University Press, New York, Oxford 2007).

<sup>327</sup> The Forest Stewardship Council (FSC) is an international non-profit organisation which promotes responsible management of the world's forests through the verification of environmentally driven standards.



relevant to have FSC approved timber to fulfil the objective of the public contract, non-FSC timber could technically fulfil the purpose of the contract. In this situation, the subject matter of the contract is the purchase of timber and the requirement to ensure that the timber is FSC approved is a secondary consideration. McCrudden recognises the internal conflict a government must face in adopting secondary considerations. On the one hand, the government is participating in the market as a purchaser with a tight budget, and on the other hand, the government must regulate the market with its purchasing power to advance social justice.<sup>328</sup>

The Directives offer detailed guidance on the inclusion of both primary and secondary non-economic criteria in daily procurement practices.<sup>329</sup> Contracting authorities cannot include secondary considerations which require contractors to subcontract to local SMEs as this would be a serious violation of the underpinning freedoms and principles of the TFEU. Similarly, contracting authorities cannot require economic operators to have local market knowledge or require the operators to source materials locally.<sup>330</sup> Secondary considerations must be linked to the subject matter of the contract, including production methods and must be conducted in compliance with other laws.<sup>331</sup> Non-economic criteria used must be specific and objectively quantifiable and must be explicitly set out in the call for competition documents.<sup>332</sup> Contracting authorities, when

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<sup>328</sup> C. McCrudden (n 326).

<sup>329</sup> In particular the following articles of the Public Sector Directive;  
Art. 18(2) Mandatory social clause;  
Art. 20 Reserved contract;  
Art. 40 Preliminary market consultations;  
Art. 42(1) Technical specifications and accessibility requirements;  
Art. 43 Labels;  
Art. 46 Division of contracts into lots;  
Art. 56 Choice of participants and award of contracts;  
Art. 57 Exclusion grounds;  
Art. 67 Contract award criteria;  
Art. 69 Abnormally low tenders;  
Art. 70 Conditions for performance of contracts;  
Art. 71 Subcontracting.

<sup>330</sup> See *Laboratori Bruneau Srl v Unità Sanitaria Locale RM/24 De Monterotondo* [1994] 1 CMLR 707 ('Laboratori Bruneau'); See also Case C- 243/89 *Storebaelt* [1993] ECR I-3353.

<sup>331</sup> Case C-513/99 *Concordia Bus*, para 26.

<sup>332</sup> Joined Cases C-448/01 *EVN AG and Another v Austria (Stadtwerke Klagenfurt AG and Another)* [2004].

evaluating the submitted tenders, must follow the award criteria set out in the call for competition notices.

Once contracting authorities comply with these tests, they have the freedom to pursue social objectives in their public procurement operations. Contracting authorities can freely design their perceived VfM objectives; such objective may include the use of targeted recruitment and training clauses<sup>333</sup>; the use of fair-trade criteria<sup>334</sup>; or the use of renewable energy sources<sup>335</sup>. Contracting authorities are not required to demonstrate an economic benefit of including the social objectives in the procurement competition.<sup>336</sup> However, this freedom of choice to pursue social objectives is not limitless. The CJEU has generally adopted a strict approach to the use of labour law requirements, which has prevented the extension of socially responsible public procurement parameters.

There are three core cases, *Ruffert*,<sup>337</sup> *Bundesdruckerei*,<sup>338</sup> and *RegioPost*<sup>339</sup>, which have assessed the inclusion of minimum wage and employment requirements in public contracts. Each of the procurement competitions was challenged on the basis of Directive 96/71<sup>340</sup> and Article 56 TFEU. The *Ruffert* case found that the inclusion of a minimum-wage requirement was in breach of EU law.<sup>341</sup> The judgment found that Article 3 of Directive 96/71 did not apply to the public contract as the wage requirement was not universally applicable and only applied to public contracts.<sup>342</sup> The *Ruffert* judgment confirmed the earlier *Viking*<sup>343</sup> and

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<sup>333</sup> Case C-31-87 *Beentjes* [1990].

<sup>334</sup> Case C-368/1 *European Commission v Netherlands* [2013] All ER (EC) 804 (*the Dutch Coffee Case*).

<sup>335</sup> Case C-448/01 *EVN* of 4 December 2003.

<sup>336</sup> Case C-513/99 *Concordia Bus*; Case C-296/15 *Medisanus d.o.o. v Splosna Bolnisnica Murska Sobota* [2016] *pub. electr.* EU:C:2016:922 Opinion of the Advocate General Saugmandsgarrd Øe.

<sup>337</sup> Case C-346/06 *Ruffert v Land Niedersachsen* [2008] *pub. electr.* EU:C:2008:189.

<sup>338</sup> Case C-549/13 *Bundesdruckerei*.

<sup>339</sup> Case C-115/14 *RegioPost*.

<sup>340</sup> Directive 96/71 concerning the posting of workers in the framework of the provision of services OJ L 18/1.

<sup>341</sup> Case C-346/06 *Ruffert*.

<sup>342</sup> This related to payments which were not laid down in Article 3(1) and (8) of the Directive 96/71. Case C-346/06 *Ruffert*, paras 31 – 34.

<sup>343</sup> Case C-438/05 *Viking Line* [2007] ECR I-10779.

*Laval*<sup>344</sup> decisions, concluding that Member States do not enjoy the freedom to require contractors to comply with domestic collective agreements rates. The court found that this type of requirement constituted as a barrier to cross-border trade, by imposing additional economic burdens on contractors and subcontractors established in the other Member States where minimum rates of pay are lower.<sup>345</sup> For economic operators based in Member States with lower minimum rates of pay, this requirement would have ‘*prohibited, impeded, or render the tender less attractive*’, therefore conferring a restriction on cross-border trade.<sup>346</sup>

In the *Commission v Grand Duchy of Luxembourg Case C-319/06*, the court further held that the Member States could not implement public policy provisions which are not equally applicable to national and foreign economic operators.<sup>347</sup> The 2014 *Bundesdruckerei* judgment again assessed the compatibility of the Posted Workers Directive with the Public Procurement Directives.<sup>348</sup> In this case, a German contracting authority requested all tenderers to comply with federal minimum wage law. The Court held that the requirement restricted subcontractors’ competitive advantage, limiting the fundamental freedom to provide services.<sup>349</sup>

However, the 2014 *Regiopost* ruling quickly diluted the restrictive approach.<sup>350</sup> This case involved a challenge to another minimum wage requirement inserted by German federal law. The regional minimum wage was only applicable to the public sector, and it did not extend to the private sector.<sup>351</sup> The *Regiopost* judgment differs to that of *Bundesdruckerei* by concluding that clauses requiring tenderers to pay regulated or collectively agreed minimum rates of pay is compatible with Article 26 of Directive

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<sup>344</sup> Case C-341/05 *Laval un Partneri* [2007] ECR I-0000, paragraphs 70 and 71.

<sup>345</sup> C. Barnard *Viking and Laval: an introduction* (2008) (10) Cambridge Yearbook of European Legal Studies 463.

<sup>346</sup> Case C-346/06 at para 37. For a similar agreement see C-298/15 *UAB Borta* [2016] *pub. electr.* EU:C:2016:921 Opinion of Advocate General Sharpston para 38.

<sup>347</sup> Case C-319/06 *Commission v Grand Duchy of Luxembourg* paras 85 and 97.

<sup>348</sup> Case C-549/13 *Bundesdruckerei*.

<sup>349</sup> Case C-549/13 at paras 35 and 36. See also F. Costamagna *Minimum Wage between Public Procurement and Posted Workers: Anything New after the Regio Post Case?* (2017) 1 *European Law Review* 101.

<sup>350</sup> Case C-115/14 *RegioPost*.

<sup>351</sup> Case C-115/14 at para 33.

2004/18/EC read in conjunction with Article 3 of the Posted Workers Directive and with Article 56 of the TFEU.<sup>352</sup>

While the *Regiopost* judgment appears to extend the permissible use of social criteria in public contracts, doubt still exists on the extent to which public procurers can incorporate employment considerations into their tendering practices.<sup>353</sup> There has been a noticeable increase in the inclusion of pay-related clauses in public sector contracts.<sup>354</sup> There are some examples of successful incorporation of living wage requirements in public contracts. Scotland has successfully incorporated living wage considerations into public contract competitions.<sup>355</sup> Scotland sought advice from the European Commission on two separate occasions, the advice received indicated that such an inclusion would be incompatible with EU law. Scotland proceeded with the implementation of the *Procurement Reform (Scotland) Act 2014*.<sup>356</sup> The Act itself does not state that compliance with the ‘*Living Wage*’ is a mandatory requirement for public contracts. However, interested bidders are required to adopt ‘*fair work practices and conditions*’ for all employees working on public contracts.<sup>357</sup> Fair work practices extend to paying the living wage and avoiding the use of unnecessary zero-hour contracts. Technically, Scottish procurers do not include mandatory living wage specifications in their contract agreements.

London actively promotes the inclusion of living wage requirements in public contracts. The City Corporation is committed to gradually,

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<sup>352</sup> Case C-115/14 at paras 66, 73 and 74.

<sup>353</sup> C. Kaupa, ‘*Public Procurement, Social Policy and Minimum Wage Regulation for Posted Workers: Towards a More Balanced Socio-Economic Integration Process?*’ (2016) 1(1) *European Papers: a Journal on Law and Integration* 127.

<sup>354</sup> Academic opinion is divided on the use of public procurement to promote employment standards. See A. Sánchez Graells, ‘*Regulatory substitution between labour and public procurement law: The EU’s shifting approach to enforcing labour standards in public contracts*’ (2018) 24(2) *European Public Law* 229.

<sup>355</sup> See Scottish Government, ‘*Statutory Guidance on the Selection of Tenderers and Award of Contracts Addressing Fair Work Practices, including the Living Wage, in Procurement.*’ (2015).

<sup>356</sup> *Procurement Reform (Scotland) Act 2014*.

<sup>357</sup> Scottish Government, ‘*Statutory Guidance on the Selection of Tenderers and Award of Contracts Addressing Fair Work Practices, including the Living Wage, in Procurement.*’ (2015).

including living wage requirements in services contracts.<sup>358</sup> This is achieved through voluntary mechanisms. The City Corporation does not appear to include living wage requirements in their weighted award criteria.<sup>359</sup> An Irish *Public Services and Procurement (Workers' Rights) Bill 2017* was proposed last year and is currently at the second stage of review.<sup>360</sup> While it is unlikely that the Bill will be enacted, it is interesting to note that there is some level of support for the inclusion of mandatory 'Living Wage' requirements in public contracts.<sup>361</sup> The Bill proposes to extend the definition of 'Most Economically Advantageous Award Criteria' to include the following considerations; trade union recognition, contractor commitments to pay their employees the living wage or above, to comply with collective bargaining agreements and a commitment not to engage with zero-hour contracts.<sup>362</sup>

Overall, the CJEU jurisprudence supports the inclusion of non-economic objectives and criteria in public procurement. The CJEU explicitly recognises contracting authorities' freedom to facilitate SME participation in public procurement. In *Swm Costruzioni 2 and Mannocchi Luigino*,<sup>363</sup> the Court remarked that;

*An objective of the public procurement rules is to open up the public procurement market for all economic operators, regardless of their size. The inclusion of small and medium-sized*

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<sup>358</sup> See the City of London *Procurement Strategy 2015-2018* p.11 The City plans to eventually require services contractors and subcontractors to pay the London Living Wage to those employees based in Greater London and pay the UK Living Wage to those employees based outside Greater London. This is restricted to employees working on the public contracts.

<sup>359</sup> See the City's Standard Conditions April 2018.

<sup>360</sup> The private member's bill *Public Services and Procurement (Workers' Rights) Bill 2017* is one of several procurement bills proposed in recent years. The Bill is currently under review.

<sup>361</sup> The majority of private members bills are not enacted. See B. Farrell *The political role of cabinet ministers in Ireland. Cabinet ministers and parliamentary government* (Cambridge University Press, Cambridge, 1994) 73.

<sup>362</sup> Proposed Art. 9(3). See the full Bill at this link; <https://data.oireachtas.ie/ie/oireachtas/bill/2017/83/eng/initiated/b8317d.pdf> Last accessed 10<sup>th</sup> June 2019.

<sup>363</sup> *Case C-94/12 Swm Costruzioni 2 and Mannocchi Luigino* [2013] *pub. electr.* EU:C:2013:646 Opinion of Advocate General Jaaskinen, para 33 para 33; Joined Cases C-523/16 MA.T.I. SUD [2018] *pub. electr.* EU:C:2018:135, para 58.

*enterprises (SMEs) is especially to be encouraged as SMEs are considered to form the backbone of European Union economy.*<sup>364</sup>

In this case, the Court considered if economic operators can rely on consortium partners qualifications and capabilities to meet the specifications required to bid for a public contract. The Court reiterated that the main purpose of the Directive is to promote trade and competition amongst *all* suppliers in the public markets.<sup>365</sup> Restricting economic operators' choice to partner with other operators would restrict them from bidding for public contracts which they could not compete for on their own. Advocate General Jaaskinen had previously noted that;

*The chances of SMEs to participate in tendering procedures and to be awarded public works contracts are hindered, among other factors, by the size of the contracts. Because of this, the possibility for bidders to participate in groups relying on the capacities of auxiliary undertakings is particularly important in facilitating the access to markets of SMEs.*<sup>366</sup>

Contracting authorities may not restrict SMEs bidding for a public contract as part of a consortium.<sup>367</sup> SMEs wishing to form a consortium are not required to establish a separate legal form for the partnership.<sup>368</sup> This is particularly important for SMEs wishing to bid for large, centralised contracts. SMEs are generally locked out of large contracts as they do not have the ability to carry out the contract on their own and need to rely on the capabilities of others to fulfil the contract requirements.<sup>369</sup>

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<sup>364</sup> Case C-94/12 *Swm Costruzioni 2 and Mannocchi Luigino* para 33.

<sup>365</sup> See Case C-94/12 para 34 which concludes that the promotion of competition has a positive impact on both the economic operators and the contracting authorities. See also Case C-305/08 *CoNISMa* [2009] ECR I-12129 para 37.

<sup>366</sup> Case C-94/12 para 33.

<sup>367</sup> See Case C-223/16 *Casertana Costruzioni v Ministero delle Infrastrutture e dei Trasporti* [2017] *pub. electr.* EU:C:2017:685.

<sup>368</sup> Case C-324/14 *JuPartner Apelski Dariusz* [2017] *pub. electr.* EU:C:2016:214.

<sup>369</sup> See Commission, 'Evaluation of SMEs' access to Public Procurement Markets in the EU.' (2010) Final Report. See also Commission, 'Making Public Procurement work in and for Europe.' (Communication) COM (2017) 572 final.

Furthermore, the Courts have also instructed contracting authorities to include fair and proportionate subcontracting considerations.<sup>370</sup>

Contracting authorities are not permitted to limit a contractors' discretion to subcontract elements of the contract to third parties.<sup>371</sup> Contractors do not have complete discretion in this area, and the contracting authority may restrict the contractor from subcontracting certain components of the public contract.<sup>372</sup> The contracting authority may also prohibit the use of subcontractors whose capacities cannot be verified or do not meet the selection criteria required for the public contract.<sup>373</sup> Subcontracting is an entry route to public procurement for suitable and capable SMEs.

Overall, the CJEU rulings adopt a positive approach when considering the inclusion of non-economic objectives in tender competitions, providing contracting authorities with the discretion and flexibility to incorporate policy-led concerns once the non-economic criteria do not violate the principles of transparency, mutual recognition, equal treatment and proportionality. Thus, non-economic objectives are permissible once they are not used in a manner which tilts the playing field in favour of certain economic operators. Although, this is not always the case as demonstrated in *Ruffert* and *Bundesdruckerei*.<sup>374</sup> In these cases, the CJEU adopted a restrictive approach, limiting contracting authorities' discretion to incorporate labour related contractual performance clauses. This research accepts that contracting authorities can pursue social objectives. The CJEU jurisprudence and the updated rules have set the parameters on how contracting authorities may compliantly incorporate social criteria in public procurement. European Commission policy documents offer

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<sup>370</sup> Case C-298/15 *Borta* [2017] *pub. electr.* EU:C:2017:266.

<sup>371</sup> Public Sector Directive, art 63(2) See also; Case C-176/98 *Host Italia* [1999] ECR I-8607 paras 26 and 27; Case C-126/03 *Commission v Germany* [2004] judgment of 18 November 2004.

<sup>372</sup> See Case C-389/92 *Ballast Neddam Groep* which concerned the reliance on third-party resources within a group company structure and Case C-176/98 *Holst Italia* which concerned the reliance on third-party resources in a joint venture arrangement.

<sup>373</sup> Case C-314/01 *Siemens and ARGE Telekom* [2004] *pub. electr.* EU:C:2004:159, para 45; See also; C-324/14 *Partner Apelski Dariusz* [2016] *pub. electr.* EU:C:2016:214

<sup>374</sup> Case C-346/06 *Rüffert*; Case C-549/13 *Bundesdruckerei*.

further guidance on how contracting authorities can incorporate social criteria into public procurement.

## 2.9 Policy Support

The European Commission's '*Public Procurement Strategy*' calls for central and local public bodies to use procurement to respond to societal, environmental and economic challenges.<sup>375</sup> It is a difficult task to ask procurers to use procurement to promote more sustainable, inclusive and innovative economies. Local and national public procurers generally tend to be concerned with the buying activity and their buying and financial needs.<sup>376</sup> Procurers are concerned with the competitiveness of local economies and the quality, costs and services of the goods or supplies procured.<sup>377</sup> There is a tendency for procurers to avoid the inclusion of social criteria in procurement competitions to avoid the risk of legal uncertainty and legal challenges from aggrieved unsuccessful tenderers.<sup>378</sup> The provisions of the Directive and the CJEU jurisprudence set out the boundaries for the inclusion of social criteria, and the Commission has further published guidance documents and policy offering public bodies advice on how to practically design and use social criteria.<sup>379</sup> The Commission recognises the importance of supporting procurers in introducing strategic public procurement operations;

*...mainstreaming innovative, green, and social criteria... as well as procurement of innovative solutions at the pre-commercial stage*

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<sup>375</sup> See Commission, '*Making Public Procurement work in and for Europe.*' (Communication) COM (2017) 572 final.

<sup>376</sup> K. Loader, '*Is public procurement a successful small business support policy? A review of the evidence*' (2013) 31(1) *Environment and Planning C: Government and Policy* 39.

<sup>377</sup> Contracting authorities are required to pursue their perceived '*value for money*' objectives within limited budgets. See L. Preuss and H. Walker, '*Psychological barriers in the road to sustainable development: evidence from public sector procurement*' (2011) 89(2) *Public Administration* 493.

<sup>378</sup> L. Georghiou, Y. Li, E. Uyarra and J. Edler, '*Public procurement for innovation in small European countries.*' A Report from the ERA-PRISM: Policies for Research and Innovation in Small Member States to Advance the European Research Area (OMC-Net Project, Brussels 2010); C.P. McCue, E. Prier, and D. Swanson, '*Five dilemmas in public procurement*' (2015) 15(2) *Journal of Public Procurement* 177.

<sup>379</sup> See Commission, '*Buying Social A Guide to Taking Account of Social Considerations in Public Procurement*' (Guide) SEC (2010) 1258, final.



*requires not only a highly competent pool of public procurers but above all policy vision and political ownership.*<sup>380</sup>

The Commission is currently developing and updating voluntary common green criteria, and the criteria will be based on Eco-label criteria and available scientific data.<sup>381</sup> Contracting authorities may reduce the administrative burden and ease their concerns regarding legal uncertainty by using the voluntary criteria set by the Commission. The *'Buying Green! A handbook on green public procurement'* is also available to support public bodies in adopting environmental considerations.<sup>382</sup>

The Commission's *'Buying Social – A guide to taking account of social considerations in public procurement'* offers legal and practical advice on the incorporation of social criteria.<sup>383</sup> The guidance document offers practical guidance on how to incorporate social criteria at the pre-tendering stages, in selection and award criteria and contractual performance clauses. While this document is expansive and offers advice on a wide range of social criteria, such as the design of inclusive criteria, SME friendly criteria and labour related criteria, the guide is outdated and is reflective of the 2004 Directives. It is currently being revised, and an updated version is due to be published in 2020.

SME participation in public procurement is supported by the *Small Business Act*.<sup>384</sup> The Act acknowledges that SMEs miss out on securing public contracts as procurers may *'find it more comfortable to award certain contracts to large enterprises with a track record rather than to young innovative companies.'*<sup>385</sup> This is one of a number of reasons why

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<sup>380</sup> COM (2017) 572 final 3.

<sup>381</sup> This will also support the effective use of the *Clean Vehicles Directive* (2010/21/EU); the *Energy Efficiency Directive* (2012/27/EU) and the *Energy Performance of Buildings Directive* (2018/844).

<sup>382</sup> See Commission, *'Buying Green! A handbook on green public procurement. Third Edition (Guidance)'* COM 179. See also; Further support; Commission, *'Guidance for Bio-Based products in public procurement'* the Circular Economy Package.

<sup>383</sup> See Commission, *'Buying Social A Guide to Taking Account of Social Considerations in Public Procurement'* (Guide) SEC (2010) 1258, final.

<sup>384</sup> See Commission, *'Think Small First' - A "Small Business Act" for Europe'* (Communication) COM (2008) 0394.

<sup>385</sup> COM (2008) 0394, section V.

SMEs fail to bid for public contracts successfully; other concerns arise around SMEs' lack of awareness of advertised contracts; lack of ability to complete the tender form; and a lack of financial and professional capabilities to meet the contractual requirements set.<sup>386</sup> To alleviate these concerns and to level the playing field for SMEs, the '*European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts*' was adopted in 2008.<sup>387</sup> The 'Code' outlines measure for public procurers to adopt to make tender competitions more conducive to SME participation.

Notably, the Code stresses that SMEs access to public contracts is not driven solely by legislative provisions but is primarily driven by a contracting authority's procurement culture.<sup>388</sup> The Code sets out a series of measures for public procurers to adopt to ease the barriers faced by SMEs. These include;

- Setting appropriately sized contracts
- Ease of access to relevant information
- Setting proportionate qualification and financial criteria
- Reducing administrative burden
- Reducing the use of cost-driven competitions
- Ensuring payments on time.

The Code suggests that if a public body is committed to supporting SME participation in public contracts, the contracting authority should follow these measures by; dividing larger contracts into smaller lots, using e-procurement tools fully, setting appropriate qualification levels and

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<sup>386</sup> COM (2008) 0394, section V.

<sup>387</sup> See Commission '*European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts*' (SWP) COM (2008) 2193.

<sup>388</sup> The importance of staff training and the need for co-operation across departments is emphasised in; J. Thomson and T. Jackson, '*Sustainable procurement in practice: lessons from local government*' (2007) 50(3) *Journal of Environmental Planning and Management* 421.

financial requirements, awarding the tender on the basis of *Best Price: Quality*,<sup>389</sup> and by paying contractors promptly.<sup>390</sup>

Concerns have been raised that the pursuit of non-economic criteria distorts market competition and has the potential to reduce economic efficiencies.<sup>391</sup> This research does not dismiss these critical and worthwhile arguments. However, the research accepts that the Directive has an economic purpose and socially-sustainable purpose. This has been set out in the Directive, the CJEU jurisprudence and by the supporting guidance and policy documents. There is a tendency by the Directive, in particular, to classify social, environmental and innovation goals in one category.<sup>392</sup> While legislative supports for the use of ecological, green and sustainable criteria further demonstrate that the use of non-economic criteria is permissible and welcomed at an EU level, this research does not plan on reviewing these practices further. This research is tasked with assessing to what extent the measures included in the Directive and policy facilitate SME participation in public procurement.

The research accepts that the facilitation of SME participation in public contracts will not distort market competition as the purpose of SME friendly policies is to open-up and increase competition amongst *all* types and sizes of companies.<sup>393</sup> The research fundamentally argues that the inclusion of SMEs in public procurement has a positive impact on employment and innovation generation. This is discussed in more detail in *Chapter Three 'SMEs and Public Procurement'*. Overall, SMEs are a primary source of employment in Member States and are key generators in the design and development of innovative services and supplies.<sup>394</sup> This

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<sup>389</sup> These measures are discussed in more detail in Chapter Three SMEs and Public Procurement.

<sup>390</sup> See also Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions OJ L 48/1.

<sup>391</sup> M. Porter and M. Kramer, '*The link between competitive advantage and corporate social responsibility*' (2006) 84(12) Harvard Business Review 78.

<sup>392</sup> Public Sector Directive recital 37 and art 67(2). However, it should be noted that environmental considerations are dealt with in more detail, see art 62.

<sup>393</sup> Case C-94/12 *Swm Costruzioni 2 and Mannocchi Luigino para 33*.

<sup>394</sup> Not all SMEs are drivers of innovation, start-ups are the key drivers of innovation as we will see in the next chapter.

chapter concludes by examining the public procurement regulatory landscapes in the two case study countries, Ireland and Northern Ireland.

The *European Union (Award of Public Authority Contracts) Regulations 2016* (SI No. 284 of 2016) implement Directive 2014/24/EU into Irish law.<sup>395</sup> Public procurement is considered a transferred matter under the Northern Ireland Act 1998 as the UK Public Contracts and Utilities Contracts Regulations were adopted prior to the restoration of a Devolved Administration in Northern Ireland.<sup>396</sup> Therefore, public procurement law in Northern Ireland falls within the scope of the UK Procurement Regulations. The *Public Contracts Regulations 2015* implement in England, Wales and Northern Ireland Directive 2014/24/EU.<sup>397</sup>

Both sets of Regulations closely transpose the provisions contained in the Directive. However, the rules did not include the provisions to mandate the division of contracts into lots<sup>398</sup> and did not provide for contracting authorities to make direct payment to subcontractors.<sup>399</sup> When implementing the rules, the states chose to implement mandatory electronic communication rather than deferring that requirement until April 2017.<sup>400</sup>

## 2.10 Public Procurement Law in Ireland

On average, the state spends approximately €8.5 billion annually concluding public supplies and services contracts.<sup>401</sup> In recent years,

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<sup>395</sup> European Union (Award of Public Authority Contracts) Regulations 2016 (SI No. 284 of 2016) (Public Authority Regulations).

<sup>396</sup> Northern Ireland Act 1998 Section 6(A). S. 6A inserted (26.6.2018 for specified purposes) by European Union (Withdrawal) Act 2018 (c. 16), ss. 12(6), 25(2)(c) (with s. 19, Sch. 2 paras. 3(5), 14(5), Sch. 8 paras. 37, 41.

<sup>397</sup> (UK) Public Contracts Regulations 2015.

<sup>398</sup> Public Authority Regulations reg 46; (UK) Public Contracts Regulations reg 46.

<sup>399</sup> Public Authority Regulations reg 71; (UK) Public Contracts Regulations reg 71.

<sup>400</sup> Both states actively promote the use of e-procurement for both above and below threshold contracts. Irish contracting authorities are encouraged to utilise the 'eTenders' national advertisement platform and Northern Irish contracting authorities are encouraged to utilise the 'eSourcingNI' and 'eTendersNI' online support platforms.

<sup>401</sup> Office of Government Procurement, 'National Public Procurement Framework' *Public Procurement Guidelines for Goods and Services*. (2019) Version 2.1. Accessible at this link; <https://ogp.gov.ie/national-public-procurement-policy-framework/> Last accessed 2<sup>nd</sup> May 2019.

Ireland has moved towards a centralised system of public procurement. The Office of Government Procurement (OGP) commenced operations in 2014, and together with four key sectors (Health, Defence, Education and Local Government), takes responsibility for sourcing all goods and services on behalf of the public service.<sup>402</sup> The three overriding goals of the office are to integrate procurement policy, strategy and operations in one office, to improve spend analytics and data management, and to secure significant savings.<sup>403</sup> National, regional and local bodies retain responsibility for sector-specific procurement operations in health, defence, education and local government. While the key four sectors retain ownership of specialised procurement, there is an overriding national public service objective to speak with ‘one voice’ to the market when procuring set categories of goods and services.<sup>404</sup> Coordinating the market in a centralised manner is designed to eliminate duplication of tasks and to secure the scale of ‘public procurement to best effect.’<sup>405</sup>

The *European Union (Award of Public Authority Contracts) Regulations 2016* (SI No. 284 of 2016) transposed Directive 2014/24/EU into Irish law. This is the central piece of regulation governing the awards of public contracts by central government departments, regional and local authorities in Ireland.<sup>406</sup> The rules on redress procedures have recently

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<sup>402</sup> Office of Government Procurement, ‘*National Public Procurement Framework’ Public Procurement Guidelines for Goods and Services*. (2017) Version 1.

<sup>403</sup> Office of Government Procurement, ‘*Communications Strategy 2018 – 2020*’. p.2.

<sup>404</sup> Office of Government Procurement (n 402).

<sup>405</sup> Office of Government Procurement (n 403) 2. While centralisation can generate savings, research is divided on what impact the use of centralised procurement has on SME participation in public contracts. See D. Pickernell, A. Kay, G. Packham and C. Miller, ‘*Competing agendas in public procurement: an empirical analysis of opportunities and limits in the UK for SMEs.*’ (2011) 29(4) *Environment and Planning C: Government and Policy* 641.

<sup>406</sup> Additional public procurement rules include; The *European Union (Award of Contracts by Utility Undertakings) Regulations 2016* (SI No. 286 of 2016) (the *Utilities Regulations*) transposed Directive 2014/25/EU into Irish law, this regulation governs procurement in water, energy, transport and postal services sectors. This Regulation is not discussed, this research focusses on the rules governing public authority contracts. Equally, this thesis does not offer an analysis of Directive 2014/23/EU which was transposed by the *European Union (Award of Concession Contracts) Regulations 2017* (SI No. 203 of 2017) (the *Concessions Regulations*). The *European Union (Award of Contracts Relating to Defence and Security) Regulations 2012* (SI No. 62 of 2012) implements the *Defence Procurement Directive 2009/81/EC* on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.

been updated to reflect the changes introduced by updated statutory instruments. Harmonised redress rules assist aggrieved unsuccessful bidders in accessing proportionate remedies for uncompetitive or flawed procurement procedures.<sup>407</sup> The EU Directives and implementing instruments do not extend to below threshold value contracts in Ireland. Domestic guidance documents govern such contracts.<sup>408</sup> Contracting authorities should always follow a competitive process, save in justifiably exceptional circumstances. The process should always take into account the general Treaty principles of transparency, equal treatment, proportionality and non-discrimination.<sup>409</sup>

At a national level, the OGP conducts procurement competitions for standardised services and supplies. Framework agreements are generally attached to the concluded contracts, allowing national, regional and local contracting authorities to purchase from the framework agreements using the stated and agreed upon form of mini-competition or purchasing method.<sup>410</sup> To date, the OGP has established 16 categories of expenditure, the OGP procures eight of these, the remaining categories are controlled by the four key sectors of health, education, defense and local government. Sourcing categories controlled at a national level include; Information and Communications Technology (ICT); Facilities Management; Utilities, Fleet and Plant, Marketing, Print and Stationery; Travel, HR and Managed Services; Professional Services; and Spot Buying.<sup>411</sup>

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Similarly, to the Utilities, Concessions and Remedies Regulations, these rules are not analysed in this research as they have limited impact on the facilitation of SME participation in public markets.

<sup>407</sup> In relation to remedies, the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (SI No. 130 of 2010) gives effect to Directive 89/665/EEC as amended by Directive 2007/66/EC (the Remedies Directives). The 2010 Regulations were amended in July 2017 by the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2017 (SI No. 327 of 2017) to align the 2010 Regulations with the Public Sector Regulations of 2016.

<sup>408</sup> Namely by Office of Government Procurement, '*National Public Procurement Framework Public Procurement Guidelines for Goods and Services.*' (2019) Version 2.1.

<sup>409</sup> Below threshold public contracts may be subjected to judicial review under 'S.I. No. 234 of 2018 Review of the award of public contracts Order 84(a).

<sup>410</sup> Framework agreements are commonly used by the OGP. The use of frameworks agreements is reviewed briefly in Chapter Three SMEs and Public Procurement.

<sup>411</sup> Office of Government Procurement, '*Communications Strategy 2018 – 2020*'.

National, regional and local bodies are responsible for procuring public works, supplies and services contracts which fall outside of these categories; for example, the Health Service Executive (HSE) manages and governs the procurement operations of the health system.<sup>412</sup> There are 31 local authorities in Ireland, 26 of which are county councils responsible for local government in 24 geographical counties. There are two city and county councils and three city councils.<sup>413</sup> Each council has jurisdiction for its administrative area.<sup>414</sup>

Semi-state bodies which are owned by some level by the state and are technically commercially-run, take ownership of their procurement practices and policies.<sup>415</sup> The Public Contracts Regulations or the Utilities Regulations may apply to some of their procurement practices, depending on the value and subject matter of the contract, however, for the most part, semi-state bodies are not required to purchase from OGP concluded contracts or adhere to government policy on public procurement.<sup>416</sup> The National Development Finance Agency (NDFA) advises contracting authority on how to secure VfM in setting up public-private partnerships (PPPs).<sup>417</sup> All projects involving the use of private finance must be referred to the NDFA for advice.<sup>418</sup>

Public procurement guidance and training material are offered through various means. The ‘*National Procurement Policy Framework*’ consists of five streams;

- Legislation (Regulations implementing the Directives)

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<sup>412</sup> As set out in the *Health Act 2004*.

<sup>413</sup> As set out under the *Local Government Reform Act 2004*.

<sup>414</sup> The *Local Government Act 2001* sets out the functions and powers entrusted to local bodies. Furthermore, Art 28(a) of the *Constitution (Bunreacht na hEireann)* formalises the role of local government in providing democratic representation of local communities.

<sup>415</sup> Semi-state bodies are governed by Department of Public Expenditure and Reform ‘*The Code of Practice for the Governance of State Bodies*.’ (2006).

<sup>416</sup> Office of Government Procurement, ‘*National Public Procurement Framework*’. (2019). Version 2.1.

<sup>417</sup> *The National Treasury Management Agency (Amendment) Act (2014)* sec 55.

<sup>418</sup> This role is provided for in the *National Development Finance (Amendment) Agency Act 2007* sec 3.

- Policy (Soft Law measures, i.e. government circulars)
- Capital Works Management Framework (Specifically designed for construction contracts)
- General Procurement Guidelines
- Detailed technical guidelines, template documents and notes published by the OGP

The most comprehensive guidance and training material on the new Directive has been published centrally by the OGP. In 2017, the OGP published a comprehensive ‘*Public Procurement Guidelines for Goods and Services.*’ document, which is subject to amendment and review periodically.<sup>419</sup> These guidelines aim to ‘*promote best practice and consistency of application of the public procurement rules in relation to the purchase of goods and services.*’<sup>420</sup> Furthermore, the OGP has recently published an information note on the incorporation of ‘*Social Considerations in Public Procurement.*’<sup>421</sup> This document offers practical advice on the inclusion of relevant and appropriate social considerations in the purchase of goods and services. Additionally, guidance and training materials have been published by national, local and regional authorities.

Achieving VfM is a key procurement principle. Individual contracting authorities are responsible for ensuring VfM outcomes.<sup>422</sup> The Irish ‘*Public Spending Code*’ requires contracting authorities to achieve VfM by ‘*doing the right thing*’ that is, spending money to achieve the right objectives, and ‘*doing it right*’, that is, spending money as efficiently as possible, avoiding waste.<sup>423</sup> The Irish National Public Procurement

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<sup>419</sup> Office of Government Procurement, *National Public Procurement Framework Public Procurement Guidelines for Goods and Services.* (2019) Version 2.1.

<sup>420</sup> Office of Government Procurement (n 419) 13.

<sup>421</sup> Office of Government Procurement *Social Considerations in Public Procurement.* OGP. (2018). Accessible at this link; <https://ogp.gov.ie/information-notes/> Last accessed 16<sup>th</sup> May 2019.

<sup>422</sup> Public bodies are required to provide ‘cost-effective’ public services under section 4(f) and (g) of the *Public Service Management Act (PSMA)*, 1997.

<sup>423</sup> Department of Public Expenditure and Reform *Public Spending Code - Expenditure Planning, Appraisal & Evaluation in the Irish Public Service: Standard Rules & Procedures* (2012) A-00.



Guidelines document sets out three forms of structured steps for conducting below-threshold public procurement processes. The guidance documents set out general guidance for contracts valued below €5,000,<sup>424</sup> contracts valued between €5,000 to €25,000<sup>425</sup> and contracts valued from €25,000 to EU thresholds.<sup>426</sup>

The national guidelines encourage the contracts to be evaluated using the ‘most economically advantageous tender’ (MEAT) award criteria and to be carried out by a team with requisite experience. The ‘MEAT’ award approach allows the contracting authority to evaluate costs alongside other characteristics of the supplies or services. Such criteria may include; quality, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, after-sales services and technical assistance, delivery dates and period of completion.<sup>427</sup> Contracting authority’s choice to use lowest price award criteria has been removed in most cases. Contracting authorities must award contracts on the basis of MEAT. This shall be identified on the basis of cost, using a cost-effectiveness approach, such as *life-cycle costing*, and may include the *best price-quality ratio*.<sup>428</sup> The introduction of MEAT as a sole award criterion will encourage the evaluation of bids on the basis of the best price-quality ratio.<sup>429</sup> It would also allow an authority to award to the

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<sup>424</sup> Contracts valued less than €5,000 should be purchased on the basis of verbal quotes from one to five competitive suppliers. Contracting authorities can evaluate the tenders on the basis of lowest price or most economically advantageous tender, assessing the tenders’ experience, technical competence, capability, financial standing.

<sup>425</sup> Supplies or services contracts valued between €5,000 and €25,000 are to be purchased on the basis of a minimum of three written quotes. The quotations received are evaluated on a lowest price or most economically advantageous tender basis. See Office of Government Procurement (n 419).

<sup>426</sup> There is no requirement to advertise contracts valued below €25,000 on the e-tenders website. Supplies and services contracts with an estimated value of and above €25,000 and works contracts with an estimated value of and above €50,000 should normally be advertised on the e-tenders site. A formal tendering process is required for such contracts. See Office of Government Procurement (n 419).

<sup>427</sup> Public Authority Regulations reg 67.

<sup>428</sup> Public Authority Regulations regs 67 and 68.

<sup>429</sup> All criteria used and relied on in the evaluation stage must be clearly stated in the call for competition notices. See *Clare Civil Engineering v Mayo County Council* [2004] IEHC; *Word Perfect Translation Services Limited v The Minister for Public Expenditure and Reform* (No.3) [2018] IECA 15.

bidder submitting the lowest priced bid provided that that bidder meets minimum quality standards established by the authority.

The new rules promote a *life-cycle costing* approach. The notion of life-cycle costing includes all costs over the life cycle of a works, supplies or services contract. This means internal costs as well as costs related to environmental factors; internal costs include costs for research and development, production, transport, consumption of energy, maintenance and end-of-life disposal; external costs include the emission of greenhouse gases, pollution caused by the extraction of raw materials used in the product or caused by the product itself or its manufacturing.<sup>430</sup>

The contracting authority should consider additionally advertising the contract notice on the OJEU site.<sup>431</sup> The contracting authorities may follow any of the procurement procedures and can ask tenderers to present or elaborate on proposals for technical or consultancy projects.<sup>432</sup> Once the preferred tenderer has been selected, the contracting authority should inform all other tenderers of their decision without delay. The guidelines do not prevent contracting authorities from including environmental or social criteria into their procurement practices.<sup>433</sup> Contracting authorities enjoy a wide discretion to include socially conscious clauses in both below and above threshold contracts.<sup>434</sup>

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<sup>430</sup> Public Authority Regulations regs 68. See also D. Dragos and B. Neamtu, '*Sustainable public procurement: life-cycle costing in the new EU directive proposal*' (2013) 8 Eur. Procurement & Pub. Private Partnership L. Rev. 19.

<sup>431</sup> This is particularly suitable in circumstances where competition is limited and there is a need to foster competitive bids. See B. Jan Drijber and H. Stergiou, '*Public procurement law and internal market law*' (2009) 46(3) Common Market Law Review 805.

<sup>432</sup> However, contracting authorities must ensure that the requests for further information cannot be construed as post tender negotiations or used to provide tenderers with competitive information. See Case C-337/98 *Commission v France*; Case C-454/06 *Pressetext*; Gottlieb, R (On the Application Of) v Winchester City Council [2015] EWHC 231 (Admin).

<sup>433</sup> Procurement practices are subject to audit and scrutiny under the *Comptroller and Auditor General (Amendment) Act 1993* and the *Local Government Reform Act 2014*.

<sup>434</sup> Complying with the VfM directions set out in *Public Spending Code - Expenditure Planning, Appraisal & Evaluation in the Irish Public Service: Standard Rules & Procedures* (2012) A-00.

## 2.11 Public Procurement Law in Northern Ireland

On average £3 million is spent annually procuring public supplies and services contracts in Northern Ireland.<sup>435</sup> A semi-centralised system of procurement operators in Northern Ireland. There are five elements to the centralised governance structure; the Construction and Procurement Delivery (CPD)<sup>436</sup>; the Procurement Board; Centres of Procurement Expertise (CoPEs) and a Procurement Practitioners' Group (PPG).<sup>437</sup> The CPD in Northern Ireland differs to the OGP, as it plays a stronger role in assisting public sector bodies in concluding public contracts. The CPD assists public bodies in defining what they need, offers advice on the best method of identifying economic operators, secures the *best value for money* when conducting procurement competitions and assists the management of concluded contracts.<sup>438</sup> Public procurers are encouraged to achieve VfM by considering '*the most advantageous combination of cost, quality and sustainability to meet customer requirements.*'<sup>439</sup> Public procurers are encouraged to use public procurement in a strategic manner.

To ease the administrative burden, the CPD conduct collaborative framework agreements which can be availed of by the 158 government bodies, government agencies, and non-departmental government bodies.<sup>440</sup> The Procurement Board is responsible for the development and coordination of public procurement policy. The CoPEs are responsible for procurement in the areas of Roads Service, NI Water, Translink, Health Estates, Procurement and Logistics Service, the Education and Library

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<sup>435</sup> Federation of Small Business Northern Ireland *The realities of public procurement for SMEs in Northern Ireland* (2014). Available at; <https://www.fsb.org.uk/docs/default-source/fsb-org-uk/the-realities-of-public-procurement.pdf?sfvrsn=1> Last accessed 25<sup>th</sup> April 2019.

<sup>436</sup> Known as the 'Central Procurement Directorate' until 2018.

<sup>437</sup> Department of Finance and CPD Northern Ireland *Public Procurement Policy* (2014) Version 11. Available at; <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/ni-public-procurement-policy-version-11-august-2014.pdf> Last accessed 25<sup>th</sup> April 2019.

<sup>438</sup> The CPD operates within the remit of the Department of Finance.

<sup>439</sup> Department of Finance and CPD Northern Ireland *Public Procurement Policy* (n 437) 3.

<sup>440</sup> A list of the participating bodies is available at this link; <https://www.finance-ni.gov.uk/publications/list-public-bodies-which-can-participate-cpd-collaborative-frameworks>. Last accessed 29<sup>th</sup> January 2019.

Boards and the Northern Ireland Housing Executive. Representatives from both the CPD and the CoPEs make up the PPG which support the development of policy.<sup>441</sup>

A significant number of Procurement Guidance Notes (PGNs) have been designed in partnership with each of these bodies, publishing guidance for contracting authorities in supporting the promotion of human rights in procurement, use of SME and social enterprise friendly criteria, the integration of the social considerations, environmental criteria and guidelines on how to manage abnormally low tenders.<sup>442</sup> Furthermore, contracting authorities are required to comply with twelve underpinning guiding principles when carrying out the procurement of contracts of all sizes. The principles reflect the statutory obligations, and overall governance objectives set out by the Programme for Government.<sup>443</sup> Contracting authorities are required to behave in an accountable, consistent, integral, informed and compliant manner to support competition in the market. The states willingness to promote socio-economic public procurement is demonstrated in the adoption of the three principles of ‘*effectiveness, efficiency and integration.*’<sup>444</sup> The principle of integration encourages contracting authorities to comply with statutory duties, but to also take into account additional requirements set out in other economic, social and environmental policies;

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<sup>441</sup> Department of Finance and CPD Northern Ireland *Public Procurement Policy* (n 437) 3.

<sup>442</sup> See CPD Policy Government Notes;  
*A Guide for Social Economy Enterprises* (2011) PGN 01/11;  
*Helping Small and Medium Sized Enterprises (SMEs) and Social Economy Enterprises (SEEs) access Public Sector contracting opportunities* (2011) PGN 02/11;  
*Public Procurement: A Guide for Small and Medium Sized Enterprises* (SMEs) (2012) PGN 02/12;  
*Helping SMEs Benefit from Subcontracting Opportunities* (2012) PGN 06/12;  
*Abnormally Low Tenders* (2013) PGN 03/13;  
*Integrating Social Considerations into Contracts* (2016) PGN 01/13;  
*Innovation in Public Procurement* (2017) PGN 02/17;  
*Human Rights in Public Procurement* (2018) PGN 03/18.

<sup>443</sup> Northern Ireland Executive *Programme for Government 2011-2015*. (2012) 27; Please note that a draft Programme for Government 2016-2021 has yet to be adopted since the collapse of the government in 2017.

<sup>444</sup> Department of Finance and CPD Northern Ireland *Public Procurement Policy* (n 437) 10.

*duties on equality of opportunity and sustainable development and the Executive's policy on joined-up government, procurement policy should pay due regard to the Executive's other economic, social and environmental policies, rather than cut across them.*<sup>445</sup>

Although the principles of effectiveness and efficiency require contracting authorities to carry out procedures 'as cost-effectively as possible' adopting socio-economic objectives in a 'balanced manner'.<sup>446</sup> This research suggests that non-economic objectives are encouraged in both jurisdictions, on the *proviso* that such objectives do not distort competition or violate the fundamental principles of the rules.

Unlike the CJEU cases, there are a limited number of cases in Ireland and Northern Ireland instructing contracting authorities on how they should incorporate social criteria in public procurement. Public procurement challenges tend to focus on tendering activities, such as the use of suitable procedures,<sup>447</sup> acceptance of late tenders,<sup>448</sup> and errors in evaluation methods.<sup>449</sup> However, government policies set out the permissible use of socially-driven practices. Both States require contracting authorities to use public procurement spend strategically, achieving VfM in all purchases.

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<sup>445</sup> Department of Finance and CPD Northern Ireland *Public Procurement Policy* (n 437) 5.

<sup>446</sup> Department of Finance and CPD Northern Ireland *Public Procurement Policy* (n 437) 4.

<sup>447</sup> See *QDM Capital Ltd. v Athlone Institute of Technology* (unreported judgment of Birmingham J, 3 June 2011) See also; Case C-226/09 *Commission v Ireland*, judgment of 18 November 2010.

<sup>448</sup> See *BAM PPP v National Treasury Management Agency & Minister for Education and Skills* [2015] No 176 JR.

<sup>449</sup> These cases largely relate to application of selection and award criteria at the evaluation stage. See *Scott and Others v. Belfast Education and Library Board* NICH D, Weatherup J, (2007);

*McLaughlin & Harvey Ltd. v Department of Finance and Personnel (No 2)* [2008] NIQB 91 (QBD, Deeny J, 11 September 2008) (Affirmed by NI Court of Appeal, 26 September 2011 [2011] NICA 60);

*Resource (NI) Limited v Northern Ireland Courts and Tribunal Service* [2011] NIQB 121;

*Easycouch Limited v Department of Regional Development* (Northern Irish High Court, McCloskey J, 28 February 2012);

*RPS Consulting Engineers Limited v Kildare County Council* [2016] IEHC 113;

*Sanofi Pasteur v Health Service Executive* [2018] IEHC 566;

*Word Perfect Translation Services Limited v The Minister for Public Expenditure and Reform (No.3)* [2018] IECA 156.

Contracting authorities retain the freedom to pursue social objectives in public procurement, including the facilitation of SME participation.

## 2.12 Conclusion

This chapter set out to provide an analysis of the Public Procurement Directives and examine the developing objectives of the Directive. The chapter has shown that the original economic objectives of the rules have gradually been supplemented with social, environmental and innovation goals. While some commentators question the legality, purpose and benefit of such developments, the research accepts that the Directive has both economic and social characteristics. Several measures have been set out in the Directives to assist SMEs in entering the public markets as main contractors or subcontractors. The main measures include the division of large contracts into smaller lots, the use of subcontractor protection conditions, the use of social, environmental and innovative award criteria and complementing contractual performance conditions, the use of proportionate financial criteria and the requirement to adopt electronic practices.

Member States are free to use public procurement strategically to achieve their individually perceived conceptions of social justice, once any social objectives do not distort market competition. Northern Ireland and Ireland transposed the Directives closely, providing public bodies with the opportunities to level the bidding playing field for SMEs. Irish and Northern Irish public bodies enjoy a wide discretion to include social criteria to achieve value for taxpayers' money. The next chapter assesses what factors hinder SMEs from successfully gaining access to public markets, relying on survey findings, academic literature and assessment reports to investigate if the measures outlined in the Directives can facilitate SME participation.

## Chapter Three SMEs and Public Procurement

### 3.1 Introduction

Chapters One and Two describe how European derived public procurement law is an important market-based tool used to foster competition in public markets and to deliver the overriding socio-economic goals of the EU. Chapter Two outlines how contracting authorities may compliantly incorporate non-economic criteria into their procurement procedures. The purpose of this chapter is to review the relationship between SMEs and public procurement, identifying what barriers SME face when competing for public contracts and identifying what SME friendly measures contracting authorities may take account of when designing procurement competitions. This chapter relies on survey findings, academic literature and assessment reports to investigate if the SME friendly provisions outlined in the Directive can facilitate SME participation.

SMEs play a critical and fundamental role in the Single Market.<sup>1</sup> SMEs account for 99% of enterprises operating in the Single Market, of which 92% are micro-enterprises.<sup>2</sup> SMEs are key drivers of employment generation and sources of innovation in the Single Market.<sup>3</sup> SMEs are the key drivers for generating local employment, sustaining local economies

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<sup>1</sup> The definition of an SME covers all enterprises with less than 250 employees and equal to or less than either €50million turnover or €43million balance sheet total. Micro-enterprises are the smallest category of SME, with less than ten employees and a turnover or balance sheet total equal to or less than €2million. See Commission 'Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422)' (2003) OJ L 124/36, annex 2.

<sup>2</sup> European Parliament, 'Small and Medium Sized Enterprises' (2019) Factsheet of the European Union. N54602.

<sup>3</sup> SMEs from the period of 2002 – 2010 were responsible for creating over 85% of all new jobs in Europe, with micro-enterprises alone responsible for 58% of total net employment growth. Innovation is driven primarily by start-ups. See J. de Kok, P. Vroonhof, W. Verhoeven, N. Timmermans T. Kwaak, J. Snijders F. Westhof, 'Do SMEs create more and better jobs?' (2011) EIM Report 6. Available at; [http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2012/do-smes-create-more-and-better-jobs\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2012/do-smes-create-more-and-better-jobs_en.pdf) Last accessed 2<sup>nd</sup> May 2019.

and promoting entrepreneurship and business risk-taking in all areas of society.<sup>4</sup> However, the Commission recognises that SME participation in the European public procurements markets is disproportionately low to the number of SMEs operating in Member States. On average, the overall contract value secured by SMEs ranges from 31 – 38% of all contracts advertised in the OJEU.<sup>5</sup> This presents significant challenges in both preparing and informing SMEs of tendering opportunities and promoting more SME-friendly procurement techniques among public buyers.

SMEs play an important role in public contracts, they offer high-quality supplies and services, and they tend to be flexible, particularly in reactions to urgent problems.<sup>6</sup> SMEs normally have a simple organisational structure, allowing procurers to have accessibility to senior management.<sup>7</sup> SMEs have instinctive local knowledge and contribute to local employment generation.<sup>8</sup> While there are potential weaknesses associated with SMEs, such as lack of technical capabilities and financial guarantees, the benefits may outweigh the concerns in a large majority of cases.<sup>9</sup> SMEs benefit greatly from selling into the public market; public procurers are important customers offering real scale opportunities both in terms of value and length of the contract.<sup>10</sup> Public procurers are buyers with continuous demand. The public sector will continue to buy throughout any economic downturn.<sup>11</sup> The public sector pay promptly, they are bound by

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<sup>4</sup> See J de. Kok *et.al* (n 3) However, it should be noted that not all SMEs offer innovative products and services. Certain categories of SMEs, namely, start-ups are responsible for driving innovative developments.

<sup>5</sup> Of which; Micro enterprises accounted for 6%, Small enterprises accounted for 11% and Medium Size enterprises accounted for 17%. See Commission, '*SMEs' access to public procurement markets and aggregation of demand in the EU 2014.*' (2014) Final Report.

<sup>6</sup> A. O'Donnell, A. Gilmore, D. Carson and D. Cummins, '*Competitive advantage in small to medium-sized enterprises*' (2002) 10(3) *Journal of Strategic Marketing* 205.

<sup>7</sup> O.J. Borch and E.L. Madsen, '*Dynamic capabilities facilitating innovative strategies in SMEs*' (2007) 1(1) *International Journal of Technoentrepreneurship* 109.

<sup>8</sup> A. Morrison, J. Breen and S. Ali, '*Small business growth: intention, ability, and opportunity*' (2003) 41(4) *Journal of Small Business Management* 417.

<sup>9</sup> E. Uyarra, J. Edler, J. Garcia-Estevéz, L. Georghiou, and J. Yeow, '*Barriers to innovation through public procurement: A supplier perspective*' (2014) 34(10) *Technovation* 631.

<sup>10</sup> L. Preuss, '*On the contribution of public procurement to entrepreneurship and small business policy*' (2011) 23(9-10) *Entrepreneurship & Regional Development* 787.

<sup>11</sup> Albeit, with reduced budgets.



legislative requirements and usually required to pay within 30 days of receiving an invoice.<sup>12</sup>

### 3.2 Definitions, Benefits and Concerns with SMEs

EU Recommendation 2003/361 provides the legal definition of the SMEs.<sup>13</sup> Medium sized-enterprises are defined as any business entity which employs fewer than 250 employees and has an annual turnover not exceeding €50million. Small businesses are business entities which employ fewer than 50 employees and have an annual turnover not exceeding €10million. Micro-enterprises are business entities which employ fewer than ten employees and have an annual turnover not exceeding €2million.<sup>14</sup> SMEs play a fundamental role in the Single Market, sustaining local economies and promoting entrepreneurship and business risk-taking in all areas of society. In 2017 SMEs contributed to 67% of total employment in the Single Market, employing almost 90 million people. SMEs account for 99.8% of all enterprises in the non-financial sector. Over 92% of all SMEs operating in Europe are defined as micro-enterprises.<sup>15</sup> SMEs predominantly operate in the following five key sectors; wholesale and retail trade, manufacturing, construction, business services, accommodation and food services.<sup>16</sup>

Similarly, to the European experience, SMEs are the backbone of the Irish and Northern Irish economies. Over 250,143 SMEs operate in Ireland employing almost 7 in every 10 employees in the business economy. In terms of the overall market share, SMEs account for 99.7% of all business

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<sup>12</sup> See Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions OJ L 48/1 art 3(2).

<sup>13</sup> See Commission 'Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422)' (2003) OJ L 124/36, annex 2.

<sup>14</sup> See Commission 'Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises' annex 2.

<sup>15</sup> See Commission, 'Annual Report on European SMEs 2016/2017. Focus on self-employment. SME Performance Review' Report 0162.

[https://ec.europa.eu/growth/content/single-market-integration-and-competitiveness-eu-and-its-member-states-2016\\_en](https://ec.europa.eu/growth/content/single-market-integration-and-competitiveness-eu-and-its-member-states-2016_en). Last accessed 2<sup>nd</sup> May 2019.

<sup>16</sup> See Commission 'Annual Report on European SMEs' 2016/2017 (n 15).

entities, contributing to 36.6% of gross value added (“GVA”).<sup>17</sup> GVA is defined as the gross income from operating activities and is the balance available to enterprises to pay employees and realise a return on investment.’<sup>18</sup> It is important to note that micro-enterprises contributed 19% of the GVA. In terms of enterprise size, over 90% of SMEs are defined as micro-enterprises, 8% are small businesses, and 2% are medium-sized enterprises.

Micro-enterprises employ 26.5% of the working population, small businesses employ 22.5%, and medium-sized enterprises employ 18.9%.<sup>19</sup> Nearly half of the enterprises belong to the services sector, over a third operate in the construction and distribution sectors, and the remaining entities work in the industry, financial and insurance sectors. While only 3% of the enterprises operate in the financial and insurance sectors, these sectors have the highest number of employees engaged per enterprise. On average enterprises operating in the financial and insurance sector employ 17 or more people.<sup>20</sup> However, in terms of turnover, the industry sector had the largest turnover in the business economy of €384.4 billion in 2014. Turnover is defined as ‘*the total invoiced by enterprises during the reference period*’.<sup>21</sup> The services and distribution sector closely followed the industry sector. The construction sector accounted for 2.3% of total turnover.

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<sup>17</sup> SMEs employ 927 759 people in Ireland. See Commission ‘*2017 Small Business Act (SBA) Factsheet – Ireland.*’ (2017). Available at <https://dbei.gov.ie/en/Publications/Publication-files/2017-SBA-Fact-Sheet.pdf> Last accessed; 15<sup>th</sup> April 2019.

<sup>18</sup> See the Irish Central Statistics Office (CSO) ‘*Business in Ireland 2012.*’ (Stationery Office, Dublin. December 2014) 5.

<sup>19</sup> While large enterprises only account for 0.3% of all enterprises, they are responsible for employing 32% of the working population. See CSO (2014) (n121) 15.

<sup>20</sup> See CSO (2014) (n 18) 9.

<sup>21</sup> See CSO (2014) (n 18) 15.

Over 132,700 SMEs operate in Northern Ireland.<sup>22</sup> Interestingly, the number of SMEs operating in the state has risen rapidly since 2015.<sup>23</sup> SMEs predominately operate in the services sectors contributing to 75% of employment, 75% of turnover and 81% of GVA in the private sector.<sup>24</sup> Micro-sized enterprises alone employ over 110,000 people, accounting towards 19% of the total workforce.<sup>25</sup> In 2017, micro-enterprises generated sales of £10.4 billion.<sup>26</sup> Across the whole UK, micro-enterprises are responsible for employing approximately 4.09 million people.<sup>27</sup>

SMEs undoubtedly play a vital role in driving employment and developing new industries. de Wit and de Kok conducted a European wide study questioning whether small businesses create more jobs than larger enterprises. The research used a dynamic classification to analyse job creation within the different size classes across all Member States. Overall the research found that small firms create more jobs in all sectors than larger companies, bar the manufacturing and industry sectors.<sup>28</sup> Birch's seminal study on the ability of small businesses to create employment in the United States in 1979 remains valid today.<sup>29</sup> More recent research conducted by Okolie and Butani et al. further supports Birch's argument that small businesses are the primary generators of employment in a

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<sup>22</sup> See Statista *Number of small and medium enterprises (SME) in the private sector in Northern Ireland from 2010 to 2018* (2018). Available at; <https://www.statista.com/statistics/668790/number-small-and-medium-businesses-northern-ireland/> Last accessed 15<sup>th</sup> April 2019.

<sup>23</sup> Approximately 110,200 SMEs operated in the state in 2013, 118,500 in 2014, 116,700 in 2015, 124,000 in 2016, 131,700 in 2017 and 132,700 in 2018. See Statista (2018) (n 22).

<sup>24</sup> See Federation of Small Businesses and Ulster University, *'The contribution of small businesses to Northern Ireland'* (2015). Available at; <https://www.fsb.org.uk/docs/default-source/Publications/the-contribution-of-small-businesses-to-northern-ireland.pdf?sfvrsn=1> Last accessed 15<sup>th</sup> April 2019.

<sup>25</sup> See N. Hewitt-Dundas and S. Roper, *'Understanding micro-businesses in Northern Ireland'* (2018). Available at; <https://www.economy-ni.gov.uk/sites/default/files/publications/economy/NI-Macros-Report.pdf> Last accessed 15<sup>th</sup> April 2019.

<sup>26</sup> See N. Hewitt-Dundas and S. Roper (n 25).

<sup>27</sup> Over 1.11 million micro-enterprises are operational across the whole UK See N. Hewitt-Dundas and S. Roper (n 25) 8.

<sup>28</sup> G. de Wit and J. de Kok, *'Do Small Businesses Create More Jobs? New Evidence for Europe'* (2014) 42(2) *Small Business Economics* 283.

<sup>29</sup> D.L. Birch, *'The Job Generation Process: Final Report to Economic Development Administration'* (MIT Cambridge, MA Program on Neighborhood and Regional Change 1979) Birch's approach was equally challenged and supported in the 1990s.

business economy.<sup>30</sup> However, Davis et al. questions small businesses true contribution to employment growth, arguing that Birch's results were based on distorted data which overestimated SMEs ability to generate employment and which failed to take into account the issue of job quality.<sup>31</sup> Neumark et al. revisited the theories put forward by Birch and Davis et al., questioning if small businesses in the US create more jobs than larger enterprises. Relying on data retrieved from a national longitudinal data file, the findings '*robustly*' show that small businesses do create more jobs than large enterprises.<sup>32</sup>

Alongside, job creation Roper argues that small businesses are important initiators and catalysts for the development of innovative goods and services for two distinct reasons.<sup>33</sup> The first reason explains that small businesses proximity to the market assists them in developing technological solutions to address new market opportunities. Secondly, small businesses are more likely to be innovative due to their organisational and financial flexibility.<sup>34</sup> Small companies tend to operate a simpler organisational structure and inhibit an entrepreneurial spirit which allows them to respond quickly to change.<sup>35</sup> However, an SMEs ability to drive innovation or change in their organisation is dependent on the entrepreneurial nature of the company or need to develop highly-technological products or services. Some SMEs will focus on survival and generating profits over-investing in innovation. While it is not accurate to say that all SMEs are capable of driving innovation, it is appropriate to say that SMEs, particularly small businesses, contribute significantly to

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<sup>30</sup> C. Okolie, '*Why size class methodology matters in analyses of net and gross job flows*' (2004) 127(7) Monthly Labor Review 3; S.J. Butani, R.L. Clayton, V. Kapani, J.R. Spletzer, D.M. Talan and G.S. Jr., '*Working Business employment dynamics: Tabulations by employer size*' (2006) 129 Monthly Labor Review 3.

<sup>31</sup> S. Davis, J. Haltiwanger and S. Schuh, '*Small business and job creation: Dissecting the myth and reassessing the facts*' (1996) 8 Small Business Economics 297.

<sup>32</sup> D. Neumark, B. Wall and J. Zhang, '*Do Small Businesses create more jobs? New evidence for the United States from the National Establishment Time Series*' (2011) 93(1) The Review of Economics and Statistics 16.

<sup>33</sup> S. Roper, '*Product Innovation and Small Business Growth: A Comparison of the Strategies of German, U.K. and Irish Companies*' (1997) 9(6) Small Business Economics 523.

<sup>34</sup> See S. Roper (1997) (n 33).

<sup>35</sup> G.T. Lumpkin and G.C. Dess '*Clarifying the entrepreneurial orientation construct and linking it to performance*' (1996) 21(1) Academy of management Review 135.

employment growth in the Single Market. It is for this reason that there are a plethora of EU policies aimed at supporting SME growth, assisting SME access markets and finance.<sup>36</sup> However, there is a worrying tendency to treat all SMEs as *one* generic group of enterprises.

The definition of SMEs offered by the EU is expansive, categorising entities by size, which results in policy treating SMEs as one homogenised group. Infelise and Diego argue that the inclusion of micro-businesses within the definition significantly distorts the analysis of SME participation in the Single Market, which results in the design of ineffective policy solutions aimed at addressing market failures in SMEs' access to finance.<sup>37</sup> The EU definition of SMEs focuses on enterprises sizes, and SME focussed policies are designed to reflect the general economic and operational concerns faced by micro, small or medium-sized entities. By and large, this is an effective policy approach as it addresses the general concerns of the SME population, hence this form of generalisation will have the most impact on the majority of SMEs operating in the Single Market.<sup>38</sup> However, this generalised approach is not always appropriate. SME friendly policies should also take into account the different *forms* of companies. In addition to ordinary for-profit SMEs, this research is also concerned with two types of generally micro-enterprises falling within the EU definition of SME; *social enterprises* and *start-ups*.

Social enterprises or social economy enterprises are rapidly becoming a popular form of enterprise in the Single Market. One in every three enterprises established in Finland, France and Belgium is a social

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<sup>36</sup> S. Panagopoulos, 'Strategic EU public procurement and small and medium size enterprise' in C. Bovis. 'Research handbook on EU public procurement law' (Edward Elgar Publishing, 2016) 270. See also; European Economic and Social Committee *Study on the assessment of the effectiveness of the EU SME policies 2007-2015* (2017). Available at; <https://www.eesc.europa.eu/resources/docs/qe-02-17-762-en-n.pdf>\_Last accessed 20<sup>th</sup> April 2019.

<sup>37</sup> F. Infelise and D. Valiante, 'Why a more accurate EU definition of SMEs matters' (2013) Centre for European Policy Studies.

<sup>38</sup> R. Mayntz, 'The conditions of effective public policy: a new challenge for policy analysis' (1983) 11(2) Policy & Politics 123.

enterprise.<sup>39</sup> The common definition of social enterprise defines social enterprises as businesses established with a profit-making goal and established with a social impact objective.<sup>40</sup> A social enterprise might establish itself as a café; the business objective of the enterprise is to sell food at profitable rates. An additional goal of the enterprise might be to use the profit generated to employ people with a disability.<sup>41</sup> Local sports or community clubs might be considered a form of social enterprise, as they are established to meet a community need and any profits generated from the use of the buildings is generally used to maintain the sporting club or host community events. There are many varieties of social enterprises, such as social businesses, social cooperatives, certified corporate social responsibility programmes of private for-profit entities and inter-sector partnerships.<sup>42</sup>

Kerlin identifies the differences between social enterprises operating in the United States compared to enterprises operating in the EU.<sup>43</sup> Social enterprises based in the United States tend to be commercial ventures organised by not-for-profit entities, whereas in the EU, social enterprises generally tend to be co-operatives funded by government grants.<sup>44</sup> The European Commission further supports this distinction by applying the term to any enterprise whose ownership structure reflects the enterprise's

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<sup>39</sup> See Commission, *'Social Business Initiative Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation'* (Communication) COM (2011) 0682 final.

<sup>40</sup> J. Blount and P. Nunley, *'Social Enterprise, Corporate Objectives, and the Corporate Governance Narrative'* (2015) 52(2) *American Business Law Journal* 201; R. Dart, *'The legitimacy of social enterprise'* (2004) 14(4) *Nonprofit management and leadership* 411; R. Harding, *'Social enterprise: the new economic engine?'* (2004) 15(4) *Business strategy review* 39; J. Defourny, C. Borzaga and J. Defourny, *'From third sector to social enterprise'* (London: Routledge, 2001) 1-28.

<sup>41</sup> R. Dart, *'The legitimacy of social enterprise'* (2004) 14(4) *Nonprofit management and leadership* 411. One examples of social enterprises operating in Ireland include; Speedpak, Jobcare, Fledglings, Hand on Heart Enterprises, MyMind and RehabEnterprises.

<sup>42</sup> D.R. Young and J.D. Lecy, *'Defining the Universe of Social Enterprise: Competing Metaphors'* (2014) 25(5) *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 1307.

<sup>43</sup> J.A. Kerlin, *'Social enterprise in the United States and Europe: Understanding and learning from the differences'* (2006) 17(3) *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 246.

<sup>44</sup> See J.A. Kerlin (n 43).

mission to promote social justice.<sup>45</sup> European social enterprises are predominantly concerned with creating employment opportunities for marginalised groups and delivering local community services.<sup>46</sup> Young and Lecy offer an alternative definition of social enterprise, arguing that the meaning cannot be reduced to one single concept and a fluid approach should be adopted to reflect the diverse and complex needs of social enterprises.<sup>47</sup>

As with most of the Member States, there is no legal definition for ‘social enterprise’ in Ireland and Northern Ireland. The sole Irish government report, the ‘2013 Forfás Report - *Social Enterprise in Ireland Report: Sectoral Opportunities and Policy Issues*’ defines social enterprises as

*an enterprise that trades for a social/societal purpose, where at least part of its income is earned from its trading activity, is separate from government and where the surplus is primarily reinvested in the social objective.*<sup>48</sup>

There is no specific legal form for social economy enterprises. The most suitable type is a ‘*Company Limited by Guarantee*’ (CLG); this form of company is limited by guarantee and does not raise money through share capital.<sup>49</sup> Members’ liability is limited to the amount of the guarantee. This form of company is suitable for social enterprises as members are not required to buy shares in the company, and the company enjoys the benefits of separate legal personality and limited liability.<sup>50</sup> In Northern Ireland, social enterprises tend to establish themselves as unincorporated associations, trusts, limited companies, industrial and provident societies

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<sup>45</sup> See Commission, ‘*Social Business Initiative Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation*’ (Communication) COM (2011) 0682 final.

<sup>46</sup> COM (2011) 0682 final.

<sup>47</sup> D.R. Young and J.D. Lecy (2014) (n 42).

<sup>48</sup> Forfás, ‘*Social Enterprise in Ireland. Sectoral Opportunities and Policy Issues.*’ Government report (2013) 2.

<sup>49</sup> See the Irish Companies Act 2014, part 18.

<sup>50</sup> Companies Act 2014, part 18.

and community interest companies (CICs).<sup>51</sup> Alternatively, many social enterprises establish themselves as registered charities. The primary benefit for a social enterprise to establish itself as a registered charity is the availability of tax exemptions.<sup>52</sup>

Market-led reports and current peer-reviewed literature conclude that due a lack of clarity on a definition of social enterprises, there is a myriad of terms used interchangeably to describe ‘*social economy*’ and ‘*social enterprise*’.<sup>53</sup> The most commonly used terms include; community and voluntary groups, community development, community enterprise, social enterprise, social innovation and social entrepreneurship, credit unions and housing and agricultural cooperatives. The common dominator is that each of these terms focuses on achieving a stated social goal, such as providing a community service, supporting the employment of disadvantaged people or people with disabilities or supporting the development of environmentally sustainable communities.<sup>54</sup> The terms used are all-encompassing, focussing on a broad spectrum of objectives, primarily promoting the development of socially sustainable local economies and communities.

O’Broin distinguishes the crucial differences between the key terms, of social economy, social enterprise, social entrepreneur and social innovation.<sup>55</sup> O’Broin relies on Amin and Noya and Clarence’s definition of social economy, concluding that it is an economic activity which sits

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<sup>51</sup> One of the most suitable forms of companies for social enterprises operating in the UK is a ‘*Community Interest Company*’ (CIC). CICs resemble a CLG with the additional mechanism to safeguard the social objective of the company. See also; P. Teague, ‘*Developing the social economy in Ireland?*’ (2007) 31(1) *International Journal of Urban and Regional Research* 91.

<sup>52</sup> R. Spear, C. Cornforth and M. Aiken, ‘*The governance challenges of social enterprises: evidence from a UK empirical study*’ (2009) 80(2) *Annals of Public and Cooperative Economics* 247.

<sup>53</sup> J. Battilana and M. Lee, ‘*Advancing research on hybrid organizing—Insights from the study of social enterprises*’ (2004) 81(1) *The Academy of Management Annals* 397; F. Lyon and L. Sepulveda, ‘*Mapping social enterprises: past approaches, challenges and future directions*’ (2009) 5(1) *Social Enterprise Journal* 83.

<sup>54</sup> T.A. Wilson, ‘*Supporting social enterprises to support vulnerable consumers: the example of community development finance institutions and financial exclusion*’ (2012) 35(2) *Journal of Consumer Policy* 197.

<sup>55</sup> R. Munck, D. O’Broin and C. Jordana, ‘*Social Innovation in Ireland: Challenges and Prospects*’ (Glasnevin Publishing, Dublin, 2017).



between the public sphere and private market and is orientated towards meeting social needs<sup>56</sup>. The term social enterprise refers to for-profit entities with a social purpose. When discussing the remit of social entrepreneurs, O’Broin relies on the comprehensive definition put forward by Social Entrepreneurs Ireland, distinguishing social entrepreneurs as those who ‘*develop new, innovative solutions to address the entrenched social and environmental challenges we face.*’<sup>57</sup> Finally, social innovation is described as a process of solution-orientated social collaborations and networks.<sup>58</sup>

As there is no uniformed definition of social enterprise, it is difficult to offer an accurate description of the size and market value of social enterprises based and operating in the Single Market. There are approximately 2 million social enterprises in Europe, representing 10% of all businesses in the EU.<sup>59</sup> There are approximately 500 social enterprises operating in Northern Ireland, generating an annual turnover of approximately £600 million. Social enterprises employ over 12,000 people in the region and a further 13,000 work with the enterprises on a voluntary basis.<sup>60</sup> However, it should be noted that these figures are outdated, they are based on the number of enterprises operating in the state in 2013.

Similarly, in Ireland, it is hard to estimate how many social enterprises are currently operating in the state. The most recent 2013 ‘*Forfás Report*’ estimated there are 1,400 social enterprises operating in the state, employing between 25,000 – 30,000 people, generating a total income of

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<sup>56</sup> A. Noya and E. Clarence, eds., ‘*The social economy: building inclusive economies.*’ (Publications de l’OCDE 2007); A. Amin, ‘*Extraordinarily ordinary: working in the social economy*’ (2009) 5(1) *Social Enterprise Journal* 30.

<sup>57</sup> As set out by Social Entrepreneurs Ireland, 2017.

<sup>58</sup> R. Munck, D. O’Broin and C. Jordana (2017) (n 55)

<sup>59</sup> As reported by the Commission, Internal Market, Industry, Entrepreneurship and SMEs. See [http://ec.europa.eu/growth/sectors/social-economy\\_en](http://ec.europa.eu/growth/sectors/social-economy_en). Last accessed 30<sup>th</sup> June 2019.

<sup>60</sup> See Department of Enterprise Trade and Investment (DETI) Social Enterprise NI Evaluation (2016). <https://www.economy-ni.gov.uk/sites/default/files/publications/deti/EVALUATION%20OF%20SOCIAL%20ENTERPRISE%20NI.pdf> Last accessed 1<sup>st</sup> April 2019.

approximately €1.4 billion.<sup>61</sup> These figures were based on reports conducted by Clann Credo ‘*The Economic and Social Contribution of Clann Credo – the Social Investment Fund and Irish Non-profits Knowledge Exchange (2012) Irish Non-profits: What do we know?*’ in 2011. These figures have been relied on in more recent reports published by Certified Public Accountants Ireland (CPA)<sup>62</sup> and by the European Commission<sup>63</sup>. This research assumes that these figures are at best a loose estimate, they are based on statistics gathered from 2009, a time of economic instability, where the state was entrenched in an economic recession. Earlier reports conducted by Clarke and Eustace<sup>64</sup> and Prizeman and Crossman<sup>65</sup> recognised the difficulties in mapping the diverse sector. However, each of the reports acknowledges that the sector is growing and has the potential to impact sustainable economic growth significantly. In 2017, the Department of Community and Rural Affairs and the Social Finance Foundation initiated plans to develop a ‘*National Strategy to Social Enterprise in Ireland*’.<sup>66</sup> Research is ongoing, and it is hoped that the policy document will be published shortly.

One of the main reasons for including social enterprises in the research is due to their growing importance. There is a shortage of research conducted on the number and value of public contracts gained by social enterprises across Europe. One of the principles of the SBA requires the EU and Member States to create an environment in which entrepreneurs and

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<sup>61</sup> Forfás *Social Enterprise in Ireland. Sectoral Opportunities and Policy Issues*. Government report (2013) 2 Please note that these figures were based on the number of enterprises operating in the state in 2009.

<sup>62</sup> The Institute of Chartered Public Accountants Ireland Social Enterprise. *The Irish and International Landscape* (2018). [https://www.cpaireland.ie/CPAIreland/media/Business-Development/CPA-Social-Enterprise\\_July2018.pdf](https://www.cpaireland.ie/CPAIreland/media/Business-Development/CPA-Social-Enterprise_July2018.pdf) Last accessed 1<sup>st</sup> April 2019.

<sup>63</sup> European Commission, Directorate-General for Employment, Social Affairs and Inclusion ‘*Mapping study on Social Enterprise Eco-systems – Updated Country report on Ireland*’ (2016).

<sup>64</sup> A. Clarke, A. Eustace and C. Wexford, ‘*Exploring Social Enterprise in nine areas in Ireland*’ Dublin Employment Pact, Clann Credo (Ulster Investment Trust and PLANET: Enniscorthy 2009).

<sup>65</sup> G. Prizeman and D. Crossan, ‘*Mapping social entrepreneurial enterprises in Ireland*’ Initiative on Social Entrepreneurship, Centre for Nonprofit Management, Trinity College Dublin 2011.

<sup>66</sup> Public Consultation on Draft National Social Enterprise Policy for Ireland 2019-2022 closed on 19 May 2019.

family businesses can thrive, and entrepreneurship is rewarded.<sup>67</sup> Policy reports on the potential role social enterprises can play in the Single Market continuously call for the greater facilitation of social enterprise participation in public procurement.<sup>68</sup> The research questions if the recent use of community benefit clauses can create an entry route to public contracts for social enterprises.

Additionally, the broad definition of SMEs includes micro-sized innovative start-ups. Start-ups are defined as any business entity which is younger than ten years, have a focus on developing highly innovative technologies and strive for large-scale business and employment growth.<sup>69</sup> The definition of start-ups additionally includes ‘scale-up’ entities. Scale-ups are a specific form of start-up that has already established significant growth.<sup>70</sup> Start-ups form a share of high growth firms which are recognised for creating more new jobs compared with other forms of business entities.<sup>71</sup> Start-ups contribute socially to the Single Market through the adoption of flexible working conditions and contribute to the Digital Agenda.<sup>72</sup> Similarly to the situation with social enterprises, there is a lack of statistics and research available on the relationship between start-ups and public procurement. Fritsch and Noseleit acknowledge that start-ups contribution to employment growth is dependent on their ability to survive in the market and compete successfully with incumbents for a prolonged period.<sup>73</sup> This suggests that employment generation is not

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<sup>67</sup> See Commission, ‘*Think Small First*’ - A “*Small Business Act*” for Europe’ (Communication) COM (2008) 0394.

<sup>68</sup> See Commission, ‘*Social Business Initiative Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation*’ (Communication) COM (2011) 0682 final.

<sup>69</sup> Kollmann, T, Linsteadt J. Kensbock, ‘*European Startup Monitor*’ (2015). [https://europeanstartupmonitor.com/fileadmin/presse/download/esm\\_2015.pdf](https://europeanstartupmonitor.com/fileadmin/presse/download/esm_2015.pdf) Last accessed 20<sup>th</sup> May 2019.

<sup>70</sup> See Commission, ‘*Europe’s next leaders: the Start-up and Scale-up Initiative*’ (Communication) COM (2016) Strasbourg, 22 November.

<sup>71</sup> According to Henrekson and Johansson 4% of firms generate 70% of new jobs. See M. Henrekson and D. Johansson, ‘*Gazelles as job creators: a survey and interpretation of the evidence*’ (2010) 35(2) *Small Business Economics* 227.

<sup>72</sup> See Commission, ‘*Single Market Act II Together for new growth.*’ (Communication) COM (2012) 0573 final.

<sup>73</sup> M. Fritsch and F. Noseleit, ‘*Start-ups, long- and short-term survivors, and their contribution to employment growth*’ (2013) 23(4) *Journal of Evolutionary Economics* 719.

linked with the number of start-ups operating in the market but is linked to the quality and competitiveness of the enterprises.

Not only are start-ups contributing to employment growth, but start-ups also contribute to developing a knowledge-based economy through the use of highly-technological products and services.<sup>74</sup> Economic growth in a knowledge-based economy relies on knowledge creation and distribution and an interdependent relationship between society, businesses and governments.<sup>75</sup> Similarly to social enterprises, start-ups may register the business as any form of permitted company. It is the character of the business which defines the company as a start-up. Start-ups tend to offer highly technological services in the IT or software development sectors and in the green technologies sectors amongst other areas. The initial capital required to commence operations is generally higher than an average SMEs, as the start-ups need to invest in or develop new technologies. The distinctive characteristics of start-ups is their objective to develop an innovative service or product which can be scaled out once the product or service is commercially ready.<sup>76</sup> This means that start-ups have the potential to create more jobs than other types of SMEs. Micro-businesses tend to employ 2-3 people, whereas start-ups tend to employ 12-13 people.<sup>77</sup> However, one of the main concerns with start-ups is their risk of collapsing; most European start-ups do not survive beyond the critical phase of 2-3 years.<sup>78</sup> Problems facing start-up growth include; concerns around profitability; cashflow; acquisition of new customers; product development, and raising capital.<sup>79</sup> Facilitating start-up participation in public procurement may alleviate some of these concerns.

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<sup>74</sup> See Commission, '*A Digital Single Market Strategy for Europe*' (Communication) COM (2015) 0192 final.

<sup>75</sup> R.G. Harris, '*The knowledge-based economy: intellectual origins and new economic perspectives*' (2001) 3(1) *International Journal of Management Reviews* 21.

<sup>76</sup> E. Autio, '*Entrepreneurship support in Europe: Trends and challenges for EU policy*' (London, England: Imperial College Business School 2016).

<sup>77</sup> See Commission, '*Europe's next leaders: the Start-up and Scale-up Initiative*' (Communication) COM (2016) Strasbourg, 22 November.

<sup>78</sup> See Commission, '*Europe's next leaders: the Start-up and Scale-up Initiative*' (n 77).

<sup>79</sup> H.G. Barkema and F. Vermeulen, '*International expansion through start-up or acquisition: A learning perspective*' (1998) 41(1) *Academy of Management Journal* 7.

Public bodies would also benefit from the innovative solutions offered by the start-ups.

Improving SME access to public procurement is intended to improve employment generation. Additionally, improving social enterprise participation will support public bodies in achieving wider societal goals, such as generating employment opportunities for vulnerable groups or supporting environmental goals. Facilitating start-up participation in public contracts will additionally improve public services. Infelise and Diego argue for the adoption of a more accurate definition of SME, which reflects the different evolution stages of an enterprise and diverse financial needs of enterprises.<sup>80</sup> By adopting policies that respond to the diverse financial and operational needs at the various stages of enterprise life would assist in policies effectively addressing market failures in SMEs' access to finance.<sup>81</sup>

Access to finance is a prevalent problem faced by all forms of SMEs.<sup>82</sup> Since the financial crisis, EU policies on SME growth are primarily concerned with improving SMEs access to finance. Public procurement is a valuable source of income for SMEs, the next section of the chapter investigates tendering barriers faced by both contracting authorities and enterprises and identifies measures set out in the Directive and policies to assist SME participation. While SME focussed policies and regional-level research treat SMEs as a homogenised group, the thesis case studies will assess what impact the provisions have on sub-forms of SMEs, including social enterprises and start-ups. SME friendly provisions set out in the Directive will have varying abilities to facilitate participation in public procurement. The use of social clauses such as community benefit clauses is shown to promote social enterprise participation in public contracts.

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<sup>80</sup> F. Infelise and D. Valiante, 'Why a more accurate EU definition of SMEs matters' (2013) Centre for European Policy Studies.

<sup>81</sup> See Commission, 'Think Small First - A "Small Business Act" for Europe' (Communication) COM (2008) 0394- suggests that this is done at a domestic level by Member States.

<sup>82</sup> T. Beck and A. Demirguc-Kunt, 'Small and medium-size enterprises: Access to finance as a growth constraint' (2006) 30(11) Journal of Banking & Finance 2931.

However, as we will see later, things are not so simple, the use of social clauses has the potential to assist and hinder for-profit SMEs from participation in public contracts. The use of PCP procedures will facilitate innovative SMEs, including start-ups and micro-enterprises participation in public contracts. It is for these purposes that the research relies on the definition offered by the EU and accepts that this definition includes all forms of businesses, including social enterprises and start-ups.

### 3.3 SMEs and Public Procurement

From the period of 2009-2012, Commission led research was conducted investigating the role SMEs play in European public procurement markets.<sup>83</sup> The studies analysed trends and patterns of contract award notices published on the Official Journal of the European Union (OJEU) during this period. A principal finding of the two published reports acknowledges that SME participation in public markets is disproportionately low to the number of SMEs operating in the Single Market. The figures indicate that SMEs secure 45% of the aggregate contract value as main contractors or as subcontractors.<sup>84</sup> Considering SMEs significant contribution in the Single Market, the Commission suggests that SMEs should retain 58% of the aggregate contract value.<sup>85</sup>

Loader identifies 23 distinct barriers which curb SME's ability to bid for public contracts successfully.<sup>86</sup> Loader divides the barriers into two categories. The first of which relates to the barriers set by public bodies, with this section divided into two sub-sections; public-sector environment and procedural issues. Public-sector environment barriers include the lack of targeted policies, cultures of risk-averse and pro-large enterprise

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<sup>83</sup> While this data is now old, it is the most recent large-scale data obtained from analysing OJEU notices available.

<sup>84</sup> See Commission, '*SMEs' access to public procurement markets and aggregation of demand in the EU 2014.*' (2014) Final Report.

<sup>85</sup> See Commission, '*Evaluation of SMEs' access to Public Procurement Markets in the EU.*' (2010) Final Report.

<sup>86</sup> Loader researched the challenges faced by SMEs when tendering for UK public contracts. The data was gathered from a UK government online feedback facility. See K. Loader, '*SME suppliers and the challenge of public procurement: Evidence revealed by a UK government online feedback facility*' (2015) 21(2) Journal of Purchasing and Supply Management 103.

attitudes and organisational complexity and inconsistency. Barriers relating to the procurement process, include finding contract opportunities of appropriate size and value, determining contractual requirements and difficulties faced competing and engaging with tender competitions. The second category of barriers identifies the problems and issues faced by SMEs, such as lack of appropriate resources and capacity to bid for and manage a contract, and a reluctance to engage with the public sector.<sup>87</sup>

There are a number of measures which impact SME participation in the Irish and UK public markets. The measures range from the type of procurer, the tender procedure chosen, value and size of the contract and choice of evaluation procedure used.<sup>88</sup>

### *1. Type of Procurer*

The procurement administrative processes in Ireland and the UK are complex and fragmented, and there is a vast variety of contracting authorities and entities with unique purchasing needs. The Commission research indicates that local and regional authorities award a higher proportion of public contracts to SMEs than the portion awarded by central authorities and other bodies governed by public law or utilities.<sup>89</sup> However, it should be noted that both states have moved towards centralised systems of procurement. The OGP and CPD are responsible for co-ordinating centralised contracts on behalf of the public sector. SMEs tend to be awarded fewer contracts from centralised procuring bodies, which normally conclude high-volume contracts.<sup>90</sup>

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<sup>87</sup> See K. Loader (2015) (n 86).

<sup>88</sup> See Commission 'SMEs' access to public procurement markets and aggregation of demand in the EU 2014.' (2014) Final Report.

<sup>89</sup> Note; This is both in terms of contract numbers and value.

<sup>90</sup> G. Spagnolo and C. Yukins, 'Lots – the Economic and Legal challenges of centralised procurement.' Colloquium in G. Piga and T. Tátrai, 'Public procurement policy' (Routledge, Abingdon, Oxon; New York, NY, 2015) 62.

## 2. *Size and Value of Contracts*

SMEs fare better at winning contracts with a value below the EU financial thresholds. SMEs are proportionately represented in below-threshold contracts. SMEs, in general, gain a lower proportion of above-threshold contracts.<sup>91</sup> However, they benefit from the division of larger contracts into lots. SMEs generally bid for small to medium value contracts, as in general, they fail to meet the technical and financial capabilities required in large-scale contracts. The Commission's research notes that approximately 65% of works contracts with a value of €300,000 or less are awarded to SMEs. This figure starts to decline for above-threshold value contracts, with SMEs winning between 21 – 29% of contracts with a value above €5mn.<sup>92</sup> Procurers can address this concern by breaking large contracts into lots. The division of lots can be based on distinct professional tasks or geographical service areas.<sup>93</sup>

## 3. *Type of Procedure*

The choice of procedure used has an impact on the number of contracts awarded to SMEs. The open procedure is the most accommodating procedure for SME participation.<sup>94</sup> The open procedure is one of the fairest procedures, allowing all interested parties to submit tenders. The procedure is suitable for straightforward types of purchases; it involves a one-step process inviting all interested parties to tender.<sup>95</sup> The contracting authority is required to publish the capacity and expertise sought for the contract. Tenders deemed to meet the minimum levels of technical and financial capacity and expertise are evaluated. The open procedure promotes competition, supports SME participation and is inherently transparent. However, the contracting authority cannot control the number

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<sup>91</sup> See Commission, '*SMEs' access to public procurement markets and aggregation of demand in the EU 2014.*' (2014) Final Report.

<sup>92</sup> See Commission, '*SMEs' access to public procurement markets and aggregation of demand in the EU 2014.*' (2014) Final Report.

<sup>93</sup> Public Sector Directive, art 46(2).

<sup>94</sup> Public Sector Directive, art 27.

<sup>95</sup> However, contracting authorities may use a staged evaluation approach when awarding a contract under an open procedure. See Case C-546/16 *Montte SL v Musikene* [2018] *pub. electr.* EU:C:2018:493 Opinion of Advocate General Szpunar paras 47 and 48.



of responses they receive, which can result in a costly and time-consuming process.<sup>96</sup>

The restricted procedure also facilitates SME participation.<sup>97</sup> The ‘*restricted procedure*’ is a two-stage process.<sup>98</sup> Any supplier can request to participate in a restricted procedure, however only those invited by the contracting authority may submit a tender.<sup>99</sup> The contracting authority can request a minimum of five and a maximum of twenty suppliers to submit a tender. Only parties who meet the contracting authorities’ minimum requirements such as professional or technical ability, experience, expertise and financial capacity, are invited to tender.<sup>100</sup> However, the competitive dialogue appears to disfavour and discourage SME participation.<sup>101</sup> In general, the percentage of the contract valued gained by SMEs participating in an open procedure is 38%, this figure is reduced to 6% when a competitive dialogue procedure is followed.<sup>102</sup> Competitive dialogue and competitive procedures with negotiations are suitable for circumstances where a contracting authority is purchasing a complex ICT contract or in circumstances where the authority is unable to define the specifications of the contract and need to engage and negotiate with suppliers to conclude their purchase.<sup>103</sup>

#### 4. *Evaluation Methods*

SMEs tend to win more contracts which are evaluated on a Most Economically Advantageous Tender (‘MEAT’) assessing criteria, than

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<sup>96</sup> A.S. Soliño and P. Gago de Santos, ‘*Transaction Costs in Transport Public-Private Partnerships: Comparing Procurement Procedures*’ (2010) 30(3) *Transport Reviews* 389.

<sup>97</sup> See Commission, ‘*SMEs’ access to public procurement markets and aggregation of demand in the EU 2014.*’ (2014) Final Report.

<sup>98</sup> Public Sector Directive, art 28.

<sup>99</sup> Public Sector Directive, art 28(1) post the completion of a qualification stage.

<sup>100</sup> Public Sector Directive, art 30.

<sup>101</sup> See Commission ‘*SMEs’ access to public procurement markets and aggregation of demand in the EU 2014.*’ (2014) Final Report.

<sup>102</sup> See Commission ‘*SMEs’ access to public procurement markets and aggregation of demand in the EU 2014.*’ (2014) Final Report.

<sup>103</sup> M. Burnett, ‘*Using competitive dialogue in EU public procurement-Early trends and future developments*’ (2009) 2 *EIPAScope* 17.

contracts awarded on the basis of the Lowest Price award criteria.<sup>104</sup> A wide variety of criteria can be assessed under the MEAT approach, examples of permissible criteria include; pricing, quality, technical merit, environmental factors, cost-effectiveness and after-sales service.<sup>105</sup> The use of the MEAT evaluation method encourages both SMEs and public procurers to take social and environmental considerations into account in their decision-making procedures.<sup>106</sup> It is questionable what percentage should be assigned to the price criteria.<sup>107</sup>

SMEs have expressed many difficulties in securing public contracts. They experience both internal and external restrictions including lack of technical qualifications and capabilities, lack of professional qualifications and capabilities, inadequate tendering skills and an inability to meet financial and insurance requirements.<sup>108</sup> External restrictions range from lack of knowledge of tender opportunities, over-emphasis on price and inadequate feedback from procurers.<sup>109</sup>

### 3.4 Survey Analysis

In order to understand the relationship between SMEs and public procurement in Ireland, exploratory research for this thesis was conducted with the OGP and Dublin City University (DCU) Business School.<sup>110</sup> From 2011 – 2015, four large-scale surveys were conducted in partnership with DCU Business School and the National Procurement Service within

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<sup>104</sup> Stake's empirical research on SME participation in Sweden contests these arguments, suggesting that the use of MEAT award criteria does not assist SMEs in winning government contracts. See J. Stake and Institutionen för samhällsvetenskaper, Södertörns högskola & Nationalekonomi, '*Evaluating quality or lowest price: consequences for small and medium-sized enterprises in public procurement*' (2007) 42(5) *The Journal of Technology Transfer* 1143.

<sup>105</sup> Case C-601/13 *Ambisig v Nersant* [2015] *pub. electr.* EU:C:2015:204 para 30.

<sup>106</sup> Case C-368/10 *Commission v Netherlands* [2012] *pub. electr.* EU:C:2012:284, para 86.

<sup>107</sup> P.S. Stilger, J. Siderius and E.M.V. Raaij, '*A comparative study of formulas for choosing the economically most advantageous tender*' (2017) 17(1) *Journal of Public Procurement* 89.

<sup>108</sup> See K. Loader (2015) (n 86).

<sup>109</sup> A. Flynn and P. Davis, '*Firms' experience of SME-friendly policy and their participation and success in public procurement*' (2016) 23(3) *Journal of Small Business and Enterprise Development* 616.

<sup>110</sup> Two national surveys were conducted in 2014 and 2015, and the findings are shared openly between DCU Business School and the researcher.

the Office of Public Works and the OGP. The primary objectives of the surveys were to baseline current practices in public procurement from both a buyer and a supplier point of view. The surveys were conducted early in the research to help determine the research methodology by identifying which SME friendly measures are being used or neglected and to preliminary explore the effectiveness of the measures. Unfortunately, it was not possible to carry out a comparative survey in Northern Ireland.<sup>111</sup>

The researcher participated in each of the four surveys, and the last two surveys were conducted during the Ph.D. programme. The findings from the 2014 and 2015 surveys are analysed as part of the thesis. The surveys were distributed in electronic format to approximately 70,000 suppliers and 4,000 public sector procurers registered on [www.etenders.gov.ie](http://www.etenders.gov.ie). The surveys were collected using the online data collection and analysis tool 'Survey Monkey'. The 2014 survey was conducted over one month, from 9<sup>th</sup> December 2013 to 7<sup>th</sup> January 2014. 5897 suppliers and 338 public purchasers responded to the survey. The 2015 survey was conducted over three months, from 1<sup>st</sup> December 2014 to 23<sup>rd</sup> February 2015. 4747 suppliers and 552 public purchasers responded to the survey. The 2014 supplier survey included 37 questions, and the procurer survey included 35 questions.<sup>112</sup> For this research, the 2014 survey is scrutinised in detail, and the 2015 survey is used as a controlling survey to identify any outliers and anomalies.

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<sup>111</sup> This research was conducted as part of a group of public procurement researchers.

<sup>112</sup> Some survey questions were common to both groups, and some survey questions were particular to either procurers or suppliers. The following key books and journal articles were consulted prior to the design of the survey method and questions. See; D.A. Dillman, *Mail and telephone surveys: The total design method* (New York: Wiley. Volume 19, 1987); F.J. Fowler, *Improving survey questions: Design and evaluation* (Sage, 1995) 38; S.E. Gaddis, *How to design online surveys* (1998) 52(6) *Training & Development* 67; J.R. Evans and A. Mathur, *The value of online surveys* (2005) 15(2) *Internet Research* 195; V.M. Sue and L.A. Ritter, *Conducting online surveys* (Sage, 2012).

### 3.4.1 2014 Supplier Survey

5897 suppliers responded to the 2014 survey. Approximately 70% of the respondents identified the legal form of their organisation as a ‘Limited Company’. The majority of the respondents identified their organisations as micro-enterprises and small enterprises.

Number of Companies	Number of Respondents	Percentage of Respondents (Rounded)
<b>Micro-sized enterprises</b> (1-9 employees)	3,185	55%
<b>Small-sized enterprises</b> (10 – 49 employees)	1,335	23%
<b>Medium-sized enterprises</b> (50 – 249 employees)	681	12%
<b>Large-sized enterprises</b> (+250 employees)	595	10%

*Table 1.0*

65% of the respondents have an annual turnover of less than €2million. 8% of the respondents reported having an annual turnover of €50million or more. Over half of the companies surveyed belong to the services sector,<sup>113</sup> the remainder of the companies predominantly belonging to the construction sector<sup>114</sup> and the manufacturing sector.<sup>115</sup> The majority of the respondents are based in Ireland,<sup>116</sup> with less than a quarter of the

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<sup>113</sup> 3175 (55%).

<sup>114</sup> 959 (17%).

<sup>115</sup> 582 (10%).

<sup>116</sup> 4432 (76%).

respondents based in Northern Ireland<sup>117</sup> the rest of the UK<sup>118</sup> and the EU.<sup>119</sup>

The survey findings show that suppliers have mixed tendering experience and success rates. When asked where their company ranked in winning public tenders, a significant proportion (38% of respondents) stated that they had ‘no success’ at all at winning bids, with only 6% agreeing that they were ‘very successful’ in gaining contracts.<sup>120</sup> The remainder of the respondents admitted to having ‘some success’ in winning public contracts. The majority of participants bid for low-medium value contracts. Over half of the respondents typically bid for below threshold contracts.<sup>121</sup>

Average size of tendered contracts	Percentage of Respondents (Rounded)
Contracts with a value of;	
€25,000 or less	35%
€25,000 - €130,000	38%
€130,000 - €250,000	10%
€250,000 - €500,000	7%
€500,000 - €1,00,000	5%
€1,00,000 +	5%

Table 2.0

Surprisingly, these figures change slightly in the 2015 survey, only 26% of the firms surveyed in 2015 indicated that they tender for contracts with a value of below €25,000 and 40% reported that they tender for contracts with a value of €25,000 - €130,000.<sup>122</sup> One possible reason for this could

<sup>117</sup> 216 (4%).

<sup>118</sup> 760 (13%).

<sup>119</sup> 229 (4%) are based in the EU, and the remainder are based worldwide.

<sup>120</sup> These figures are inclusive of the 10% of respondents which define their organisation as a ‘large company.’ Unfortunately, it was not possible to isolate these respondents from the overall findings. Therefore, it is not clear what forms of companies indicated that they were ‘very successful’ in winning public contracts.

<sup>121</sup> The €25,000 band was selected as government guidance requests contracting authorities to advertise supplies and services contracts with a value of €25,000 and above on the national etenders platform. See Office of Government Procurement, ‘National Public Procurement Framework’ Public Procurement Guidelines for Goods and Services.’ (2019) Version 2.1. Accessible at this link; <https://ogp.gov.ie/national-public-procurement-policy-framework/> Last accessed 2<sup>nd</sup> June 2019.

<sup>122</sup> See (n 121) The EU advertising thresholds rates are listed in Appendix A.

be the centralisation of procurement activities by the OGP. Between 2014 and 2015, the OGP concluded a number of significant national framework agreements and aggregated contracts on notebook and tablet computers, ICT services, personal computers, travel insurance, taxi services to the greater Dublin area, external workplace investigation services, multi-language services, emergency ambulance services, legal services, electrical goods, accounting, audit, financial and economic services. Contracts were extended for personal protective equipment and bulk liquid fuels.<sup>123</sup>

Central government departments, regional authorities, local authorities and county councils are strongly encouraged to procure from OGP centralised contracts to achieve cost and administrative savings from reduced duplication of tendering.<sup>124</sup> If public procurers started purchasing from the central contracts and framework agreements in 2014, you would expect to see a decrease in the availability and quantity of low-value contracts. As the use of large centralised contracts is becoming the norm in the state, it is a crucial time to assist SMEs in successfully tendering for above-threshold contracts. Albano and Sparro recognise that SMEs will be ‘locked’ out of the centralised contracts in circumstances where the centralised procurement body does not divide the contract into several smaller lots.<sup>125</sup> The prominent ruling in the Irish *Copymore* case questioned the impact of the use of centralised contracts on the exclusion of SMEs from the public market for a prolonged period.<sup>126</sup>

The *Copymore* case challenged the validity of the procurement procedure used to conclude seven ‘*Managed Print Services*’ framework agreements.<sup>127</sup> The framework agreements were concluded by the National Procurement Service (NPS) in February 2012. The applicants

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<sup>123</sup> Office of Government Procurement, ‘*Communications Strategy 2018 – 2020*’.

<sup>124</sup> See Circular 16/13, ‘*Revision of arrangements concerning the use of Central Contracts put in place by the National Procurement Service*’ (2013) .

<sup>125</sup> G.L. Albano and M. Sparro, ‘*Flexible Strategies for Centralized Public Procurement*’ (2010) 1 *Review of Economics and Institutions* 2.

<sup>126</sup> *Copymore Limited & Ors -v- The Commissioner of Public Works in Ireland* [2013] IEHC 230. Subsequent ruling; IECA 119 (11 June 2015).

<sup>127</sup> The framework agreements were used at the end of a competitive tender procedure.

secondly contended the validity of ‘*Circular 06/12 Public Procurement (Framework Agreements)*’.<sup>128</sup> The applicants comprised of eleven separate small limited liability companies which had previously supplied managed print services to local schools and other public bodies.<sup>129</sup> Each of the companies had a direct or indirect interest in the supply of public print services contracts. It must be noted that none of the companies tendered for the framework agreements.<sup>130</sup> None of the companies on their own would have met the €10 million insurance requirement.<sup>131</sup> However, the request for tender encouraged the use of consortia bidding.<sup>132</sup> The approximate value of the contract was €100 million over two years.<sup>133</sup>

In relation to the first issue, the applicants contended that the framework agreements did not comply with Part 13 of Schedule 5 of Regulation 2006.<sup>134</sup> The contract notice did not expressly state the actual date the contract was awarded on, and it did not specify the contract prices and appeals period allowed. The High Court did not accept these challenges, concluding that the mistakes made were not manifest errors and did not prejudice the applicants.<sup>135</sup> As the applicants did not submit a tender bid, they had no standing to make general complaints about the tender

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<sup>128</sup> Replaced with Circular 16/13, ‘*Revision of arrangements concerning the use of Central Contracts put in place by the National Procurement Service*’ (2013).

<sup>129</sup> The companies fell within the SME category.

<sup>130</sup> It is enough to show that they had an interest in the contract and were unfairly prevented from submitting a bid. See *R. v. Avon C.C., ex p. Terry Adams Ltd.* [1994] Env. L.R. 442; Case-C 230/02 *Grossmann Air Services v Austria* [2004] 2 CMLR 2; *Ryanair v. Minister for Transport* [2009] IEHC 171.

<sup>131</sup> One of the main problems associated with the use of centralised contracts is the potential restriction of competition. See D. Pickernell, A. Kay, G. Packham and C. Miller, ‘*Competing agendas in public procurement: an empirical analysis of opportunities and limits in the UK for SMEs.*’ (2011) 29(4) *Environment and Planning C: Government and Policy* 641.

<sup>132</sup> *ibid* 126 (Hogan J at para 8) SMEs could have pooled their resources to meet the selection criteria. Contracting authorities may not restrict the submission of consortium bids. See Case C-94/12 *Swm Costruzioni 2 and Mannocchi Luigino* [2013] *pub. electr.* EU:C:2013:646 Opinion of Advocate General Jaaskinen, para 33 paras 29 and 33; Case C-324/14 *Partner Apelski Dariusz* [2016] *pub. electr.* EU:C:2016:214.

<sup>133</sup> The insurance requirements may therefore seem appropriate to the value of the contract. Public Sector Directive, art 58(3) prevents contracting authorities from setting financial criteria which exceeds two times the estimated contract value, except in duly justified cases. However, different financial criteria should be set to reflect the value of the individual lots.

<sup>134</sup> S.I. No. 329 of 2009, part 13.

<sup>135</sup> For a discussion on what consists a ‘*manifest error*’ see Case C-454/06 *Pressetext*.

documentation. However, the applicant's second claim regarding the validity of the Circular was upheld.<sup>136</sup>

Circular 06/12 was published by the Minister for Public Expenditure and Reform in July 2012. Clause Four of the Circular introduced a mandatory condition;

*In order to increase the usage of National Procurement Services framework agreements and thereby secure best value for money, the government has decided that it should be mandatory for public service bodies to use the specified framework agreements.*<sup>137</sup>

Appendix one of the Circular further observed that; *'When opting for managed print service solutions it is mandatory to use this framework agreement.'* The applicants argued that the mandatory clause of the Circular would have *'profound consequences'* for their firms.<sup>138</sup> The firms contended that if they had of known that the framework agreements included a mandatory clause, then they would have submitted a tender. One of the applicants, Eurotech Office Equipment Ltd., received written correspondence from South Tipperary County Council thanking the company for the previous good service it provided and stated that due to the adoption of the Circular, it would *'not be in a position to hold an open tender.'*<sup>139</sup> Hogan J found that the mandatory clauses effectively changed the original framework agreements and locked the applicants out of local public markets. As the Circular was published post completion of the procurement of the managed print services contracts, the Court found that the Circular was *ultra vires* as it required the mandatory use of these framework agreements.<sup>140</sup> A different ruling would have been expected if the Circular was published before the commencement of the procurement

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<sup>136</sup> *ibid* 126 (Hogan J at paras 47 and 48).

<sup>137</sup> Circular 06/12 Public Procurement (Framework Agreements), part 4.

<sup>138</sup> *ibid* 126 (Hogan J at para 13).

<sup>139</sup> *ibid* 126 (para 13).

<sup>140</sup> *ibid* 126 (Hogan J at para 63).



procedure. The Circular was subsequently updated to reflect the judgment.<sup>141</sup>

To return to the survey findings, while the number of firms solely competing for below €25,000 valued contracts may have fallen, the average small business tends to bid for suitably sized contracts. Suppliers bid for contracts that they can effectively complete, and experience a mixed, leaning more towards a negative success rate. Nevertheless, SMEs will need to consider ways to improve their chances of tendering for centralised contracts, especially considering that over 43% of companies indicated that they planned to increase their tendering activity.<sup>142</sup>

An additional question was included in the 2015 survey, asking suppliers to indicate in their experience do public buyers ensure that framework agreements give small suppliers the opportunity to compete. 65% of the surveyed firms disagreed with this statement, and this may suggest that SMEs do not perceive framework agreements to be a viable entry route into the public market. While it is unclear what impact centralisation is having on SME engagement, government circulars on the facilitation of SME friendly measures are making it easier for businesses to find and compete for advertised contracts. A positive finding from the report found that 91% of companies use the eTenders platform to find and bid for public tenders. SMEs find it easier to bid for national contracts.<sup>143</sup> The majority of the companies tender solely in Ireland, with only 18% tendering for EU contracts. This figure does not apply to the UK, with over a quarter of the respondents indicating that they bid for public contracts regularly in the UK.<sup>144</sup>

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<sup>141</sup> See Circular 16/13, 'Revision of arrangements concerning the use of Central Contracts put in place by the National Procurement Service' (2013).

<sup>142</sup> SMEs should consider forming partnerships with other economic operators to bid for large contracts. We will see an example of this in *Chapter Six Buy Social Case Study*.

<sup>143</sup> Loader noted a similar finding amongst UK SMEs. See K. Loader, 'SME suppliers and the challenge of public procurement: Evidence revealed by a UK government online feedback facility' (2015) 21(2) *Journal of Purchasing and Supply Management* 103.

<sup>144</sup> Post completion of the thesis, the researcher plans to assess what impact Brexit will have on cross-border public procurement between Ireland and Northern Ireland.

When asked about their tendering experience, most companies neither agreed nor disagreed that public contracts;

- are divided into lots to facilitate SME access;
- joint bidding among SMEs is actively encouraged;
- or that contracting authorities are flexible in the proof of financial capacity that they accept.

Less than a third of the companies agree that pre-qualification criteria are relevant and proportionate to the circumstances of the contract.<sup>145</sup> However, over half of the respondents agree that contracting authorities allow for self-declarations. Such self-declarations allow companies to declare that it meets the financial capacity criteria and relevant insurance criteria at the initial tendering stage.<sup>146</sup> Tenderers are only required to produce evidential documents if they are selected as the preferred tenderer at the end of the competition.

When asked what problems companies faced when tendering, over 65% of the respondents agreed that they met problems communicating with the public-sector bodies and with the costs associated with compiling a tender.<sup>147</sup> The respondents indicated that they faced problems in understanding questions asked in the request for tender documentation, identifying available public-sector contracts and not being able to meet requirements for previous experience in supplying to the public sector. Less than 40% of the respondents indicated that they experience problems;

- meeting financial capacity and insurance requirements;
- finding partner firms in which to make a joint bid for a contract

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<sup>145</sup> It is important to note that the survey was completed before the Public Sector Directive was implemented in Ireland. Contracting authorities are now required to set proportionate financial selection criteria. See Public Authority Regulations, reg 58.

<sup>146</sup> To ease administrative burden on suppliers, contracting authorities are encouraged to use the 'European Single Procurement Document' and 'eCertis' platforms. See also Commission, 'Think Small First' - A "Small Business Act" for Europe' (Communication) COM (2008) 0394.

<sup>147</sup> These issues can be addressed through the use of prior information notices, e-procurement and simple, straightforward tender competitions. See S. Panagopoulos, 'Strategic EU public procurement and small and medium size enterprise' in C. Bovis, 'Research handbook on EU public procurement law' (Edward Elgar Publishing, 2016).

- and having the organisational capacity for managing a public contract.

Lack of knowledge and understanding of procurement legislation and policy documents is another barrier to participation identified by the suppliers. Over half of the surveyed firms indicated that they have no knowledge whatsoever of the European Directives and Irish Regulations on public procurement.<sup>148</sup> As such, the companies were unable to state whether they believe the procurement rules have an impact on; transparency and clarity in the procurement process, SME participation in the public market and competition between suppliers and costs in procurement procedures. The vast majority of the companies surveyed have no knowledge of government circulars on facilitating small business in public procurement and circulars on sustainable procurement. While it not necessary for SMEs to have a working knowledge of the rules to compete for public contracts effectively, a lack of understanding of the rules may limit unsuccessful aggrieved tenderers' ability to seek appropriate redress for non-compliant competitions.<sup>149</sup>

Of the 5897 companies surveyed, only 56 companies stated that they had previously initiated a legal challenge under the Remedies Regulations.<sup>150</sup> Of those 56 challenges, 19 were still in progress at the time of the survey, 16 of the challenges were successful, and 21 were unsuccessful. Over half of the respondents indicated that the cost of legal representation, reputational risk, duration of legal proceedings and lack of knowledge of

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<sup>148</sup> Firms were asked to indicate their understanding of ; S.I. 329 of 2006 implementing EU Public Procurement Directive 2004/18/EC, S.I. 50 of 2007 implementing EU Public Procurement Directive (Utilities Sector) 2004/17/EC, S.I. 130 of 2010 and S.I. 131 of 2010 implementing EU Public Procurement Remedies Directive, S.I. 339 of 2011 European Communities (Clean and Energy-efficient Road Transport Vehicles) Regulation 2011 and S.I. 62 of 2012 European Union (Award of Contracts Relating to Defence and Security) Regulations 2012.

<sup>149</sup> It is important that unsuccessful aggrieved bidders are aware of the available remedial rights set out in the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2017 (SI No. 327 of 2017).

<sup>150</sup> S.I. 130 of 2010 implementing EU Public Procurement Remedies Directive.

the procurement and remedies legislation acts as barriers for unsuccessful tenderers to initiate a legal challenge under the Remedies legislation.<sup>151</sup>

Overall, the supplier survey findings indicate that suppliers tend to bid for low-value contracts conducted by local and regional public bodies. Overly complex and large contracts hinder participation. It is not clear whether the use of lots, framework agreements and the promotion of consortia supports SME participation. Suppliers have little knowledge of the procurement rules and tend not to challenge procurement decisions. While suppliers are making the best use of the advertising platform to find and bid for public contracts, suppliers indicated that they would like more engagement and interaction with the public bodies. This can be done in a compliant manner, contracting authorities can conduct market engagement activities before the publication of a competition and should offer genuine feedback to unsuccessful tenderers post completion of the evaluation stage.<sup>152</sup>

#### 3.4.2 2014 Public Procurer Survey

The public procurer survey also offered a useful insight into the Irish public procurement landscape. 338 public purchasers responded to the survey. The public procurers surveyed had varying degrees of experience;

- 37% of respondents have less than five years of purchasing experience;
- 23% have 6-10 years of purchasing experience;
- with the remaining 11% having 21 years plus purchasing experience.

Only 11% described their sole role in the organisation as buying goods and services, 34% described buying goods and services as a significant part of their role, but it is not their only role. 45% of the respondents

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<sup>151</sup> While the OGP operates a free '*Tender Advisory Services*' for aggrieved SMEs, bidders are required to apply to the High Court to seek remedial actions. It should be noted that few cases are heard before the High Court each year.

<sup>152</sup> Approximately 80% of the companies believe that receiving feedback from public sector buyers would help them to improve their future tender submissions.

described purchasing as a minor part of their role, and the remainder indicated that purchasing does not form part of their formal role.<sup>153</sup> Of the procurers surveyed, less than a fifth are employed by a central government department, such as Education, Finance or Defence departments. Even with the establishment of the NPS and the new OGP, the public procurement market is still extremely complex and fragmented in Ireland.

Type of public sector organisation	Total %
<b>Central Government Department (e.g. Education, Finance, Defence)</b>	18%
<b>Local Authority</b>	11%
<b>Educational Institution</b>	23%
<b>State Agency</b>	13%
<b>Semi-State Body</b>	9%
<b>Utility Body</b>	4%
<b>Another entity which funded in part by the public sector</b>	22%

Table 3.0

Whilst the procedures used by public bodies differs greatly from each department or authority, procurers generally comply with best practice manuals published by the Department of Finance and Office of Public Works. A positive finding found that approximately 70% of the public buyers are familiar with the content of the now replaced ‘*Circular 10/10 Facilitating SME participation*’<sup>154</sup> and ‘*Circular 01/11 Model Tender and*

<sup>153</sup> For the respondents that indicated that purchasing did not form part of their main role, they may have the occasional need to purchase ad-hoc goods and services. For example, a school principal’s main role is to manage the educational needs of the students. From time to time, the principal is required to purchase school supplies, cleaning and catering services. Arguments have been raised about the inefficiencies of this form of ad-hoc purchasing and call for governments to professional the procurement sector. See J.M Steinfeld, C. McCue and E. Prier, ‘*Examining professionalisation in public procurement by ranking practitioner job positions according to job activities*’ (2016) 9(3) International Journal of Procurement Management 328.

<sup>154</sup> Now incorporated into Circular 10/2014, ‘*Initiatives to Assist SMEs in Public Procurement*’ 2014 and the Office of Government Procurement, ‘*National Public*

*Contract*’ documents for the public service and supplies contracts.<sup>155</sup> 60% were aware of ‘*Circular 16/13 Revision of arrangements concerning the use of central contracts*’ put in place by the NPS and now the OGP.<sup>156</sup> A more negative finding indicates that only 44% of the procurers are familiar with the ‘*Green Tenders – An Action Plan for Public Procurement*.’<sup>157</sup>

More than half of the procurers indicated that they consider the importance of SME access, innovation, environmental sustainability and local economic sustainability when designing request for tender documentation.<sup>158</sup> Only a third of procurers consider engaging with the not-for-profit sector or social enterprises when conducting procurement competitions.<sup>159</sup> Procurers facilitate SME participation by using simple procedures and proportionate criteria. The open procedure is the most commonly used process for supplies and general services contracts valued between €25,000 - €125,000 and for works and related services contracts worth between €50,000 - €250,000.<sup>160</sup> Most procurers consider themselves flexible in the type of proof of financial capacity they accept and ensure that pre-qualification criterion is relevant and proportionate to the circumstances of the contract. Over 80% allow suppliers at the time of tendering to declare that they have the appropriate and proportionate financial and insurance capacity, which is necessary to undertake the

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*Procurement Framework*’ *Public Procurement Guidelines for Goods and Services*. (2019) Version 2.1.

<sup>155</sup> Circular 01/11, ‘*Model Tender and Contract*’ sets out standard documentation for public procurers to use when conducting an open procedure to conclude a public supplies or services contract.

<sup>156</sup> Interestingly, McDermott J accepted that Circular soft-law requirements created enforceable obligations. See *Copymoore Ltd & ors -v- Commissioners of Public Works of Ireland* [2016] IEHC 709 para 28.

<sup>157</sup> Note this is a guidance document and is not a soft-law circular.

<sup>158</sup> It is timely to ask this question again, it has been three years since the rules were transposed in Ireland. It is interesting to ask if the new rules make it easier for procurers to consider SME participation when designing the request for tender documentation and contractual performance clauses.

<sup>159</sup> However, it appears that only NUI Galway, the National Children’s Hospital construction board and the Irish Prison Service are actively relying on Public Sector Authorities, reg 20 to support social enterprise participation in public contracts.

<sup>160</sup> This indicates that public procurers are largely complying with Circular 10/2014, ‘*Initiatives to Assist SMEs in Public Procurement*’ 2014 and the Office of Government Procurement, ‘*National Public Procurement Framework*’ *Public Procurement Guidelines for Goods and Services*.

contract. Over 70% of the procurers purchase from national framework agreements.<sup>161</sup>

Some less positive findings indicate that less than a third break contracts into lots where possible to facilitate SME access and less than 40% encourage joint bidding among SMEs. The vast majority of procurers do not make full use of electronic procurement, such as e-auctions, e-assessment, e-evaluation and e-contract management. Only 40% indicated that they regularly use electronic invoicing.<sup>162</sup> Additionally, the use of PCP is not widely used by public bodies. Over half of the procurers surveyed regularly research suppliers and markets, with a fifth of procurers engaged with designing, prototyping, or testing new products and services with suppliers.<sup>163</sup>

Another adverse finding suggests that only 55% of the procurers provide feedback to unsuccessful firms after each contract has been awarded. Over a quarter of the procurers provide feedback most of the time. While these figures appear relatively low, nearly all of the procurers agree that providing feedback helps to improve the quality of suppliers' future tenders.<sup>164</sup> The sufficiency of reasons for rejecting a tender was recently assessed in *RPS Consulting Engineers Limited v Kildare County Council*.<sup>165</sup> The Court found that alongside providing unsuccessful tenderers reasons as to why they were not selected, contracting authorities are additionally required to answer any follow-up questions a tenderer may have on the information offered.<sup>166</sup> This triggers an additional obligation, contracting authorities when answering the follow-up questions are required to provide more extensive reasons explaining the

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<sup>161</sup> See (n 158).

<sup>162</sup> Again, the new Directive was not transposed when this data was gathered. The Public Authorities alongside S.I 258 of 2019 the European Union (*Electronic Invoicing in Public Procurement*) Regulations 2019 have since come into effect.

<sup>163</sup> Limited research is available on what impact these activities have on promoting the participation of small innovative companies in public contracts.

<sup>164</sup> See A. Glover, *'Accelerating the SME Economic Engine: Through Transparent, Simple and Strategic Procurement'* (HM Treasury, London 2008).

<sup>165</sup> *RPS Consulting Engineers Limited v Kildare County Council* [2016] IEHC 113.

<sup>166</sup> In addition to the standstill notice requirements set out in the Remedies Directive, art 2(a).

rationale of the decision-making process.<sup>167</sup> Procurers need to keep updated with legislative developments; however the survey findings show that procurers understanding of public procurement legislation is relatively limited with less than a fifth indicating to have a good knowledge of the 2004 Public Sector Regulations and the 2010 Remedies Regulations. Procurers appear to have little knowledge of the Defence and Security Regulations,<sup>168</sup> Utilities Procurement Regulations<sup>169</sup> and the Clean Vehicles Regulations.<sup>170</sup>

Further data collected by the OGP indicates that approximately 66% of the State's expenditure is with SMEs based within the State.<sup>171</sup> 74% of the tender notices were considered '*below OJEU threshold tenders*', with the median values range from €50,000 to €500,000 depending on the category of goods and services involved.<sup>172</sup> These results show that public procurers are adhering to the soft-law document by publishing low-medium value tender competitions on the central advertising facility, which has, in turn, resulted in the participation of SMEs in the market place. However, the limited amount of research available does not indicate what percentage or value of the contracts is obtained by the enterprises. The OGP updated procurement circulars in 2014 to strengthen the measures to encourage further SME participation.<sup>173</sup>

Public procurers actively adhere to certain soft-law requirements, such as the advertising of below-threshold contract openly on the central

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<sup>167</sup> This case demonstrates that even if a compliant procedure has been followed, the Court will collapse the competition if the feedback provided in the standstill letter is generic and unhelpful. See also; T-638/11 *European Dynamics Belgium and Others v EMA*, para 68.

<sup>168</sup> SI 62 of 2012 European Union (Award of Contracts Relating to Defence and Security) 2012.

<sup>169</sup> Now replaced with SI 286-2016 European Union (Award of Contracts by Utility Undertakings) Regulations 2016.

<sup>170</sup> SI 339-2011 European Communities (Clean and Energy-Efficient Road Transport Vehicles) Regulations 2011.

<sup>171</sup> This research is based on the analysis of 5,826 tender notices that were published on the eTenders site in 2013. See Office of Government Procurement, '*Public Service Spend and Tendering Analysis*' (2013). Available at; <http://www.procurement.ie/sites/default/files/ogp-public-service-spend-tendering-analysis-2013-1.pdf> Last accessed 1<sup>st</sup> June 2019.

<sup>172</sup> See Office of Government Procurement (n 171).

<sup>173</sup> See Circular 10/14; '*Initiatives to assist SMEs in Public Procurement*'.



advertising facility and allowing SMEs to use self-declarations.<sup>174</sup> While policy is helping procurers adopt SME friendly measures, there appears to be a lack of co-ordinated support and training on the remit of procurement legislation.<sup>175</sup> Procurers should be made aware of how the legislation allows for the strategic use of public procurement. Additionally, procurers should be made aware of their legal requirements, particularly in relation to the requirement to provide detailed notification letters to unsuccessful tenderers before the commencement of the standstill period.<sup>176</sup> Overall, the survey findings suggest that Irish public procurers comply with the best guidance; they use open procedures, set relevant and proportionate financial and qualification requirements and use e-procurement tools. As government policy is moving towards centralisation and encouraging the use of standardised documents at a local level, procurement appears to focus on the tendering activity and lacks strategic focus.

### 3.5 Key Factors Enabling SME Participation

It is now well established from a variety of studies that SMEs face both internal and external barriers when competing for public contracts.<sup>177</sup> At a European level there are a plethora of SME focussed policies set out in; the ‘*European Charter for Small Enterprises*’,<sup>178</sup> the ‘*Lisbon Programme*’,<sup>179</sup> the Communication on implementing a ‘*Modern SME Policy for Growth and Employment*’,<sup>180</sup> the ‘*European Small Business Act*’ (SBA)<sup>181</sup> and the European ‘*Small Business Portal*’.<sup>182</sup> Each of the

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<sup>174</sup> However, as the European Single Procurement Document and the eCertis tools were not available at this time, the use of these tools was not assessed.

<sup>175</sup> Although, the OGP do offer tendering support to all central and local public bodies. See Office of Government Procurement ‘*Communications Strategy 2018 – 2020*’.

<sup>176</sup> Remedies Directive, art 2(a).

<sup>177</sup> See Bovis (1998); Morand (2003); L Carpineti, G Piga, M Zanza (2006); Erridge (2007); Preuss (2011); Kidalov and Snider (2011); Flynn and Davis (2016) Loader (2015) Pangaopoulos (2016).

<sup>178</sup> The European Charter for Small Enterprises was approved by EU leaders at the Feira European Council on 19-20 June 2000.

<sup>179</sup> See Commission ‘*Working together for growth and jobs. A new start for the Lisbon strategy*’ (Act) COM (2005) 24 final.

<sup>180</sup> See Commission ‘*Implementing the Community Lisbon programme - Modern SME policy for growth and employment*’ (Act) COM (2005) 551 final.

<sup>181</sup> See Commission ‘*Think Small First*’ - A “*Small Business Act*” for Europe’ (Communication) COM (2008) 0394.

<sup>182</sup> See Commission, ‘*Thinking Big for Small Businesses - What the EU does for SMEs*’ (2011) 24 final.

policies recognise the important role SMEs play in supporting a sustainable and competitive Single Market. This research argues that the most influential policy in this area is the '*European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts*' as it has influenced the provisions relating to the division of large contracts into smaller lots in the Directives.<sup>183</sup> While the code remains a voluntary tool for procurers to use, elements of the code have been cemented as legislative provisions.<sup>184</sup> Alongside the encouragement of the use of proportionate lots, the code offers advice for contracting authorities on how to; improve suppliers' access to relevant information, setting proportionate selection and award criteria, and reducing the administrative burden for suppliers. Interestingly, the objective of the code is to assist contracting authorities in exploiting the SME friendly provisions of the 2004 Directives to level the playing field for all enterprises. Although, now the code has been elevated from assisting with the implementation of provisions to influencing critical legislative measures of the 2014 Directive.<sup>185</sup> This is evident in the requirements to use e-procurement tools, self-declarations and proportionate financial selection criteria.<sup>186</sup>

The European Commission is committed to sustaining and encouraging SME participation and growth across the single market and has integrated SME friendly initiatives into public procurement policy and procedures, including; the '*Public Procurement for Better Environment*',<sup>187</sup> the '*Pre-*

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<sup>183</sup> See Commission, '*European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts*' (SWP) COM (2008) 2193.

<sup>184</sup> Namely, the requirement to use proportionate financial criteria and to divide large contracts into smaller lots. See Public Sector Directive, arts 46 and 58.

<sup>185</sup> Public Sector Directive, recital 78 makes a direct reference to the Code. In particular, the recital encourages contracting authorities to promote competition by dividing large contracts into smaller lots.

<sup>186</sup> The Code is not solely responsible for the adoption of these measures. These measures were also promoted in European working papers. See Commission, '*Evaluation of SMEs' access to Public Procurement Markets in the EU.*' (2010) Final Report; Commission, '*SMEs' access to public procurement markets and aggregation of demand in the EU 2014.*' (2014) Final Report.

<sup>187</sup> See Commission, '*Public procurement for a better environment*' (Communication) COM (2008) 400 final.

*Commercial Procurement*<sup>188</sup> and the '*Integrating Social Considerations into Public Procurement*'.<sup>189</sup> The communications encourage contracting authorities to consider the facilitation of SME participation during the full procurement cycle rather than focusing primarily on the administrative tendering function.<sup>190</sup>

Measures set out in the '*European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contract*' mirror provisions included in policies, guidance documents and information notes adopted in Ireland and Northern Ireland over the last ten years. Two of the most relevant soft-law policies adopted in Ireland are the 2017 '*Public Procurement Guidelines for Goods and Services*'<sup>191</sup> and the '*Social Considerations in Public Procurement*'.<sup>192</sup> The Procurement Guidelines aim to promote consistency of best practice procurements for supplies and services contracts. The '*Social Considerations in Public Procurement*' document does not prescribe what social criteria contracting authorities should incorporate into their procurement practices, and instead offers guidance on how to compliantly incorporate non-economic objectives into their procurement procedures.<sup>193</sup> The guides assist contracting authorities in designing competitions which include SME and social enterprise

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<sup>188</sup> See Commission, '*Pre-commercial Procurement: driving innovation to ensure sustainable high-quality public services in Europe*' (Communication) COM (2007) 0799 final.

<sup>189</sup> See Commission, '*Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement*' (Communication) COM (2001) 566 final.

<sup>190</sup> The process starts when the public procurer considers the public needs, completes the tender stage, manages the contract execution stage and ends with the removal of waste products or services. See; W. Holding, '*Problems of State Procurement*' (1976) 8 Public Contract Law Journal 17; D.C. Dragos and B. Neamtu, '*Sustainable Public Procurement: Life-Cycle Costing in the New EU Directive Proposal*' (2013) 8 Eur Procurement & Pub Private Partnership Law Rev 19.

<sup>191</sup> Office of Government Procurement, '*National Public Procurement Framework' Public Procurement Guidelines for Goods and Services.*' (2019) Version 2.1. Accessible at this link; <https://ogp.gov.ie/national-public-procurement-policy-framework/> Last accessed 2<sup>nd</sup> June 2019.

<sup>192</sup> Office of Government Procurement, '*Social Considerations in Public Procurement. OGP.*' (2018). Accessible at this link; <https://ogp.gov.ie/information-notes/> Last accessed 2<sup>nd</sup> June 2019.

<sup>193</sup> Office of Government Procurement (2018) (n 192).

friendly provisions, community benefits clauses, and other innovative, environmental and social considerations.<sup>194</sup>

Similarly, to the measures listed in the Directive and regional guidance documents, contracting authorities are encouraged to conduct electronic competitions, to avoid single-supplier large contracts, to use the open procedure and to set appropriate selection and award criteria.<sup>195</sup> Again, policy and guidance documents in Northern Ireland rely on the same measures to facilitate competition amongst all forms of businesses.<sup>196</sup> The most noteworthy soft-law measures include policies on the integration of social considerations in public contracts, helping SMEs benefit from subcontracting opportunities, and guides assisting both SMEs and social enterprises enter the public market.<sup>197</sup> Importantly, the NI policies offer advice for both procurers and suppliers.<sup>198</sup>

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<sup>194</sup> Additional SRPP guidance is available, see; Circular 15/2011, ‘*Mechanism to monitor compliance with employment law in outsourced operations under the Croke Park Agreement*’; ‘*Green Tenders: An Action Plan on Green Public Procurement*’ 2012; EPA, ‘*Green Procurement Guidance for the Public Sector*’ 2014; Circular 10/2014, ‘*Initiatives to Assist SMEs in Public Procurement*’ 2014.

<sup>195</sup> This is to encourage competitive cross-border trade amongst all suppliers. When designing the call for competition notices and carrying out the evaluations, contracting authorities must be mindful of the TFEU principles. Recently, Canadian courts have extended the scope of the ‘*administrative law duty of procedural fairness*’ to public procurement. Contracting authorities are now required to comply with an additional principle of *fairness* when setting criteria and rejecting tenderers for failing to meet the minimum standards set by public bodies. See; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* [2010] 1 SCR 69; *Mega Reporting Inc. v. Yukon (Government of)*, 2017 YKSC 69 (CanLII); *Interpaving Limited v. City of Greater Sudbury*, 2018 ONSC 3005 (CanLII); *Aquatech Canadian Water Services Inc v H2OInnovation Inc.*, 2018 ABCA 140 (CanLII); *CG Acquisition Inc. v. P1 Consulting Inc.*, 2018 ONSC 4089 (CanLII); *Maglio Installations Ltd. v. Castlegar (City)*, 2018 BCCA 80 (CanLII).

<sup>196</sup> Department of Finance and CPD Northern Ireland Public Procurement Policy (2014) Version 11.

<sup>197</sup> See CPD Policy Government Notes;  
A Guide for Social Economy Enterprises (2011) PGN 01/11;  
Helping Small and Medium Sized Enterprises (SMEs) and Social Economy Enterprises (SEEs) access Public Sector contracting opportunities (2011) PGN 02/11;  
Public Procurement: A Guide for Small and Medium Sized Enterprises (SMEs) (2012) PGN 02/12;  
Helping SMEs Benefit from Subcontracting Opportunities (2012) PGN 06/12;  
Abnormally Low Tenders (2013) PGN 03/13;  
Integrating Social Considerations into Contracts (2016) PGN 01/13;  
Innovation in Public Procurement (2017) PGN 02/17;  
Human Rights in Public Procurement (2018) PGN 03/18.

<sup>198</sup> Whereas, recent Irish policies tend to focus on procurers’ activities.

While national reports in both states indicate that SME participation in public contracts has increased recently, SMEs are faced with internal and external barriers when competing for public contracts, particularly when competing for aggregated national contracts conducted by the OGP in Ireland and by the CPD in Northern Ireland.<sup>199</sup> Limited research is available from either state on the inclusion of social enterprises and innovative start-ups in public contracts.<sup>200</sup>

A large and growing body of literature reviews the relationship between SMEs and public procurement. There is no unified approach adopted to assess what is the optimal approach to facilitating SME participation in public markets. However, the main body of literature relies on the following criteria to assess SME participation;<sup>201</sup>

- choice of procedure,
- use of electronic procurement,
- sub-dividing contracts,
- size of the contract,
- type of procurer,
- subcontractor criteria,
- consortia promotion,
- selection and award criteria,
- costs associated with SME friendly tendering,
- tender feedback,

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<sup>199</sup> A. Erridge, and J. McIlroy, '*Public Procurement and Supply Management Strategies*' (2002) 17(1) *Public Policy and Administration* 52; A. Flynn, and P. Davis, '*The policy-practice divide and SME-friendly public procurement.*' (2016) 34(3) *Environment and Planning C: Government and Policy* 559.

<sup>200</sup> Seminal research has been conducted by Erridge, Loader and Halloran. See A. Erridge and S. Hennigan, '*Sustainable procurement in health and social care in Northern Ireland*' (2012) 32(5) *Public Money and Management* 363; K. Loader, '*Is public procurement a successful small business support policy? A review of the evidence*' (2013) 31(1) *Environment and Planning C: Government and Policy* 39; D. Halloran, '*Local Government and Public Procurement: Legal and Policy Issues Related to Social Procurement and Community Benefit Clauses in Contracts in Ireland*' (2013) 3(29) *King's Inns Student L. Rev.*

<sup>201</sup> See Bovis (1998); Morand (2003); L Carpineti, G Piga, M Zanza (2006); Erridge (2007); Preuss (2011); Kidalov and Snider (2011); Flynn and Davis (2016) Loader (2015) Pangaopoulos (2016).

- public body payments,
- innovative procedures,
- the availability of training and policy support for procurers and suppliers.

This research intends to contribute to the body of literature and hopes to uniquely contribute to the area by using a case study approach to assess what impact the inclusion of specific social criteria has on SME participation. Research predominantly accepts that the use of proportionate criteria, open procedures, e-procurement and MEAT award criteria assists SMEs in tendering for public contracts.<sup>202</sup> This research builds on previous studies by assessing whether; *the use of lots; the use of community benefit clauses; the use of subcontractor considerations; and the use of PCP* facilitates all forms of SMEs in both above and below-threshold contracts. SMEs struggle to compete for large contracts, and as centralised contracts are being used more regularly by Irish and Northern Irish public bodies, SMEs will need to consider how they can best gain a proportion or lot of these contracts. There is also a growing trend to include community benefit clauses in works and services contracts, again SMEs will need to consider how they can comply with these requirements if they are going to bid for the public contracts successfully. Research on the use of pre-market engagement activities is limited in both jurisdictions,<sup>203</sup> even though a fifth of the procurers surveyed for this research agree that they have engaged with designing, prototyping or

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<sup>202</sup> Additionally, noted in; Commission, ‘*Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth"*’ (Communication) COM (2011) 0206 final; Commission, ‘*Proposal for a Directive of the European Parliament and of the Council on Public Procurement.*’ (2011) COD 0438; See Commission, ‘*SMEs' access to public procurement markets and aggregation of demand in the EU 2014.*’ (2014) Final Report.

<sup>203</sup> Research on this topic has predominantly conducted by J. Carlisle, R. Eadie, A. Erridge, R. Fee, G. Heaney, S. Hennigan and R. Perera, See R. Fee, A. Erridge, and S. Hennigan, ‘*SMEs and government purchasing in Northern Ireland: problems and opportunities*’ (2002) 14(5) *European Business Review* 326; A. Erridge, ‘*Public procurement, public value and the Northern Ireland unemployment pilot project*’ (2007) 84(a) *Public Administration* 1023; R. Eadie, S. Perera, G. Heaney, and J. Carlisle, ‘*Drivers and barriers to public sector e-procurement within Northern Ireland's construction industry*’ (2007) 12 *Journal of Information Technology in Construction* 103.

testing new products and services with suppliers.<sup>204</sup> This research assesses criteria which will assist all types of SMEs bid for current public contracts in Ireland and Northern Ireland. The next section of the chapter reviews why each of the four measures was chosen.

### 3.5.1 Use of Lots

One of the most prominent SME friendly provisions included in the Directive encourages the division of large contracts into lots to enhance competition.<sup>205</sup> Chapter Two noted that the new Directive calls for extensive use of lots, going as far as requiring contracting authorities to justify their reasons for not using lots. There are some exceptions to this requirement; for example, where the division of the contracts into lots would restrict competition or would be unsuitable due to the excessive technical subject matter of the contract.<sup>206</sup> The primary objective of the use of lots is to enhance competition, and contracting authorities are prohibited from using lots to avoid the full application of the rules.<sup>207</sup> When calculating the value of the contract, contracting authorities must combine the total estimated value of the individual lots. Contracting authorities can further promote competition by limiting the number of lots a supplier can win.<sup>208</sup>

Spagnolo and Yukins declare that a public procurer's decision to divide a contract into smaller lots '*is the most important decision in procurement*' as it determines the '*object procured*' and '*defines the market*.'<sup>209</sup> A decision to use lots either encourages or restricts competition. Vesel notes the potential risks associated with procuring central or large contracts on

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<sup>204</sup> Public procurers survey, 2014.

<sup>205</sup> Public Sector Directive, recital 78 and art 46.

<sup>206</sup> Public Sector Directive, 46(1). See also J. Telgen, N. Uenk, W. Lohmann and E. Manunza, '*Conditions on lot: practical desirability versus legal acceptability*' in G. Piga and T. Tátrai, '*Public procurement policy*' (Routledge, Abingdon, Oxon; New York, NY, 2015) 94.

<sup>207</sup> See Commission of the European Communities, '*The Cost of Non-Europe, Basic Findings, Vol.5, Part A; The Cost of Non-Europe in Public Sector Procurement*' Official Publications of European Communities, Luxembourg 1988.

<sup>208</sup> Public Sector Directive, 46(2).

<sup>209</sup> G. Spagnolo and C. Yukins, '*Lots – the Economic and Legal challenges of centralised procurement*'. Colloquium in G. Piga and T. Tátrai, '*Public procurement policy*' (Routledge, Abingdon, Oxon; New York, NY, 2015) 61.

the basis of value alone.<sup>210</sup> In such cases, large enterprises are incentivised to submit low bids which outbid SMEs from the competition.<sup>211</sup> If the contract is a large centralised contract, SMEs are technically locked out of the public market for the life-cycle of the contract, which may last four years.<sup>212</sup> Within this time, SMEs may collapse, leaving a gap in the market place. When the procurer goes back to the market for a re-buy contract, they may be faced with an uncompetitive market. The incumbent will subsequently be able to increase prices and continue to lock out any new bidders from entering the public market.<sup>213</sup>

Spagnolo and Yukin's support of the use of lots does not extend to supporting the provision set out in the Directive. When discussing the new 'lots' article, Spagnolo and Yukin argue that EU legislators and national legislation should not introduce prescriptive measures and should allow contracting authorities to continue to enjoy the freedom to use their procuring expertise and market knowledge to conduct tender competitions effectively.<sup>214</sup> When limiting the number of lots a supplier can bid for, this potentially hinders competition by restricting potential tenderers choice to demonstrate their capabilities to carry out the contract. Interested economic operators should be allowed to bid for all lots, although, a limit set on how many lots one economic operator can win will promote competition.<sup>215</sup>

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<sup>210</sup> T. Vesel, 'Addressing social considerations in PP: best practices for fighting social dumping in Slovenia' in G. Piga and T. Tátrai, 'Public procurement policy' (Routledge, Abingdon, Oxon; New York, NY, 2015) 39.

<sup>211</sup> This point is not referring to abnormally low tenders, however, it is referring to competitively priced bids. Vesel suggests that larger organisations can submit loss leader style pricing to win the contract by being able to cover operational costs through increased prices in private contracts. See Vesel (n 210).

<sup>212</sup> Particularly in cases where a framework agreement or dynamic purchasing system is used. Public Sector Directive arts 33 and 34.

<sup>213</sup> C. Webster, 'Buyer involvement in purchasing success' (1993) 22(3) *Industrial Marketing Management* 199.; E. Bakker, H. Walker and C. Harland, 'Organising for collaborative procurement: an initial conceptual framework.' *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing*. (Academic Press, Boca Raton, FL, 2006) 14.

<sup>214</sup> See G. Spagnolo and C. Yukins (n 209) 62.

<sup>215</sup> See G. Spagnolo and C. Yukins (n 209) 62. See also; Zimmermann M, 'Economic Efficiency and the Division of Large Procurement Contracts Into Lots: An Analysis' (2017) 12 *Eur Procurement & Pub Private Partnership L Rev* 422.



Chapter Two offered a discussion on the effectiveness of the use of lots. Trybus appropriately concluded that the effectiveness of the use of lots depends on the size, value and nature of the individual lots.<sup>216</sup> The use of lots makes it easier for SMEs to bid for large contracts, however, this alone may not directly promote successful SME bidding. Alongside the use of lots, other SME friendly measures should be incorporated into the call for competition documents. This research aims to add clarity to this debate by assessing what impact the use of lots has on SME participation.

### 3.5.2 Community Benefit Clauses

This research is interested in the use of community benefit clauses, and questions if the inclusion of ‘*targeted recruitment and training clauses*’ facilitate SME participation in public procurement. Public sector interest in the use of community benefit clauses has increased rapidly over the last five years.<sup>217</sup> Targeted recruitment and training clauses are routinely included in large works and services contracts in Northern Ireland and have been included in a number of key construction contracts in Ireland. Contractors are additionally required to include the targeted recruitment and training clauses in any subcontracts awarded to carry out key elements of the public contract. As community benefit clauses become more popular, SMEs will need to demonstrate their abilities and willingness to meet these criteria. SMEs which formalise existing practices, such as the employment and training of apprenticeships will improve their chances of being able to compete for large contracts or subcontracts.<sup>218</sup>

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<sup>216</sup> M. Trybus, ‘*The Division of Public Contracts into Lots under Directive 2014/24: Minimum Harmonisation and Impact on SMEs in Public Procurement?*’ (2018) 43(3) *European Law Review* 313.

<sup>217</sup> In the UK and Ireland. See *The Public Services (Social Value) Act 2012; Integrating Social Considerations into Contracts* (2016) PGN 01/13 (NI policy).

<sup>218</sup> If SMEs do not engage in any social activities, they may consider developing a new ‘corporate social responsibility’ (CSR) programme. Brooks comments that SMEs already engage with socially responsible activities without naming or acknowledging the importance of the activities. See S. Brooks, ‘*The practice and construction of corporate social responsibility among small to medium sized enterprises in South Wales*’ (2004) 17(1) *Contemporary Wales* 162.

As already discussed, community benefit clauses have the potential to facilitate social enterprise participation in public procurement.<sup>219</sup> There are many issues facing social enterprises in entering the public market; they struggle internally to compete at a professional level, lacking the financial capacity and operational capabilities to carry out standard goods and services contracts.<sup>220</sup> The use of community benefit clauses can encourage social enterprise participation in public contracts, as firstly the social enterprises are motivated by the social justice objectives and secondly, the enterprises have the experience in carrying out the community benefit requirements. To overcome the tendering barriers, social enterprises can partner with large companies to pool their resources to meet the social requirements and the financial and professional selection criteria.<sup>221</sup>

The inclusion of community benefit clauses may be initially seen by for-profit SMEs as a hindrance to participation, increasing operational and tender costs and forcing suppliers to carry out work which is outside their normal work practices.<sup>222</sup> Baden et al. raise an important question regarding what effect social clauses have on SMEs. This research has focussed on what impact social criteria has on SME engagement, but it must also question what potential impact such procurement practices have on SME operations. Baden et al.'s research analysed 68 SME owner-managers opinion on issues faced when tendering for public contracts, including their perceptions of *imposed* versus *voluntary* CSR related standards.<sup>223</sup> The European Commission defines CSR as a 'concept

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<sup>219</sup> Thus, responding to the wider objectives set by the Directive to develop a competitive, inclusive and innovative Single Market. See Public Sector Directive, art 2.

<sup>220</sup> S. Munoz, 'Social enterprise and public sector voices on procurement' (2009) 5(1) Social Enterprise Journal 69; A. Argyrou, 'Providing Social Enterprises with Better Access to Public Procurement: The Development of Supportive Legal Frameworks' (2017) 12 Eur. Procurement & Pub. Private Partnership Law Rev 310.

<sup>221</sup> M. Loosemore, 'Building a new third construction sector through social enterprise' (2015) 33(9) Construction Management and Economics 724.

<sup>222</sup> D. Baden, I.A. Harwood and D.G. Woodward, 'The effect of buyer pressure on suppliers in SMEs to demonstrate CSR practices: An added incentive or counter productive?' (2009) 27(6) European Management Journal 429.

<sup>223</sup> D. Baden, I.A. Harwood and D.G. Woodward, 'The effects of procurement policies on 'downstream' corporate social responsibility activity: Content-analytic insights into the views and actions of SME owner-managers' (2011) 29(3) International Small Business 259.

whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.<sup>224</sup> Baden et al.'s research found that imposed CSR measures increased costs for suppliers and demotivated the workforce by forcing them to carry out activities outside of their normal work duties.<sup>225</sup> Studer et al. further notes that SMEs in general, do not engage with CSR activities, due to a lack of policy support, insufficient resources and an overriding profit agenda.<sup>226</sup> Lantos additionally argues that shareholders rights would be violated if companies pursue CSR obligations. This opinion assumes that shareholders are only concerned with dividends.<sup>227</sup> Sarbutts refutes these claims, contending that SMEs are in a favourable position to adopt social objectives or CSR goals, as in general SMEs are not pressurised by stakeholders need for profits and are generally connected to local communities.<sup>228</sup>

Perrini, Russo and Tencati further dispute the above arguments and similarly agree with Sarbutts that SMEs can quickly and effectively adopt a social agenda.<sup>229</sup> A continuous argument has been raised that SMEs engage in social activities without identifying and recording the long-term impact of these activities. Perrini *et al.* refer to this as '*sunken CSR*' and Jenkins refers to it as '*silent CSR*'.<sup>230</sup> SMEs are more connected to local

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<sup>224</sup> See Commission, '*Promoting a European framework for Corporate Social Responsibility*' (Green Paper) COM (2001) 366. See also; Commission, '*A renewed EU strategy 2011-14 for Corporate Social Responsibility*' (Communication) COM (2011) 0681 final.

<sup>225</sup> D. Baden, I.A. Harwood and D.G. Woodward (2011) (n 223).

<sup>226</sup> S. Studer, R. Welford, P. Hills, '*Drivers and barriers to engaging small and medium-sized companies in voluntary environmental initiatives*' (2005) The University of Hong Kong Working Paper, November.

<sup>227</sup> This opinion assumes that shareholders are concerned with dividends not the promotion of the company's social commitments or objectives. See G.P. Lantos, '*The boundaries of strategic corporate social responsibility*' (2001) 18(7) *Journal of Consumer Marketing* 595.

<sup>228</sup> N. Sarbutts, '*Can SMEs 'do' CSR? A practitioner's view of the ways small and medium-sized enterprises are able to manage reputation through corporate social responsibility*' (2003) 7(4) *Journal of Communication Management* 340.

<sup>229</sup> F. Perrini, A. Russo and A. Tencati, '*CSR strategies of SMEs and large firms. Evidence from Italy*' (2007) 74(3) *Journal of Business Ethics* 285.

<sup>230</sup> H. Jenkins, '*A Critique of Conventional CSR Theory: An SME Perspective*' (2004) 29(4) *Journal of General Management* 37; F. Perrini, S. Pogutz and A. Tencati, '*Corporate social responsibility in Italy: State of the art*' (2006) 23(1) *Journal of Business Strategies* 65.

communities than large organisations. SMEs employ locally, offer local sponsorships and donations, accept volunteer workers and apprenticeships.<sup>231</sup> In order to improve their chances of bidding for public contracts, SMEs should ‘*control and report*’ the impact of their activities.<sup>232</sup>

Tátrai argues that SMEs need to view social criteria as essential operational functions.<sup>233</sup> As more and more public bodies require contractors to comply with targeted recruitment and training clauses, SMEs will need to demonstrate their ability and willingness to meet the contractual performance clauses. Additionally, the adoption of socially related criteria and sustainability practices should assist SMEs in competing for private contracts with large organisations. Current literature indicates that large-sized enterprises are increasingly adopting sustainable procurement procedures akin to the approaches adopted by their public-sector counterparts.<sup>234</sup> This is evident in the adoption of the first international standard on sustainable procurement, ‘*ISO 20400-2017*’.<sup>235</sup> The progressive standard sets out guidance for all forms of organisations on integrating social sustainability requirements into procurement procedures.

It is difficult to ignore the growing use of community benefit clauses in the EU countries. Northern Ireland has not yet adopted a legal act on the use of socially responsible public procurement. A Bill was proposed to introduce a socially responsible procurement act, similar, to the laws

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<sup>231</sup> F. Perrini, A. Russo and A. Tencati (2007) (n 229).

<sup>232</sup> Perrini et. al. suggest that SMEs must control and monitor their social activities to embed CSR into their operations. See F. Perrini, A. Russo and A. Tencati (2007) (n 229).

<sup>233</sup> G. Piga and T. Tátrai, ‘*Public procurement policy*’ (Routledge, Abingdon, Oxon; New York, NY, 2015). See also; H. Walker and L. Preuss, ‘*Fostering sustainability through sourcing from small businesses: public sector perspectives*’ (2008) 16(15) *Journal of Cleaner Production* 1600.

<sup>234</sup> R. Sparkes and C.J. Cowton, ‘*The maturing of socially responsible investment: A review of the developing link with corporate social responsibility*’ (2004) 52(1) *Journal of Business Ethics* 45.

<sup>235</sup> The first international standard on sustainable procurement, ‘*ISO 20400-2017*’ was adopted in 2017. See ISO 20400:2017, *Sustainable procurement — Guidance*. The guide builds on 2010 ISO 20600 voluntary guidance on social responsibility.

enacted by Scotland,<sup>236</sup> England and Wales<sup>237</sup>. However, the Bill has stalled since the collapse of the government in January 2017. Instead, there are several '*Buy Social*' policies in place at the moment. Since Nov 2015, contracting authorities are requested to incorporate social clauses into the following contracts; building contracts with a value of £2m and above and civil engineering contracts with a value of £4m and above.<sup>238</sup> Since February 2017, contracting authorities are requested to include social clauses in services contracts with a value of £500,000 per annum or more. A '*Buy Social*' unit has been set up to draft standardised clauses and to assist contracting authorities in using social clauses. The Buy Social unit focuses on the promotion of '*targeted recruitment and training clauses*'.<sup>239</sup>

Before the establishment of the OGP in Ireland, public procurement policy did not encourage the inclusion of social clauses in public contracts. However, within six months of its establishment, the OGP created a '*Social Clauses Project Group*'.<sup>240</sup> The pilot project aims to identify public contracts where social clauses could be deployed to contribute to employment or training opportunities for long term unemployed. The project is concentrating on examining the use of social clauses in contracts where contractors are likely to employ additional workers to deliver the contract.<sup>241</sup> The project is, in particular, reviewing the use of social clauses in two contracts; Grangegorman Development<sup>242</sup> and Developed Schools Build Programme. In the Developed Schools Build Programme, the social clauses included in the Public Works contracts require that;

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<sup>236</sup> Procurement Reform (Scotland) Act, 2014.

<sup>237</sup> Social Value Act (UK), 2012.

<sup>238</sup> Procurement Guidance Note (PGN) 01/13 *Integrating Social Considerations into Contracts* is applicable to all Northern Ireland Public Procurement Policy (NIPPP) users.

<sup>239</sup> The Buy Social Unit was established and operates under the Strategic Investment Board.

<sup>240</sup> Dail Deb 25 February 2015 (8351/15) 87.

<sup>241</sup> However, there have been no assessment reports published by the project group to date.

<sup>242</sup> The Grangegorman Development Agency is a statutory agency established in 2006 by the Irish Government under the *Grangegorman Development Agency Act 2005* to redevelop the former St. Brendan's Hospital grounds in Dublin City Centre.

*...10% of the aggregate time worked on site to have been undertaken by individuals who have been registered on a national unemployment register within the EU for a continuous period of at least 12 months immediately prior to their employment on the project, 2.5% of the aggregate time worked on site to have been undertaken by individuals who are employed under a registered scheme of apprenticeship or other similar national, accredited training or educational work placement arrangement.*<sup>243</sup>

The Department of Social Protection, through its Intreo offices, is providing support to the contractors in meeting their obligations under the contract by providing suitably trained candidates.<sup>244</sup> Early results, indicated that approximately 48 long term unemployed people had been hired across fifteen sites out of a total workforce of 440. The pilot project has published no further results.<sup>245</sup> While the OGP has not included any targeted recruitment and training clauses in their contracts, they have published guidance on the use of social considerations in public contracts.

It is important to note that this is not a recent advancement of socially focused procurement, targeted recruitment and training requirements have been used for the last twenty years.<sup>246</sup> Prior to the review and final adoption of the Directive, Member States had successfully demonstrated socially responsible practices through the use of policy-led initiatives. In 2008, Amsterdam introduced a ‘*Social Return*’ initiative as part of a strategic public policy plan. The initiative required municipalities to include social conditions in public goods and services contracts, in view of promoting the employment of people at risk on the labour market.<sup>247</sup> Similar ‘*Social Return*’ initiatives have been adopted in Maastricht and

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<sup>243</sup> Seanad Deb, 7 December 2016 (27).

<sup>244</sup> Intreo offers tailored employment services and supports for jobseekers and employers.

<sup>245</sup> Dail Deb, 25 February 2015 (8351/15) 87.

<sup>246</sup> Case C-31/87 *Beentjes* [1988] ECR 4929.

<sup>247</sup> Amsterdam’s South East District successfully incorporated the clauses in a major construction contract for urban development work. Within the first year, the contractor had secured twelve traineeships and seven employment positions for people with a migrant background. See Commission, ‘*Buying Social A Guide to Taking Account of Social Considerations in Public Procurement*’ (Guide) COM (2010) 1258, final.

Gouda. Denmark is considered as one of the first Member States to proactively encourage the inclusion of social clauses in public contracts, by issuing an action for social considerations in 1995 and creating an internal portal on the use of such considerations in 2000.<sup>248</sup>

In 2003, the Scottish government adopted the “*Community Benefits in Procurement (CBIP) Pilot Programme*.”<sup>249</sup> Five public bodies participated in the pilot programme with the aim of maximising local employment to reduce social exclusion. The public bodies incorporated a variety of social clauses into their procurement practices, once the requirements were relevant to the subject matter of the contract and were consistent with government procurement policy.<sup>250</sup> Each of the five participating public bodies incorporated the social provisions into their practices through a variety of ways and stages in the procedure. Some incorporated the labour conditions by setting minimum targets including; setting a percentage of the total labour time required to deliver the contract, setting a specified number of beneficiaries (e.g. employees, trainees, work placements); or setting a specified number of weeks of engagement for recipients in the contract. All of the participating contracting bodies found that the inclusion of employment clauses did not deter bidders and, found that in each case, the authorities were able to achieve their policy objectives without any additional cost to the contracts.<sup>251</sup> Building on this success, the Scottish Government implemented a comprehensive strategic plan on the use of social procurement in 2016.<sup>252</sup>

The use of such clauses is not isolated to the EU. Certain US states have adopted progressive social procurement practices, allowing for states and

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<sup>248</sup> COM (2010) 1258, final.

<sup>249</sup> See Scottish Government Community Benefits in Public Procurement (2008). Available at; <http://www.scotland.gov.uk/Resource/Doc/212427/0056513.pdf> Last accessed 24<sup>th</sup> April 2019.

<sup>250</sup> Contracting authorities were also required to comply with the TFEU principles of transparency, equal treatment, non-discrimination and proportionality. See Case C-513/99, *Concordia Bus*, [2002] ECR I-7213, para 81; Case C-4481/01 *EVN* [2003] ECR I-14527.

<sup>251</sup> See Scottish Government Community Benefits in Public Procurement (n 249).

<sup>252</sup> Procurement Reform (Scotland) Act 2014.

cities to include localised criteria in circumstances where geographic preference is permitted under federal funding legislation.<sup>253</sup> The US State of Ohio is currently reviewing the legality of the mandatory inclusion of local employment clauses in public contracts concluded by Cleveland's public procurers.<sup>254</sup> In 2003, the city of Cleveland introduced a '*Lewis Law*' which requires public bodies to include local labour clauses in all public improvement contracts. In an attempt to reduce poverty levels in the city, the law requires contractors to ensure that a minimum of '*20% of the total work hours is performed by Cleveland residents, with at least 4% of those hours performed by low-income individuals.*'<sup>255</sup>

Ackerman notes that this practice is not the norm in the US. However, there are some federal laws which promote the use of local employment and local suppliers in limited circumstances; for example, in tackling the obesity epidemic, public bodies may purchase local food produce for federal food programs, such as school lunch programs.<sup>256</sup> States may additionally introduce preferential laws in circumstances where they are acting as '*market participants.*'<sup>257</sup> Ackerman notes that this reasoning was the basis for the Supreme Court's decision in *White v. Massachusetts Council of Construction Employers* in upholding Boston's executive order requiring 50% of all construction projects employees to be residents of the city.<sup>258</sup>

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<sup>253</sup> For a discussion on US preference laws see; Y. Qiao, K.V. Thai and G. Cummings, '*State and local procurement preferences: a survey*' (2009) 9(3/4) *Journal of Public Procurement* 371.

<sup>254</sup> In 2016, the State of Ohio passed a revised code prohibiting the states' public bodies from including local labour clauses in public contracts. The city of Cleveland challenged the constitutionality of the code on the grounds that it violated the City's Home Rule authority. The Eight District Court of Appeals upheld this argument, concluding the state's law infringed the city's local governance powers. The court concluded that the Lewis Law was not a '*residency*' law, nor a '*police power*' law, it was a permissible law provided for under home rule authority. The State of Ohio has since requested a discretionary appeal to the Ohio Supreme Court. See Supreme Court of Ohio Clerk of Court - Filed January 22, 2018 - Case No. 2018-0097.

<sup>255</sup> *Fannie M. Lewis Cleveland Resident Employment Law* (Chapter 188).

<sup>256</sup> A.S. Ackerman, '*Buy Healthy, Buy Local: An Analysis of Potential Legal Challenges to State and Local Government Local Purchase Preferences*' (2011) 43(4) *Urban Lawyer* 1015.

<sup>257</sup> A.S. Ackerman (n 256).

<sup>258</sup> *White v. Mass. Council of Constr. Emp'rs*, 460 U.S. 204, 213 (1983). See also; A.S. Ackerman (n 256).



Ackerman continued by recognising that such preferential laws will not be deemed constitutional in cases where the state is not acting as a market participant and relies on the preferential clauses as a policy or regulation tool. As found in the case of *W.C.M. Window Co. v. Bernardi*, where the Illinois state introduced a law which required all public bodies to include a local employment clause in all forms of public contracts.<sup>259</sup> In this instance, the public bodies were not operating social clauses as market participants.<sup>260</sup>

Such a direct approach cannot be adopted by the EU Member States, direct requirements to promote domestic employment would fundamentally breach the principles of non-discrimination and equal treatment.<sup>261</sup> However, one could question whether the use of targeted recruitment and training clauses are in reality ‘*quasi-local employment*’ clauses. The procurers may hope to encourage the inclusion of people from local unemployment lists. However, the contractor must be willing to accept at-risk employees based in any of the Member States. While there are positive examples of how public procurement expenditure can have a positive impact on local economies, there is a shortage of evidence on the long term economic, social and legal impacts of the use of social criteria in Ireland and Northern Ireland.<sup>262</sup> Although this is another reason why SMEs should formalise and record their social activities to demonstrate their ability to meet targeted recruitment and training clauses. SMEs are closely connected to local communities and are the key drivers of local employment.

This thesis contributes to current research by questioning if the inclusion of community benefit clauses facilitates all forms of SME participation in

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<sup>259</sup> *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 489 (7th Cir. 1984).

<sup>260</sup> A.S. Ackerman (n 256).

<sup>261</sup> Case C-249/81 *Commission v Ireland (Buy Irish)* [1982]; Case C-113/13 *Spezzino* [2014] *pub. electr.* EU:2014:2440.

<sup>262</sup> Not excluding work completed by Halloran, Flynn and Davis on the recent impact of social procurement. See; D. Halloran, ‘*Local Government and Public Procurement: Legal and Policy Issues Related to Social Procurement and Community Benefit Clauses in Contracts in Ireland*’ (2013) 3(29) *King's Inns Student L. Rev.*; A. Flynn and P. Davis, ‘*The rhetoric and reality of SME-friendly procurement*’ (2015) 35(2) *Public Money & Management* 111.

public contracts. It is an important time to assess the use of such clauses, as the use of socially driven clauses are becoming ‘normal’ practice in large scale works and services contracts. Community benefit clauses have the potential to facilitate social enterprises in public contracts and additionally can encourage the participation of SMEs which have adopted social practices to improve their chances of winning public contracts.<sup>263</sup>

### 3.5.3 Subcontractor considerations

SMEs can gain access to large public contracts through the supply chain.<sup>264</sup> SMEs may compete privately to work with organisations which have been awarded public contracts. As we have already discussed, the Directive includes some provisions to support subcontractors, including the contracting authorities’ ability to pay subcontractors directly or to request information on subcontractors throughout the life-cycle of the contract to ensure that they meet the minimum requirements to work on the public contract. The main contractor remains largely free to subcontract with any business of their choosing.<sup>265</sup> Equally, a contracting authority can use subcontractor considerations to assess the sustainability of the supply chain. It is not uncommon for contracting authorities to ask suppliers to consider subcontracting with SMEs.<sup>266</sup> Monitoring of the supply chain can assist contracting authorities in measuring competition and economic stability in the marketplace.<sup>267</sup>

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<sup>263</sup> Two of the studied contracts for this thesis included targeted recruitment and training clauses. We will discuss these in more detail in Chapter Four *Methodology*.

<sup>264</sup> L. Moretti and P. Valbonesi, ‘Firms’ qualifications and subcontracting in public procurement: an empirical investigation’ (2015) 31(3) *The Journal of Law, Economics, and Organization* 568.

<sup>265</sup> Once they meet the minimum selection and qualification criteria. Public Sector Directive art 71. See Case C-314/01 *Siemens AG Österreich, ARGE Telekom & Partner and Hauptverband der österreichischen Sozialversicherungsträger*, Judgment of 18 March 2004.

<sup>266</sup> The OGP in Ireland and the CPD in Northern Ireland actively promote the use of SMEs in the supply chain.

<sup>267</sup> H. Walker and W. Phillips, ‘Sustainable procurement: emerging issues’ (2009) 2(1) *International Journal of Procurement Management* 41.

Subcontracting checks assist contracting authorities in identifying potential problems with the main contractor. This is particularly useful in certain circumstances where a large contract has been awarded on the basis of lowest cost. If a contractor submitted a low-cost bid to win the advertised contract, changes in economic conditions would have an impact on the ability of the contractor to carry out the contract for the agreed price. If it is not sustainable for the company to absorb the costs of the contract, it can lead to costs-over-runs or the eventual bankruptcy of the company.<sup>268</sup> The latter situation has a direct impact on the completion of public contracts and the stability of unpaid subcontractors. The most prominent example of this occurring is seen in the unexpected collapse of the UK company *Carillion plc*. The quick demise of the large company had a direct and significant impact on the collapse of subcontractors and the non-completion of public works contracts in both the UK and Ireland.<sup>269</sup>

At the time of the collapse, Carillion plc. was managing six Irish public works contracts for the construction and refurbishment of schools and colleges. Carillion plc. was awarded these contracts as part of the '*InspiredSpaces*' consortium with the '*Dutch Infrastructure Fund Corporation*'.<sup>270</sup> InspiredSpaces subcontracted elements of the construction work to the Irish company '*Sammon Contracting Ireland LTD*'. As a result of the Carillion plc. collapse and non-payment of invoices, Sammon subsequently entered into liquidation in June 2018, resulting in the loss of over 200 jobs.<sup>271</sup> Sammon further subcontracted

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<sup>268</sup> M. Gunduz and H. Karacan, '*Assessment of abnormally low tenders: a multinomial logistic regression approach*' (2017) 23(6) *Technological and Economic Development of Economy* 848.

<sup>269</sup> For a discussion on the Carillion plc. collapse see; D. Rogers, '*Not-so-sudden death: How Carillion disguised its ailing finances just enough*' (2018) 9(2) *Construction Research and Innovation* 44; S. Wren-Lewis, '*What Carillion's collapse tells us about public sector outsourcing*' (2018) *British Politics and Policy* at LSE.

<sup>270</sup> InspiredSpaces consortium were awarded a €100 million contract for the construction of six schools by September 2018. See Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach díospóireacht, *Role and Operation of National Development Finance Agency: Discussion* (3<sup>rd</sup> July 2018).

<sup>271</sup> Brennan, J. 2018, *NTMA considers contractors risk list after Carillion collapse*, The Irish Times Ltd, Dublin. *Sammon Contracting Ireland LTD.*, hereinafter referred to as 'Sammon'

with ‘*G Morgan & Sons LTD.*’ for the supply and delivery of furniture to five schools.<sup>272</sup> *G Morgan & Sons LTD.* is a micro-enterprise with nine employees. The company claim that the failure to pay for contracts completed has caused cash flow difficulties for the company.<sup>273</sup>

A High Court proceeding between *G Morgan and Sons LTD.* against *Inspired Spaced Bundle 5(Ireland)* for payment of supplied school furniture is ongoing.<sup>274</sup> This case is directly connected to the collapse of Carillion. The school bundle contract was suspended in January 2018 with only three out of the five schools ready to open for the academic year.<sup>275</sup>

The UK and Irish Regulations do not require contracting authorities to make direct payment to subcontractors.<sup>276</sup> The UK and Irish contracting authorities are encouraged to include subcontractor considerations in their procurement procedures to prevent situations like this occurring again. Not only should contracting authorities assess subcontractors’ qualification and selection criteria when competing for a subcontract, but contracting authorities should also assess that contractors are upholding their contractual duties with the subcontractors throughout the performance of the contract.<sup>277</sup> SMEs should not be discouraged by recent events from participating in large public contracts as subcontractors. SMEs engaged in large-scale public contracts have the potential to

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<sup>272</sup> Schools contracted included Loreto College in Wexford and Colaiste Raithin, Bray, Co. Wicklow.

<sup>273</sup> See Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach d’ospóireacht, Role and Operation of National Development Finance Agency: Discussion (3rd July 2018).

<sup>274</sup> *G. Morgan & Sons Limited* initiated a High Court proceeding against *Inspired Spaces* in August 2018 seeking several declarations and injunctions for the return and non-use of furniture supplied to two schools. See *G Morgan & Sons Ltd v Inspired Spaces Bundle 5 [Ireland] Ltd* 7399.

<sup>275</sup> See Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach d’ospóireacht, Role and Operation of National Development Finance Agency: Discussion (3rd July 2018).

<sup>276</sup> Public Authority Regulations reg 71; (UK) Public Contracts Regulations reg 71. For an overview of the Irish and Northern Irish Regulations, please refer back to Chapter 2 Section 2.10 Public Procurement Law in Ireland and Section 2.11 Public Procurement Law in Northern Ireland.

<sup>277</sup> For example, checking compliance with Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions OJ L 48/1.

increase their growth rate, employment, technology investments and can use the experience to bid for future public and private contracts.<sup>278</sup>

The current situation of instability in works contracts is not unique to the UK or Ireland, Vesel comments that the legal acceptance of low-priced tenders has resulted in the bankruptcy of primary contractors and the subsequent long delays of completion of contracts in Slovenia. This occurred in the Slovenia public contract for the construction of the Markovec tunnel at the Koper – Izola motorway.<sup>279</sup> When assessing the validity of the procurement procedure, The Slovenian National Review Commission concluded that the principle of free-market competition allows for tenderers to submit low prices which guarantee their existence on the market.<sup>280</sup> While, wider economic factors will have the greatest impact on the risk of large enterprises succeeding or failing, contracting authorities can take measures to reduce the risk of non-compliance and cost over-runs.<sup>281</sup> One of the most efficient measures to reduce these risks is to set stringent controls on the assessment of abnormally low tenders and the subsequent monitoring of work and supply chain management during the performance of the contract.<sup>282</sup> The procurer may not play a role in this part of the contract, monitoring and auditing reviews may be conducted by end-users, financial departments or independent review bodies.<sup>283</sup>

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<sup>278</sup> See SIGMA, *‘Small and Medium-sized Enterprises in Public Procurement.’* (2017) Brief 33, OECD Publishing, Paris; See Commission, *‘Making Public Procurement work in and for Europe.’* (Communication) COM (2017) 572 final.

<sup>279</sup> T. Vesel, *‘Addressing social considerations in PP: best practices for fighting social dumping in Slovenia’* in G. Piga and T. Tátrai, *‘Public procurement policy’* (Routledge, Abingdon, Oxon; New York, NY, 2015) 39.

<sup>280</sup> See No of Decision, 018-163/2009-21. See also; T. Vesel (n 279).

<sup>281</sup> S. Marwa and M. Zairi, *‘An exploratory study of the reasons for the collapse of contemporary companies and their link with the concept of quality’* (2008) 46(9) Management Decision 1342.

<sup>282</sup> Additionally, contracting authorities must ensure that the contractual performance clauses do not evolve beyond what was originally agreed at the tender stage. See Case C-454/06 *Pressetext*; Case 549/14 *Finn Frogne* [2016] *pub. electr.* EU:C:2016:634.

<sup>283</sup> Although, an important finding from each of the case studies demonstrates that motivated public sector employees are key in delivering the social requirements. Importantly, the employees driving change in the public contracts were engaged in each stage of the procurement cycle.

This research reviews the use of subcontractor considerations which encourage contractors to engage with SMEs. Current literature presents two arguments as to the most effective manner to introduce policy-led objectives into procurement practices. One side of the argument contends that a *mandatory* approach results in high levels of compliance and monitoring of the policy-led objectives, such as the inclusion of SMEs in the supply chain.<sup>284</sup> This approach suggests that if contracting authorities wish to promote SME participation in the supply chain, they should make this requirement a compulsory contractual performance clause. The other side of the argument insists that compliance with a policy objective can be effectively met through the use of *voluntary* regimes.<sup>285</sup> Contracting authorities following this approach would encourage rather than insist on the main contractor working with SMEs. Supporters of the voluntary approach argue that market pressure is a key factor in securing compliance levels with voluntary requirements, as contractors in fear of losing the contract or of losing future contracts will comply with the voluntary objectives set out by the contracting authority.<sup>286</sup> It is further argued that voluntary criteria are more effective when they include a degree of flexibility to allow the contractor to respond to any economic changes in the marketplace.<sup>287</sup> Counter-arguments can be made against both points; mandatory approaches may result in high levels of compliance but may additionally result in higher operational costs for both the contracting authority and economic operator. While a voluntary approach may be less expensive to manage, it does not guarantee compliance with the stated objective.<sup>288</sup>

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<sup>284</sup> See A.I. Anand, '*Voluntary vs mandatory corporate governance: Towards an optimal regulatory framework*' (2005) in American Law & Economics Association Annual Meetings 44. Although such an approach in public procurement contracts would violate the TFEU principles.

<sup>285</sup> L. Senden, '*Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?*' (2005) 9(1) *Electronic Journal of Comparative Law*.

<sup>286</sup> See A.I. Anand (n 284). See also T.P. Lyon and J.W. Maxwell, '*Corporate social responsibility and the environment: A theoretical perspective*' (2008) 2(2) *Review of Environmental Economics and Policy* 240.

<sup>287</sup> A. McWilliams and D. Siegel, '*Corporate social responsibility: A theory of the firm perspective*' (2001) 26(1) *Academy of Management Review* 117.

<sup>288</sup> Y Fassin, '*SMEs and the fallacy of formalizing CSR*' (2008) 17(4) *Business Ethics: A European Review* 364.

However, a mandatory approach is simply not possible for EU contracting authorities. Contracting authorities cannot set-aside proportions of public contracts or subcontracts for SMEs.<sup>289</sup> To support SME participation in large contracts, contracting authorities can adopt *voluntary subcontractor considerations*. Contracting authorities may include voluntary contractual performance clauses in the contract asking the main contractor to consider the sustainability of the supply chain. Furthermore, contracting authorities may directly ask the main contractor to consider subcontracting with SMEs.<sup>290</sup> As the requirements would be voluntary in nature, the contracting authority cannot apply penalties for non-performance. If the contracting authority is truly engaged with developing a sustainable supply chain, the contracting authority must make regular checks on the main contractor and all subcontractors assessing if the contractual performance requirements are being met.<sup>291</sup>

Shockro and Sanchez-Graells have raised concerns around the imposition of subcontracting conditions, arguing that the impositions would unduly distort competition and would increase the likelihood of collusion between competitors.<sup>292</sup> While this research accepts that a mandatory subcontracting requirement has the potential to distort competition by limiting the main contractor's freedom to fulfil their contractual duties as they see fit, this research argues that the use of voluntary SME subcontractor conditions *facilitates* competition rather than distorting competition. SMEs are currently excluded from large contracts, and one of the easiest routes for SMEs to gain a share of this capital is by subcontracting with a larger organisation. Contracting authorities who are invested in developing strong subcontractor clauses will monitor the

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<sup>289</sup> See Case 549/14 *Finn Frogne* [2016] *pub. electr.* EU:C:2016:634.

<sup>290</sup> Although, contracting authorities are not permitted to require subcontractors to contract with SMEs from a specific geographical location.

<sup>291</sup> H. Walker, L. Di Sisto and D. McBain, '*Drivers and barriers to environmental supply chain management practices: Lessons from the public and private sectors*' (2008) 14(1) *Journal of Purchasing and Supply Management* 69.

<sup>292</sup> M.J. Shockro, '*An antitrust analysis of the relationship between prime contractors and their subcontractors under a government contract*' (1982) 51(4) *Antitrust Law Journal* 725; A. Sánchez Graells, '*Public procurement and the EU competition rules*' (2nd edn Bloomsbury Publishing 2015) 353.

supply chain which in turn may mitigate the incidents of subcontractors not complying with contractual obligations set by the contracting authority and will additionally check to see that the subcontractors have received payment for their work. The research case studies assess if voluntary subcontractor considerations promote SME participation in the public contract.

#### 3.5.4 Pre-commercial Procurement

Innovative procurement is designed to improve public services and procurement procedures.<sup>293</sup> In a similar way, to environmental procurement, innovative procurement is studied as an independent sub-theme of public procurement research. Chapter Two offered a broad overview of the innovative provisions set out by the Directive. This section summarises the main approaches to the study of innovative public measures and identifies which approach this research aligns with when analysing the impact of innovative practices on the facilitation of SME participation in public procurement. The Directive explicitly encourages the use of innovative procedures and criteria once the processes do not violate the fundamental TFEU principles.<sup>294</sup> Contracting authorities are encouraged to carry out market consultations before the publication of a tender competition to make themselves aware of newly available technologies or solutions,<sup>295</sup> secondly contracting authorities may include ‘*variants*’ criteria, allowing economic operators to offer an alternative product or service other than what was specified in the competition notice.<sup>296</sup>

Literature differs as to the purpose, approach and study of innovative public measures. Obwegeser and Müller’s recent work offers an overview of the study of innovation as a policy tool and classifies three approaches

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<sup>293</sup> J. Edler and L. Georghiou, ‘*Public procurement and innovation—Resurrecting the demand side*’ (2007) 36(7) *Research Policy* 949.

<sup>294</sup> Public Sector Directive, arts 2(1), 67(2), 70, 76(2).

<sup>295</sup> Contracting authorities are encouraged to publish ‘*prior information notices*’ (PINs) to inform the market of upcoming competitions. See Public Sector Directive, arts 26(5), 48(2).

<sup>296</sup> Public Sector Directive, art 45. See also; *Resource (NI) Limited v Northern Ireland Courts and Tribunal Service* [2011] NIQB 121.



adopted by current literature.<sup>297</sup> The first approach focuses on innovations in the public procurement process, the second approach relates to the innovation of public services using procurement, and the third approach relates to the use of public procurement as a tool for demand-led innovation policy-making.<sup>298</sup> The first approach ‘public procurement *for* innovation’ concentrates on using procurement as a demand-side tool to generate innovation.<sup>299</sup> Contracting authorities would use such an approach to ask the market to develop and supply innovative solutions. The second approach, ‘public procurement *of* innovations’ uses procurement to modernise public bodies operations *and* to generate innovative goods and services for end-users.<sup>300</sup> The third approach, innovative public procurement, reviews innovative internal practices adopted by contracting authorities.<sup>301</sup> PCP falls under the second category, relying on demand-led innovation to develop solutions to public sector problems and to support the development of economic operators equally.<sup>302</sup>

PCP is defined as the purchasing of research and development (R&D) of new innovative solutions.<sup>303</sup> Public procurement refers to the procedures by which public bodies purchase goods, services or construction works.<sup>304</sup> Traditionally, there are three types of public contracts; public works contracts, public supplies contracts and services contracts.<sup>305</sup> For these types of contracts, public contracting authorities detail the contract

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<sup>297</sup> N. Obwegeser and S.D. Müller, ‘*Innovation and public procurement: Terminology, concepts, and applications*’ (2018) 74-75 *Technovation* 1.

<sup>298</sup> N. Obwegeser and S.D. Müller (n 297).

<sup>299</sup> J. Edler and L. Georghiou (n 293).

<sup>300</sup> M. Rolfstam, W. Phillips and E. Bakker, ‘*Public procurement of innovations, diffusion and endogenous institutions*’ (2011) 24(5) *International Journal of Public Sector Management* 452.

<sup>301</sup> C. Edquist, and J.M. Zabala-Iturriagoitia, ‘*Public Procurement for Innovation as mission-oriented innovation policy*’ (2012) 41(10) *Research Policy* 1757.

<sup>302</sup> L. Hommen and M. Rolfstam, ‘*Public procurement and innovation: towards a taxonomy*’ (2008) 8(3) *Journal of Public Procurement* 17.

<sup>303</sup> See Commission, ‘*Pre-commercial Procurement: driving innovation to ensure sustainable high-quality public services in Europe*’ (Communication) COM (2007) 0799 final. R&D activities are exempt from the Public Sector Directive.

<sup>304</sup> Public Sector Directive, art 1(2).

<sup>305</sup> There will be a natural overlap of the different forms of contracts in complex contracts. For a discussion on the rules governing mixed contracts see; *QDM Capital v Athlone Institute of Technology* (unreported judgment of Birmingham J, 3 June 2011).

specifications and requirements in a bidding document or a request for tender document.<sup>306</sup> This document is then advertised electronically nationally or on a regional basis depending on the value of the contract. Interested economic operators are given sufficient time to complete and return the tender document.<sup>307</sup> PCP does not follow this route.

The key characteristics of PCP projects can be summarised as industry responding to a social problem and creating a solution using public funds.<sup>308</sup> Whilst projects are funded using public money, the funds are not provided through a grant form. During the first stage of the PCP, public contracting authorities engage with a number of suppliers to identify possible solutions to a public problem. Contracting authorities select a list of preferred suppliers to progress to the second stage. At this stage, the suppliers, in partnership with the public body, are requested to prototype their solution. Contracting authorities may carry out further negotiation or prototype stages with one or more suppliers. Suppliers retain intellectual property and gain valuable experience working with the public sector.<sup>309</sup>

PCP modernises public services while creating contract opportunities for *start-ups* and *small enterprises*. For PCP to be effective, both the public sector and the private sector share the risks and benefits of undertaking new product or service developments.<sup>310</sup> PCP programmes are regularly conducted in Germany, Denmark, the UK, Sweden, Finland, Italy, Netherlands, Sweden, Austria, Belgium and Norway. Frameworks for PCP and pilot projects have been designed and implemented in Hungary, Poland, Iceland and Spain.<sup>311</sup> States like Ireland, Lithuania and Portugal,

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<sup>306</sup> The requirements must be presented in a precise and clear manner. See Case C-27/15 *Pizzo* [2016] *pub. electr.* EU:C:2016:404 para 36.

<sup>307</sup> Different time-frames and processes apply to the various procedures.

<sup>308</sup> C. Edquist and J.M. Zabala-Iturriagoitia, 'Why Pre-Commercial Procurement is not Innovation Procurement' (2012). Lund University, CIRCLE-Center for Innovation, Research and Competences in the Learning Economy (No. 2012/11).

<sup>309</sup> COM (2007) 0799 final.

<sup>310</sup> A.R. Apostol, 'Pre-commercial procurement: regulatory effectiveness?' (Doctoral dissertation, Faculty of Law, Leiden University, 2014).

<sup>311</sup> S. Bedin, F. Decarolis, and E. Iossa, 'Quantifying the impact of Pre-Commercial Procurement (PCP) in Europe based on evidence from the ICT sector' (2014) *Contract*, (30CE) p.0637188.

are in the process of developing policy and frameworks for the effective use of PCP projects.<sup>312</sup> PCP contracts are used widely by Horizon 2020, and this broad spread exposure may encourage more contracting authorities to engage in similar procedures.<sup>313</sup> Start-ups generally lack the experience, operational and financial capacity to bid for advertised below-threshold contracts. For some start-ups, PCP will be their only entry route into the public sector.

The use of PCP has additional societal benefits. One of the Europe 2020 goals embedded in the Directives encourages innovative public procurement to contribute to a ‘*smart*’ economy. The smart objective encourages economic growth based on knowledge, research and innovation and delivered through the increased use of public-sector R&D and education.<sup>314</sup> This objective is further supported by the adoption of the ‘*Digital Single Market*’.<sup>315</sup> The European Commission’s ‘*Digital Single Market*’ strategy aims to promote access to online activities for individuals and businesses under conditions of ‘*fair competition, consumer and data protection, removing geo-blocking and copyright issue*’.<sup>316</sup> As SMEs are key generators of innovation in the Single Market, public bodies are encouraged to turn to the market to seek assistance to improve public services and public sector operations. Over the last decade, there has been a remarkable uptake of public-private sector R&D developments, the most prominent of which is the adoption of the *Smart Cities* initiatives.

Smart Cities initiatives are being implemented across the world; public authorities are forming partnerships with citizens, academia and private sector bodies to develop internet data infrastructures to improve urban

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<sup>312</sup> S. Bedin, F. Decarolis, and E. Iossa (n 311)

<sup>313</sup> See General Annexes of the Horizon 2020 Work Program (in Particular Annex C, D and E).

<sup>314</sup> Eurostat, ‘*Smarter, Greener, more Inclusive? Indicators to support the 2020 Strategy*’ (European Union, Luxembourg, 2016 edition).

<sup>315</sup> See Commission, ‘*A Digital Single Market Strategy for Europe*’ (Communication) COM (2015) 0192 final.

<sup>316</sup> COM (2015) 0192 final.

living.<sup>317</sup> Smart Cities initiatives are being undertaken in New York, Singapore and Copenhagen, among other cities. Initiatives range from the replacement of payphone kiosks in New York City with ‘*Link*’ structures. The ‘*Links*’ offer free public Wi-Fi, charging points and public supports such as electronic access to city services, maps and directions.<sup>318</sup> Singapore has used smart solutions to successfully address their significant congestion problems, through the introduction of road sensors, phased traffic lights and congestion charges.<sup>319</sup> Copenhagen is on course to become the first carbon-neutral city by 2025, the city gathers and utilises data analytics to improve smart, green efficient growth.<sup>320</sup>

In a world of growing urban populations, city officials are turning to digital solutions to address environmental concerns and promote economic growth and social equality.<sup>321</sup> McLaren and Agyeman contend that Smart Cities have the potential to address these issues and to create a genuine, socially sustainable and innovative future.<sup>322</sup> Kitchin suggests that the term ‘*Smart Cities*’ requires cities to have incorporated ‘*pervasive and ubiquitous*’ computing in daily operations and requires governance by innovative, entrepreneurial businesses and engaged citizens.<sup>323</sup> Debate continues about the best strategies for managing digital cities, with one side of the argument contending that embedded digital monitoring increases the risk of privacy invasion, while the other side of the argument dismisses these fears, defending the use of data-gathering sensors to reduce congestion and improve public transport and urban living

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<sup>317</sup> D. McLaren and J. Agyeman, ‘*Sharing cities: a case for truly smart and sustainable cities*’ (MIT Press, 2015).

<sup>318</sup> See more at; <https://www.link.nyc/> This initiative was introduced by the City of New York in partnership with the private sector consortia ‘*City Bridge*’. Last accessed 23<sup>rd</sup> June 2019.

<sup>319</sup> See L. Kong and O. Woods, ‘*The ideological alignment of smart urbanism in Singapore: Critical reflections on a political paradox*’ (2018) 55(4) *Urban Studies* 679.

<sup>320</sup> Copenhagen, ‘*CPH 2025 Climate Plan – Copenhagen Carbon Neutral by 2025 – A Green, Smart and Carbon Neutral City*’ (The City of Copenhagen Technical and Environmental Administration, 2012).

<sup>321</sup> P.R. Ehrlich and J.P. Holdren, ‘*Impact of population growth*’ (1971) 171(3977) *Science* 1212.

<sup>322</sup> D. McLaren and J. Agyeman (n 317).

<sup>323</sup> R. Kitchin, ‘*The real-time city? Big data and smart urbanism*’ (2014) 79(1) *GeoJournal* 1.

standards.<sup>324</sup> The research is intrigued by this debate, however, it is beyond the scope of this research to engage in this argument. The research is concerned with how these initiatives are concluding PCP contracts and questions if the PCP procedures followed facilitate SME participation in public contracts. As the use of PCP and Smart City initiatives are growing, it is timely to assess what impact the use of these generally low-value public purchases have on SME participation.

Two of the research case studies scrutinise the use of Smart City programmes adopted by Dublin City Council and Belfast City Council. The case studies are concerned with the potential increased demand for ‘smart’ innovative services created by the smart cities’ programmes, the research questions how ICT focussed SMEs, start-ups, entrepreneurs, academics and non-profits can avail of these opportunities. Both programmes have adopted ‘*Small Business Innovative Research*’ (SBIR) initiatives to use public procurement to drive innovation in the public sector.<sup>325</sup> Both programmes use PCP to carry out SBIR programmes. The public bodies can engage with innovative start-ups and micro-enterprises using PCP to find solutions to societal needs collectively.<sup>326</sup> SBIR initiatives encourage the public sector to engage with enterprises during product or service development and design stage, allowing the enterprises to respond to public needs.<sup>327</sup> This research questions if the use of PCP by the two Smart City programmes facilitates SME participation. In particular, the research will assess if the use of PCP facilitates the participation of start-ups, who are normally excluded from the public

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<sup>324</sup> A.S. Elmaghraby and M.M. Losavio, ‘*Cyber security challenges in Smart Cities: Safety, security and privacy*’ (2014) 5(4) *Journal of Advanced Research* 491. Note, further arguments have been posed regarding cities capabilities to install, gather, monitor and analyse wide scale data sensors. These issues raise an important question as to the economic sustainability of the smart programmable cities’ models. This question is not directly related to the research question and will not be addressed in the thesis. However, it will be reviewed in disseminating research articles.

<sup>325</sup> SBIR is defined as a partnership between a public body and a private entity or entrepreneur, where the public body funds the private sector R&D projects. See A. Link and J. Scott, ‘*Government as entrepreneur: Evaluating the commercialization success of SBIR projects*’ (2010) 39(5) *Research Policy* 589.

<sup>326</sup> J. Edler and L. Georghiou (n 293).

<sup>327</sup> S.J. Wallsten, ‘*The effects of government-industry R&D programs on private R&D: the case of the Small Business Innovation Research program*’ (2000) *The RAND Journal of Economics* 82.

procurement competitions due to their size, experience and financial capacities. Facilitating start-ups in PCP competitions has the potential to have a significant long-term impact for both the economic operators and the public bodies. The start-ups can use the experience to develop, prototype and test their proposed solutions. Post-completion of the contract, the start-up should be able to sell the product or service developed for the public sector to other public bodies and the wider private sector. When start-ups reach the ‘commercialisation’ stage, it is estimated that they employ four times more people than other forms of SMEs.<sup>328</sup> As we will see later on, public bodies are using relatively small amounts of public funds to assist the private sector in developing products and services which improve urban living standards and assist in meeting national policy objectives.

### 3.6 Implementing social and innovative changes in the public sector

This research is interested in recent developments of public procurement, mainly the use of socially and innovatively driven procedures. However, the European Commission complains that approximately 55% of all contracts advertised on the OJEU are awarded on the basis of lowest cost.<sup>329</sup> Contracting authorities may rely on the lowest cost award criteria for several reasons; contracting authorities have limited budgets; the lowest-cost award criteria is technically straightforward and easy to use, and there is minimal risk of legal challenge.<sup>330</sup> SMEs frequently state the use of ‘*lowest cost*’ hinders their ability to compete for public contracts.<sup>331</sup> It is widely accepted that SMEs generate local employment growth and the Directive includes provisions which support SMEs. Contracting

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<sup>328</sup> See Commission, ‘*Europe’s next leaders: the Start-up and Scale-up Initiative*’ (Communication) COM (2016) Strasbourg, 22 November.

<sup>329</sup> See Commission, ‘*Making Public Procurement work in and for Europe.*’ (Communication) COM (2017) 572 final.

<sup>330</sup> The exception to this is the number of challenges on the acceptance of abnormally low tenders. See Case C-76/81 *Transporoute*, C-103/88 *Fratelli Costanzo*; Case C-285/99 *Impresa Lombardini*; C-599/10 *SAG ELV Slovensko and Others*; Case C-147/06 *SECAP and Santorso*; *SRCL v NHSE* [2018] EWHC 1985 (TCC).

<sup>331</sup> See Commission, ‘*SMEs’ access to public procurement markets and aggregation of demand in the EU 2014.*’ (2014) Final Report.

authorities will have to change their procuring attitudes and procedures to promote SME competition. There are also a number of hurdles facing procurers in introducing change to the purchasing activities, namely, complex legislation, lack of policy supports and embedded cultural attitudes.<sup>332</sup>

It is often reported that the private sector can introduce socially-driven changes in a more rapid manner than the public sector.<sup>333</sup> One of the main differences between the public sector and the private sector is the quantity and complexity of rules and regulations governing their operational practices. Private enterprises must adhere to company law, financial legislation, such as taxation and insurance rules, labour and environmental laws. Public sector bodies, in addition to these requirements, must also adhere to public administrative law when carrying out operational tasks. Traditionally, robust regulatory systems were seen as a barrier to innovation and social changes, with public sector bodies focused on abiding by legislation rather than on changing or improving standard practices.<sup>334</sup> Contracting authorities traditionally might have found it easier to purchase on the lowest-cost approach. In addition to regulatory constraints, the public sector capacity to change was further restricted by the global financial crisis.<sup>335</sup> States were faced with reduced budgets without experiencing any significant reduction in the need for public services. Innovative and socially conscious practices and systems could assist states in utilising public finances in a sustainable manner that

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<sup>332</sup> K. Loader, 'SME suppliers and the challenge of public procurement: Evidence revealed by a UK government online feedback facility' (2015) 21(2) *Journal of Purchasing and Supply Management* 103-112; A. Flynn, and P. Davis, 'The policy-practice divide and SME-friendly public procurement' (2016) 34(3) *Environment and Planning C: Government and Policy* 559.

<sup>333</sup> However, the private sector adopt social goals in response to customer demand rather than the pursuit of social justice. The exception to this is B-Corps. B-corps are a hybrid form of social enterprise. See D. Reiser, 'Benefit Corporations - A Sustainable Form of Organization' (2011) 46(3) *Wake Forest L Rev* 591.

<sup>334</sup> D. Albury, 'Fostering Innovation in Public Services' (2005) 25(1) *Public Money & Management* 51.

<sup>335</sup> The global financial crisis had a significant impact on the two case study countries. See C. Coulter and A. Nagle, 'Ireland Under Austerity: Neoliberal Crisis, Neoliberal Solutions' (Manchester Univ Press, 2015).

achieves value for taxpayers' money.<sup>336</sup> Regulatory frameworks should not be seen as a barrier to change, and instead should be used as a facilitator for conducting innovative procedures. The Directive is no longer focussed on purely economic objectives and contains numerous provisions allowing contracting authorities to use procurement strategically to support the development of sustainable, inclusive and innovative market places.

A recent OECD report outlines a framework for understanding public sector innovation and identifies a number of strategies for public bodies to employ to successfully drive socio-innovative practices at every level of the public sector.<sup>337</sup> The report explains that change in public sector operations is dependent on four factors; '*the individual innovator, the organisation in which they operate, adoption of new practices and improving the legislative framework.*' The framework relies on large-scale research gathered by the OECD's '*Observatory of Public Sector Innovation*'.<sup>338</sup>

Firstly, the framework acknowledges the importance of individuals, recognising that individual employees act as the creators of '*change*'. The change will occur when a key employee is willing to do something differently.<sup>339</sup> Governments should encourage public sector employees to drive change within individual departments. Employees should be motivated and encouraged to implement changes or to develop a new process which helps improve public services. Public employees, unlike the private sector, may not reap financial awards for implementing new

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<sup>336</sup> M. Stewart-Weeks and T. Kastle, '*Innovation in the Public Sector*' (2015) 74 Australian Journal of Public Administration 63.

<sup>337</sup> OECD, '*The Innovation Imperative in the Public Sector: Setting an Agenda for Action*' (OECD, Publishing, Paris, 2015).

<sup>338</sup> The Observatory of Public Sector Innovation (OPSI) gathers and analyses information on innovative public sector practices. The OPSI assists public bodies in implementing innovation in their operations. See <https://oecd-opsi.org/> Last accessed 10/04/2019

<sup>339</sup> See also; W.A. Taylor and G.H. Wright, '*Organizational readiness for successful knowledge sharing: Challenges for public sector managers*' (2004) 17(2) Information Resources Management Journal 22; S. Fernandez and H.G. Rainey, '*Managing successful organizational change in the public sector*'. In *Debating Public Administration* (Routledge, 2017) 7.



changes, but instead, are motivated by promotion prospects and career development.<sup>340</sup>

Secondly, the report finds that engaged employees must be supported by their organisation. The organisation must create an environment to allow innovative practices to be designed and implemented.<sup>341</sup> The hypothesis outlined in the research argues that data information knowledge and learning is vital to promoting change in the public sector. This would suggest that the public sector bodies should willingly share and collect data on public service operations with the private sector, academia and the voluntary sector. By sharing information and data, the private sector would, in turn, offer advice or solutions on how to improve public services.<sup>342</sup> For this approach to be truly effective, the public sector would have to encourage engagement with the private sector openly and should actively implement changes or ideas recommended by the private sector, the voluntary sector or by academia.<sup>343</sup>

The third requirement of change identified by the report requires public bodies to work in new ways. If the public sector is to facilitate the new practices fully, they need to develop strategic partnerships across the public sector to harmonise improved services.<sup>344</sup> Partnerships between the public sector and the private sector, academia and the voluntary sector are required to foster new ideas.<sup>345</sup> The final requirement demands a review of the rules surrounding policy and procedures.<sup>346</sup> Public sector bodies

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<sup>340</sup> See P.E. Crewson, 'Public-service motivation: Building empirical evidence of incidence and effect' (1997) 7(4) *Journal of Public Administration Research and Theory* 499; R. Bysted and K.R. Jespersen, 'Exploring managerial mechanisms that influence innovative work behaviour: Comparing private and public employees' (2014) 16(2) *Public Management Review* 217.

<sup>341</sup> OECD (2015) (n 337).

<sup>342</sup> C.M. Chan, 'From open data to open innovation strategies: Creating e-services using open government data.' In 2013 46th Hawaii International Conference on System Sciences (1890-1899).

<sup>343</sup> OECD (2015) (n 337).

<sup>344</sup> OECD (2015) (n 337).

<sup>345</sup> See also; E. Vigoda, 'From responsiveness to collaboration: Governance, citizens, and the next generation of public administration' (2002) 62(5) *Public Administration Review* 527; J.W. Selsky and B. Parker, 'Cross-sector partnerships to address social issues: Challenges to theory and practice' (2005) 31(6) *Journal of Management* 849.

<sup>346</sup> While the 'Buying Social' European guidance document is currently under review, the Commission should equally consider updating the PCP guidance document.

should offer clarification of what procedures are permissible within the remit of public legislation. Internal policies and procedures should be modernised and revised if such rules are acting as a barrier to innovative processes. All four factors of change must exist for the public sector to fully support and implement new changes.<sup>347</sup>

The European Commission published one of the most comprehensive reports on European public sector innovation in 2013.<sup>348</sup> While the report initially praises European Member States for fostering innovation in the private sector, by providing finance to private entities to develop new technologies and ICT infrastructure, the report calls for the Member States to strengthen the public sector's capacity to innovate. Facilitating innovative practices in the public sector is intended to assist in improving public services and to address societal problems such as the need to provide high-quality health care to support ageing populations.<sup>349</sup>

Similarly, to the OECD report, the Commission report recognises that a lack of coordinated support for innovative leaders and administrative heavy legislation are acting as barriers to social change and innovation in the public sector. The report calls for the Member States to modernise their internal practices, to facilitate digital governance and to actively engage with the private and voluntary sector.<sup>350</sup>

Sorensen and Torfing further support the argument that for social change to exist, the public sector must form a collaborative partnership with the private sector.<sup>351</sup> Sorensen and Torfing outline a framework for collaborative innovation that closely reflects the OECD framework. Their framework is based on four propositions. The first proposition is based on the sharing of knowledge. The hypothesis states that while individuals

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<sup>347</sup> OECD (2015) (n 337).

<sup>348</sup> Commission, *'Powering European Public Sector Innovation: Towards a New Architecture Report of the Expert Group on Public Sector Innovation'* (Luxembourg: Publications Office of the European Union, 2013).

<sup>349</sup> C. Bason, *'Leading public sector innovation: Co-creating for a better society.'* (2nd edn Policy Press, 2018).

<sup>350</sup> See Commission (2013) (n 348).

<sup>351</sup> E. Sorensen and J. Torfing, *'Enhancing collaborative innovation in the public sector'* (2011) 43(8) *Administration and Society* 868.

are the initial inventors of new or improved developments, these ideas are only truly effective when they are shared or transformed with other parties. The second proposition argues that the ideas generated are best developed when shared with diverse non-competitive partners; for example, when a private entity shares an idea with a public sector body. Thirdly, the hypothesis argues that both sides must jointly implement the new developments, with both sides sharing the risk of failure or loss. Finally, the last proposition contends that the idea must be disseminated to other public bodies and private sector entities.<sup>352</sup> Similarly, to the OECD research, this framework recognises the importance of individuals as innovators and the importance of sharing risk and ideas between the private and public sector. Moreover, this framework additionally pays attention to the harmonisation of new processes or developments across the public sector by encouraging the dissemination of the new practices.<sup>353</sup>

There is a recurring theme that suggests in order for change to take place, contracting authorities must be willing to take risks and develop ways to design tender specifications and award criteria. Unfortunately, there is limited ability for contracting authorities to change the procedures set out in the Directive.<sup>354</sup> Contracting authorities are prohibited from engaging with SMEs during open and restricted competitions. Although contracting authorities may conduct market research prior to the design and publication of the call for competition.<sup>355</sup> However, PCP offers contracting authorities flexibility in developing partnerships with the private sector.

Lee, Hwang and Choi's research relies heavily on practical case studies to further prove the theory that a public body's capacity to change is directly

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<sup>352</sup> E. Sorensen and J. Torfing (n 351).

<sup>353</sup> J. Edler, S. Ruhland, S. Hafner, J. Rigby, L. Georghiou, L. Hommen, M. Rolfstam, C. Edquist, L. Tsipouri and M. Papadakou, *Innovation and public procurement. Review of issues at stake* (ISI Fraunhofer Institute Systems and Innovation Research, Karlsruhe, 2005).

<sup>354</sup> Case C-16/98 *Commission v France* [2000] ECR I-08315.

<sup>355</sup> Public Sector Directive, arts 26(5), 48(2).

related to its willingness to engage with the private or voluntary sector.<sup>356</sup> Examples provided by Denmark and the UK depict how collaborative partnerships between the sectors can result in significant changes and improvements to public services. Denmark and the UK have previously invited interested parties to offer advice on issues of public concerns, such as climate change and local community public services through their ‘*MindLab*’ and ‘*Public Services Lab*’ programmes.<sup>357</sup> Sweden has used PCP to design and implement new innovative traffic systems and is currently using the process to develop a robotic health care service for the elderly population.<sup>358</sup> More recently, Ireland and Northern Ireland adopted the Smart Cities programmes to improve urban living standards.

The public body must follow the four stages of change set out in the OECD report and reiterated in recent literature to successfully embed innovative procurement practices.<sup>359</sup> Firstly, a motivated and engaged public sector employee will be the driver of the initiative, understanding the need to include social criteria in public procurement. Secondly, the public body must support the employee in implementing the initiative, allowing the employee to begin negotiations with the private or voluntary sector. Thirdly, the public body must engage with all stakeholders, including other public bodies, academia, local communities and the business sector. Finally, national policy and legislation must allow for the activity to take place.<sup>360</sup>

The revised rules on public procurement make it easier for public bodies to incorporate social objectives into their public procurement practices,

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<sup>356</sup> S.M. Lee, T. Hwang and D. Choi, ‘*Open innovation in the public sector of leading countries*’ (2012) 50(1) *Management Decision* 147.

<sup>357</sup> J. Christiansen, ‘*The Irrealities of Public Innovation Exploring the political epistemology of state interventions and the creative dimensions of bureaucratic aesthetics in the search for new public futures.*’ National Endowment of Science, Technology and the Arts (Nesta, UK) ( PhD Dissertation 2013).

<sup>358</sup> VINNOVA is Sweden’s innovation agency, it promotes collaborations between the private sector, universities and the public sector. <http://www.vinnova.se/en/Publications-and-events/News/2013/130308-Pre-Commercial-Procurement/> Last accessed 10<sup>th</sup> September 2018.

<sup>359</sup> E. Sorensen and J. Torfing, ‘*Enhancing collaborative innovation in the public sector*’ (2011) 43(8) *Administration and Society* 868.

<sup>360</sup> See E. Sorensen and J. Torfing (n 359).

such as the facilitation of SME participation. Results should be disseminated to other public bodies and the Member States. If public bodies successfully adopt procedures and provisions to facilitate all forms of SMEs, the public body should be willing to share their experiences with interested stakeholders. SME participation is facilitated by the use of the open procedure, use of electronic tools and eased selection criteria. The research asks if other criteria and procedures set out in the Directive and supporting policies; namely, the use of lots, use of community benefit clauses, use of subcontractor considerations and use of PCP facilitate SME participation in public procurement. In assessing the use of the social criteria, the research will consider the OECD requirements for change, by considering what impact the public body's willingness to do something differently supported the effectiveness of the reviewed procurement procedure.

### 3.7 Conclusion

SMEs dominate the Single Market, driving innovation and generating local employment growth. However, they are unfairly represented in public markets. There are a number of common reasons for this, they lack the capacity, experience and financial ability to carry out public contracts. Onerous tendering practices limit access to competitions and large organisations out-bid SMEs at the tendering stage. Supporting SME growth and development is at the heart of Single Market policies, recognising the socio-economic importance of supporting SMEs.

European public procurement rules aim to level the playing field for SMEs. The Directive addresses the issue of inclusive qualification criteria. Contracting authorities must only include financial and economic criteria which are relevant and proportionate to the subject matter of the contract. The minimum turnover required for a contract should not normally exceed at the most twice the estimated contract value.<sup>361</sup> Furthermore, the

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<sup>361</sup> Public Sector Directive, recital 83.

Directive aims to ease the administrative burden on small business by introducing a ‘*European Single Procurement Document*’. Suppliers will have the ability to upload certificates and financial documents to this online document. Contracting authorities will be able to access supplier information from the procurement document.<sup>362</sup>

This research is interested in assessing what impact the use of social criteria in public procurement has on SME participation. The research is interested in examining the use of social criteria which has the potential to facilitate *all* forms of SMEs in public contracts, including the facilitation of social enterprises and innovative start-ups. The case studies will assess the practical impact of dividing large contracts into lots, the use of community benefit clauses, the use of subcontractor considerations and the use of PCP on SME engagement. Procurers should rethink their spending behaviours to consider including initiatives that will increase SME competition. Public procurement has the potential to invigorate SMEs as a driving force within local economies and has the potential to achieve the socio-economic goals set out in the Single Market Act at a localised level.

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<sup>362</sup> Public Sector Directive, recital 84.

## Chapter Four: Methodology

### 4.1 Introduction

The research adopts a mixed-method approach, relying on cross-national comparative case studies. A socio-legal approach allows for the research to effectively examine the impact of including social criteria in public contracts. The procurement procedures for four public contracts concluded by Irish and Northern Irish public bodies are reviewed. A primarily qualitative approach is adopted, semi-structured interviews with key public procurers and SMEs were conducted to gain a true understanding of the issues facing the inclusion of social criteria in public contracts. This chapter offers a summary of the research objectives and the research approach. An overview of how the case studies were selected, conducted and analysed is offered, with the chapter concluding by outlining the primary limitations of the research.

### 4.2 Research Design

#### 4.2.1 Research Objectives

The research examines the relationship between public procurement and SMEs. The research questions to what extent the inclusion of social criteria and innovative procedures in public procurement facilitates SME participation. SMEs are the key drivers of innovation and generators of local employment.<sup>1</sup> However, SMEs are under-represented in the public markets. SMEs are in particular locked out of large contracts, and some forms of small businesses such as social enterprises and start-ups struggle

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<sup>1</sup> D.L. Birch, *The Job Generation Process: Final Report to Economic Development Administration* (MIT Cambridge, MA Program on Neighborhood and Regional Change 1979).

to bid for low-value contracts.<sup>2</sup> The research examines what impact; the division of large contracts into smaller lots, use of community benefit clauses, use of subcontractor considerations and the use of PCP has on SME engagement. The research aims to identify the extent to which the use of social criteria and innovative procedures help to address market gaps in SMEs' access. To achieve these objectives, a cross-country case study strategy is used to form an understanding of the practical implications of the use of social criteria.

#### 4.2.2 Socio-Legal Approach

This thesis adopts a socio-legal methodology. The research employs empirical methods of analysis, such as the use of surveys and semi-structured interviews to understand the purchasing context within which public procurement law exists.<sup>3</sup> By choosing to study the effectiveness of public procurement law from a socio-legal approach, the research is required to demonstrate an understanding of the legal, social and political culture of each jurisdiction reviewed. It is not unusual for public procurement research and public procurement law research to adopt a mixed-method approach.<sup>4</sup> The research uses multiple research production and analysis approaches to understand the legal, social and political culture of the Irish and Northern Irish public procurement landscapes.<sup>5</sup>

A doctrinal approach was first used to identify; the objectives of the legislation; the permissible use of social criteria and innovative

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<sup>2</sup> K. Loader, '*SME suppliers and the challenge of public procurement: Evidence revealed by a UK government online feedback facility*' (2015) 21(2) *Journal of Purchasing and Supply Management* 103.

<sup>3</sup> Mixed methods of data gathering are common in socio-legal studies. See S. Wheeler and P.A. Thomas, '*Socio-Legal Studies*' in DJ Hayton, (ed), *Law's Future(s)* (Oxford, Hart Publishing, 2002) 217; R. Banakar and M. Travers, '*Theory and method in socio-legal research*' (Hart Pub, Portland, Or; Oxford; 2005) xiv.

<sup>4</sup> See R. Fee, A. Erridge and S. Hennigan, '*SMEs and government purchasing in Northern Ireland: problems and opportunities*' (2002) 14(5) *European Business Review* 326; K. Loader, '*SME suppliers and the challenge of public procurement: Evidence revealed by a UK government online feedback facility*' (2015) 21(2) *Journal of Purchasing and Supply Management* 103; A. Flynn and P. Davis, '*Investigating the effect of tendering capabilities on SME activity and performance in public contract competitions*' (2017) 35(4) *International Small Business Journal: Researching Entrepreneurship* 449.

<sup>5</sup> Multiple research methods were employed to deepen the researcher's knowledge of the topic. For a discussion on the suitability of this approach see; D. Watkins and M. Burton eds., '*Research methods in law*' (2nd ed., Routledge, 2017) 5.



procedures within the remit of the Directive; SME friendly provisions set out in the Directive; the relationship between SMEs and public procurement; the barriers faced by SMEs when tendering; and the SME friendly provisions of the Directive. A large-scale survey was also conducted during this period to offer an overview of the Irish public procurement landscape. Once the research identified suitable SMEs friendly provisions to review, the research was then tasked with identifying suitable case studies to review. Four individual case studies were reviewed. Semi-structured interviews were conducted with contracting authorities and with SMEs, and request for tender documents, call for competitions and excerpts from concluded contracts were reviewed.

#### 4.2.3 Case Study Approach

In recent years, there has been an increasing interest in the use of empirical research in legal scholarship.<sup>6</sup> This is especially evident in research examining the use of economic law.<sup>7</sup> A case study approach allows for the research to observe the functioning and effects of public procurement law.<sup>8</sup> There are problems associated with empirical research, such as the use of poor research techniques and relying on skewed samples to produce generalisations.<sup>9</sup> The research acknowledged these concerns and potential problems and took all necessary steps to conduct the empirical research in an informed, open, ethical and prescriptive manner. It would be difficult to assess the effect and efficacy of the use of SME friendly provisions through a doctrinal approach.<sup>10</sup>

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<sup>6</sup> M.R. Heise, 'An Empirical Analysis of Empirical Legal Scholarship Production, 1990-2009' (2011). Cornell Law Faculty Publications. Paper 700.

<sup>7</sup> R.C. Ellickson, 'Trends in Legal Scholarship: A Statistical Study' (2000) 29 *Journal of Legal Studies* 528.

<sup>8</sup> J.M. Smits, 'Law and interdisciplinarity: on the inevitable normativity of legal studies, *Critical Analysis of Law*' (2014) 1 *An International & Interdisciplinary Law Review* 84; A. Argyrou, 'Making the case for case studies in empirical legal research' (2017) 13(3) *Utrecht Law Review* 95.

<sup>9</sup> D.L. Rhode, 'Legal Scholarship' (2002) 115 *Harvard Law Review* 1327.

<sup>10</sup> C.A. Nard, 'Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession' (1995) 30 *Wake Forest Law Review* 347.

When the research methodology was being designed, a primarily quantitative mixed-method research approach was considered. This approach proposed to gather data from calls for competition and contract notices published on the OJEU, etenders.ie and on etenders.ni.<sup>11</sup> The approach would have relied on the publication of contract notices to statistically record how many SMEs were awarded contracts on the back of competitions which included social criteria. However, there were concerns regarding access to information using this approach. There are inconsistencies as to what information contracting authorities publish in calls for competitions and contract award notices. In a large number of cases, interested economic operators are required to express '*their interest*' in the contract before they can access the bidding documents.<sup>12</sup> The researcher did not wish to falsely express an interest in a contract to gain access to the information. A more ethical and structured manner would have required partnering with the OGP in Ireland and with the CPD in Northern Ireland to retrieve access to contracts advertised on the etenders sites. This approach was rejected as it was difficult to estimate the amount of work that would have been required to conduct this form of research. Additionally, this approach failed to take into account the procurers and SMEs opinions and thoughts of incorporating social criteria into procurement practices.<sup>13</sup>

When this approach was rejected, a case study strategy was explored. Yin notably remarks that case study strategies are a flexible form of study, allowing the researcher to utilise several data gathering techniques and tools. Data gathering tools available to researchers include and are not limited to; formal and semi-formal interviews, participant observation, non-participant direct observation, documentary analysis, use of surveys

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<sup>11</sup> A.J. Onwuegbuzie, R.M. Bustamante and J.A. Nelson, '*Mixed Research as a Tool for Developing Quantitative Instruments*' (2000) 4(1) *Journal of Mixed Methods Research* 56.

<sup>12</sup> This is to assist contracting authorities in gauging the interested competition in the contract and assisting the authorities in preparing for the administrative workload of evaluating submitted tenders.

<sup>13</sup> J.M. Smits (2014) (n 8) This approach may have limited the researcher's understanding and appreciation of the practical implication of the rules on SME participation.

and questionnaires, and the management of relationships with key informants.<sup>14</sup> The use of multiple data gathering tools enriches a researchers' understanding of the practical implications of the studied activity, as well as offering an insight into interviewees' perceptions and views on the studied topic. Additionally, case studies findings allow for hypothesis generation and concept building.<sup>15</sup> The researcher can use the results of a limited number of studied circumstances to develop a working hypothesis which can contribute to the replication of positive results on a broader scale.<sup>16</sup>

There is no definitive way to study the topic of public procurement law. The open-ended nature of case study data collection allowed for the research to examine the use of social criteria in considerable depth.<sup>17</sup> The key benefit of adopting a case study strategy for this thesis is its inherent flexibility to study the practical impact of public procurement law on SME participation in public markets.

Semi-formal interviews were conducted with the contracting authorities and with the awardee economic operator or operators. The findings of the case studies were applied to current and appropriate literature and are summarised in the final chapter of this thesis. This approach offered an insightful understanding of the practical constraints and opportunities faced by contracting authorities in attempting to incorporate non-economic considerations into their procurement practices.<sup>18</sup>

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<sup>14</sup> R.K. Yin, *Applications of case study research* (Beverly Hills, CA, Sage Publishing, 1993) 5.

<sup>15</sup> Concerns on the conduct of the case studies were considered throughout the research design, gathering and analysis stages. See P.B. Corcoran, K.E. Walker and A.E. Wals, *Case studies, make-your-case studies, and case stories: a critique of case-study methodology in sustainability in higher education* (2004) 10(1) *Environmental Education Research* 7.

<sup>16</sup> R. Whipp, *Qualitative methods: technique or size? Researching the world of work* (1998) *Strategies and methods in studying industrial relations* 51; K.M. Eisenhardt and M.E. Graebner, *Theory building from cases: Opportunities and challenges* (2007) 50(1) *Academy of Management Journal* 25.

<sup>17</sup> S.M. Barkan, B. Bintliff, and M. Whisner, *Fundamentals of Legal Research* University of Washington School of Law Research Paper No. 2015-09; *Fundamentals of Legal Research* (Foundation Press 10th ed. 2015).

<sup>18</sup> R. Banakar, *Having one's cake and eating it: the paradox of contextualisation in socio-legal research* (2011) 7(4) *International Journal of Law in Context* 487-503.

### 4.3 Case Study Selection

A significant amount of time was spent on deciding which countries to study, which SME friendly provisions to review and the identification of suitable public contracts. Originally, the research identified Scotland as the main case study to review. Scotland is one of the leading Member States in pursuing socially driven procurement, adopting both policies and legislation to encourage the use of social clauses in public procurement.<sup>19</sup> This is, of course, true of all the UK and is evident in the adoption of the *Public Services (Social Value) Act 2012*<sup>20</sup> and the *Modern Slavery Act 2015*.<sup>21</sup> However, a decision was made to review the use of strategic public procurement in Ireland and Northern Ireland for a number of pragmatic reasons. The researcher is based in Ireland and has strong connections with the public bodies, making it easier to access information.

Furthermore, the long-term objective of the research is to encourage Irish public bodies to use public procurement as a strategic tool to improve socio-economic policy objectives. It was more appropriate to review and compare the Irish and Northern Irish public procurement landscape from the period 2014 – 2018. During the early stages of the research, neither state had adopted socially driven public procurement policies which were comparable to the Scottish example. A more rigorous approach was to study the developing public procurement policies in Ireland and Northern Ireland during this period. Both states have similarly sized economies dominated by SMEs.<sup>22</sup> SMEs in both regions face similar administrative, financial and professional hurdles in bidding for contracts.<sup>23</sup> The

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<sup>19</sup> Scotland's *Procurement Reform (Scotland) Act 2014*; Scottish Government, *Scottish Model of Procurement* (2016); Scottish Government *The Public Procurement Reform Programme 2006-2016 Achievements and Impacts* (2016).

<sup>20</sup> *Public Services (Social Value) Act 2012*. See also Lord Young's supporting Review of the Social Value (2015).

<sup>21</sup> *Modern Slavery Act 2015*

<sup>22</sup> British Irish Governmental Strategy Study on All Island Economy 'Comprehensive study on the All-Island economy' (Intertrade Ireland, 2018) 45

<sup>23</sup> See R. Fee, A. Erridge and S. Hennigan, 'SMEs and government purchasing in Northern Ireland: problems and opportunities' (2002) 14(5) *European Business Review* 326; A. Flynn, and P. Davis, 'The policy-practice divide and SME-friendly public procurement' (2016) 34(3) *Environment and Planning C: Government and Policy* 559.

Directives were transposed closely and similarly in Ireland and Northern Ireland.

#### 4.3.1 Public Procurement Law in Ireland and Northern Ireland

The main source of public procurement law in Ireland and Northern Ireland is the EU Directives on procurement. Both countries have implemented the Directives into national law in similar manners. Both implementing instruments did not mandate for the division of contracts into lots.<sup>24</sup> Neither instrument mandated for strict subcontractor requirements, tenderers are not required to declare their proposed use of subcontractors, neither permit contracting authorities to pay subcontractors directly.<sup>25</sup> Both jurisdictions chose to implement mandatory electronic communication by the dates outlined.<sup>26</sup> Some of the key socially centred provisions are discussed in further detail below.

##### *Use of Lots*

Contracting authorities may divide larger contracts into smaller lots to foster competition in the market.<sup>27</sup> If a contracting authority does not divide an above threshold contract into smaller lots, the authority shall offer a justification of their decision not to subdivide the public contract.<sup>28</sup> The discretionary provisions were transposed in Reg 46(3) and Reg 46(4), allowing contracting authorities to limit the number of lots they may award to one tenderer.<sup>29</sup> If the contracting authority chooses to limit the number of lots one tenderer may be awarded, they must clearly state this

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<sup>24</sup> Neither state had implemented mandatory provisions or adopted soft-law mechanisms on this before, unlike France and Germany. France and Germany mandated for the division of large contracts into lots, both states had some level of experience of imposing similar rules. See the global French framework on procurement ‘*Ordonnance no 2015-899 of 23 July 2013*’ and the German ‘*Ordonnance on the award of public contracts VGV, GWB, Part 4. Acts against Restraints of Competition.*’

<sup>25</sup> Public Authority Regulations reg 71; (UK) Public Contracts Regulations reg 71.

<sup>26</sup> Both states actively promote the use of e-procurement for both above and below threshold contracts. Irish contracting authorities are encouraged to utilise the ‘*eTenders*’ national advertisement platform and Northern Irish contracting authorities are encouraged to utilise the ‘*eSourcingNI*’ and ‘*eTendersNI*’ online support platforms.

<sup>27</sup> Public Authority Regulations reg 46; (UK) Public Contracts Regulations reg 46.

<sup>28</sup> Public Authority Regulations reg 46(1); (UK) Public Contracts Regulations reg 46(1).

<sup>29</sup> Public Authority Regulations reg 46(3); (UK) Public Contracts Regulations reg 46(4).

in the contract notice or in the invitation to confirm interest.<sup>30</sup> Both the OGP in Ireland and the CPD in Northern Ireland encourage contracting authorities to use proportionate lots to encourage SME and social enterprise participation in public contracts.<sup>31</sup>

### ***Contract award criteria***

Contracting authorities can award contracts on the basis of cost, a life-cycle costing or a best price-quality ratio.<sup>32</sup> The best price-quality ratio may include qualitative, environmental or social aspects, once the criteria are linked to the subject matter of the contract. Such criteria may include social, environmental and innovative operational characteristics.<sup>33</sup> Weightings must be assigned to each criterion and should be transparently set out in the procurement documents. Qualitative criteria must not restrict competition or confer an unrestricted freedom of choice onto the contracting authority.<sup>34</sup> This includes the freedom to include community benefit clauses.

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<sup>30</sup> *McLaughlin & Harvey Ltd. v Department of Finance and Personnel* (No 2) [2008] NIQB 91 (QBD, Deeny J, 11 September 2008) (Affirmed by NI Court of Appeal, 26 September 2011 [2011] NICA 60).

<sup>31</sup> See Office of Government Procurement, ‘*National Public Procurement Framework*’ *Public Procurement Guidelines for Goods and Services*. (2019) Version 2.1; Department Accessible at this link; <https://ogp.gov.ie/national-public-procurement-policy-framework/> Last accessed 02/06/19; Department of Finance and CPD Northern Ireland *Public Procurement Policy* (2014) Version 11. Available at; <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/ni-public-procurement-policy-version-11-august-2014.pdf> Last accessed 25th April 2019.

<sup>32</sup> Public Authority Regulations regs 67 and 70; (UK) Public Contracts Regulations regs 67 and 70.

<sup>33</sup> The OGP and the CPD offer guidance on how to incorporate weighted criteria in tender competitions. See (n 31).

<sup>34</sup> *Scott and Others v. Belfast Education and Library Board* NICH D, Weatherup J, (2007); *Release Speech Therapy Ltd v Health Service Executive* [2011] IEHC 57, McMahon J; *Easycotech Limited v Department of Regional Development* (Northern Irish High Court, McCloskey J, 28 February 2012).

### *Subcontracting requirements*

Contracting authorities may ask tenderers to indicate in the tender whether the company intends to subcontract any element of the contract if it is awarded the contract.<sup>35</sup> Contracting authorities may require subcontractors to submit a separate European Single Procurement Document (ESPD) to assess the subcontractor's suitability to carry out the contract.<sup>36</sup> Tenderers may rely on the capacity of subcontractors to demonstrate compliance with the selection requirements, in circumstances where the subcontractor will perform the works or services for which its capacity is required.<sup>37</sup> Winning tenderers are required to provide details and information of all subcontractors relied on during the life of the contract.<sup>38</sup>

Contracting authorities in Ireland and Northern Ireland can pursue and incorporate both economic and non-economic criteria easily. Both states have a centralised system of public procurement and are actively promoting the facilitation of SMEs in public contracts in both above and below threshold contracts.<sup>39</sup>

### *Use of PCP*

Below threshold procurement is governed by soft-law in both jurisdictions.<sup>40</sup> There are no prescriptive rules on how to use innovative procedures. Contracting authorities can use the innovation partnership, include variants in open, restricted, competitive dialogue and negotiation with competition procedures.<sup>41</sup> However, a significant amount of

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<sup>35</sup> Public Authority Regulations reg 71; (UK) Public Contracts Regulations reg 71.

<sup>36</sup> The ESPD electronic service is freely available for suppliers via the national tender advertisement platforms.

<sup>37</sup> Public Authority Regulations reg 71; (UK) Public Contracts Regulations reg 71.

<sup>38</sup> Public Authority Regulations reg 71(3); (UK) Public Contracts Regulations reg 71(3).

<sup>39</sup> See (n 31).

<sup>40</sup> See (n 31).

<sup>41</sup> Public Authority Regulations section 3; (UK) Public Contracts Regulations section 3.

innovative procurement is being conducted for low-value spends by Smart Cities initiatives.<sup>42</sup>

The research was able to identify four public contracts which incorporated social criteria and innovative procedures into the procurement practices. The case studies provide new insights into the use of social criteria and innovative procedures in high and low-value public works, supplies and services contracts. The procurement procedures used to conclude four public contracts are reviewed. Two ‘*above-threshold*’ contracts are reviewed and two ‘*below-threshold*’ contracts are assessed. For the above threshold case studies, a construction contract for a *New Children’s Hospital* in Ireland is compared with a public service and supplies contract concluded by the *Buy Social Unit* in Northern Ireland. For the below-threshold contracts, two PCP procedures conducted by *Smart Dublin* and *Smart Belfast* are reviewed. The case studies were selected as they represent changes occurring in the Irish and Northern Irish public procurement markets, contracting authorities in both states are incorporating community benefit clauses in large contracts and using PCP practices to secure ‘*Smart City*’ objectives.

The National Children’s Hospital construction contract is currently the most expensive contract being undertaken in the State. The case study is directly compared with the large-scale services contract concluded by the Central Procurement Directorate and the Buy Social unit in Northern Ireland.<sup>43</sup> Both contracts include *community benefit clauses*, *subcontractor protection considerations*, and elements of the contracts were divided into smaller *lots*. While the subject matter of the contracts

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<sup>42</sup> Chapter 7 Smart Dublin and Chapter 8 Smart Belfast review the recent increase in the use of innovative procurement strategies in detail.

<sup>43</sup> While the Central Procurement Directorate (CPD) is now known as the ‘*Construction and Procurement Delivery*’ (CPD), the case study chapters will continue to refer to the CPD as the Central Procurement Directorate. This is the title used in all of the call for competition and contracts notices reviewed for this thesis.



was considerably different, one being a works contract and one being a services contract, the clauses are similar.<sup>44</sup>

Additionally, the Buy Social team offered assistance to the National Children's Hospital's Community Benefit Manager in designing the community benefit clauses.<sup>45</sup> Both case studies included targeted recruitment and training community benefit clauses in their contracts to encourage the employment of long-term unemployed young people or disadvantaged persons. Both procuring teams received advice on the design and implementation of the targeted recruitment and training clauses from the same social procurement consultant.<sup>46</sup> Such clauses are becoming increasingly common in Northern Ireland public contracts, whereas the use of employment-based clauses is still relatively new in Ireland.

The two low-value case studies examine the use of PCP activities used by Smart Dublin and Dublin City Council, and Smart Belfast and Belfast City Council, to achieve smart cities objectives. The Smart Dublin case study examines the PCP used for a competition to improve cycling rates in Dublin city. The Smart Belfast case study reviews a competition conducted to maximise business revenue rates in the city. While the subject matter of the contracts is significantly different, the procedures followed are comparable.<sup>47</sup>

#### 4.4 Generalising Results

The research was concerned with the validity and reliability of results produced by relying on a case study strategy.<sup>48</sup> The initial quantitative methodology approach proposed for this research would have adequately offered reliable and generalised results. By reviewing the published call

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<sup>44</sup> Both contracts included community benefit clauses and SME focussed subcontractor considerations. Elements of the contracts were sub-divided into smaller lots.

<sup>45</sup> Interview with Ingrid McElroy, Community Benefit Programme Manager, National Paediatric Hospital Development Board Fitzpatrick, Director for Project Management and Project Controls (Dublin, Ireland, 10 June 2016).

<sup>46</sup> See Interview with the Community Benefit Programme Manager (n 45).

<sup>47</sup> Request for tender documents for both contracts were reviewed for this thesis.

<sup>48</sup> See D.L. Rhode (n 9).

for competition and contract award notices, the results generated would offer a reliable representation of public procurement expenditure in Ireland and Northern Ireland. However, the case study approach could not replicate this generalisation of results. Each of the public contracts reviewed is specialised, and the contracting authorities were committed to conducting competitions which incorporated both economic and non-economic objectives. In each of the case studies, the public body demonstrated a commitment to use public procurement to achieve both social objectives and cost efficiencies. While the case study findings may not represent the views of the *majority* of public procurers, the findings can be used to improve future purchases by the case study participants or by the broader public sector.<sup>49</sup> The case study findings can help predict what actions might occur if a particular procedure is adhered to under similar market conditions. Yin explains that basis of the generalisation in case study strategies is not concerned with the typicality of the object of the study, but it is concerned with the context of particular processes, which have the ability to influence future behaviours and actions.<sup>50</sup>

This research investigated the impact of the inclusion of social criteria in public procurement on SME participation in public contracts. The findings of the four case studies are used to develop a hypothesis which predicts that under similar market conditions and public sector commitment, the use of the social criteria, namely, the use of lots, use of community benefit clauses, use of subcontractor conditions and use of PCP facilitates SME participation in both low-value and high-value public contracts. It is timely to conduct this form of research, as the purchasing objectives adopted by the four public bodies represent current changes in the public procurement landscape. The two high-value case studies incorporate community benefit clauses and subcontractor considerations, both of which are prominently promoted by national policies. The two low-value

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<sup>49</sup> As suggested by Sorensen and Torfing. See E. Sorensen and J. Torfing, 'Enhancing collaborative innovation in the public sector' (2011) 43(8) *Administration and Society* 868.

<sup>50</sup> R.K. Yin, 'Applications of case study research' (Beverly Hills, CA, Sage Publishing, 1993) 39.

Smart Cities represent growing popularity in partnering with innovative suppliers to improve public supplies and services. The findings will be useful for public bodies which are committed to utilising public procurement expenditure to achieve social goals.

#### 4.5 Doctrinal analysis

Desk-based research was conducted throughout the research approach. The purpose of this approach was to identify, analyse and synthesise the content of public procurement law governing the purchases of public works, supplies and services contracts.<sup>51</sup> The research concentrated on gathering data from current European and national case law, relevant literature on the objectives and purposes of the legislation, European Commission assessment reports and national policy documents. The research gathered formed an underlying framework for field-based research activities. Shortly after the research commenced, the European Directives on public procurement were revised.<sup>52</sup> One of the major revisions of the rules was the focus it placed on SME participation in public markets.<sup>53</sup> It was essential that the research identified, critiqued and analysed the SME friendly provisions contained in the rules. To this end, the research relied heavily on literature published from 2014 onwards.<sup>54</sup>

This research focussed disproportionately on CJEU case law over domestic case law for a number of reasons. Case law shaping our understanding of the permissible use of non-economic criteria is primarily adopted by the CJEU,<sup>55</sup> with domestic case law focussing on procedural

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<sup>51</sup> T. Hutchinson and N. Duncan, 'Defining and describing what we do: doctrinal legal research' (2012) 17(1) Deakin Law Review 83.

<sup>52</sup> Directive 2014/23/EU; Directive 2014/24/EU; Directive 2014/25/EU.

<sup>53</sup> See Commission, 'Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market' COM (2011) 15/47.

<sup>54</sup> However, older research on; the purpose and changing objectives of the legislation; the normative use of socially driven procurement and PCP; suitable legal methodologies; and the economic importance of SMEs; were a vital resource to this research.

<sup>55</sup> Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands*, [1988] ECR 4635; Case C-243/89 *Commission v Denmark ("Storebaelt")* [1993] ECR I-3353, para 33; Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, para 54; Case C-225/98 *Commission v France ("Nord-pas-de-Calais")* [2000] ECR I-7445; Case C-513/99 *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne ("Concordia Buses")* [2002] ECR I-7213; Case C-448/01, *EVN AG and Wienstrom GmbH v Austria ("EVN")* [2003] ECR I-14527.

tendering issues, such as the acceptance of late tenders, abnormally low tenders, award and selection criteria.<sup>56</sup> The majority of these judgments improve our understanding of the provisions of the Directives and clarify contracting authorities' responsibilities in upholding the principles of non-discrimination, proportionality, equal treatment and transparency. These clarifications will ultimately improve contracting authorities' compliance with the rules, thus encouraging a competitive public market. However, the majority of the case law does not directly answer the research question asked. There is a limited number of public procurement judgments in Ireland compared with Northern Ireland. While the number of cases has been steadily increasing since 2009,<sup>57</sup> the judgments do not significantly shape our understanding of the use of social criteria.

## 4.6 In the Field

### 4.6.1 Surveys

While the research used surveys to gauge the Irish public procurement landscape, these results are not used to answer the research question. The survey findings were relied on to assist in the identification of the legal measures used in the case study investigations. One of the key benefits of using large scale surveys is their abilities to generalise data findings.<sup>58</sup>

Two large-scale surveys were conducted in partnership with Dublin City University (DCU) Business School, the National Procurement Service (NPS) and the OGP from 2014 - 2015.<sup>59</sup> The survey was distributed using

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<sup>56</sup> See; *Scott and Others v. Belfast Education and Library Board* NICH D, Weatherup J, (2007);

*McLaughlin & Harvey Ltd. v Department of Finance and Personnel (No 2)* [2008] NIQB 91 (QBD, Deeny J, 11 September 2008) (Affirmed by NI Court of Appeal, 26 September 2011 [2011] NICA 60);

*Resource (NI) Limited v Northern Ireland Courts and Tribunal Service* [2011] NIQB 121;

*Easycoach Limited v Department of Regional Development* (Northern Irish High Court, McCloskey J, 28 February 2012);

*RPS Consulting Engineers Limited v Kildare County Council* [2016] IEHC 113;

*Sanofi Pasteur v Health Service Executive* [2018] IEHC 566;

*Word Perfect Translation Services Limited v The Minister for Public Expenditure and Reform (No.3)* [2018] IECA 156.

<sup>57</sup> Since the implementation of Directive 2007/66/EC ('Remedies Directive').

<sup>58</sup> D. De Vaus, 'Surveys in social research.' (Routledge, 2013).

<sup>59</sup> The findings of the survey were openly shared with the INTERREG 4A research team in DCU. There were many objectives of the survey including; to baseline current

Survey Monkey to approximately 70,000 suppliers and 4,000 public sector procurers registered on [www.etenders.gov.ie](http://www.etenders.gov.ie). Responses were gathered over a four-week period, during this time, registered users were contacted on two separate occasions. The 2014 survey was conducted over one month, from 9<sup>th</sup> December 2013 to 7<sup>th</sup> January 2014. 5897 suppliers and 338 public purchasers responded to the survey. While the 2015 survey questions mirror the questions included in the 2014 survey, the survey was conducted over a significantly longer period of time. The 2015 survey was conducted from 1<sup>st</sup> December 2014 to 23<sup>rd</sup> February 2015. 4747 suppliers and 552 public purchasers responded to the survey.

As this research commenced in January 2014, the 2014 survey results were used to identify a suitable research methodology. The 2015 survey results did not have a direct impact on the identification of which SME measures should be studied in the case studies. The 2015 survey was used as a controlling survey to identify any outliers and anomalies in the early survey. The survey questions are listed in Appendices E and F. The 2014 supplier survey included 37 questions, and the procurer survey included 35 questions.<sup>60</sup> The public procurer survey included questions asking procurers; to indicate their average tendering practices; to indicate any problems they face when tendering; what the normal tendering procedures are used by the public body; and what measures does the public body take to facilitate SME participation in public contracts. The supplier survey asked registered suppliers to indicate; their company size; experience in

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practices in public procurement from both a buyer and supplier point of view; to profile the individuals involved in tendering for public sector business and the firms in which they are employed; to profile public procurers and the public sector organisations in which they are employed; to establish the activities that make up the role of public procurers and the role of tenderers; to gauge the level of interaction and engagement between public procurers and suppliers; to establish the means through which public procurers advertise their contracts as well as the evaluation procedures used for the award of contracts; to identify how suppliers source public sector contracts and to examine the typical contract value they aim to win; to assess the implementation of Department of Finance Circular 10/2010 guidelines aimed at facilitating SME access to public procurement; to determine the key motivators for suppliers attempting to win public sector contracts and the factors that impede them in doing so; and to scrutinise the impact of EU Directives on public procurement practice in Ireland from both a supplier and a buyer perspective.

<sup>60</sup> Some survey questions were common to both groups, and some survey questions were particular to either procurers or suppliers.

tendering for public contracts; the problems facing suppliers when bidding for public contracts; and the measures used to support suppliers in bidding for public contracts.<sup>61</sup> The percentage completion rate for suppliers was 75% and for public procurers 68%. Survey data is stored by DCU Business School and will be destroyed in compliance with the University's internal data management rules.

#### 4.6.2 Semi-structured interviews

18 semi-structured interviews were conducted with contracting authorities, policy advisors and SMEs.<sup>62</sup> Each interview lasted between one to two hours and was conducted in person or by phone.<sup>63</sup> There were a number of objectives to carrying out the research interviews including; to gain an insight into the regular procurement procedures of a contracting authority; to understand why and how public procurers include social criteria in public contracts; and to understand what impact the inclusion of social criteria has on SME participation.

Several research questions were prepared in advance and emailed to the interviewees prior to the interview.<sup>64</sup> However, as the interviews were conducted in a semi-structured manner, it was difficult to predict how an interviewee was going to respond. The researcher was required to improvise during the interviews to ask relevant and appropriate follow-up

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<sup>61</sup> The following key books and journal articles were consulted prior to the design of the survey method and questions. See; D.A. Dillman, *Mail and telephone surveys: The total design method* (New York: Wiley. Volume 19, 1987); F.J. Fowler, *Improving survey questions: Design and evaluation* (Sage, 1995) 38; S.E. Gaddis, *How to design online surveys* (1998) 52(6) *Training & Development* 67; J.R. Evans and A. Mathur, *The value of online surveys* (2005) 15(2) *Internet research* 195; V.M. Sue and L.A. Ritter, *Conducting online surveys* (Sage, 2012).

<sup>62</sup> Appendix D lists the names of all of the interviewees.

<sup>63</sup> Site interviews were mainly carried out with the public procurers and phone interviews were conducted with suppliers.

<sup>64</sup> A mix of open and closed questions were used to gauge a deep understanding of the interviewees tendering actions and motivations. The following key book was consulted prior to the design of the interview questions. See; N.M. Bradburn, S. Sudman, E. Blair, W. Locander, C. Miles, E. Singer and C. Stocking, *Improving interview method and questionnaire design: Response effects to threatening questions in survey research* (San Francisco: Jossey-Bass; 1979) A copy of the interview questions is listed in Appendices B and C.

questions. The fluidity of this approach allowed the researcher to gain an insight into the operational elements and constraints of the reviewed procurement competitions. A list of the interviewee questions is listed in Appendix B and C.

For three out of the four case studies, the researcher had access to the call for competition documents for the reviewed contract prior to the interviews.<sup>65</sup> However, the award of the National Children's Hospital's construction contract was delayed, and the first research interview took place without reviewing the contract documents. Follow up interviews took place after the researcher received information on the concluded contracts. Interviews with SMEs took place after work commenced on the project.<sup>66</sup> SMEs were interviewed on their tendering experience and on their overall experience of working on the public contract. Unfortunately, the interviewee did not have access to interview the unsuccessful tenderers.

The semi-formal interviews yielded the most insightful information, helping the researcher to understand the important role trained and dedicated public sector employees play in implementing change in the public sector. One of the research findings acknowledges the important role *people* play in implementing strategic public procurement.<sup>67</sup> The interviewees detailed how they achieved changes to procurement practices during a time where public money was constrained, and there was a growing requirement to use standardised procurement documents and contracts or to purchase from centralised framework agreements.

#### 4.6.3 Field Notes and Sequential Analysis

Becker and Geer's '*sequential analysis*' calls for researchers to conduct preliminary analysis during the research gathering stages to develop

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<sup>65</sup> This information is freely available on national advertising platforms.

<sup>66</sup> The research waited until any challenges were presented and dealt with by the public bodies. To assess the practical implications of subcontractor considerations, it was appropriate to let the contract commence before interviewing the winning bidders.

<sup>67</sup> This finding is discussed in detail in *Chapter 9: Conclusions and Discussions*.

working hypotheses.<sup>68</sup> The continuous checking of data against the researcher's interpretation of the results deepens and broadens the researcher's understanding of the studied topic. The data gathered was analysed throughout the doctoral studies. The survey findings were analysed before the case studies were selected. The findings were used to identify which SME measures should be studied in the case studies. Additionally, follow-up semi-structured interviews were carried out post reflection of provisional case study findings. The follow-up interviews were required not only to follow up on the contract performance, but the interviews provided the researcher with the opportunity to ask questions that were missed, misunderstood or misinterpreted during the first round of interviews.

#### 4.7 Reflexivity

Alongside the sequential analysis of the data, the researcher was required to reflex on her own perspectives, assumptions and key choices.<sup>69</sup> To prevent subjectivity skewing the framing of the research questions and data collection, the researcher followed the ethical procedures set out by Maynooth University's ethical protocols. Data collection tools were continuously reviewed to remove any bias in the research questions.<sup>70</sup> Ethical protocols and consent information is listed in Appendix G.

#### 4.8 Analysis

##### 4.8.1 Qualitative

Interviews were either recorded on a digital audio recorder or notes were taken for review, depending on the preference of the interviewee. Permission was sought from the procuring officers to include their name

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<sup>68</sup> HS Becker and B. Geer, '*Participant observation: the analysis of qualitative field data.* In: Burgess RG, editor. *Field research: a sourcebook and field manual.*' (London: Allen and Unwin; 1982).

<sup>69</sup> See R. Whipp, '*Qualitative methods: technique or size?*' (1998) *Researching the world of work: Strategies and methods in studying industrial relations* 51.

<sup>70</sup> As suggested by R. Whipp. See (n 69).



and their organisation name in the thesis and research dissemination publications, such as academic journal articles, presentations and teaching case studies. However, permission was not sought to include transcripts in the thesis itself. Commercially sensitive information was discussed in each of the semi-structured interviews.<sup>71</sup> The survey responses were stored on Survey Monkey and analysed using Microsoft Excel. As the survey was conducted in partnership with DCU and the Office of Government Procurement (OGP), the researcher did not retain ownership of the data, nor was the researcher responsible for storing the data. The data is retained and managed by DCU and the OGP.

#### 4.9 Limitations and Exclusions of the study

##### 4.9.1 Exclusion of Services of General Economic Interest

This research focuses on assessing the impact of the inclusion of social criteria in public contracts as defined by the Directive. A public contract exists when a pecuniary interest is concluded in writing between one or more suppliers with one or more public bodies.<sup>72</sup> The Directive sets out provisions on how contracting authorities and entities may purchase works, supplies and services contracts. The scope of the definition of works contracts extends to building and civil engineering contracts, supplies contracts extend to contracts for the purchase of supplies and services contracts extend to contracts for advertising, property management, cleaning, management consultancy, financial and ICT related services.<sup>73</sup> This research is not concerned with the *Services of General Economic Interest* (SGEI) or hybrid-forms of SGEIs.<sup>74</sup> SGEIs are services required by the State which the private sector does not fully provide, such as social housing or healthcare provisions.<sup>75</sup> Such forms of

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<sup>71</sup> Confidential information discussed included procurers marking schemes, suppliers tendered costs, information around suppliers' products and services developments.

<sup>72</sup> Public Sector Directive, art 2(1).

<sup>73</sup> Public Sector Directive, art 2(1). This is not an exhaustive list.

<sup>74</sup> See Commission, '*A Quality Framework for Services of General Interest in Europe*' (Communication) COM (2011) 900 final.

<sup>75</sup> See also, Commission, '*Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest*,

contracts may fall outside the remit of the Directive. This research is interested in the facilitation of SMEs in public services, supplies or works contracts which are governed by the procurement rules. PCP contracts generally fall outside the remit of the rules; however, a full tender competition may follow the completion of the PCP stage.

#### 4.9.2 State aid

Similarly, the research does not extend its discussion to review State Aid. A 2016 press release from the Commission helps us understand the sometimes-blurred lines between public procurement and state aid. The statement concluded: *'If public authorities buy goods or services through tenders, which respect EU rules on public procurement, this is in principle sufficient to ensure that the transaction is free of State Aid.'*<sup>76</sup> The National Children's Hospital and the Buy Social case studies fully applied and complied with the applicable implementing rules on public procurement. The two low-value case studies were not required to follow the applicable implementing rules on public procurement.<sup>77</sup>

However, the authorities procured the services on the back of competitive tender procedures which respected the fundamental principles of transparency, equal treatment, non-discrimination and proportionality. It can, therefore, be concluded that the contracts reviewed were free of State Aid.<sup>78</sup> The primary objective of State Aid rules is to prevent protectionism; the contracts reviewed generated cross-border trade.<sup>79</sup> The contracts reviewed were not set-aside for SMEs and measures included in the contracts did not favour locally based companies. The Smart Cities case studies explicitly state they were not engaging with State Aid activities. In the most simplistic terms, the competitions did not constitute

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*and in particular to social services of general interest.'* (Staff Working Paper) SWD (2013) 53 final/2.

<sup>76</sup> See Commission. 'State aid: Commission clarifies scope of EU State aid rules to facilitate public investment' (Press Release) 19 May 2016. Available at; [http://europa.eu/rapid/press-release\\_IP-16-1782\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1782_en.htm) Last accessed 27th May 2019.

<sup>77</sup> The contracts had an estimated value which fall far below the EU advertising thresholds.

<sup>78</sup> See Commission (2016) (n 76).

<sup>79</sup> See Commission, 'Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union' (2016) OJ C 262.

as State Aid as the contracting authorities bought the services at market prices, the competitions were conducted openly, and importantly the contracting authorities do not enjoy exclusive use of the developed products and services.<sup>80</sup>

#### 4.9.3 Sheltered Workshops

Originally, the research had considered reviewing the use of sheltered workshops alongside the use of community benefit clauses, lots, subcontractor protection considerations and PCP procedures. The research accepts that Article 20 of the Directive is an important tool for assisting social enterprises in accessing public contracts.<sup>81</sup> The article permits contracting authorities to reserve certain public contracts for certain sheltered workshops and economic operators. Contracting authorities may reserve the right to participate in a public contract competition to sheltered workshops and economic operators whose primary operating purpose is the integration of disabled or disadvantaged persons. Alternatively, contracting authorities may provide for such contracts to be performed in the context of sheltered employment programmes, where at least 30% of the employees of the workshop or economic operator are disabled or disadvantaged workers.<sup>82</sup>

Permissible operators must fulfil the following conditions; its objective is the pursuit of a public service mission linked to the delivery of the services; its profits are reinvested to achieve the organisation's objectives; the ownership or management structure are based on employee ownership or participatory principles or require the active participation of employees or stakeholders; the organisation has not been awarded a services

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<sup>80</sup> This was made explicitly clear in Smart Belfast call for competition notice. (T107 SBRI FAQ) This will be discussed further in Chapter 8 Smart Belfast.

<sup>81</sup> Public Sector Directive, art 20 allows contracting authorities to set-aside certain contracts for sheltered workshops or economic operators which aim to promote the long-term employment of disabled and disadvantaged persons. See also; Case C-70/95 Sodemare [1997] ECR I-03395; Case C-113/13 *Spezzino* [2014] pub. electr. EU:2014:2440.

<sup>82</sup> Public Sector Directive, art 20.

contracted by the contracting authority pursuant to the Directive within the last three years.

A fifth case study on the use of reserving contracts was carried out but was eventually removed from the thesis as there was little comparative material to use to assess the findings. The case study explored a procurement procedure used to procure a catering and café management contract for a new law building in the National University of Galway (NUIG). The building was funded by philanthropic means and is used to host community-driven institutes and disability law courses.<sup>83</sup> Two interviews were conducted with one public sector employee and managing director of the awardee company for this case study. The purpose of the interview with the public sector employee was to discuss how the tendering procedure was chosen and managed.<sup>84</sup> The interviewee noted that the procuring team and staff of the building collectively analysed three different procurement options.<sup>85</sup> Firstly, the team considered procuring a commercially driven contract. However, they dismissed this idea on the grounds that it did not meet the ethos of the building. Secondly, the team considered procuring the services of an existing catering company on campus and asking the company to ensure that 50% of their employees were classified as persons with disabilities, this approach was overly complicated and appeared in conflict with procurement rules. Thirdly, the team considered and adopted an approach to set the contract aside for a sheltered workshop. A social enterprise was awarded the contract after a competitive procedure and managed the contract until summer 2018. It appears that the approach of setting the contract aside was beneficial and acceptable for the team, the team recently commenced a new competition for another sheltered workshop. A team member who

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<sup>83</sup> This information was obtained in an interview with Charlotte May-Simera, Researcher in NUI Galway (By phone, 8<sup>th</sup> August 2016).

<sup>84</sup> Interview with Charlotte May-Simera. See (n 83).

<sup>85</sup> Interview with Charlotte May-Simera. See (n 83).

was involved in the decision to set aside the contract was interviewed as part of the thesis research in August 2016.<sup>86</sup> The interviewee stated;

*the café has had a massive impact. It has changed the feeling of the building; it is the heart of the building, people of the café are part of the community.*<sup>87</sup>

Since the research for the thesis was gathered, there has been further use of set-aside contracts in Ireland. The Irish Prison Service (IPS) has appointed a ‘*Social Enterprise Manager*’, and the IPS is currently conducting market soundings for the use of a set-aside contract.<sup>88</sup> This is undoubtedly an important development and will be researched fully outside of this thesis. However, the research relies on this brief case study to put forward the argument that social enterprise participation is encouraged through the use of Article 20 of the Directive.

#### 4.10 Conclusion

The research benefitted from adopting a mixed-method socio-legal approach. The survey findings shaped the direction and selection of the case study choices. The case studies offered valuable insights into the practical implications of pursuing socially-driven and innovative procurement procedures in both above and below threshold contracts. The data gathered was used to develop the working hypothesis; the research concludes that the use of lots, use of community benefit clauses, use of subcontractor considerations and the use of PCP facilitates SME participation.

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<sup>86</sup> Interview with Michael Smyth, Managing Director of the awardee company ‘*Saol Café*’ (By phone, 11<sup>th</sup> August 2016).

<sup>87</sup> Interview with Michael Smyth. See (n 86).

<sup>88</sup> Interview with Siobhan Cafferty, Social Enterprise Project Manager, Irish Prison Service (By phone 19<sup>th</sup> December 2018).



## Chapter Five National Children’s Hospital Case Study

### 5.1 Introduction

This case study examines the €1.7 billion works contract for the construction of the New Children’s Hospital in Dublin 8.<sup>1</sup> The hospital has yet to be named and will hereinafter be referred to as the ‘NCH’.<sup>2</sup> Three forms of social criteria were contained in the request for tender documentation and replicated in the contract performance clauses. The purpose of this case study is to scrutinise the impact the criteria has on SME engagement, namely the impact of the division of the contract into smaller lots, the use of community benefit clauses and subcontractor protection criteria. To understand the rationale for the development of the socially conscious procurement procedure, the chapter opens with a discussion on the development of the favourable climate for societal change. Economic recovery and construction sector growth in contrast with prolonged poverty levels in the hospital locality and the outstanding need to provide a contemporary national paediatric hospital created a favourable environment for the adoption of socially responsible procurement practices.<sup>3</sup> The chapter continues by reviewing the individual criteria included in the tender documents and assesses the impact they are having on SME participation at different stages of the procurement cycle. In summary, the use of subcontractor voluntary considerations is having a direct and verifiable impact on SME participation in the supply-chain. In

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<sup>1</sup> This estimate was accurate as of 27th June 2019. See J. Bray, ‘*Children’s hospital costs to have ‘real implications’ for health service for years to come. Inside Politics: We could find ourselves in a position where we might need to borrow billions.*’ The Irish Times. 27<sup>th</sup> June 2019.

<sup>2</sup> See O. Kelly, ‘*New children’s hospital faces legal action over ‘Phoenix’ name Arizona hospital warns Dublin hospital not to leverage ‘our name and goodwill’*’ The Irish Times 6<sup>th</sup> December 2017.

<sup>3</sup> During the financial crisis, contracting authorities resorted to purchasing on the basis of cost-efficient criteria. See R. Hyman, ‘*Social dialogue and industrial relations during the economic crisis: Innovative practices or business as usual?*’ (Geneva: ILO, 2010); B.G. Peters, J. Pierre and T. Randma-Liiv, ‘*Global financial crisis, public administration and governance: Do new problems require new solutions?*’ (2011) 11(1) Public Organization Review 13.

contrast, the community benefit clause and use of lots did not create a pathway for the facilitation of small business participation in the works contract. The concluding section of the chapter offers an analysis of the verifiable research findings.

## 5.2 Background to the design of socially conscious public procurement contracts

Original political intentions to build a national paediatric hospital can be traced back to the late 1980s as plans to modernise the ageing national Temple Street Children’s hospital failed to come into fruition.<sup>4</sup> In 1999, plans to construct a €300 million hospital on the grounds of the Mater Misericordiae University Hospital in Dublin were introduced.<sup>5</sup> Forward onto 2006, no construction contracts for the hospital had been concluded, and a new National Paediatric Hospital Development Board (NPHDB) was established with the responsibility of amalgamating the three existing children’s hospitals into one national hospital of expertise.<sup>6</sup> Initial public contracts for the design of the hospital were awarded with a plan to complete the construction of the hospital in 2012. However, planning permission for the hospital was refused in February 2012 and plans were once more delayed.<sup>7</sup> Post completion of expert reviews, it was decided that the new hospital would be located on the St. James’s hospital site in Dublin 8. The reasoning for co-locating the new Children’s Hospital with St. James’s Hospital was based on the findings of leading independent reports.<sup>8</sup>

The ‘*National Model of Care 2015*’ called for the building of a new national children’s hospital to effectively deal with the contemporary

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<sup>4</sup> Seanad Deb. 4<sup>th</sup> October 1988. *Adjournment Matter. Temple Street Hospital, Dublin.*

<sup>5</sup> See Phibsborough *Local Area Plan Key Site Framework Strategy* (2015) Chapter 6. p. 62.

<sup>6</sup> See more on the Board’s membership and functions here; <https://health.gov.ie/national-paediatric-hospital-development-board/> Last accessed 9<sup>th</sup> March 2019.

<sup>7</sup> For detailed reasons as to why planning permission was denied see; P. Melia, ‘*Height was the main reason that planners refused permission for the proposed National Children’s Hospital in Dublin: National*’ (Independent News & Media, Dublin, 2012)

<sup>8</sup> See the Bristol Inquiry into paediatric cardiac surgery in the UK 2001; Scottish review of paediatric services 2004; the McKinsey Report, “*Children’s Health First*” (2006); The Mollis (Queensland) Review 2006; Independent Review Group established by the Minister for Health 2011 and Dolphin Review Group 2012.



paediatric health care needs which are not currently being met by the current three separate paediatric services offered in Dublin.<sup>9</sup> The new hospital will amalgamate the three current paediatric hospitals on one single campus on St. James's Hospital grounds. The Children's Hospital Group (CHG) and the NPHDB will monitor and oversee the merging of the three hospitals into one singular unit. Additionally, the hospital will operate in conjunction with two satellite centres at Tallaght Hospital and Connolly Hospital in Blanchardstown. The two satellite centres will operate as urgent care units where consultancy-led emergency care will be provided.<sup>10</sup>

While the hospital is located in the centre of medical excellence in Ireland, it is important to understand the socio-economic reality of the location. The hospital is located in Dublin 8 which comprises of; Dolphin's Barn, Inchicore, Islandbridge, Kilmainham, Merchants Quay, Portobello, South Circular Road, the Phoenix Parks and the Liberties. These areas experience high levels of crime, drug use and unemployment. The construction and operation of the hospital have the potential to transform the area by improving employment rates, thus reducing the number of people living in poverty.<sup>11</sup>

These regions fall within two Garda districts, the North Central DMR and the South Central DMR. The Garda Recorded Crime Statistics 2010-2014 indicate that two districts experience some of the highest recorded controlled drug offences, and theft and burglary offences in the State. The North Central DMR has the highest level of controlled drug offences in the country.<sup>12</sup> The two divisions experience the highest levels of recorded

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<sup>9</sup> See *National Model of Care* (2015). <https://www.hse.ie/eng/about/who/cspd/ncps/paediatrics-neonatology/moc/> Last accessed 11<sup>th</sup> March 2019.

<sup>10</sup> See the *National Children's Hospital's Clinical Vision* (2015); <http://www.newchildrenshospital.ie/clinical-vision/delivering-the-right-care-in-the-right-place-at-the-right-time-by-the-right-staff/> Last accessed 11<sup>th</sup> March 2019.

<sup>11</sup> See NCH '*Harnessing the Potential – Report*' (2015). <http://www.newchildrenshospital.ie/wp-content/uploads/2016/08/20151029-Community-Benefit-Study-issued.pdf> Last accessed 11<sup>th</sup> March 2019.

<sup>12</sup> The following figures were obtained from the Garda Recorded Crime Statistics (2018).

theft and related offences<sup>13</sup> and the highest levels of recorded attempts or threats to murder, assaults, harassment and related offences.<sup>14</sup>

These findings have been confirmed by studies conducted by independent institutions, public bodies and academic studies. The 2015 CSO ‘*Survey on Income and Living Conditions*’ noted that the consistent poverty rate for the entire Dublin region was 7.4%.<sup>15</sup> The Dublin Dashboard collates data from Dublin City Council (DCC), Dublinlinked, Central Statistics Office (CSO), Eurostat and public-sector bodies. It was developed by the Programmable City Project and the All-Island Research Observatory (AIRO) at Maynooth University and is managed in partnership with DCC. Recent Dashboard data indicates that there has been a recorded increase across the Dublin area in the following offences; theft and related offences, public order and other social code offences, burglary and related offences, and sexual offences.<sup>16</sup> Drug-use is also a prevalent problem for the city. A 12-month prospective study conducted by the Dublin ambulance services examined the number and location of opioid overdose (‘OD’) incidents among drug users in the city. The research studied the relationship between OD incidents with urban deprivation and the presence of addiction services. The study found that within one year there

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<sup>13</sup> The recorded figure for the South Central DMR was 9390 and the North Central DMR was 7651. See Garda Recorded Crime Statistics (n 12)

<sup>14</sup> The recorded figure for the South Central (SC) DMR was 932 and the North Central (NC) DMR was 797.

Additionally, the two areas experience some of the highest rates in; ‘robbery, extortion and hijacking offences’. (SC DMR; 395 / NC DMR; 342)

‘burglary and related offences’ (SC DMR; 1766 / NC DMR; 1112)

‘fraud, deception and related offences’ (SC DMR; 505 / NC DMR; 368)

‘weapons and explosive offences’ (SC DMR; 225 / NC DMR; 214)

‘damage to property and to the environment’ (SC DMR; 1433 / NC DMR; 1521)

The two areas experience the highest levels of;

‘public order and other social code offences’ (SC DMR; 2956 / NC DMR; 1803)

‘offences against the government, justice procedures and organisations of crime’ (SC DMR; 159 / NC DMR; 3231)

See Garda Recorded Crime Statistics (n 12).

<sup>15</sup> See CSO ‘*Survey on Income and Living Conditions (SILC)*’ Statistical Release (2018). <https://www.cso.ie/en/releasesandpublications/er/silc/surveyonincomeandlivingconditions2015/> Last accessed 17<sup>th</sup> March 2019.

<sup>16</sup> See Dublin Dashboard and AIRO *Recorded Crime Monitoring Tool* (2016). [http://www.dublindashboard.ie/pages/DublinMapped\\_1](http://www.dublindashboard.ie/pages/DublinMapped_1) Last accessed 17<sup>th</sup> March 2019.

were 469 overdoses, the majority of which (86%) were concentrated in the city centre.<sup>17</sup>

The tendered value of the hospital construction contract was €1 billion. This figure has risen to €1.7 billion, making it the most expensive public contract in Ireland.<sup>18</sup> It is therefore imperative that there is a clear trickle-down and significant impact of the spend in this area.<sup>19</sup> The areas surrounding the hospital have been let down by successive political promises of social support. In 2017, the International Federation for Human Rights (FIDH) lodged a complaint to the European Committee of Social Rights requesting the Committee to find that Ireland was not in conformity with Articles 11,<sup>20</sup> 16,<sup>21</sup> 17<sup>22</sup> and 30<sup>23</sup> alone or in conjunction with Article E<sup>24</sup> of the revised European Social Charter. The FIDH alleged that the State has failed to incorporate these provisions within the national housing legal, policy and administrative framework. It was argued that some local authorities violated the provisions in terms of the adequacy, habitability and suitability of allocated social housing.

Furthermore, the FIDH argued that the regeneration programmes of the social housing estates violate the housing rights set out in the Charter. The Committee declared the complaint admissible on the 17<sup>th</sup> March 2015, and it is currently under examination. The FIDH logged the complaint on behalf of 130,000 residents living in 20 run-down housing complexes in inner-city Dublin and Limerick.<sup>25</sup> The residents complained of

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<sup>17</sup> J. Klimas, M. O'Reilly, M. Egan, H. Tobin and G. Bury, 'Urban overdose hotspots: a 12-month prospective study in Dublin ambulance services' (2014) 32(10) American Journal of Emergency Medicine 1168.

<sup>18</sup> The current estimate cost of the construction contract is €1.7 billion. See J. Bray (n 1).

<sup>19</sup> In terms of employment growth and wider economic stability.

<sup>20</sup> European Social Charter, article 11-1 *The right to protection of health*.

<sup>21</sup> European Social Charter, article 16 *The right of the family to social, legal and economic protection*.

<sup>22</sup> European Social Charter, article 17 *The right of children and young persons to social, legal and economic protection*.

<sup>23</sup> European Social Charter, article 30 *The right to protection against poverty and social exclusion*.

<sup>24</sup> European Social Charter article E *Non-discrimination*.

<sup>25</sup> See; European Committee of Social Rights, *International Federation for Human Rights (FIDH) v. Ireland* Complaint No. 110/2014. Decision of admissibility 17<sup>th</sup> March 2015.

experiencing sewage problems, persistent leaks, harmful damp and mould. Some of the residents live in close proximity to the New Hospital, including residents from Dolphin's House and St. Theresa's Gardens.<sup>26</sup>

DCC adopted a Regeneration Plan for Dolphin's House in August 2014; however, due to the budget deficits, the plan was only approved by the then Minister for Housing Simon Coveney in July 2016.<sup>27</sup> The €16mn regeneration plan involves the development of 72 flats and the reconfiguration of three existing blocks to make 63 larger apartments. Work has commenced and is ongoing. Dolphin House and Park will remain to be Dublin's largest public housing flat complex. The most recent figures estimate that 853 people live in the complex are characterised as being '*highly disadvantaged*'.<sup>28</sup> It is estimated that 36% of the children living in the area do not progress beyond primary school; the national figure is 11%. There are high levels of youth unemployment, drug use and anti-social behaviour in the area. However, there are no independent statistics made available to reinforce these beliefs.<sup>29</sup>

On a more positive note, there is a vibrant, supportive community, who are unwavering in their attempts to fight for the survival and regeneration of the flats and houses. The Dolphin House Community Development Association advocates for the improvement of the sub-standard housing and co-ordinates a number of community development services. The services include the Dolphin Community Employment Scheme,<sup>30</sup> the Health Project Community Worker,<sup>31</sup> Management of the Community

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<sup>26</sup> See (n 25).

<sup>27</sup> See O. Kelly, '*€26m regeneration of 100 homes at Dolphin House complex is completed dilapidated. 1950s Dublin estate had persistent damp, mould and sewage problem*' The Irish Times (16<sup>th</sup> November 2018).

<sup>28</sup> See St. Theresa's Gardens Regeneration Board, '*Strategic Plan 2018 – 2021*' (August 2018); See also; A. Dermody, C. Gardner, M. Quigley and P. Isard, '*The People Make the Place, A Research Report to Inform the Social Regeneration of Dolphin House Estate*' (2014).

<sup>29</sup> See Dublin City Council, '*St. Teresa's Gardens Regeneration Programme update*' (2015). See also (n 28).

<sup>30</sup> For further information see; <https://www.dolphinhouse.ie/cep/> Last accessed 17<sup>th</sup> June 2019.

<sup>31</sup> See; <https://www.dolphinhouse.ie/healthinitiative/> Last accessed 17<sup>th</sup> June 2019.

Centre,<sup>32</sup> Computer and IT Training,<sup>33</sup> and Community and Family Activities.<sup>34</sup>

The area is also home to a diverse number of micro-enterprises, social enterprises and charities, some of whom are very welcoming of the addition of the hospital to the area. Aoife Carragher, owner of Reilly's Pharmacy, Thomas Street, Dublin 8 stated;

*...as a business owner and resident of Dublin 8, I'm a huge supporter of the development of the new children's hospital on a shared campus with St James's Hospital. Dublin 8 is a wonderful area to work and live in, but it would benefit enormously from this kind of investment. I have no doubt that a development of this scale would result in a much-needed regeneration for the wider community.*<sup>35</sup>

The largest construction contract is taking place in the heart of a deprived area of Dublin, and it is essential for this research to understand and trace the economic and social impact this expenditure will have on the local area. This is recognised by all stakeholders in the area. Kerrill Thornhill, managing director of MedicaLeGuides in the Liberties' Digital Hub further noted that;

*The new children's hospital is the most significant capital investment project ever undertaken in healthcare in Ireland and businesses in Dublin 8 stand to gain a lot from the fact that it is being developed in our community. We are very cognisant of the potential for the development of a 'technology corridor' in close proximity to a major healthcare campus.*<sup>36</sup>

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<sup>32</sup> See; <https://www.dolphinhouse.ie/dhcda/> Last accessed 17<sup>th</sup> June 2019.

<sup>33</sup> See; <https://www.dolphinhouse.ie/digitalproject/> Last accessed 17<sup>th</sup> June 2019.

<sup>34</sup> See; <https://www.dolphinhouse.ie/familysupport/> Last accessed 17<sup>th</sup> June 2019.

<sup>35</sup> Testimonial from Aoife Carragher, owner of Reilly's Pharmacy, Thomas Street, Dublin 8. Cited on the National Children's Hospital website; <http://www.newchildrenshospital.ie/> Last accessed 17<sup>th</sup> June 2019.

<sup>36</sup> Testimonial from Kerrill Thornhill, managing director of MedicaLeGuides in the Liberties' Digital Hub, an IT company that develops innovative software solutions for the health sector. Cited on the National Children's Hospital website; <http://www.newchildrenshospital.ie/> Last accessed 17<sup>th</sup> June 2019.

Four semi-structured interviews were conducted with the key procuring staff from 2016 – 2018 to assess the impact of the use of social criteria. Additionally, the social criteria provisions included in the call for competition and subsequent contractual performance clauses and conditions were scrutinised. The remainder of the chapter will offer a summary of the social criteria and assess the current impact on SME participation.

### 5.3 Request for Tender for the Construction of a New National Paediatric Hospital

#### 5.3.1 Description of the project

There are two boards responsible for the management of the NCH, the NPHDB is responsible for the design, build and construction of the hospital and the Children’s Board is responsible for bringing together the three existing hospitals.<sup>37</sup> The design team was appointed in August 2014 and planning permission was sought in April 2015. The first ‘enabling’ contract was awarded in August 2016,<sup>38</sup> planning permission for the construction contract was approved in April 2017 and work commenced in August 2017. Construction of the hospital is due to be completed by 2022. Considering the time-frame of the previous failed attempts to build the hospital, the Director for Project Management and Project Controls noted that the process appears to *‘have come a long way in a very short period of time, it reflects the efforts and commitment of the team to make this a success.’*<sup>39</sup> While the design and construction plans were completed relatively quickly, the NPHDB were very conscious off and *‘did address in the early stages the economic and social contribution of such a big spend’*<sup>40</sup> and what impact this would have on the local community and surrounding areas.<sup>41</sup> The hospital board and the community were in

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<sup>37</sup> The three existing hospitals include; Our Lady’s Children Hospital, Temple Street, and the National Children’s Hospital, Tallaght.

<sup>38</sup> The enabling contract consisted of the demolition of existing buildings on the site and preparing the site for construction.

<sup>39</sup> Interview with Richard Fitzpatrick, Director for Project Management and Project Controls, NPHDB (Dublin, Ireland, 10<sup>th</sup> June 2017).

<sup>40</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>41</sup> See NCH *Harnessing the Potential* (n 11).

support of including socially conscious practices from the outset. Some of the core design team had previously worked on large construction projects across Europe which incorporated social criteria. The community was instrumental in lobbying for the inclusion of social criteria.<sup>42</sup> The team, the community activists and the regeneration policy creators are all fully supportive in delivering sustainable benefits from the construction contract. A '*principle of collaboration and engagement*' underpins the foundation of the works contract.<sup>43</sup> This extends to developing an active relationship with the contractor and with the whole supply chain. The Project Manager is the Chair of Construction Ireland Association and he recognises that the sector as a whole needs to change and is demonstrating a willingness to adopt more efficient and socially conscious practices to deliver better outcomes. The Project Manager further recognised that '*this project could be an exemplar for the industry*' a standard which public bodies could base their future works projects on.<sup>44</sup>

During the planning stage, the Community Benefit Programme Manager (CBPM) was responsible for identifying current socially responsible public procurement practices in the construction industry. The CBPM identified works contracts which trialled and pioneered social benefit clauses. The CBPM spent time with Scottish procurers and in Northern Ireland with the '*Buy Social*' team.<sup>45</sup> Once the research was completed, the CBPM identified the main opportunities and constraints for the NCH. At this time, the levels of unemployment were high in the State and in the area of Dublin 8.<sup>46</sup> A core concern at this point was improving employment levels in the community. Assistance was sought from Richard MacFarlane, a procurement consultant who assisted in the

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<sup>42</sup> B. Checkoway, '*Six strategies of community change*' (1995) 30(1) Community Development Journal 2; T. Bovaird, '*Beyond engagement and participation: User and community coproduction of public services*' (2007) 67(5) Public administration review 846.

<sup>43</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>44</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>45</sup> The Buy Social team assist Northern Ireland procurers in implementing social benefits in public works and services contract. This will be discussed further in Chapter 6 Buy Social Case Study.

<sup>46</sup> See NCH *Harnessing the Potential* (n 11) The report notes that approximately half of the electoral divisions in the vicinity of the hospital are classified as disadvantaged.

drafting of the wording of the clause.<sup>47</sup> MacFarlene also assisted with the drafting of the NI Buy Social community benefit clauses. The wording of the two clauses is very similar with minor alterations.<sup>48</sup>

Even though there was support from all stakeholders in promoting social engagement, views were divided on how this should be achieved. Initially, the NPHDB resisted the inclusion of a *mandatory* clause into the procurement process and the public contract. The CBPM was faced with questions on whether it would have been more beneficial to include the social benefit objective into a hospital or procurement ‘*charter*’ or a ‘*blanket paragraph*’ in the tender documents. Arguments in support of a *voluntary* regime would argue that this approach has the potential to reap high levels of compliance with low levels of administrative burden and costs for suppliers and procurers.<sup>49</sup> However, voluntary regimes cannot guarantee compliance with stated provisions, whereas mandatory provisions offer legal guarantees in relation to compliance with the contract conditions.<sup>50</sup>

Revell and Blackburn,<sup>51</sup> Studer et al.<sup>52</sup> and Williamson et al.<sup>53</sup> argue that SMEs will only comply with non-economic criteria if they are obliged to

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<sup>47</sup> R. MacFarlene is a leading private consultant who specialises in designing and evaluating social benefit clauses in public procurement. Interview with Ingrid McElroy Community Benefit Programme Manager, National Paediatric Hospital Development Board Fitzpatrick, Director for Project Management and Project Controls (Dublin, Ireland, 18<sup>th</sup> July 2016).

<sup>48</sup> Replication of best practices is identified as an effective mechanism for implementing change in public sector operations. See A. De Wit, ‘*Measurement of project success*’ (1988) 6(3) *International Journal of Project Management* 164.; T. Entwistle and S. Martin, ‘*From competition to collaboration in public service delivery: A new agenda for research*’ (2005) 83(1) *Public Administration* 233.

<sup>49</sup> L. Senden, ‘*Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?*’ (2005) 9(1) *Electronic Journal of Comparative Law*.

<sup>50</sup> Y Fassin, ‘*SMEs and the fallacy of formalizing CSR*’ (2008) 17(4) *Business Ethics: A European Review* 364.

<sup>51</sup> A. Revell and R. Blackburn, ‘*The business case for sustainability? An examination of small firms in the UK’s construction and restaurant sectors*’ (2007) 16(6) *Business Strategy and the Environment* 404.

<sup>52</sup> S. Studer, R. Welford, P. Hills, ‘*Drivers and barriers to engaging small and medium-sized companies in voluntary environmental initiatives*’ (2005) The University of Hong Kong Working Paper, November.

<sup>53</sup> D. Williamson, G. Lynch-Wood, and J. Ramsay, ‘*Drivers of environmental behaviour in manufacturing SMEs and the implications for CSR*’ (2006) 67(3) *Journal of Business Ethics* 317.



do so. Walker and Preuss offer a further element to this discussion, asserting the companies including SMEs will view socially responsible criteria as ‘*commercial*’ requirements, if they do not accept the tender conditions they will not win the contract or gain entry to the supply chain.<sup>54</sup> As this contract was of significant value, presumably it was going to generate competitive bids from a small number of large well-established construction companies, which may have interpreted the social clauses as commercial requirements.<sup>55</sup>

To ensure maximum compliance with the social benefit ethos of the hospital, the board and procurement team decided to include a mandatory targeted recruitment and training community benefit clause. The clause targets new-entrant employees as this reflected the economic landscape in 2014 - 2015. Secondly, the procurement documents include a number of voluntary subcontractor protection considerations and used partial lots for mixed associated public contracts. This research examined the clauses and considerations relating to community benefits, subcontractor considerations and division of the contract into lots.

### 5.3.2 Lots

Separate lots were used, mechanical and electrical contracts were awarded separately. The largest lot was for the construction of the hospital. Importantly, the social criteria equally apply to the separate lots.<sup>56</sup> The value of the individual lots is described as ‘*significant*’, the research does not have access to these figures.<sup>57</sup> The lots were not used to encourage SME participation. The lots represent the various complex elements of the contract.<sup>58</sup>

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<sup>54</sup> H. Walker and L. Preuss, ‘*Fostering sustainability through sourcing from small businesses: public sector perspectives*’ (2008) 16(15) *Journal of Cleaner Production* 1600.

<sup>55</sup> G.L. Albano and M. Sparro, ‘*Flexible Strategies for Centralized Public Procurement*’ (2010) 1(2) *Review of Economics and Institutions*.

<sup>56</sup> Interview with the Director for Project Management and Project Controls (n 39). This includes both the community benefit clauses and the subcontractor considerations.

<sup>57</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>58</sup> Interview with the Director for Project Management and Project Controls (n 39).

### 5.3.3 Community Benefit Clauses

A mandatory community benefit clause was included as a tender award criterion and a subsequent contract performance clause. The decision to include community benefit clauses was based on the findings of the independent report ‘*Harnessing the potential: Maximising the community benefit from the New Children’s Hospital.*’<sup>59</sup> Secondly, the decision to include the community benefit clauses was made to ensure compliance with government policies on supporting sustainable economic development, namely the ‘*Action Plan for Jobs*’ and the ‘*Planning Policy Statement 2015.*’ The community benefit clause fundamentally requires the winning tenderer to employ a minimum number of ‘*new entrant employees or trainees*’ over the life-cycle of the contract. Alongside policy goals, the local community lobbied for the inclusion of employment promotion clauses and warmly welcomed the NPHDB’s commitment to including mandated requirements. A community stakeholder, Joe Donohoe, Project Manager of the Fatima Groups United noted that;

*The inclusion of Social Benefit Clauses as a conditional part of the public procurement process, is not an insignificant contract. [clause] It includes training elements with local schools and pathways to employment. Real and sustainable jobs are the only way to break poverty and the hospital offers employment opportunities during construction and when construction is completed.*<sup>60</sup>

The clause aims to promote employment and appropriate training opportunities to young people under the age of 25 who are struggling to gain long-term employment.<sup>61</sup> The clause states that;

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<sup>59</sup> See NCH *Harnessing the Potential* (n 11) The NPHDP’s primary justification for including the employment-based clauses was based on statistics of the local population living in and near the vicinity of the hospital. Over 50% of the local electoral divisions are classified as areas of disadvantage.

<sup>60</sup> Testimonial from Joe Donohoe, Fatima Groups United Project Manager. Cited on the National Children’s Hospital website; <http://www.newchildrenshospital.ie/> Last accessed 20<sup>th</sup> March 2019.

<sup>61</sup> Request for Tender, clause 2.2.

*...a minimum of xxx-person weeks of employment to be provided for 'new entrant employees / trainees' that have an employment, apprenticeship or trainee contract with the contractor or a subcontractor, where a person week is the equivalent of one person employed for five days either on site, or through a mix of on-site work and off-site 'training'.<sup>62</sup>*

The clause continues to define three different types of new entrant employees or trainees. It firstly defines a person who is leaving or has within the last 12 months left an educational establishment or a training provider. This definition extends to students who have completed paid work placements.<sup>63</sup> Secondly, the definition extends to young people who are under the age of 25 and who have not worked in the construction sector for more than 52 weeks and are actively seeking employment that includes on or off-site training and assessment.<sup>64</sup> The third classification covers persons aged 25 or over who have been registered as a job-seeker for more than 52 weeks and are actively seeking employment, which must include on-site training.<sup>65</sup> Additionally, this option is open to existing 'new entrant trainees' who may have previously been employed by the contractor and are now seeking a fully new position to complete their new entrant period of employment.

The 'new position' requirement is essential to prevent fraudulent behaviour.<sup>66</sup> The clause was additionally included in the enabling part of the contract.<sup>67</sup> If the contractor wishes to avail of this option, they must produce an evidentiary document to the NPHDB to verify that the previous new entrant employment had genuinely ended. This requirement

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<sup>62</sup> Request for Tender, clause 2.2 The exact amount of person weeks was not made available.

<sup>63</sup> Interview with Ingrid McElroy, Community Benefit Programme Manager, National Paediatric Hospital Development Board Fitzpatrick, Director for Project Management and Project Controls (Dublin, Ireland, 10<sup>th</sup> June 2016).

<sup>64</sup> Interview with the Community Benefit Programme Manager (n 63).

<sup>65</sup> Interview with the Community Benefit Programme Manager (n 63).

<sup>66</sup> Interview with the Community Benefit Programme Manager (n 63).

<sup>67</sup> The purpose of the enabling contractor was to get the site ready for construction, it required demolition of St. James's hospital buildings and removal of waste. It is important to note that this contract was concluded through a separate tender, not an individual lot. Both contracts were awarded to *BAM Construction Ltd.*

will curb contractors from dismissing current trainees, with the plans to subsequently hire the ex-employees to comply with the community benefit requirements.<sup>68</sup> A fourth classification includes apprentices who are registered with a recognised apprenticeship provider. This classification extends to professional trainees that are registered with a professional body or with an educational institute. However, the clause prohibits the contractor from employing more than 50% of new entrant employees or trainees person-weeks requirement from the apprenticeships and professional trainees' classification.<sup>69</sup> The winning contractor is required to notify the NPHDB of each new entrant employee or trainee vacancy.<sup>70</sup>

Importantly, the community benefit clause outlines a procedural implementation plan. There is a requirement to register each new entrant employee and trainee with the CBPM. The new employee must be provided with the relevant training and accreditation for the tasks they are expected to perform. The contractor is required to facilitate these training opportunities by offering flexible working arrangements. New employees should additionally be offered support with numeracy, literacy and information technology if required, to further support the trainees

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<sup>68</sup> Interview with the Community Benefit Programme Manager (n 63) See also; R. Macfarlane and M. Cook, *The Scottish Government: Community Benefits in Public Procurement: a Report Demonstrating the Methodology for Including Targeted Recruitment and Training Clauses in Public Sector Contracts* (2008) Scottish Government; V. Sutherland, A. McTier, A. Glass and A. McGregor, *Analysis of the impact and value of community benefit clauses in procurement* (University of Glasgow, eprints, 2015).

<sup>69</sup> Community benefit clauses should embody an element of flexibility, particularly for long-term contracts. The clauses should reflect socio-economic challenges; for example, if these clauses were designed in 2019, the apprenticeship requirement might be increased as this is reflective of the current market. There is a shortage of apprenticeships in the country. The Higher Education Authority has recently adopted policy promoting the use of apprenticeships in the private sector. See Higher Education Authority, *Apprenticeship – Real-Life Learning. Developing a National Apprenticeship Handbook*. May 2017. Available at; <http://hea.ie/assets/uploads/2017/06/Developing-a-National-Apprenticeship-Handbook.pdf> Last accessed 25th April 2019.

<sup>70</sup> Monitoring of use and compliance with the clause is one of the key instruments used to ensure compliance with non-standard provisions. V Sutherland, A McTier, A Glass, A McGregor, *Analysis of the impact and value of community benefit clauses in procurement* Training and Employment Research Unit (University of Glasgow, eprints, 2015).

effectively completing the required training for the post.<sup>71</sup> The contractor is solely responsible for the training and accreditation costs.<sup>72</sup> A second essential element of the community benefit clause is the requirement to offer unpaid work experience and industry placements;

*...a minimum of xxx weeks of unwaged placement opportunities and industry placements across a range of disciplines and across a range of skill levels must be made available when requested by the NPHDB or an agency named by the NPHDB for this purpose and mentoring and support provided.*

Additionally, the main contractor and its subcontractors are required to notify the NPHDB and the named agencies of vacancies for skilled and experienced workers. The primary goal of this requirement is to maximise possible recruitment from the employment agencies named by the NPHDB. It also stretches the onus of the implementation of the community benefit clause from solely the main contractor to the subcontractor. Each member of the supply chain is responsible for ensuring compliance with the social requirements. Within four weeks of the contract being signed, the main contractor was required to produce a 'detailed workforce forecast' with time-framed projections of all future employment positions.<sup>73</sup>

When designing the social criteria, the procurers spoke with representatives from the OGP and Grangegorman, building on their experiences, success and failures of using socially responsible public procurement.<sup>74</sup> The NHPDB did consider including penalties for failure to comply with the social requirements, however, ultimately this was not included on the basis that it was subjective in nature and was in conflict

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<sup>71</sup> This clause does not state how this element should be achieved. The CBPM and the main contractor will need to develop this requirement further over the life-cycle of the contract. As this contract is ongoing, it is difficult to assess to what extent the contractor will comply with this requirement. There are no penalties imposed for non-compliance. It will be interesting in future years to assess the effectiveness of this provision.

<sup>72</sup> Request for Tender, clause 2.3 Unpaid work experience and industry placements.

<sup>73</sup> Request for Tender, clause 2.5.

<sup>74</sup> Interview with the Community Benefit Programme Manager (18<sup>th</sup> July 2016).

with the community ‘buy-in’ nature of the clause.<sup>75</sup> It was acknowledged that the clauses were ‘well received by the tenderers.’<sup>76</sup> The OGP was uncertain if the social criteria should be marked and weighted in the award stage of the competition.<sup>77</sup>

Initially, the criteria were contained in the appendices of earlier demolition contracts preceding the large construction contract, the use of social criteria was new to both the procurer and tenderers at this stage. There was a recognition that the quality of understanding and commitment to the criteria greatly improved post completion of the initial enabling contract.<sup>78</sup> Building on the success of the initial contract, the procurers included the community benefit clause as an award criterion. The NPHDB contend that the social criteria are an ‘integral part of the contract’<sup>79</sup> and this was respected and acknowledged by the tenderers which integrated the requirements into the entirety of the tender submissions.<sup>80</sup> The procuring team believe that the use of pre-market engagement activities and media exposure highlighting the long-term benefits of the use of social criteria motivated tenderers to structure and design their tender responses in a socially conscious manner.<sup>81</sup> Most of the bids were described as innovative and detailed, reflecting the suppliers understanding of the long-term impact of the spend in the local area.<sup>82</sup>

A technical assistance panel was established to evaluate the bids. A ‘most economically advantageous award’ criteria was used. In the end, there was no weighting attached to the criteria. The technical assistance panel

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<sup>75</sup> Interview with the Community Benefit Programme Manager (n 63).

<sup>76</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>77</sup> In general, the OGP has demonstrated limited support for the use of social clauses in public contracts. The exception to this is the social procurement information note published in late December 2018. See Office of Government Procurement *Social Considerations in Public Procurement*. OGP. (2018). Accessible at this link; <https://ogp.gov.ie/information-notes/> Last accessed 16<sup>th</sup> May 2019.

<sup>78</sup> Interview with the Community Benefit Programme Manager (n 63).

<sup>79</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>80</sup> This finding supports arguments raised by Piga and Tátrai, that tenderers will view social criteria as normal commercial practices. See G. Piga and T. Tátrai, ‘Public procurement policy’ (Routledge, Abingdon, Oxon; New York, NY, 2015).

<sup>81</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>82</sup> Interview with the Director for Project Management and Project Controls (n 39).

reviewed the social dimension of contract in isolation and reported back to the procurement evaluation team on the merits and demerits of the bids. The mandatory clauses were awarded on a pass or fail basis.<sup>83</sup> A goal of the research is to assess what impact the inclusion of these criteria has on SME participation in the procurement process. Current literature suggests that the inclusion of community benefit clauses facilitates social enterprise participation in large-scale works contracts but hinders for-profit SMEs from participating in public contracts.<sup>84</sup> Findings will be discussed in section 5.4.

#### 5.3.4 Subcontractor Considerations

Secondly, the NPHDB prioritise developing a sustainable supply chain by encouraging the main contractor to subcontract with SMEs and social enterprises. A number of *voluntary* social considerations were included in the tender award criteria and subsequent works contract. The considerations are not binding in nature.<sup>85</sup> The main contractor was tasked with two primary goals; firstly, to participate in a market consultation event and to secondly assist and support small businesses in gaining access to the supply chain.<sup>86</sup> Whilst the contract does not set any specific targets, it sets stipulations. In relation to the first goal, a '*supply chain opportunities*' consideration requested the contractor to host a '*Meet the Buyer*' event in Dublin 8 within four weeks of contract commencement. A Meet the Buyer event is a form of pre-market engagement. The main contractor meets with interested economic operators to inform them of

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<sup>83</sup> Interview with the Director for Project Management and Project Controls (n 39) However, a combined weighting mark was applied to a 'contract delivery' criteria, a subsection of this criteria assessed how each tenderer planned to manage supply-chains.

<sup>84</sup> D. Baden, I. Harwood and D. Woodward, '*The effects of procurement policies on 'downstream' corporate social responsibility activity: Content-analytic insights into the views and actions of SME owner-managers*' (2011) 29(3) *International Small Business* 259; M. Loosemore, '*Building a new third construction sector through social enterprise*' (2015) 33(9) *Construction Management and Economics* 724.

<sup>85</sup> Request for Tender, section 3.

<sup>86</sup> Request for Tender, section 3.

potential future subcontracts.<sup>87</sup> The purpose of requiring the main contractor to host the networking events is to encourage a trickle-down effect, which would see the inclusion of SMEs in the supply chain.<sup>88</sup>

The main contractor is encouraged to work with SMEs and social enterprises. The voluntary clause requests the main contractor to ‘*engage positively with potential suppliers*’ to identify and keep a note of micro-businesses, which would not necessarily meet the professional and financial requirements to bid for government contracts, but have the potential to complete small elements or lots of the construction contract over the two years.<sup>89</sup> The contractor is encouraged to work with the identified companies to offer them advice on how to prepare their businesses to compete for any potential subcontracts effectively. This is a novel approach, the NPHDB is essentially asking the prime contractor to mentor and offer tendering advice and support to micro-enterprises, which will most likely be small private and social businesses from the area who registered their interest to work with the contractor at the Meet the Buyer events.<sup>90</sup>

It could be argued that this not as a responsible practice, that it is not economically or socially sensible to monitor and control the supply chain in this manner.<sup>91</sup> It could further be argued that such requirements violate the fundamental principles which underpin procurement law by requiring the winning contractor to engage in locally centred activities.<sup>92</sup> However, the procurement board have clearly outlined and maintained that the contract is not driven by economic objectives alone. The board have

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<sup>87</sup> For a wider discussion on the use of supplier engagement activities. See A.K. Cecil and J. Sperstad, ‘*Investigating the Hosted-Buyer Model From the Buyer Perspective: An Exploratory Study*’ (2015) 16(4) *Journal of Convention & Event Tourism* 298.

<sup>88</sup> A. Flynn and P. Davis, ‘*Investigating the effect of tendering capabilities on SME activity and performance in public contract competitions*’ (2017) 35(4) *International Small Business Journal: Researching Entrepreneurship* 449.

<sup>89</sup> Request for Tender, section 3.

<sup>90</sup> We will discuss this further in section 5.5.3.

<sup>91</sup> M.J. Shockro, ‘*An antitrust analysis of the relationship between prime contractors and their subcontractors under a government contract*’ (1982) 51(4) *Antitrust Law Journal*. 725; A. Sánchez Graells, ‘*Public procurement and the EU competition rules*’ (2nd edn Bloomsbury Publishing 2015) 353.

<sup>92</sup> A. Sánchez Graells (n 91) 353.



incorporated clear and specific social objectives into the contractual performance clauses, which are related to the subject matter of the contract and support local policy goals.<sup>93</sup>

The hospital is to be built for a significant sum of money in a deprived area of Dublin. The socio-sustainable elements of the project were designed in line with local and national policy, and the considerations are not implemented in a mandatory manner. Additionally, the practices do not exclude companies from other areas of Ireland, Europe or the world from expressing an interest in subcontracting or from participating in the networking events.<sup>94</sup> The ‘*mentoring*’ element of the request, falls more in line with pre-market engagement techniques, the contractor is requested to inform potentially interested companies of future opportunities and to offer insightful hints and tips on how to submit a successful tender.<sup>95</sup> These forms of pre-market consultations are conducted regularly and openly by both private and public-sector purchases.<sup>96</sup> It is actively encouraged in the preamble of the Directives and through the use of ‘*Buyer Profiles*’ and ‘*Prior Indicative Notices*’ (‘PINs’) on the OJEU Tenders Electronic Daily website.<sup>97</sup>

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<sup>93</sup> See NCH *Harnessing the Potential* (n 11); Office of Government Procurement, ‘*National Public Procurement Framework*’ *Public Procurement Guidelines for Goods and Services*.’ (2017) Version 1; St. Teresa’s Gardens Regeneration Board, ‘*Strategic Plan 2018 – 2021*’ (August 2018); See also; A. Dermody, C. Gardner, M. Quigley and P. Isard, ‘*The People Make the Place, A Research Report to Inform the Social Regeneration of Dolphin House Estate*’ (2014).

<sup>94</sup> The call for competition notice was advertised widely and the contracting authority hosted information events about the contract in the UK. See Interview with the Director for Project Management and Project Controls (n 39).

<sup>95</sup> Under normal procurement conditions, this requirement might be considered excessive and going beyond the main subject-matter of the contract. However, this contract is of significant and growing financial value, and it is underpinned by policies requiring the procurement spend to support sustainable growth in the impoverished area. Additionally, it is of benefit to the main contractor to foster a competitive supply-chain. As the considerations are voluntary in nature, they are not violating public procurement rules. There are no sanctions applicable for non-compliance with this consideration.

<sup>96</sup> In fact, the main contractor carries out these activities as part of their normal business operations.

<sup>97</sup> The Buyer Profile is an option available to contracting authorities who would like to keep the market informed of future potential opportunities. The buyer profile includes general information about the contracting authority together with information on ongoing invitations to tender, scheduled purchases, contracts concluded, and procedures cancelled. Prior Information Notices are an indication notice to the market of a forthcoming procurement The Directive sets out the content of a Prior Information Notice and refers to the standard format that must be used. This standard format is published by

The CBPM and the main contractor are tasked with trying to maximise the local supply chain.<sup>98</sup> The word ‘*trying*’ is important here, the research sought to understand whether the contractor was in support of the voluntary request.<sup>99</sup> The NPHDB’s decision to include the supply chain opportunities considerations as voluntary requests over a mandatory approach was based on the underpinning construction principles of ‘*collaboration and engagement*’.<sup>100</sup> The NPHDB wanted to build a flexible and integrated relationship with the contractor. The team recognise that one of the key elements to the successful operation of both of the social criteria, the community benefit clause and the sub-contractor considerations, is the monitoring and evaluation of the contractors’ performance.<sup>101</sup>

#### 5.4 Research Findings

The main construction contract was awarded to BAM Ireland. The company is not an SME, BAM Ireland is a ‘*wholly-owned subsidiary of Netherlands’ Royal BAM Group*’.<sup>102</sup> BAM Ireland is one of the largest multinational construction businesses operating in the state. The company’s estimated turnover for 2018 was €550 million.<sup>103</sup> Work

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the European Commission on its website at [www.simap.europa.eu](http://www.simap.europa.eu). The format is the same for all types of contracts. See Public Sector Directive, art 48.

<sup>98</sup> Interview with the Director for Project Management and Project Controls (n 39). Request for tender documentation, section 3.

<sup>99</sup> Unfortunately, the researcher was unable to interview a representative from the main contractor. Numerous attempts were made; however it was not possible due to the timing of the research, complications with the finalisation of the work and a delay in the appointment of a community-benefit co-ordinator. The contract is still in its infancy, major elements of the contract have not been commenced. The researcher hopes to continue researching this area post-submission of the thesis and plans to request to interview the contractor again when the works have progressed further.

<sup>100</sup> Interview with the Director for Project Management and Project Controls (n 39)

<sup>101</sup> V Sutherland, A McTier, A Glass, A McGregor, ‘*Analysis of the impact and value of community benefit clauses in procurement*’ Training and Employment Research Unit (TERU) (University of Glasgow, eprints, 2015); A. Edman and P. Nohrstedt, ‘*No Socially Responsible Public Procurement without Monitoring the Contract Conditions*’ (2017) 12 Eur. Procurement & Pub. Private Partnership L. Rev 352.

<sup>102</sup> BAM Ireland refers to itself as ‘*the largest multinational construction business operating nationally with expertise and experience in the delivery of many of Ireland’s flagship infrastructural and building projects.*’ See <https://www.bamireland.ie/> Last accessed 4<sup>th</sup> February 2019.

<sup>103</sup> See BAM Ireland’s published financial statements; <https://www.bamireland.ie/about/financials/> Last accessed 4<sup>th</sup> February 2019.

commenced on the project in August 2017 and is ongoing. The purpose of this case study is to examine what impact the inclusion of the use of lots, community benefit clauses and subcontractor protection considerations had on SME participation. This case study examines a works contract, and as such, it does not include a PCP element.

### 5.5.1 Use of Lots Findings

The use of lots was the first measure assessed. The research did not detect any evidence that the use of the lots encouraged SMEs to tender for the contract. There are several straightforward reasons for this result. The value, workload and speciality required for each of the lots would have deterred SMEs from bidding for the contract. The Director for Project Management and Project Controls suggested that due to the extremely specialised nature of the lots, SMEs would find it difficult to partner with enough entities to meet the qualification criteria.<sup>104</sup> This finding confirms Trybus's scepticism that the use of lots in large-scale contracts does not effectively meet the desired objective of promoting SME participation.<sup>105</sup> Trybus concludes that the number and size of lots determine the success of SME participation.<sup>106</sup> SMEs benefit the most when contracts are divided into many (more than 10) small lots, and in cases where tenderers are prohibited from winning all advertised lots.<sup>107</sup>

### 5.5.2 Use of Community Benefit Clauses Findings

The second provision assessed, the use of community benefit clauses, did not facilitate SME participation in the public contract. A targeted

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<sup>104</sup> Interview with the Director for Project Management and Project Controls (n 39). The Request for tender documentation, section 3 reiterated the importance of Recital 32, summarising that the lots should not be used in circumstances where they would render the execution of the contract excessively difficult or expensive.

<sup>105</sup> M. Trybus, 'The Promotion of Small and Medium Sized Enterprises in Public Procurement: a Strategic Objective of the New Public Sector Directive?' in F. Lichère, R. Caranta and S. Treumer (eds.), 'Modernising Public Procurement: The New Directive' (Djøf: Copenhagen, 2014) 255. See also; C. Nicholas and M. Fruhmann, 'Small and medium-sized enterprises policies in public procurement: time for a rethink?' (2014) 14(3) Journal of Public Procurement 328.

<sup>106</sup> M. Trybus, 'The Division of Public Contracts into Lots under Directive 2014/24: Minimum Harmonisation and Impact on SMEs in Public Procurement?' (2018) 43(3) European Law Review 313.

<sup>107</sup> Grimm, Pacini, Spagnolo and Zana, 'Division into Lots and Competition in Procurement.' Ch. 7 in Handbook of Procurement (2006) 168.

recruitment and training clause was included as an award criterion in the tender stage and was subsequently included as a contractual performance clause. The social benefit clause aims to promote pathways to long-term employment for new entrant employees.<sup>108</sup>

As this research did not have access to the bids submitted by unsuccessful tenderers, the research does not help us understand whether the inclusion of the clause impacted the tenderer's decision to submit a bid.<sup>109</sup> Nor do these case study findings improve our understanding as to whether the inclusion of social criteria increases tender prices, thus inadvertently disadvantaging SMEs from participating in competitions. Thus, the results do not agree or disagree with arguments raised by Sánchez Graells on the competitive restriction of community benefit clauses.<sup>110</sup> Nor do the results support arguments raised by Walker and Preuss contending that such clauses are deemed as '*commercial*' requirements which do not have a significant impact on costs.<sup>111</sup>

While the community benefit clause did not facilitate SME participation at the tendering stage, SMEs may have to comply with the requirements in the supply chain. The clauses are proportionately applied to subcontracts.<sup>112</sup> SMEs can improve their chances of winning subcontracts by demonstrating an ability or willingness to meet the social requirements. SMEs may already be engaging in this area without labelling it as such, SMEs employ and train apprentices and offer work placements to trainees and school goers.<sup>113</sup> It might be beneficial for SMEs to formalise their existing socially sustainable practices or agree upon new goals in an

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<sup>108</sup> Request for Tender, clause 2.2.

<sup>109</sup> This information is not freely made available. Contracting authorities are only required to publish the name of the preferred bidder. See Directive 2007/66/EC, art 2(a)

<sup>110</sup> A. Sánchez Graells, '*Public procurement and the EU competition rules*' (2nd edn Bloomsbury Publishing 2015).

<sup>111</sup> H. Walker and L. Preuss, '*Fostering sustainability through sourcing from small businesses: public sector perspectives*' (2008) 16(15) *Journal of Cleaner Production* 1600 See also; V Sutherland, A McTier, A Glass, A McGregor, '*Analysis of the impact and value of community benefit clauses in procurement*' Training and Employment Research Unit (TERU) (University of Glasgow, eprints, 2015).

<sup>112</sup> Request for Tender, section 3.

<sup>113</sup> F. Perrini, A. Russo and A. Tencati, '*CSR strategies of SMEs and large firms. Evidence from Italy*' (2007) 74(3) *Journal of Business Ethics* 285.

internal charter of ethics to improve their chances of winning subcontracts.<sup>114</sup> One of the unsuccessful tenderers in this case study implemented a new internal social policy to reflect the demands set out in this contract, this may help the economic operator in competing for future contracts which include community benefit clauses.<sup>115</sup>

On a separate note, the main contractor is meeting the employment targets. At the time of writing, there were no updated figures on how many people were employed by the contractor. However, the contractor was successfully able to demonstrate that they exceeded the target set in the enabling contracts. As these contracts did not require a large workforce, there were on average 32 employees on-site daily, the targeted recruitment and training clause reflected this reality. A minimum of 126 person weeks of employment were to be provided for the enabling contract. The contractor provided for 147 employment person weeks throughout the contract, and this resulted in four new full-time employment positions being created accounting for 10% of the workforce.<sup>116</sup> The new positions included an engineer's assistant,<sup>117</sup> a site manager,<sup>118</sup> and two general operators.<sup>119</sup> These positions were carried over onto the main construction contract, and the four people were still employed at the time of the publication of the most recent monitoring report.<sup>120</sup>

An interesting finding of the research is the recent use of sheltered workshops. The sheltered workshop provision was relied on to procure a social enterprise to provide in-house catering and cleaning services.<sup>121</sup> Two additional people have since been employed and are receiving

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<sup>114</sup> K.R. Webb, 'Voluntary codes: private governance, the public interest and innovation.' (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004).

<sup>115</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>116</sup> These results were gathered and published by the Community Benefit Programme Manager and the main contractor. (n 63). *Currently unavailable online.*

<sup>117</sup> As of February 2018, this employee had been employed for 50 weeks. (See n 116).

<sup>118</sup> As of February 2018, this employee had been employed for 49 weeks. (See n 116).

<sup>119</sup> As of February 2018, these employees have been employed for 28 and 20 weeks successively. See (n 116).

<sup>120</sup> Interview with the Community Benefit Programme Manager (n 63).

<sup>121</sup> Public Authority Regulation, reg 20; Interview with the Community Benefit Programme Manager (Dublin, 3<sup>rd</sup> August 2018).

training to assist them in finding long-term employment elsewhere. Local SMEs are benefitting from other sections of the hospital construction project. One local community partnership was awarded a cleaning contract for the NPHDB and the NCH's administrative offices, to date, this has resulted in the employment of two additional employees.<sup>122</sup>

### 5.5.3 Subcontractor Considerations Findings

The third provision assessed the use of subcontractor considerations. Non-binding conditions were included in the tender award and contract performance stages which request the main contractor to consider including SMEs in the supply chain. The contractor was requested to host a Meet the Buyer market consultation event and to assist suppliers in obtaining the minimum standards or needs required to enter the supply chain and to trial small volumes of work with micro-enterprises.<sup>123</sup> BAM Ireland has participated in two Meet the Buyer Events, one local event in October 2016 and one national Enterprise Ireland event in September 2017. An estimated 128 companies from around the country attended the events.<sup>124</sup> This was done in partnership with the NPHDB who identified suitable organisations, the identified groups included SMEs and social enterprises based in the proximity of the construction site.<sup>125</sup>

While there was no requirement placed on the contractor to work with the identified companies, the clause states that the contractor '*shall engage positively with potential suppliers and subcontractors*' identified at the Meet the Buyer event.<sup>126</sup> Furthermore, the contractor was requested to undertake assessments of the potential subcontractors' capability and to identify any additional standards suppliers needed to obtain to enter the supply chain. To further encourage smaller entities participation, the

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<sup>122</sup> Presumably there were no incumbent concerns, including TUPE issues, here as the contract was for cleaning services in a new building for the new development unit.

<sup>123</sup> Request for tender, section 3.

<sup>124</sup> Interview with the Community Benefit Programme Manager (n 121).

<sup>125</sup> Request for Tender, section 3.1.

<sup>126</sup> Request for Tender, section 3.2.

contractor was requested to assist potential suppliers in obtaining these requirements and standards and was asked to design trial work packages or set aside small supply volumes of work for micro-enterprises, thus giving the small businesses a chance to prove their capabilities to bid for larger sub-contracts.<sup>127</sup> The procurers did not want this provision to be exploited by the contractor and requested that the entities recruited to work on the trial basis were appointed on terms that are comparable with other subcontractors.<sup>128</sup>

The procurers actively monitor the use of subcontractors. BAM Ireland is required to record the percentages of contracts awarded to subcontractors, ensuring that all subcontractors observe any applicable obligations in the fields of environmental, social and labour law.<sup>129</sup> To date, BAM Ireland has only published subcontracting information for the enabling contract. 93% of all subcontracts were awarded to SMEs, 32% of all goods and services subcontracts were awarded to companies based in Dublin 8 and 12.<sup>130</sup> This included the awarding of subcontracts to local micro-enterprises based in the area to erect hoarding and to provide salvage facilities.<sup>131</sup>

A business directory was generated by the CBPM as there was a delay in the recruitment of BAM Ireland's project social coordinator.<sup>132</sup> Communication from the NPHDB and BAM Ireland is made available on the directory, informing interested parties of development updates and future work plans. This is not a contract advertising site. However, it does include a business 'search' facility, whereby BAM Ireland can identify potential subcontractors. Local community groups and business support networks such as Dublin South City Partnership, SJH Lamp Project,

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<sup>127</sup> Request for Tender, section 3.2.

<sup>128</sup> Interview with the Community Benefit Programme Manager (n 121).

<sup>129</sup> In compliance with Public Authority Regulation, art 71.

<sup>130</sup> Interview with the Community Benefit Programme Manager (n 121).

<sup>131</sup> Interview with the Community Benefit Programme Manager (n 121).

<sup>132</sup> Interview with the Community Benefit Programme Manager (n 121).

Liberties Business Forum and Canals Business Network have access to the Directory.<sup>133</sup>

Sánchez Graells's arguments on the anti-competitive nature of social procurement would suggest that these conditions are curbing the main contractors purchasing power and discretion.<sup>134</sup> If these clauses were introduced in a mandatory manner, it could be argued that such restrictions would violate the fundamental principles, curbing market competition, thus limiting taxpayers' value for money.<sup>135</sup> However, these clauses are voluntary in nature. No minimum requirements were set. Contracting authorities can encourage the main contractor to subcontract with SMEs. However, the contracting authority is not permitted to require bidders at the tendering stage to conclude partnership agreements with proposed subcontractors.<sup>136</sup>

Trybus argues that SMEs do not want to enter the public market as subcontractors as they feel squeezed by larger companies.<sup>137</sup> This concern raises the question should contracting authorities assist SMEs entering the supply chain in large contracts. In this case study, the contract is complex, expensive, and bespoke, which ultimately restricts SMEs from entering the competition as a single provider and makes it difficult for SMEs to tender as part of a consortium. Subcontracting is the only route for SMEs to access the contract.<sup>138</sup> Voluntary considerations have resulted in the development of a business directory, the hosting of a Meet the Buyer event

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<sup>133</sup> Interview with the Community Benefit Programme Manager (n 121).

<sup>134</sup> A. Sanchez Graells, 'Truly competitive public procurement as a Europe 2020 lever: what role for the principle of competition in moderating horizontal policies?' (2016) 22(2) European Public Law 377.

<sup>135</sup> See Case C-249/81 *Commission v Ireland (Buy Irish)* [1982]; Case C-113/13 *Spezzino* [2014] *pub. electr.* EU:2014:2440.

<sup>136</sup> Case C-234/14 *Ostas celtnieks SIA v Talsu novada pasvaldiba* [2016] *pub. electr.* EU:C:2016:6 (ECJ); Case C-406/14 *Wroclaw - Miasto na prawach powiatu* [2015] *pub. electr.* EU:C:2015:761 Opinion of Advocate General Sharpsto.

<sup>137</sup> M. Trybus, 'The Promotion of Small and Medium Sized Enterprises in Public Procurement: a Strategic Objective of the New Public Sector Directive?' in F. Lichère, R. Caranta and S. Treumer (eds.), 'Modernising Public Procurement: The New Directive' (Djøjf: Copenhagen, 2014) 255.

<sup>138</sup> K. Loader, 'Is public procurement a successful small business support policy? A review of the evidence' (2013) 31(1) *Environment and Planning C: Government and Policy* 39.



and the appointment of a Community Benefits Officer. BAM Ireland has estimated that €500,000 of goods and services contracts have been subcontracted to companies based in Dublin alone.<sup>139</sup>

Commitment by the NPHDB has been evident during the contract performance stage. The NPHDB, along with a procuring manager from St. James's Hospital, participated in a social enterprise site visit organised by the Irish Social Enterprise Network. The purpose of the event was to investigate the feasibility of including social enterprise friendly practices in future procurement competitions. Six social enterprises were given ten minutes to present their companies services and supplies.<sup>140</sup>

Alongside, the promotion of SMEs in the supply chain and the plans to maximise employment and training opportunities, the NPHDB has an additional social priority theme; '*raising aspirations through education.*'<sup>141</sup> In achieving these aims, the NPHDB has hosted Career Days for local secondary schools and colleges of further education. 28 teachers and 246 students attended the events. Additionally, the NPHDB are in the process of designing a nursing and healthcare programme and will soon deliver a six-week innovative engineer-driven education programme for students.<sup>142</sup> As this contract is a long-term contract, the NPHDB are assisting in creating a trained and engaged future employment pool which will assist the contractor in achieving the targets set out in the community benefit clause.<sup>143</sup>

It should be noted that the considerations were implemented in a voluntary manner.<sup>144</sup> The main contractor cannot be penalised for lack of

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<sup>139</sup> Interview with the Community Benefit Programme Manager (n 121).

<sup>140</sup> The researcher participated in this event.

<sup>141</sup> See NCH *Harnessing the Potential* (n 11).

<sup>142</sup> Interview with the Community Benefit Programme Manager (n 121) Further supporting the Department of Education's *STEM Education Policy Statement (2017–2026)*.

<sup>143</sup> Interview with the Community Benefit Programme Manager (n 121) This indicates that the contracting authority is genuinely engaged in developing a sustainable supply chain.

<sup>144</sup> Note, the targeted recruitment and training clauses are mandatory in nature. Request for tender, section 2.

compliance with the requirements. One argument against the use of voluntary clauses suggests that contractors have limited reasons to engage fully and comply with the social objectives of the contract.<sup>145</sup> Anand suggests contract performance auditors will not be motivated to check compliance of the clause as there are no penalties attached for non-compliance.<sup>146</sup> However, if the procurement board had adopted a mandatory social regime, this may have resulted in legal challenges on the anti-competitiveness of the measure and may have increased additional administrative and monitoring costs.<sup>147</sup>

Research on the use of socially driven criteria argues that socially responsible practices are not achieved through legislation and are alternatively driven by commercial practices. Holmlund and Kock<sup>148</sup> and Spence<sup>149</sup> contend that social criteria are led by large organisations who are in a position to impose standards in the supply chain. This is evident by BAM Ireland's commitment to other socially driven goals, such as schools-engagement programme. It seems that public sector buying preferences will motivate large companies to implement socially and environmentally responsible operational measures.<sup>150</sup> Spence further argues that sustainable supply-chains and operations should be based on open and honest partnerships, whereby both parties adopt agreed-upon ethical policies.<sup>151</sup> Baden et al.'s research echo this argument and calls for businesses to play a more significant role in the design of social and

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<sup>145</sup> Y Fassin, '*SMEs and the fallacy of formalizing CSR*' (2008) 17(4) *Business Ethics: A European Review* 364.

<sup>146</sup> A.I. Anand, '*Voluntary vs mandatory corporate governance: Towards an optimal regulatory framework*' (2005) in *American Law & Economics Association Annual Meetings* 44.

<sup>147</sup> I Harwood and S. Humby, '*Embedding corporate responsibility into supply: A snapshot of progress*' (2008) 26(3) *European Management Journal* 166.

<sup>148</sup> M. Holmlund and S. Kock, '*Buyer dominated relationships in a supply chain-a case study of four small-sized suppliers*' (1996) 15(1) *International Small Business Journal* 26.

<sup>149</sup> L.J. Spence, '*CSR and small business in a European policy context: The five "C"s of CSR and small business research agenda*' (2007) 112(4) *Business and Society Review* 533.

<sup>150</sup> H. Walker and L. Preuss, '*Fostering sustainability through sourcing from small businesses: public sector perspectives*' (2008) 16(15) *Journal of Cleaner Production* 1600.

<sup>151</sup> L.J. Spence (n 149) 533.

environmental criteria.<sup>152</sup> The NPHDB collaborated with the local community and key stakeholders to develop the social objectives of the contract.

A voluntary approach and a commitment by the NPHDB to ‘*collaborate and engage*’ has contributed to the success of the voluntary regime. The procurers are determined to work towards securing a ‘*lasting, sustainable legacy of the project.*’<sup>153</sup> The success of the design and implementation of social criteria is due to the commitment and dedication of the hospital board champions.<sup>154</sup> They have an acute awareness of the impact the expenditure could potentially have on the long-term development and growth of the area. A senior procurement manager of the co-located St. James’s hospital believes that the actions being taking now will ultimately result in the more efficient operation of the adult A&E department.<sup>155</sup> This view is based on the belief that an improvement in business growth and employment creation in the community will reduce the number of new heroin users and incidents of heroin overdoses.<sup>156</sup>

This finding extends to other stakeholders, in particular, the community stakeholders. The community was involved from the very beginning and not only are they concerned with gaining short-term employment and business growth, but they are also investing in developing a sustainable legacy for the area.<sup>157</sup> The community groups act as an important external

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<sup>152</sup> D. Baden, I. Harwood and D. Woodward, ‘*The effects of procurement policies on ‘downstream’ corporate social responsibility activity: Content-analytic insights into the views and actions of SME owner-managers*’ (2011) 29(3) International Small Business 259.

<sup>153</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>154</sup> Namely, the Director for Project Management and Project Controls and the Community Benefit Programme Manager. For a discussion on the importance of employees in change management see; T. Cooke-Davies, ‘*The “real” success factors on projects*’ (2002) 20(3) International Journal of Project Management 185.

<sup>155</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>156</sup> A crude analysis suggests that the more capital and employment opportunities that there are in the local economy is directly related to the reduction of anti-social behaviour. For a broader discussion on why greater economic equality not greater wealth promotes a more equal society see; R. Wilkinson and K. Pickett, ‘*The spirit level: Why greater equality makes societies stronger*’ (Bloomsbury Publishing USA, 2011).

<sup>157</sup> Interview with the Community Benefit Programme Manager (n 63) The Community Benefit Programme Manager hosts regular strategic meetings with the key community stakeholders.

auditor and conscious compass for the hospital boards, BAM Ireland and their subcontractors. Their role should not be underestimated, for it is these stakeholders who have the most to gain from the successful implementation of the community benefit clauses. Gordon Jeyes, Independent Chairman of the Community Benefits Oversight Group, said;

*The new children's hospital is the largest capital investment in healthcare in the history of the State. Through the construction phase and into the operational phase, a hospital of this nature brings enormous activity economically and socially – to the community and the focus of our group is to ensure that local people and businesses benefit from this as much as possible.*<sup>158</sup>

Compliance monitoring with the voluntary subcontractor clause is exceptionally high in this contract. This appears partly due to the dedication and enthusiasm showed by the CBPM, who was engaged with the process from the beginning.<sup>159</sup> Subcontracting voluntary measures are securing social value for taxpayers' money. The flexibility of the measure and the relationship built between the NPHDB and the main contractor appear to have contributed to the success of the social consideration. If the success of this consideration is to be replicated by other contracting authorities, it would be advisable to adopt a similar voluntary approach. Contracting authorities should tighten the relationship between the tender stage and the contract performance by involving the community benefit co-ordinator at each stage of the procurement process.<sup>160</sup>

### 5.5 Overall Impact of the Contract Award and Performance

The combination of the different social criteria is having a positive impact on the local community. From the outset, BAM Ireland was supportive of

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<sup>158</sup> Testimonial from Gordon Jeyes, Independent Chairman of the Community Benefits Oversight Group. Cited on the National Children's Hospital website; <http://www.newchildrenshospital.ie/> Last accessed 17<sup>th</sup> June 2019.

<sup>159</sup> Although, the commitment of the CBPM and the community stakeholders does not entirely remove the risk of non-compliance.

<sup>160</sup> The CBPM is key to the success of the implementation of the community benefit clause and subcontractor considerations in this contract.

and engaged with social benefit ethos. One small individual story illustrates the positive impact on the local community. Before the contract commenced, BAM Ireland employed the first ‘*new entrant*’ employee. BAM Ireland sourced the employee, the employee was a young man working in Naas.<sup>161</sup> As the person was already employed, he did not meet the criteria set out in the social clause. BAM Ireland asked the Board to consider the young man’s situation. He aspired to commence a career in construction and applied to undertake construction studies at third level in Dublin Institute of Technology (DIT). However, the young man failed to gain the required Central Applications Office (CAO)<sup>162</sup> points in his Leaving Certificate examinations.<sup>163</sup> He was advised to apply to a construction Post Leaving Certificate (PLC)<sup>164</sup> course and to gain relevant work experience, once he completed this, he could apply to DIT to undertake the construction degree. The Board on this occasion allowed for the employment to count as part of the targeted recruitment requirement as the young man’s probabilities of returning to full-time education and ultimately gaining long-term employment in the construction sector were vastly improved by completing the work experience.<sup>165</sup> The clause was designed to be flexible and allows the Board to approve potential employees who fall outside the exact criteria included.<sup>166</sup>

A recruitment pathway was established by the NPHDB to assist the contractor in meeting the employment targets.<sup>167</sup> BAM Ireland is encouraged to use the local Intreo service to advertise employment opportunities. Intreo offices operate under the remit of the Department of Employment Affairs and Social Protection. The offices offer employment

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<sup>161</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>162</sup> The Central Applications Office processes applications for undergraduate courses in Irish Higher Education Institutions (HEIs).

<sup>163</sup> The Leaving Certificate examinations are the terminal examinations of post-primary education. Students are graded on a points basis for the purposes of selection into further education, employment, training and higher education.

<sup>164</sup> PLCs are normally carried on a full-time basis by a vocational school.

<sup>165</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>166</sup> The importance of flexibility in social criteria is emphasised in; A. McWilliams and D. Siegel, ‘*Corporate social responsibility: A theory of the firm perspective*’ (2001) 26(1) *Academy of Management Review* 117.

<sup>167</sup> This was not a mandatory requirement.

and training support for job seekers and employers.<sup>168</sup> Both the NPHDB and the main contractor are responsible for securing and demonstrating a genuine commitment to the clause. BAM Ireland is responsible for creating work plans and histograms estimating the probabilities of workplace opportunities throughout the life-cycle of the contract.<sup>169</sup> The communities are responding to these predictions and are offering relevant training and upskilling courses to potential employees.<sup>170</sup> The CBPM stated;

*...we are in a community which is disadvantaged, which does not have a huge history in certain areas of people finishing school let alone going into college, it is incredibly important that the contractors and we ourselves in the development board engage with young people and show them the opportunities that are there.*<sup>171</sup>

All stakeholders displayed a commitment to the criteria in the procurement process. An unsuccessful tenderer has since incorporated the social plan they created for the bid into their internal operations plan.<sup>172</sup> This highlights that there is a willingness in the construction community to change their work practices. This finding has also reinforced the NPHDB's belief that it was '*the right decision*' to include the clauses into the award criteria, but which do not include penalties for non-compliance.<sup>173</sup> It was shown that the provisions designed in this manner could ultimately change the mindset and operations of large construction

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<sup>168</sup> Further information on the Intreo system is available at this link; <http://www.welfare.ie/en/Pages/Intreo.aspx> Last accessed 4th February 2019.

<sup>169</sup> Request for Tender, section 2.

<sup>170</sup> Information derived from the work plans and histograms is passed onto employment support agencies in the local communities. Interview with the Director for Project Management and Project Controls (n 39).

<sup>171</sup> Interview with the Community Benefit Programme Manager (n 63).

<sup>172</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>173</sup> Interview with the Director for Project Management and Project Controls (n 39).

companies.<sup>174</sup> The procurers rank the community benefit clauses as important as the physical construction work.<sup>175</sup>

Not only were the interested economic operators and public procurers committed to delivering the social objectives. Local businesses and the community at large have openly supported the inclusion of social criteria. Business advisory groups offered technical supports and training to local businesses and potential employees on how to navigate the social requirements. The contracting authority did not receive any criticism from interested economic operators regarding the social criteria.

Employment targets were included in the enabling contracts. The majority of people who expressed an interest in working on these contracts were long-term unemployed people, and the team is considering how they can facilitate entry back into the workforce in subcontracting opportunities. Currently, there are more opportunities for apprenticeships at this stage of the construction contract.<sup>176</sup> The team are identifying potential job opportunities for the life-cycle of the whole contract and plan to train up the cohort of long-term unemployed persons to get them ready for the next round of expected employment opportunities. The team are also working with youths in the area, young people who are at the Leaving Certificate cycle and encouraging Junior Certificate cycle students to continue with their academic studies.<sup>177</sup> This indicates that the procuring team are concerned with the long-term impact of the spend on the local community and are invested in securing long-term value for tax-payers' money.

While the criteria are designed to support the local communities primarily, they do not discriminate against potential employees on the grounds of

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<sup>174</sup> However, as already suggested, the economic operators may be beginning to view these clauses as commercial clauses. The operators' willingness to adopt new social measures is motivated by their desire to improve their chances of bidding for public contracts not by a desire to achieve socially driven objectives.

<sup>175</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>176</sup> Higher Education Authority, *'Apprenticeship – Real-Life Learning. Developing a National Apprenticeship Handbook.'* May 2017.

<sup>177</sup> NCH *Harnessing the Potential* (n 11) The independent report called for the contracting authority to consider the long-term impact on the citizens living near the hospital.

nationality.<sup>178</sup> One element of the criteria aims to support vulnerable workers who are employed from the other EU Member States. During the design of the targeted recruitment and training clauses, the team was mindful of the significant number of EU citizens with no formal training and education who had been made unemployed in the state during the recession years and who had few prospects of gaining long-term employment.<sup>179</sup> There is a protective element in this clause which requires the contractor to offer language and other appropriate training to unskilled workers. The purpose of this is to assist short-term employees and ‘at-risk’ employees in gaining long-term sustainable employment. When discussing the use of these clauses with potentially interested economic operators, the NPHDB framed the benefits of creating a future sustainable workforce for the employers.<sup>180</sup>

The NPHDB describes the contract as being the most ‘*far-reaching [contract] to date and is also at some points loose which allows for innovation.*’<sup>181</sup> While the clause does not mention anything in relation to gender, during the research interviews, it was mentioned that the procuring team expressed a desire for the clause to encourage and embed the practice of diverse employment practices, including the practice of employing and encouraging more women to enter the construction sector.<sup>182</sup> This desire to leave a socially sustainable impact is also evident in the NPHDB’s internal operations. The board are leading by example, they have leased out offices in a building which has been empty for over eight years since.<sup>183</sup>

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<sup>178</sup> The contractor is not required to employ local people or subcontract with local SMEs. The contractor retains the discretion on who they employ and award subcontracts to, once they comply with the contractual performance clauses.

<sup>179</sup> Interview with the Director for Project Management and Project Controls (n 39). During the recession in 2009, immigrants experienced a rate of job losses close to 20%. Whereas, national rates at this time were 7%. See A. Barrett and E. Kelly, ‘*The impact of Ireland’s recession on the labour market outcomes of its immigrants*’ (2012) 28(1) European Journal of Population 91.

<sup>180</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>181</sup> Interview with the Community Benefit Programme Manager (n 63).

<sup>182</sup> Interview with the Community Benefit Programme Manager (n 63).

<sup>183</sup> Interview with the Community Benefit Programme Manager (n 121).



The building is in the heart of Fatima Gardens, one of the core areas identified in the Regeneration Project. Catering contracts have been concluded with a local social enterprise based close to the offices. The team have been able to trace the impact the contracts have had on the social enterprise's growth. The contracts have resulted in the social enterprise employing two new members of staff. Additionally, one of the former employees has left to commence permanent full-time work elsewhere.<sup>184</sup> The increase in revenue has also resulted in increased training opportunities for their workers and financial support for the local creche. All of which is designed to assist the community workers in finding long-term sustainable employment. These findings have reinforced the team's belief that they are '*doing the right thing*.'<sup>185</sup> The preliminary successes have encouraged the procurers to consider how they will conduct the procurement procedures for the operational functions of the hospital, with a view to including more innovative and sustainable practices.<sup>186</sup>

While the social benefits of promoting education and training have positive economic and social benefits, this research is interested in what impact the use of such clauses has on SME participation. The use of the clause did not generate social-enterprise participation in the tendering stage of the contract. However, the clause may still have an impact on SMEs in the supply chain. There will be over one hundred varies types of subcontracts concluded over the life-cycle of the contract, and each subcontractor will have to adhere to the social requirements of the main contract.<sup>187</sup>

In relation to the subcontracting considerations, there are two things which the procurement team must continue to consider during the contract

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<sup>184</sup> It is important to note that this is a specific objective of the social enterprise, to provide '*at-risk*' employees with the experience and training to commence long-term employment elsewhere.

<sup>185</sup> Interview with the Director for Project Management and Project Controls (n 39).

<sup>186</sup> It is unclear at this stage what impact the significant costs-overruns will have on future procurement competitions.

<sup>187</sup> Post completion of the thesis, the research plans to assess what impact the use of social criteria has on SME participation in the subcontracts awarded by BAM Ireland.

performance stage. The first being, the trickle-down affect – the possibility of SMEs winning a smaller slice or crumbs of the large main construction contract.<sup>188</sup> This is the only pathway for SMEs to generate direct income from the contract, some SMEs such as local cafes and shops will indirectly generate income from the contract.<sup>189</sup> Within the first six months of the contract commencing, 93% of all subcontracts were awarded to companies based in the Dublin region.<sup>190</sup> 32% of the goods and services contracts were awarded to SMEs based in Dublin 8 and 11.<sup>191</sup> Secondly, the procurement team needs to consider what impact the inclusion of social clauses will have on SMEs once they have been successfully awarded a subcontract. It will only affect SMEs which will have to employ new employees to carry out the contract. This is a limitation of the research, due to the time the thesis will be submitted it will not have the capacity to trace the impact the clause will have on subcontractors.<sup>192</sup>

BAM Ireland, in partnership with the hospital board, hosted a local small Meet the Buyer event prior to the commencement of the enabling contracts. 23 small and micro enterprises attended the event to meet with BAM Ireland's two key procuring officers. Before the event, BAM Ireland specified the types of contracts which will be subcontracted throughout the contract, and these range from stationary contracts to contracts for fencing around the hospital grounds.<sup>193</sup> As a follow-up procedure, the NPHDB asked for feedback from the participating companies. A common finding from the feedback was the suppliers '*delight*' in meeting the

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<sup>188</sup> S.C. Lenny Koh, M. Demirbag, E. Bayraktar, E. Tatoglu and S. Zaim, '*The impact of supply chain management practices on performance of SMEs*' (2007) 107(1) *Industrial Management & Data Systems* 103.

<sup>189</sup> L. Calvano, '*Multinational corporations and local communities: A critical analysis of conflict*' (2008) 82(4) *Journal of Business Ethics* 793.

<sup>190</sup> NPHDB Construction Update, February 2018. Not currently available online.

<sup>191</sup> These areas are located in the vicinity of the construction site.

<sup>192</sup> Another question that must be asked is whether or not the social clauses apply to contracts sub-contracted by the subcontractors, follow up research will assess the long-term impact on the supply-chain.

<sup>193</sup> Intertrade Ireland assists SMES across the island of Ireland in accessing business opportunities and has as an overriding goal of supporting cross-border trade. Intertrade host cross-border 'Meet the Buyer' events regularly. These events are normally generic in nature and are attended by various procurers and suppliers.

procuring officers and noted that was the *'most useful thing'* for them.<sup>194</sup> Suppliers are now in the position to prepare for the potential subcontracts which may be advertised over the coming years. This may include getting their businesses operational ready and conducting training on how to successfully prepare tender bids. BAM Ireland operates a business mentoring scheme and offered a place on the scheme to one of the companies which attended the Meet the Buyer event.<sup>195</sup> During the tender planning stage, the NPHDB considered the potential role social enterprises could play in the construction contracts. The board decided that the best way that they could incorporate social enterprises into the contracts was to inform and educate the main contractor on the role social enterprises play in society.<sup>196</sup>

## 5.6 Conclusion

The construction contract for the National Children's Hospital illustrates the benefits of socially-driven public procurement. The inclusion of the community benefit clause has successfully promoted the integration of vulnerable groups and disadvantaged young people from the locality into the labour market. However, in answering the research question, the mandatory community benefit clause did not facilitate SME participation in the public contract.

Overall, the findings conclude that voluntary socially responsible regimes can create a balance between the economic and social objectives of the legislation. The research demonstrates that the use of subcontractor protection considerations can successfully facilitate SME participation in the public market. Voluntary mechanisms like this can assist SMEs in competing for high-value contracts. A key factor for the success of this consideration is due to the relationship developed between all stakeholders. The Community Benefit Programme Manager was involved in the tender design, advertising and evaluation stage and is involved in

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<sup>194</sup> Interview with the Community Benefit Programme Manager (n 63).

<sup>195</sup> Interview with the Community Benefit Programme Manager (n 63).

<sup>196</sup> The contracting authority cannot insist on which companies the main contractor subcontracts with over the course of the contract.

monitoring contract performance. If this success is to be replicated by other public bodies, public procurers should tighten the relationship between the tender stage and the contract performance stage. This case study demonstrates that the success of socially responsible public procurement is dependent on the motivation of public sector ‘champions’, a supporting policy backdrop and a commitment from all key stakeholders.

## Chapter Six Buy Social Case Study

### 6.1 Introduction

The purpose of this case study is to question the extent to which the inclusion of social criteria in a public services contract facilitated SME participation in the Northern Irish public market. Whilst, the contract assessed in this case study is a public services contract, it included comparable social criteria with the National Children's Hospital public works contract.<sup>1</sup> It is also cited as the first large scale services contract to incorporate social clauses in Northern Ireland.

Over the last five years, Northern Ireland has adopted socially responsible public procurement policies. Political willingness to adopt public sector reforms was enshrined in the '*Programme for Government 2011-2015*' report,<sup>2</sup> which complements the 2014 political *Stormont House Agreement*.<sup>3</sup> Both agreements detail the necessity for public sector reform due to the reduction in the availability of UK grants and financial support, and the long-term political need to unify a '*divided society*.'<sup>4</sup> A number of public sector administrative reforms have been made, including the establishment of a '*Buy Social Unit*' in 2014.<sup>5</sup> The unit was established to coordinate the use of social clauses in Northern Ireland's public procurement contracts. The unit works in partnership with the Central

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<sup>1</sup> Both contracts included similar community benefit clauses, subcontractor considerations and elements of the contract were divided into smaller lots.

<sup>2</sup> See Northern Ireland Executive, '*Programme for Government 2011-2015*' (2012) 27; Please note that a draft *Programme for Government 2016-2021* has yet to be adopted since the collapse of the government in 2017.

<sup>3</sup> See the '*Stormont House Agreement*' (2014); [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390672/Stormont\\_House\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf) Last accessed 25th March 2019.

<sup>4</sup> The collapse of the Northern Irish government has delayed recent implementation of legislation and policies required to achieve agreed upon objectives.

<sup>5</sup> The Buy Social unit offers support and training on the incorporation of community benefit clauses in public works and services contracts. See more; <https://buysocialni.org/> Last accessed 25/03/2019.

Procurement Directorate (CPD)<sup>6</sup> and with the Strategic Investment Board (SIB). SIB seconded two employees to assist with the development and implementation of the social criteria.<sup>7</sup> The unit is tasked with three core public procurement goals, to promote targeted recruitment and training for people who are long-term unemployed and leaving education, to create opportunities for people with disabilities or learning difficulties and, to ensure the provision of relevant training.<sup>8</sup>

As in, the Irish case study, SMEs are the backbone of the economy. Over 118,000 SMEs operate in Northern Ireland, accounting for approximately 75% of all turnover and employment in the private sector.<sup>9</sup> SME growth is required to maintain and support a sustainable and prosperous economy.<sup>10</sup> This case study questions if the recent policy approaches on social procurement are conducive to supporting SME participation in the public market?

This case study explores a socially-conscious competition concluded by the CPD and the Buy Social unit for the supply and operation of a cleaning, catering and ancillary services contract. Comparably, to the New Children's Hospital construction contract, the contract included mandatory community benefit clauses, voluntary subcontractor considerations and the contract was divided into smaller lots. The research examines the impact the criteria had on SME participation at the tendering stage and also in the contract performance stage. The case study findings demonstrate a valid link between the use of social criteria and the

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<sup>6</sup> Now referred to as '*Construction and Procurement Delivery*' (CPD). However, this terminology is not used for the remainder of the thesis as the unit was known as the Central Procurement Directorate when the tender competition was conducted.

<sup>7</sup> Interview with Hollie Carroll, Development Officer, Buy Social Unit (Belfast, Northern Ireland, 5<sup>th</sup> October 2016).

<sup>8</sup> The Buy Social Unit was established under the remit of the Strategic Investment Board to assist with the effective delivery of procurement policy goals. See CPD Public Guidance Note; '*Integrating Social Considerations into Contracts*' (2016) PGN 01/13.

<sup>9</sup> Federation of Small Business Northern Ireland *The realities of public procurement for SMEs in Northern Ireland* (2014). Available at; <https://www.fsb.org.uk/docs/default-source/fsb-org-uk/the-realities-of-public-procurement.pdf?sfvrsn=1> Last accessed 25<sup>th</sup> April 2019.

<sup>10</sup> P. Cooke, S. Roper and P. Wylie, '*The Golden Thread of Innovation*' and *Northern Ireland's Evolving Regional Innovation System*' (2003) 37(4) *Regional Studies* 365.

facilitation of SME engagement in public contracts, one of the contractual lots was awarded to a consortium partnership comprising of one large organisation and one micro social enterprise. Additionally, a subcontract was awarded to a B-corporation company.<sup>11</sup> Data for this case study was gathered by interviewing public officials and awardee companies and by studying the published request for tender documents.<sup>12</sup> The chapter opens with a discussion on the development and adoption of socially responsible procurement practices in the state. It continues by examining the parameters of the criteria included in the £27mn cleaning, catering and ancillary services contract.

## 6.2 Case Study Background

There were a number of policy developments which created a favourable environment for the widespread adoption of social criteria in works contracts. The Buy Social unit was established as a response to the 2010 ‘*Sustainable Development Strategy for Northern Ireland*’ and by the ‘*Programme for Government*’ joint commitment to introducing social procurement.<sup>13</sup> Both strategies called for the reform of public sector services, including the greater use of socially-driven public procurement.

One of the most influential factors on policy development was the adoption of the OECD Report ‘*Northern Ireland (United Kingdom) Implementing Joined-up Governance for a Common Purpose*’ in 2016.<sup>14</sup> The OECD published the report on the back of a request by the Government in 2014 for guidance on public-sector reform.<sup>15</sup> This report

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<sup>11</sup> This is discussed in section 6.8.3 Note a B Corporation is a form of hybrid social enterprise. See D. Reiser, ‘*Benefit Corporations - A Sustainable Form of Organization*’ (2011) 46(3) Wake Forest L Rev 591.

<sup>12</sup> Five interviews were completed for this case study. Two with CPD Development Officers, one with a Legal Counsel, and two with the representatives from the awardee companies. See Appendix D.

<sup>13</sup> See Northern Ireland Assembly Commission *Sustainable Development Strategy for the Northern Ireland* (April 2010). See also *Programme for Government* (n 2).

<sup>14</sup> See OECD *Northern Ireland (United Kingdom) Implementing Joined-up Governance for a Common Purpose* (Public Governance Reviews, OECD Publishing, 2016).

<sup>15</sup> See OECD (n 14) 5.

was completed before the Brexit referendum and the collapse of the government in 2017. The report highlighted that inconsistencies in the use of social clauses were limiting their long-term socio-economic benefits.<sup>16</sup> The government was encouraged to establish a coordinated and harmonised national approach for the incorporation of social clauses in public contracts. This recommendation provided greater backing for the adoption of the Buy Social unit.<sup>17</sup> ‘*Buy Social*’ is not only the name of the support body, but it is also used as a procurement term. A universal ‘*Buy Social*’ term has been defined by SIB, defining the term as;

*...a way to maximise the benefits from public procurement in terms of personal well-being, social cohesion and inclusion, equal opportunities and sustainable development.*<sup>18</sup>

While the definition provided by the SIB is far-reaching, the Buy Social team are currently focusing on the incorporation of ‘*targeted recruitment and training*’ community benefit clauses in public contracts. The targeted recruitment and training standardised clauses designed by the Buy Social unit require contractors to set-aside a proportion of any new paid employment positions for ‘*new entrant trainees*’. A ‘*new entrant trainee*’ is any person;

*...who lack the skills and experience to compete for and sustain a job through the labour market e.g. because they have no substantial work experience (such as school or college leavers) or a long-term unemployed person with no experience in the sector they are seeking to join.*<sup>19</sup>

When this clause was designed, unemployment rates were a third higher in people aged 25 years or younger than those older than 25 years of age.<sup>20</sup>

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<sup>16</sup> See OECD (n 14) 247.

<sup>17</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>18</sup> See the SIB and Buy Social unit guidance *What is Buy Social?* (1).

<sup>19</sup> See the SIB and Buy Social unit guidance *Who is a New Entrant Trainee?* (1).

<sup>20</sup> The unemployment rate of young people (aged 18 to 24) in Northern Ireland from 2013 was 20.4%. This figure has decreased significantly in recent years. See Statista *Rate of youth unemployment in Northern Ireland from 2013 to 2018* (2018).



Contracting authorities are requested to use public procurement to assist young people, who are at risk of gaining full-time paid employment.<sup>21</sup> When the clauses were being designed, advice was sought from the Equality Commission and from the internal legal team to ensure that the clause did not discriminate on the basis of age. The clause was not found not to be discriminatory in nature as it aligned closely with government policies on the promotion of the employment of young people.<sup>22</sup>

Cross-departmental support for the promotion of social procurement is evident, the Department of Finance's Procurement Board has formally adopted the '*Buy Social*' term as a purchasing principle.<sup>23</sup> The OECD recommendations, the public-sector acceptance of the Buy Social term and the concentration of employment promotion policies allowed for the design and adoption of national Buy Social procurement requirements.<sup>24</sup> Since the 5<sup>th</sup> November 2015, procurers are required to include Buy Social requirements in building contracts exceeding £2m and in civil engineering contracts with a value of £4m or more. The Procurement Board enforces this requirement.<sup>25</sup> Following the publication of the '*Strategic Review of Social Clauses*', a '*Buy Social Construction Model*' was implemented in April 2016.<sup>26</sup> The targeted recruitment and training requirements were extended to cover supplies and services contracts.<sup>27</sup>

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<sup>21</sup> See CPD Public Guidance Note, '*Integrating Social Considerations into Contracts*' (2016) PGN 01/13.

<sup>22</sup> Interview with Development Officer, Buy Social Unit (n 7). See also; See Northern Ireland Assembly Commission Sustainable Development Strategy for the Northern Ireland (April 2010) (n 13) See also *Programme for Government* (n 2).

<sup>23</sup> See the CPD and Department of Finance *Sustainable Procurement in Construction; Sustainability Requirements; Model Contract Clauses and Guidance* (2019).

<sup>24</sup> Austen and Seymour argue that a lack of industry commitment to policy objectives results in high levels of non-compliance and minimal benefits for either side. See; S. Austen and R. Seymour, '*Can governments use their construction contracts to improve training outcomes?*' (2009) 15(1) *Journal of Purchasing and Supply Management* 43.

<sup>25</sup> See CPD Public Guidance Note (n 21).

<sup>26</sup> To date, the Unit has successfully included social criteria in the contracts ranging from £2mn - £110m works contracts for the Department for Regional Development, Department of Health, Social Services and Public Safety, Department of Health, Social Services and Public Safety, Central Procurement Directorate, Department of Enterprise, Trade and Investment, Education Authority, Department of Education and the Department of Agriculture and Rural Development. See the Buy Social Unit Case Studies.

<sup>27</sup> However, the revisions made did not extend to imposing penalties apply for non-compliance. See CPD Public Guidance Note (n 21).

Prior to the creation and operation of the Buy Social unit, the ‘*Construction Industry Federation Northern Ireland*’ (CIFNI) included targeted recruitment and training clauses into certain works contracts. The clauses were designed for construction contracts only, and they were not included in supplies or services contracts.<sup>28</sup> The clauses were designed in partnership with the construction sector. During the research interviews, the Buy Social interviewees identified some inherent issues the CIFNI clauses. One problem identified referred to the lack of payment offered to the work experience recipients.<sup>29</sup> The clauses were also uniformed in nature and were ‘*copied and pasted*’ from contract to contract.<sup>30</sup> This did not always result in the most successful operations.<sup>31</sup>

The recipients were in receipt of social welfare. The clauses required contractors to offer work experience rather than offering paid-work placements.<sup>32</sup> The Buy Social clauses are primarily concerned with paid work placements and training, with the long-term view of improving unemployment rates in the region.<sup>33</sup> Another issue raised with the CIFNI clauses was the emphasis placed on recruiting people from the Department of Employment and Learning’s approved list of unemployed persons.<sup>34</sup> The clauses were inflexible in nature, people were automatically selected to work on the construction contracts. This did not automatically ensure that the most appropriate person was placed onto a suitable contract.<sup>35</sup> This had negative repercussions and associations for the person placed on the work experience and for the primary contractor. A significant number of people placed on work experience were required to work approximately

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<sup>28</sup> The former clauses have been replaced by the; CPD and Department of Finance, ‘*Sustainable Procurement in Construction; Sustainability Requirements; Model Contract Clauses and Guidance*’ (2019). See also See CPD Public Guidance Note (n 21).

<sup>29</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>30</sup> Interview with Development Officer, Buy Social Unit (n 7) The importance of flexibility in social criteria is emphasised in; A. McWilliams and D. Siegel, ‘*Corporate social responsibility: A theory of the firm perspective*’ (2001) 26(1) *Academy of Management Review* 117.

<sup>31</sup> Interview with Development Officer, Buy Social Unit (n 7) This resulted in untrained and unmotivated people being placed with construction firms.

<sup>32</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>33</sup> See CPD (n 28).

<sup>34</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>35</sup> Interview with Development Officer, Buy Social Unit (n 7).

35-40 hours per week and in turn received a £15 supplement to their social welfare payment.<sup>36</sup> There was little incentive for the recruited employees or trainees to engage with the practice fully.<sup>37</sup>

The Buy Social initiative offers a more flexible structure, allowing contracted suppliers to source employees from a wide list of non-governmental employment schemes, they do not require the contractors to solely use the list of people provided by the Department of Employment and Learning.<sup>38</sup> The unit established a ‘*brokerage*’ website to assist contractors in finding ‘*employability brokers*’ to assist them in meeting their targeted recruitment and training requirements.<sup>39</sup> Contractors are not expected to meet the employment targets on their own, the Buy Social unit offers practical assistance to contractors in finding suitably trained and available trainees and employees.

A further significant change introduced by the Buy Social unit is the use of monitoring mechanisms. Data collected from the CIFNI clauses was difficult to review, data was not reported and was analysed in an ad-hoc and non-harmonised manner.<sup>40</sup> The Buy Social unit is committed to reviewing the effectiveness and the socio-economic impact of the use of the community benefit clauses. The Buy Social unit was established to address the problems associated with the former CIFNI clauses and to support the strategic use of public procurement.<sup>41</sup>

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<sup>36</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>37</sup> See also; CFP Report on the Inquiry into Public Procurement in Northern Ireland (2010). available online at: [http://archive.niassembly.gov.uk/finance/2007mandate/reports/Report\\_19\\_08\\_09R.htm#3](http://archive.niassembly.gov.uk/finance/2007mandate/reports/Report_19_08_09R.htm#3) Last accessed 28<sup>th</sup> March 2019.

<sup>38</sup> This appears in compliance with the TFEU principles of non-discrimination and equal treatment.

<sup>39</sup> This is an example of how the Buy Social unit is making it easier for procurers and suppliers to comply with community benefit clauses. See <https://buysocialni.org/contractors/find-a-broker/> Last accessed 28<sup>th</sup> March 2019.

<sup>40</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>41</sup> See OECD (n 14).

### 6.3 Case Study Details

This case study examined a three-year supplies and services contract.<sup>42</sup> The ‘*Cleaning, Catering and Ancillary Services*’ contract had an overall value of £27million. The tender procedure was conducted by the CPD and the Buy Social unit. The request for tender and accompanying contract was unique in design as it was one of the first services contracts to include social clauses.<sup>43</sup> The CPD carried out the procurement process on behalf of various public-sector bodies.<sup>44</sup> Work commenced on the contract in May 2016.

While this was the first socially-responsible supplies and services contract carried out by the CPD and the Buy Social unit, the two bodies had previously included social criteria in procured works contracts. Initially, when the two bodies commenced working together, the relationship was described as a ‘*strained*’ one.<sup>45</sup> Similarly, to the issues faced by the National Children’s Hospital’s CBPM, CPD was reluctant to incorporate any clauses which would increase legal uncertainty, costs and administrative burden for interested economic operators and public bodies.<sup>46</sup> One of the initial problems identified by the team was the unwillingness of the public service to change their attitudes towards procurement practices. The Buy Social Development Officer commented that;

*...when you are working with the public sector, unless it is black and white and has to be done, then they question ‘why should I do that?’*

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<sup>42</sup> The contract period was initially for two years, with the option to extend the contract for a further 12 months subject to annual review. The request for tender documents and contract clauses were reviewed. The request for tender documents were made freely and openly available to all interested suppliers.

<sup>43</sup> Interview with Anna Grey, Legal Counsel, Buy Social Unit (Belfast, Northern Ireland, 5<sup>th</sup> October 2016).

<sup>44</sup> Request for Tender, *Lots 1 and 2 Specification Schedule* (P19012.Cft29343).

<sup>45</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>46</sup> L. Georghiou, Y. Li, E. Uyarra and J. Edler, ‘*Public procurement for innovation in small European countries.*’ A Report from the ERA-PRISM: Policies for Research and Innovation in Small Member States to Advance the European Research Area (OMC-Net Project, Brussels 2010); C.P. McCue, E. Prier, and D. Swanson, ‘*Five dilemmas in public procurement*’ (2015) 15(2) *Journal of Public Procurement* 177.

*and people were doing it [using social criteria] out of the kindness of their heart because nobody was making them.*<sup>47</sup>

These fears have been reiterated by Baden et al. and Sánchez Graells questioning the administrative costs and burden of implementing employment-based social considerations.<sup>48</sup> Changes introduced to public sector operations is dependent on the support of public sector officials.<sup>49</sup> However, the relationship improved quickly between the Buy Social unit and the CPD, this was mainly due to the introduction of social procurement legislation in the rest of the UK and the successful implementation of social clauses in pilot work contracts.<sup>50</sup> Socially-driven procurement practices were becoming more established and seen as “*the norm*” in high-value works contracts in Scotland.<sup>51</sup> Repeating others’ successes reduces public bodies’ unwillingness and fears of introducing change to established practices.<sup>52</sup> By the time, the social criteria were being designed for the request for tender and accompanying contracts, CPD was actively supporting socially responsible procurement practices. Recently the CPD introduced a guidance note setting out instructions for the inclusion of social criteria in works, supplies and services contracts.<sup>53</sup> When the clauses were first used, the Buy Social team spent between 4-5 months negotiating the clause with CPD.<sup>54</sup> Since completing this pilot project, it now ‘*only takes days to one week*’ to negotiate the inclusion of social criteria in works and services contracts. Whilst CPD were initially

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<sup>47</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>48</sup> D. Baden, I. Harwood and D. Woodward, ‘*The effects of procurement policies on ‘downstream’ corporate social responsibility activity: Content-analytic insights into the views and actions of SME owner-managers*’ (2011) 29(3) International Small Business 259.

<sup>49</sup> See J. Barton Cunningham and J.S. Kempling, ‘*Implementing change in public sector organizations*’ (2009) 47(2) Management Decision 330.

<sup>50</sup> *Public Services (Social Value) Act 2012*. See also Lord Young’s supporting Review of the Social Value (2015).

<sup>51</sup> *Procurement Reform (Scotland) Act, 2014*

<sup>52</sup> A. De Wit, ‘*Measurement of project success*’ (1988) 6(3) International Journal of Project Management 164.; T. Entwistle and S. Martin, ‘*From competition to collaboration in public service delivery: A new agenda for research*’ (2005) 83(1) Public Administration 233.

<sup>53</sup> CPD and Department of Finance, ‘*Sustainable Procurement in Construction; Sustainability Requirements; Model Contract Clauses and Guidance*’ (2019). See also See CPD Public Guidance Note (n 21).

<sup>54</sup> Interview with Development Officer, Buy Social Unit (n 7).

reluctant to implement community benefit clauses, the Directorate had previously published a procurement guidance note in 2012 aimed at *'helping SMEs benefit from subcontracting opportunities in public contracts.'*<sup>55</sup> The Directorate also published two additional procurement guidance notes to assist both SMEs and social enterprises *'access public sector contract opportunities.'*<sup>56</sup> The reviewed contract included several provisions to support SME participation which reflected the best practices set out in the procurement guidance notes. The request for tender and accompanying contract reviewed included a community benefit clause, subcontractor conditions, and the contract was divided into three lots.

#### 6.4 Division of contract into smaller lots

The contract was divided into three heterogeneous lots, with each lot representing a different contractual need. The procurement documents directly state that the purpose of dividing the contract into lots was *'to ensure the security of supply, preserve competition and encourage participation by small and medium size enterprises (SMEs).'*<sup>57</sup> While each tenderer could bid for all three lots, a proportionate measure was included by the CPD, only allowing one supplier to win an individual lot.<sup>58</sup> Tenderers were required to confirm that their organisation had a minimum annual turnover of 1.5 times the value of the individual lots for the past two years.<sup>59</sup> The minimum annual turnover to qualify for Lot 1 was £4.5million, £3million for Lot 2 and £6million for Lot 3.<sup>60</sup>

As each lot had different end-users, the lots were evaluated by different panels of representatives. Lots 1 and 2 were divided up by Post Code. Lot 1 and 2 were reviewed by a panel composing of representatives from NI's

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<sup>55</sup> See CPD, *'Helping SMEs Benefit from Subcontracting Opportunities'* (2012) PGN 06/12. See also; Department of Finance and CPD Northern Ireland, *'Public Procurement Policy'* (2014) Version 11.

<sup>56</sup> See CPD, *'A Guide for Social Economy Enterprises'* (2011) PGN 01/11; *Helping Small and Medium Sized Enterprises (SMEs) and Social Economy Enterprises (SEEs) access Public Sector contracting opportunities* (2011) PGN 02/11.

<sup>57</sup> Request to Tender *Instruction to Tenderers*, section 19.

<sup>58</sup> Public Contracts Regulations reg 46(4).

<sup>59</sup> Or for the period the tenderer has been trading if this is less than two years. Public Contracts Regulations, reg 58.

<sup>60</sup> Request to Tender *Instruction to Tenderers*.

Civil Service departments and NI Water. Representatives from the Police Service NI (PSNI) and the Forensic Science NI (FSNI) evaluated Lot 3.<sup>61</sup> As tenderers were limited to the number of lots they could be awarded, to ensure fairness in the process, Lot 3 with the highest value was awarded first, Lot 1 was awarded secondly with the next highest value and finally, Lot 2 was awarded.<sup>62</sup> Even though tenderers were limited in the number of lots they could be awarded, there was no restriction placed on their subcontracting choices.<sup>63</sup> A large enterprise was awarded Lot 2 and was subsequently sub-contracted to work on Lot 1. This case study examined Lot 1. Specifically, Lot 1 required catering and hospitality services for the following public bodies and offices; the Causeway Exchange (DCAL), Clarendon Road (DE), Clarence Court (DRD), County Hall, Ballymena (DRD), County Hall Coleraine (DRD), Goodwood House, (DFP) and the Great Northern Tower (DSD).<sup>64</sup>

### 6.5 Community Benefit Clauses

A ‘*targeted recruitment and training*’ community benefit clause was included in the procurement documents. The clause required that 40% of all new employees employed to work on the contract are classified as new entrant employees in years one and two. This requirement rises to 50% in year three.<sup>65</sup> Furthermore, 10% of these positions must be set-aside for people with disabilities registered with the Disability Employment Service, Department of Communities.<sup>66</sup> The Buy Social unit would have ultimately liked to include a more ‘*prescriptive*’ clause in the services contracts, similar to the clause attached to the National Children’s Hospital case study.<sup>67</sup> However, all parties to the procurement competition

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<sup>61</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>62</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>63</sup> Public Contracts Regulations, reg 71.

<sup>64</sup> Request for Tender, *Lot One Specifications*, section 1.

<sup>65</sup> Request for Tender, *Lot One Specifications*, section 19.

<sup>66</sup> Request for Tender, *Lot One Specifications*, section 19. Note contracting authorities should also take into account the definitions of disabled worker, disadvantaged worker and sheltered employment set out in Art. 2(3), 2(4), 2(100) Regulation (EU) 651/2014.

<sup>67</sup> Interview with Development Officer, Buy Social Unit (n 7).

agreed on a *'per-annum'* assessment clause.<sup>68</sup> By contrast, the National Children's Hospital clause requires the main contractor to deliver a set number of employment hours. The Buy Social team argued that the approach used by the National Children's Hospital guaranteed employment and training opportunities.<sup>69</sup> There was no guarantee on how many new entrant trainees would benefit from the clause contained in this contract.

Unlike the New Children's Hospital construction contract, this contract had to take transfer of undertakings (TUPE) compliance considerations into account.<sup>70</sup> The TUPE regulations protect the rights of employees where the company in which they are employed is transferred to a new owner, and this regularly occurs in the cleaning and catering sectors. During the tender design stage, the procuring team identified three approaches to reduce TUPE complications. The first approach identified sought to attach a specific employment and training target to each million awarded, the team deemed that this approach was suitable where TUPE applied to 0 – 50% of the estimated workforce.<sup>71</sup> The second approach attached employment and training targets on an annual basis rather than a financial basis. It was concluded that this approach was suitable, where TUPE applied to more than 50% of the estimated workforce.<sup>72</sup> The third approach was an *'add-on'* where the first or second approach is suitable, and additionally, the clause requires the employment of people with disabilities, employment of ex-prisoners and young adults moving from the full care of the Health and Safety Executive into the workforce.<sup>73</sup>

The cleaning and catering contract adopted the second approach. This approach was adopted (using a percentage rather than set working weeks)

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<sup>68</sup> Interview with Legal Counsel, Buy Social Unit (n 43) This form of targeted recruitment and training clause is more suitable to services contracts than works contracts. This is due to the size of the contracts and employment generation potential.

<sup>69</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>70</sup> The contracting authority and contractor were required to comply with the *Transfer of Undertakings (Protection of Employment) Regulations 2006* and the *Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 (TUPE)*.

<sup>71</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>72</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>73</sup> Interview with Development Officer, Buy Social Unit (n 7).



to avoid adding extra costs to the project. When TUPE does not apply, 10% of the new workforce must be identified as ‘*new entrant trainees*’.<sup>74</sup> The targets are designed based on the labour value of the contract; construction contracts by their very nature will have higher targets set than those included in a services contract. The disability requirement in the contract ensures that at least 4% of the overall workforce must be sourced from the Department of Communities, Disabilities Employment Service.<sup>75</sup> This service offered ‘*exceptional support and assistance*’ to the Buy Social team.<sup>76</sup> The Buy Social team attempted to build a strong relationship with the preferred contractor from the start of the contract, assisting the main contractor in meeting the employment targets.

The social clauses were included as part of the tender award criteria. Among other things, the tenderers were asked to demonstrate how they would meet the sustainability aspects of the contract, including meeting the targeted recruitment and training clauses. The weighting attached to the overall criteria was 21%.<sup>77</sup> Tenderers were required to confirm that their organisations had the capability;

*...to deliver the contract conditions relating to recruitment and training, including the appointment, mentoring and support of new entrant trainees; the notification of all vacancies to agencies named by the client and the provision of equal opportunities for candidates applying through these agencies; and the provision of related monitoring and verification information.*<sup>78</sup>

There were no penalties imposed for non-compliance with the social criteria. However, the unit is currently considering and researching the

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<sup>74</sup> See; Strategic Investment Board and Buy Social Unit, ‘*Buy Social Training Toolkit: Targeted Recruitment & Training*’ (Version 1, 2016, p.41). For a discussion on the impact of TUPE when tendering see; A. Kerr and M. Radford, ‘*TUPE or not TUPE: competitive tendering and the transfer laws*’ (1994) 14(4) Public Money & Management 37.

<sup>75</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>76</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>77</sup> Request for Tender, *Qualitative Award Criteria*. AC1. Service Delivery to meet the Specification.

<sup>78</sup> Request to Tender, *Instructions to Tenderers* MR1.

possibilities and ways to introduce penalties for future contracts.<sup>79</sup> There is a belief that if the clauses are set as a contract performance clause, they should be treated as a standard contract clause which normally carries penalties for non-compliance.<sup>80</sup> The Buy Social Development Officer suggested that a penalty in the form of non-compliance certificates could be potentially be used, suggesting that if suppliers receive three or more certificates over a set period, they could be barred from participating in future competitions.<sup>81</sup> These penalties would have to include a time limitation period, and the barring penalty could not be imposed for an undisclosed period.<sup>82</sup>

The Buy Social team has recently developed an online toolkit to assist public procurers using social clauses.<sup>83</sup> Public procurers considering incorporating community benefit clauses into services contracts can utilise the online toolkit by submitting financial details of the contract, the length of the contract and the approximate turnover of potential contractors, the online diagnostic tool calculates whether the clauses are suitable or not for the contract. If the clauses are found to be suitable, the procurers can then include the appropriate social clause designed by the team, thus eliminating any legal uncertainty, additional costs or time to the procurement procedure.<sup>84</sup>

## 6.6 Subcontractor considerations

A voluntary subcontractor consideration was included in the contract. The Buy Social team was responsible for drafting and incorporating the targeted recruitment and training community benefit clause. CPD was

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<sup>79</sup> Interview with Nuala Griffiths Development Officer, Buy Social Unit (Belfast, Northern Ireland, 5<sup>th</sup> October 2016). This is discussed further in section 6.8.2.

<sup>80</sup> See C. D'Alpaos, M. Moretto, P. Valbonesi and S. Vergalli, '*Time overruns as opportunistic behavior in public procurement*' (2013) 110(1) *Journal of Economics* 25.

<sup>81</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>82</sup> Public Contracts Regulations, reg 57.

<sup>83</sup> Strategic Investment Board and Buy Social Unit, '*Buy Social Training Toolkit: Targeted Recruitment & Training*' (Version 1, 2016).

<sup>84</sup> See Strategic Investment Board and Buy Social Unit (n 83). The toolkit has diminished the operational fears reiterated by; D. Baden, I. Harwood and D. Woodward, '*The effects of procurement policies on 'downstream' corporate social responsibility activity: Content-analytic insights into the views and actions of SME owner-managers*' (2011) 29(3) *International Small Business* 259.

responsible for the inclusion of all other social and environmental criteria.<sup>85</sup> A voluntary consideration was included encouraging the winning contractor to make ‘*use of small and medium enterprises within the supply chain.*’<sup>86</sup> All onus was placed firmly on the main contractor to ensure that subcontractors were compliant with all the contractual requirements and expectations.<sup>87</sup> No specific details were included on how such subcontracting relationships should be formed or maintained. The consideration states;

*The Client encourages the use of small and medium enterprises within the supply chain. The Contractor may enter into agreements with supply chain partners, as well as utilising the Contractor’s own resources. The Contractor shall institute a stringent vetting procedure when working with external supply chains. Any relationship entered into will be subject to the Conditions of the Contract and any reference to the Contractor shall be taken as a reference to any service partner working with or on behalf of the Contractor. The Contractor shall warrant that the performance measures which they are expected to operate within have been transferred contractually, to any supply chain partners.*<sup>88</sup>

Unlike the National Children’s Hospital case study, this consideration was not bespoke to this contract. The National Children’s Hospital subcontractor consideration was included with the purpose of encouraging the main contractor to actively engage with SMEs, with the consideration going as far as requesting the main contractor to host Meet the Buyer networking events, identifying future subcontracting opportunities and outlining minimum requirements for future subcontracting elements.<sup>89</sup>

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<sup>85</sup> Interview with Development Officer, Buy Social Unit (n 7).

<sup>86</sup> Request for Tender, *Specifications*, section 16. These forms of clauses are permissible, once the contracting authority does not set aside public contracts for SMEs. See Case C-113/13 *Spezzino* [2014] *pub. electr.* EU:2014:2440.

<sup>87</sup> Request for Tender, *Specifications*, sections 16 and 19. As discussed in section 3.5.3, contracting authorities should maintain an active monitoring role during the contract performance stage.

<sup>88</sup> Request for Tender, *Specifications*, section 16.1 There is an element of flexibility and fairness in this section.

<sup>89</sup> See section 5.3.4.

The consideration differs to the National Children's Hospital case study as it was not solely attached to this contract, it forms part of CPD's sustainable buying practices. The wording of both considerations is similar in parts, requesting the main contractor to monitor all subcontractor's activity over the life-cycle of the contract.<sup>90</sup>

The consideration encourages contractors to consider developing a sustainable economic supply chain. In particular, contractors are encouraged to work with small and micro-enterprise and social enterprises.<sup>91</sup> Noticeably, the public body requires the main contractor to declare that they will pay all subcontractors promptly in line with public pay agreements, the specifications require '*payment to subcontractors must be made within 30 days of receipt of a valid invoice.*'<sup>92</sup>

Similarly, to the National Children's Hospital case study, an envisaged partnership between the contracting authority and supplier is outlined in the tender specifications. Guiding principles contained in the specifications outline a partnership based on the delivery of high-quality, efficient services, prompt payments and a joint commitment to implementing a sustainable structure which promotes continuous improvements and innovations. The core operational components of the contract require the contractor to provide a clean and safe working environment for employees, to deliver a high-quality, consistent service to all public-sector bodies, and to ensure compliance with all relevant forms of health and safety and food legislation.<sup>93</sup>

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<sup>90</sup> Public Authority Regulations reg 71(3); (UK) Public Contracts Regulations reg 71(3) Contracting authorities should also monitor contractors and subcontractors compliance with the criteria.

<sup>91</sup> Request for Tender, *Specifications*, section 19.3. See also Department of Finance and CPD Northern Ireland, '*Public Procurement Policy*' (2014) Version 11. Available at: <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/ni-public-procurement-policy-version-11-august-2014.pdf> Last accessed 25th April 2019.

<sup>92</sup> Request for Tender, *Specifications*, section 16.1 See also Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions OJ L 48/1.

<sup>93</sup> Including compliance with the Food Safety (NI) Order 1991, Regulation (EC) No 852/2004, Regulation (EC) No 853/2004, Regulation (EC) 178/2002, Food Hygiene Regulations (NI) 2006, Food Premises (Registration) Regulations 1991, Food Safety (General Food Hygiene) Regulations 1995 and Food Safety (Temperature Control) Regulations 1995, Food Information Regulations 2014(EC) Nos 1169/2011.

Contract performance and monitoring criteria were outlined in detail in the request for tender documents. The initial duration of the contract was two years, with the option of extending the contract by 12 months depending on contract performance. Prices were fixed for the initial two years.<sup>94</sup> Contractors were required to submit bi-annual assessments, including a '*Continuous Improvement Plan*' outlining a strategic review of resources with a view of improving environmental and operational inefficiencies. Contractors throughout the life-cycle of the contract are encouraged to introduce innovative improvements to realise cost savings and reduce energy usage.<sup>95</sup>

An essential part of the procurement cycle is the monitoring and evaluation of the implementation of operations.<sup>96</sup> The primary contractor was required to meet with the contracting authority within ten days of the contract commencement to agree day to day '*Operational Procedures*' and '*Key Performance Indicators*'.<sup>97</sup> Weekly progress updates are required throughout the remainder of the contract. The contractor is responsible for providing all the necessary training required for the transfer of any employees under TUPE. In addition to this, the primary contractor is responsible for regularly informing the contracting authority of subcontractor's performances.<sup>98</sup> Importantly, the Buy Social co-ordinator has been involved at every stage of the procurement cycle to ensure compliance and commitment to the community benefit clauses.<sup>99</sup>

## 6.8 Research Findings

Lot 1 was awarded to a consortium, lots 2 and 3 were awarded to large private organisations. This case study reviewed lot 1 which was awarded

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<sup>94</sup> Request for Tender, *Specifications*, section 5.1.

<sup>95</sup> Request for Tender, *Specifications*, sections 5 and 19.

<sup>96</sup> L. Georghiou, J. Edler, E. Uyarra and J. Yeow, '*Policy instruments for public procurement of innovation: Choice, design and assessment*' (2014) 86 *Technological Forecasting & Social Change* 1.

<sup>97</sup> Request for Tender, *Specifications*, section 6.

<sup>98</sup> Request for Tender, *Specification*, section 6.

<sup>99</sup> Interview with Development Officer, Buy Social Unit (n 7).

to a consortium partnership comprising of one large multinational corporation, G4S Northern Ireland Ltd., hereinafter referred to as ‘G4S’, and one small local social enterprise, Loaf Catering, operating under the NOW Group. The NOW Group specialises in supporting people with learning difficulties and autism in finding long-term employment. Loaf catering specialises in ‘*outside catering*’ and operates three cafes in Belfast city.<sup>100</sup> G4S describes itself as ‘*the leading global integrated security company, specialising in the provision of security products, services and solutions.*’<sup>101</sup> The purpose of this case study is to examine what impact the inclusion of the use of lots, community benefit clauses and subcontractor considerations had on SME participation. As this case study examines a service and supplies contract, it does not include a pre-procurement element.

#### 6.8.1 Use of Lots Findings

The first measure assessed questioned what impact the division of the large contract into smaller lots had on SME participation. The £27mn contract was divided into three £9mn lots. G4S and the NOW Group’s ‘Loaf Catering’ suggested that the division of the contract into smaller lots had an impact on their decision to bid. The consortium was awarded ‘Lot 1’. It was the first time that the two companies partnered on a contract and the contract was of significant value and size for the social enterprise.<sup>102</sup> The minimum annual turnover to qualify for Lot 1 was £4.5million.<sup>103</sup> Considering the value of the size of the lot, it could be argued that SMEs would be deterred from bidding for the contract as sole providers.<sup>104</sup> Loaf Catering would not have had the capability or capacity to bid for this contract on their own. On the other hand, G4S had the financial,

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<sup>100</sup> Loaf Catering is a small social enterprise employing 14 people. See more about the company at; <https://www.loafcatering.com/our-team> Last accessed 30<sup>th</sup> April 2019.

<sup>101</sup> G4S is a large organisations that employs over 34,000 people in the UK and Ireland. See; [www.g4s.ie](http://www.g4s.ie) Last accessed 30<sup>th</sup> April 2019.

<sup>102</sup> Interview with Maeve Monaghan, CEO NOW Group (by phone, 26<sup>th</sup> October 2016) and Interview with Brendan Flynn, Operations Director, G4S Northern Ireland (by phone, 10<sup>th</sup> November 2016).

<sup>103</sup> Request for Tender, *Lot One Specifications, section 1.*

<sup>104</sup> M. Trybus, ‘*The Division of Public Contracts into Lots under Directive 2014/24: Minimum Harmonisation and Impact on SMEs in Public Procurement?*’ (2018) 43(3) *European Law Review* 313.

professional capability and experience to tender for the contract on their own, they could have subcontracted the social benefits requirements to Loaf Catering, or they could have appointed a social benefits manager as BAM Ireland did to carry out the social benefit requirements.

However, G4S choose to partner with Loaf Catering. The company indicated that the decision to split the contract into smaller lots had an impact on their decision to submit a tender as part of a consortium.<sup>105</sup> The value of the contract was significant enough for G4S to adopt new social practices by partnering with a social enterprise.<sup>106</sup> G4S's Operations Manager indicated that the size of the contract was ideal for trialling a new partnership with Loaf Catering.<sup>107</sup> This supports EU and national policy on the encouragement to divide large contracts into smaller lots to encourage SME participation.<sup>108</sup>

#### 6.8.2 Community Benefit Clauses Findings

The research secondly examined the use of a targeted recruitment and training community benefit clause. Unlike, the National Children's Hospital case study, the inclusion of the clause had a direct impact on the decision of the winning consortium to bid for the contract. This finding suggests that the social clause encouraged the participation of a social enterprise in the public contract.<sup>109</sup>

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<sup>105</sup> Interview with the Operations Director, G4S Northern Ireland (n 102).

<sup>106</sup> Companies are willing to adopt operational changes to secure profitable contracts or investments. See; M.A. Ayadi, M.I. Kusy, M. Pyo and S. Trabelsi, 'Corporate Social Responsibility, Corporate Governance and Managerial Risk-Taking' (2015) 11(1) The Journal of Theoretical Accounting Research 50.

<sup>107</sup> The Operations Director indicated that the company wished to expand their CSR policies and the company was inspired by the impact the social enterprise has on people living in deprived areas of Belfast. See Interview with the Operations Director, G4S (n 102).

<sup>108</sup> Even though the social enterprise could not have competed for the lot on their own merit, the division of the contract into the smaller lots assisted the social enterprise in gaining a share of the contract. See Commission, 'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts' (SWP) COM (2008) 2193; Department of Finance and CPD Northern Ireland *Public Procurement Policy* (2014) Version 11.

<sup>109</sup> Loosemore argues that social enterprises are optimal consortia partners for large companies as the social enterprises have the ability to carry out or manage the community benefit clauses. See M. Loosemore, 'Social procurement in UK construction projects' (2016) 34(2) International Journal of Project Management 133.

G4S was interested in the public contract, but due to a lack of understanding of community benefit clauses, they were unsure as to how to bid for the public contract. As this form of community benefit clause had not been incorporated into services contracts before, the G4S Belfast branch was not overly familiar with the social requirements.<sup>110</sup> However, they were extremely familiar with tendering and tender evaluation systems. The company believe that that they are *'fairly well tuned in, how they [tenders] are marked, we go after every mark, treat it like an exam.'*<sup>111</sup> The team normally adopts a structured tendering approach, however, they *'struggled to find the right approach'* for this contract, they struggled to *'identify what the real objective [of the contract] was'*, concluding it was *'not clear'* in the request for tender documents.<sup>112</sup> To improve their chances of winning the public contract, G4S offered to partner with Loaf Catering. They hoped that the social enterprise would assist them in understanding, implementing and monitoring the community benefit requirements.<sup>113</sup> It appears that G4S viewed the targeted recruitment and training clause as a *'commercial'* requirement and understood that the company could not successfully bid for the contract without adopting operational changes.<sup>114</sup>

The social enterprise, on the other hand, was familiar with both public contracts and community benefit requirements. This was not the first public contract the social enterprise was awarded. Now Group had previously been awarded contracts relating to training and employment of people with disabilities and the long-term unemployed.<sup>115</sup> Loaf Catering is a subsidiary of the Now Group. Loaf Catering was previously awarded a contract with Belfast City Council to establish a café in Belfast City

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<sup>110</sup> See Interview with the Operations Director, G4S Northern Ireland (n 102).

<sup>111</sup> See Interview with the Operations Director, G4S Northern Ireland (n 102).

<sup>112</sup> See Interview with the Operations Director, G4S Northern Ireland (n 102).

<sup>113</sup> See Interview with the Operations Director, G4S Northern Ireland (n 102).

<sup>114</sup> As suggested by H. Walker and L. Preuss, *'Fostering sustainability through sourcing from small businesses: public sector perspectives'* (2008) 16(15) Journal of Cleaner Production 1600.

<sup>115</sup> Interview with the CEO, NOW Group (n 102) .



Hall.<sup>116</sup> This contract was defined as a *'flagship contract'* by the social enterprise, it was a public services contract which was awarded on a MEAT basis and did not include any social clauses.<sup>117</sup> The contract was award on the basis of price and quality, and the duration of the contract was 2.5 years.<sup>118</sup> G4S believed that the social enterprises' experience and business objectives made them the ideal partner for this contract.<sup>119</sup>

The CEO of the Now Group acknowledged that the community benefit clause *'opened a conversation [with G4S] that wouldn't have happened otherwise.'*<sup>120</sup> The inclusion of the social clause opened up public sector opportunities for the company, without the inclusion of the clause, the social enterprise and its subsidiaries would not have had the capability or interest in carrying out large contracts, like the catering, cleaning and ancillary services contract.<sup>121</sup> The company was interested in the contract for a number of reasons, Loaf Catering could deliver pre-packed sandwiches, the company could deliver the targeted recruitment and training requirements and the 10% disability recruitment requirements particularly enthused the company.<sup>122</sup>

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<sup>116</sup> The company competed against for-profit SME competitors to win the contract. See Interview with the CEO, NOW Group (n 102).

<sup>117</sup> On a separate note, social enterprises should also tender for public contracts which do not include social criteria, as public contracts offer a reliable source of income. See J. Barraket and J. Weissman, *'Social procurement and its implications for social enterprise: a literature review'* Working Paper No. CPNS48 (The Australian Centre for Philanthropy and Nonprofit Studies, 2009).

<sup>118</sup> Interview with the CEO, NOW Group (n 102).

<sup>119</sup> Interview with the Operations Director, G4S Northern Ireland (n 102) G4S were able to pass some of the social responsibilities onto Loaf Catering. Loaf Catering were in a better position to achieve the targets due to their connection to the local community and their adopted social agenda. See N. Cornelius, M. Todres, S. Janjuha-Jivraj, A. Woods and J. Wallace, *'Corporate social responsibility and the social enterprise'* (2008) 81(2) *Journal of Business Ethics* 355.

<sup>120</sup> Interview with the CEO, NOW Group (n 102).

<sup>121</sup> For a discussion on the barriers faced by social enterprises see; S. Munoz, *'Social enterprise and public sector voices on procurement'* (2009) 5(1) *Social Enterprise Journal* 69; A. Erridge and S. Hennigan, *'Sustainable procurement in health and social care in Northern Ireland'* (2012) 32(5) *Public Money and Management* 363; A. Argyrou, *'Providing Social Enterprises with Better Access to Public Procurement: The Development of Supportive Legal Frameworks'* (2017) 12 *Eur. Procurement & Pub. Private Partnership Law Rev* 310.

<sup>122</sup> Interview with the CEO, NOW Group (n 102).

However, the CEO of the NOW Group questioned the overall benefits of community benefit clauses. The CEO emphasised the importance of monitoring and evaluating the social requirements throughout the contract performance stage and went as far as suggesting that penalties should be applied for non-compliance.<sup>123</sup> The Buy Social unit has designed targeted recruitment and training clauses which should be used in defined circumstances. The clauses do not impose penalties for non-compliance.<sup>124</sup> Additionally Loaf Catering and G4S expressed concerns around the monitoring and evaluation of the social clauses in the supply chain. The biggest risk factors for G4S is the monitoring of subcontractor's compliance with social clauses. G4S suggested that the social clauses added another layer of risk to the company, adding '*performance and reputational risk*' for non-compliance.<sup>125</sup> The company noted that partnering with social enterprises is '*part of the solution*' in mitigating against these risk factors.<sup>126</sup>

Overall, the consortium appears in favour of social clauses and strongly praise the network established by the Buy Social team. They credit the work done by the Buy Social team in making the implementation of the clause manageable and achievable.<sup>127</sup> G4S indicated that the partnership with the Now Group was of '*personal interest*.'<sup>128</sup> The company believed in the values and work conducted by the organisation. G4S commended the brokerage system set up and managed by the Buy Social team. The

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<sup>123</sup> Interview with the CEO, NOW Group (n 102). This opinion is in line with the Development Officers view on penalties for non-compliance. See Interview with Development Officer, Buy Social Unit (n 7).

<sup>124</sup> Although, there are no penalties imposed for non-compliance, contracting authorities may rely on Public Contract Regulations, reg 57(8)(c), to exclude tenderers from competitions for prior behaviour in a public contract. Reg 57(8)(c) allows a contracting authority to exclude a tenderer in circumstances where the supplier has shown persistent or significant deficiencies in the performance of a prior public contract. However, contracting authorities can generally only rely on this regulation in circumstances where the deficiencies in past performance led to early termination of the contract. See Case C-470/13 (Generali).

<sup>125</sup> Interview with the Operations Director, G4S Northern Ireland (n 102).

<sup>126</sup> Interview with the Operations Director, G4S Northern Ireland (n 102).

<sup>127</sup> Interview with the Operations Director, G4S Northern Ireland (n 102); Interview with the CEO, NOW Group (n 102). Both interviewees acknowledged the practical and helpful support that they received from the Buy Social Development Officer (Hollie Carroll).

<sup>128</sup> Interview with the Operations Director, G4S Northern Ireland (n 102).

employees, trainees and apprentices recruited through the system were of an extremely high calibre and are in general well briefed and prepared for the work.<sup>129</sup>

Loosemore's research asserts the belief that social enterprises are ideal consortium partners for private enterprises tendering for UK construction contracts.<sup>130</sup> This case study supports Loosemore's argument and extends his argument beyond construction contracts, suggesting that social enterprises are ideal consortium partners for any public contract which includes targeted recruitment and training clauses.<sup>131</sup> If the success of this case study is to be replicated in Ireland, further training and specific policy supports for social enterprises should be put in place.<sup>132</sup> Overall, the finding indicates that the inclusion of the mandatory community benefit clause facilitated a social enterprise in entering the market as a partner on a high-value contract. The social enterprise entered the contract as a partner and not a subcontractor.

### 6.8.3 Subcontractor Considerations Findings

The third measure tested examined the use of subcontractor considerations. The considerations were not as prescriptive as those set out in the National Children's Hospital contract. The research findings indicate that the inclusion of the considerations facilitated SME participation in the supply chain. A subcontract was awarded to a form of social enterprise.<sup>133</sup> Since the research was gathered, G4S subcontracted with 'Ingeus' to assist with their targeted recruitment and training

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<sup>129</sup> This finding demonstrates the importance of the commitment of the public body to the social objectives. See E. Sorensen and J. Torfing, 'Enhancing collaborative innovation in the public sector' (2011) 43(8) Administration and Society 868.

<sup>130</sup> See Loosemore (n 109).

<sup>131</sup> This comment refers to social enterprises which specialise in the training and employing of 'at risk' individuals.

<sup>132</sup> As suggested in; Commission, 'Powering European Public Sector Innovation: Towards a New Architecture Report of the Expert Group on Public Sector Innovation' (Luxembourg: Publications Office of the European Union, 2013); OECD *The Innovation Imperative in the Public Sector: Setting an Agenda for Action* (OECD, Publishing, Paris, 2015).

<sup>133</sup> A subcontract was awarded to a hybrid form of social enterprise.

requirements. Ingeus is a global employing and training organisation and is a founding member of the B-Corp community in the UK.<sup>134</sup>

Social enterprises and benefit corporation or b-corporations sit between charities and SMEs. Dees et al., Cummings and Marquis et al. acknowledge the difficulty of defining the now blurred roles of for-profit and different forms of social businesses.<sup>135</sup> Traditionally, social objectives were mainly pursued by charities and SMEs were driven by the need to secure profits.<sup>136</sup> Social enterprises have two objectives, an objective to generate profit and an objective to use the profit earned to support a societal goal.<sup>137</sup> Benefit companies or ‘B-corporations’ are established private companies, and enjoy benefits associated with the registered form of companies, such as limited liability, and equally pursue a social goal.<sup>138</sup> Reiser argues that B Corporations are a form of hybrid social enterprise.<sup>139</sup> Hiller identifies that in order for a business to identify as itself as a ‘B-corporation’ it must meet the following five requirements. Firstly, the company must be able to show that the identified social objective has a social benefit. This may include the pursuit of increasing employment opportunities for people with disabilities and for people who are unemployed. Secondly, the social operations of the company are subject to an independent annual audit by a certified body. Thirdly, the company must not prioritise profits or maximise shareholders dividends. Fourthly, the company’s activities must be conducted transparently.

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<sup>134</sup> Ingeus assists public bodies and employers design and deliver services to solve complex challenges caused by social and technological change.’ See <https://www.ingeus.com/> Last accessed 3<sup>rd</sup> June 2019.

<sup>135</sup> B. Cummings, ‘Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest’ (2012) 112 Columbia Law Review 578.

<sup>136</sup> J.G. Dees and B.B. Anderson, ‘Sector-Bending: Blurring Lines between Nonprofit and For-Profit’ (2003) 40 Society 16; C. Marquis, M.A. Glynn and G.F. Davis, ‘Community Isomorphism and Corporate Social Action’ (2007) 32(3) The Academy of Management Review 925.

<sup>137</sup> Some countries have legislated for this type of company, including Italy, France, Germany, Russia and Japan. See Commission, ‘Social Business Initiative Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation’ (Communication) COM (2011) 0682 final.

<sup>138</sup> E.A. Peterson and D.S. Patel, ‘Benefit Corporations: Fostering Socially Conscious Corporate Leadership’ (2016) 8 Southern Journal of Business and Ethics 92.

<sup>139</sup> D. Reiser, ‘Benefit Corporations - A Sustainable Form of Organization’ (2011) 46(3) Wake Forest L Rev 591.

Fifthly, the company will be penalised for lack of compliance with the stated social objectives.<sup>140</sup>

'B-Corp' is a global certification with over 1000 certified companies operating in 33 countries.<sup>141</sup> A B Corporation certification in the UK requires businesses to redefine success by verifying that the certified companies meet stringent standards of social and environmental performance, accountability and transparency. Ingeus is a for-profit organisation which has legally formalised their social and environmental commitments in their Articles of Association.<sup>142</sup> In a recent Buy Social case study publication, Ingeus stated;

*We are delighted to work in partnership with G4S. It's early days, but already eight of our job seekers have found employment in cleaning and catering. Part of our service is to support not only the job seeker but also the employer. We have built quality and trusting relationship with G4S, and we look forward to continued success.*<sup>143</sup>

The subcontractor considerations combined with the community benefit clause has resulted in the direct inclusion of a socially conscious company in the supply chain. This research suggests that the inclusion of the social criteria has changed the culture of the large organisation.<sup>144</sup> If it were not for the social criteria, the large company would not have contracted with the social enterprises.<sup>145</sup> This is having a direct and positive impact on the local economy. Two small stories illustrate the positive impact on the local

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<sup>140</sup> J.S. Hiller, 'The Benefit Corporation and Corporate Social Responsibility' (2013) 118 Journal of Business Ethics 287. See also; Peterson and Patel (n 138).

<sup>141</sup> The B Corp Certification measures a company's entire social and environmental performance.

<sup>142</sup> This is a requirement of the B Corp Certification. It has been argued that companies are turning to the B Corp Certification due to a lack of legal supports for social enterprises. See M.J. Stecker, 'Awash in a sea of confusion: Benefit corporations, social enterprise, and the fear of "greenwashing"' (2016) 50(2) Journal of Economic Issues 373.

<sup>143</sup> See the Buy Social Unit Case Studies <https://buysocialni.org/about-buy-social/case-studies/> Last accessed 25<sup>th</sup> March 2019.

<sup>144</sup> McCrudden discusses the benefits of using procurement to drive social change in; C. McCrudden, 'Using public procurement to achieve social outcomes' (2004) (4) in *Natural Resources Forum* 257-267.

<sup>145</sup> Interview with the Operations Director, G4S Northern Ireland (n 102).

community. A cleaning operator position was offered to a person who was unemployed since 2004, and the newly employed operator commented that; *'The job's brilliant. It's good to have a bit of dignity back, I feel more self pride.'* Another cleaning operator stated, *'I signed up to Steps to Success with Ingeus five months ago and am so pleased to get this job, I love the fact that I'm busy all the time.'*<sup>146</sup>

Similarly, to the National Children's Hospital case study, this finding questions Trybus's argument that SMEs do not want to enter the public market as subcontractors.<sup>147</sup> The case study's finding demonstrates that social enterprises are willing to enter the market as subcontractors and consortium partners. The National Children's Hospital case study argued that subcontracting opportunities are a realistic public procurement entry route for SMEs, this case study extends this argument to include social enterprises. It is interesting to note that the inclusion of the social criteria did not inadvertently distort market competition by encouraging the contractors to subcontract with SMEs.<sup>148</sup> The contractors additionally awarded a subcontract to a large enterprise.<sup>149</sup> The subcontractor considerations did not restrict the main contractor's freedom and discretion to chose to subcontract elements of the contract.<sup>150</sup>

The subcontractor considerations findings in this case study support Davies and Crane's arguments on the efficiency of incorporating social criteria related criteria through voluntary regimes.<sup>151</sup> G4S was not under

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<sup>146</sup> See the Buy Social Unit Case Studies <https://buysocialni.org/about-buy-social/case-studies/> Last accessed 25<sup>th</sup> March 2019.

<sup>147</sup> M. Trybus, *'The Division of Public Contracts into Lots under Directive 2014/24: Minimum Harmonisation and Impact on SMEs in Public Procurement?'* (2018) 43(3) European Law Review 313.

<sup>148</sup> As feared by Baden et. al. See D. Baden, I. Harwood and D. Woodward, *'The effects of procurement policies on 'downstream' corporate social responsibility activity: Content-analytic insights into the views and actions of SME owner-managers'* (2011) 29(3) International Small Business 259.

<sup>149</sup> Interview with the CEO, NOW Group (n 102).

<sup>150</sup> Public Contracts Regulations, art 71(2) See Case C-314/01 *Siemens AG Österreich, ARGE Telekom & Partner and Hauptverband der österreichischen Sozialversicherungsträger*, judgment of 18 March 2004.

<sup>151</sup> I.A. Davies and A. Crane, *'Corporate social responsibility in small-and medium-size enterprises: investigating employee engagement in fair trade companies'* (2010) 19(2) Business Ethics: A European Review 126.

any mandatory requirements to demonstrate delivery of social benefits in the supply-chain but were still motivated to do so. G4S further believe that there is a broader opportunity to engage with SMEs in the supply chain in a more structured manner.<sup>152</sup> Both G4S and Loaf Catering would like to see contracting authorities to not only focus on employment clauses but to take into account subcontractor considerations additionally. G4S would like to see a clause introduced which requires the main contractor to subcontract to a targeted number of SMEs.<sup>153</sup> G4S would recommend a scored awards criterion that offered marks for plans to subcontract with SMEs. Such an approach is not permitted by European public procurement.<sup>154</sup> But it is interesting to note that the large company supports the strategic use of public procurement. It may be worthwhile for the Commission to review its guidance for below threshold procurement, reviewing if it is suitable to reserve elements of low-value contracts for SMEs based in the EU Member States.

The use of lots, community benefit clauses and subcontractor mechanisms facilitated the participation of two forms of social enterprises in the public contract. While each criterion individually encouraged participation, the community benefit clause is the central provision in this case study. If it were not for this provision, neither party would not have worked together, and Loaf Catering would not have expressed an interest in the contract.<sup>155</sup> The combination of the three clauses created a favourable climate for the promotion of social enterprises in the main contract and the supply-chain.<sup>156</sup> The main contractors demonstrated and implemented the social objectives actively throughout the contract. This research can assume that

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<sup>152</sup> Interview with the Operations Director, G4S Northern Ireland (n 102).

<sup>153</sup> Interview with the Operations Director, G4S Northern Ireland (n 102) The Operations Director suggested that this approach would increase competition and job opportunities in the local markets.

<sup>154</sup> However, this form of discriminatory behaviour would distort rather than foster competition. See Case C-249/81 *Commission v Ireland (Buy Irish)* [1982].

<sup>155</sup> Interview with the CEO, NOW Group (n 102).

<sup>156</sup> Albany recognises that innovation, or social change, occurs when the change is supported by a combination of facilitating provisions. See D. Albury, 'Fostering innovation in public services' (2005) 25(1) *Public Money and Management* 51.

the inclusion of the social clause, in particular, has facilitated the participation of a sub-forms of SMEs in the public contract.

### 6.8 Overall Impact of the Contract Performance Stage

At the time the research was gathered, the consortium was successfully managing the contract and complying with the employment-based social clauses, with 80% of the all-new employees defined as ‘*New Entrant Trainees*’.<sup>157</sup> The uniqueness of this case is the willingness of the two different organisations to work together. Both parties relied on each other’s operational practices and capabilities to tender for the contract. However, it should be noted that the relationship was not without difficulties. Loaf Catering had to invest in their operations to meet the high-quality standards set by G4S. The level of business was limited at the start of the contract, and the initial income stream was different than expected. G4S acknowledged that they ‘*did not appreciate*’ Loaf Catering’s operational standards.<sup>158</sup>

Although both parties recognised that there were some differences in operational standards at the start of the contract, both parties equally complimented the other for encouraging them to adopt changes in their organisations. Loaf Catering expressed gratitude for the advice and assistance offered by G4S on how to improve operational standards.<sup>159</sup> The social enterprise hoped that the changes made to their internal operations would improve efficiency and assist the company in bidding for future public contracts. The consortium experience encouraged G4S to engage with the social criteria further. The initial consortium inspired G4S to subcontract with different forms of social enterprises.<sup>160</sup>

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<sup>157</sup> See the Buy Social Unit Case Studies <https://buysocialni.org/about-buy-social/case-studies/> Last accessed 25<sup>th</sup> March 2019.

<sup>158</sup> Interview with the Operations Director, G4S Northern Ireland (n 102). Working with large organisations assist social enterprises in improving their operational capabilities. See E. Skloot, ‘*Evolution or extinction: A strategy for nonprofits in the marketplace*’ (2000) 29(2) *Nonprofit and Voluntary Sector Quarterly* 315.

<sup>159</sup> Interview with the CEO, NOW Group (n 102). See also; E. Skloot (n 158).

<sup>160</sup> This finding supports Holmlund, Kock and Spence’s theories that commercial practices drive CSR related actions. G4S was motivated by the changes in the procurers buying preferences to work with the social enterprise. Older studies conducted by Williamson et al. and by Revell and Blackburn similarly conclude that suppliers’



Harwood and Humby question if the use of social criteria is counterproductive, arguing that socially-related criteria set out by procurers in the selection criteria can result in a '*ceiling effect*' whereby companies view the criteria set out as the upper limit of standards they need to achieve.<sup>161</sup> This suggests that companies are deterred from embracing stronger social practices than those set out in the contractual requirements. However, the case study's findings indicate that the use of the community benefit clause had a wider impact on the winning tenderers internal operations. The consortium partnership encouraged G4S to adopt additional social practices, further supporting their existing CSR policies.<sup>162</sup> The inclusion of the community benefit clause had a long-term impact on the awardee company.

If this case study is to be replicated by other large companies and social enterprises, the companies will need to evaluate the costs and potential benefits of working together. The companies will need to first invest in a potential relationship, outlining any training or accreditations which are required for the contract.<sup>163</sup> There are long term efficiency and operational benefits for social enterprises, which will assist them in working for or partnering with larger corporations or public bodies in the future. Large organisations will benefit from the expertise of the social enterprises in putting forward a combined focus on achieving social goals, which they can incorporate into their business strategies or corporate social responsibility aims.<sup>164</sup>

Similarly, to the National Children's Hospital case study, the partnership between the public body and the contractor was essential to the successful

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motivation to incorporate socially-related objectives is intrinsically linked to the business environment and regulation.

<sup>161</sup> I Harwood and S. Humby, '*Embedding corporate responsibility into supply: A snapshot of progress*' (2008) 26(3) *European Management Journal* 166.

<sup>162</sup> See Interview with the Operations Director, G4S Northern Ireland (n 102).

<sup>163</sup> Porter and Kramer argue that social '*value creation*' is achieved through multiple partnerships. This research suggests that contracting authorities should aim to replicate the success of this case study by actively encouraging all forms of companies to tender as a consortium. This is an appropriate request once it does not lead to collusive behaviour between companies. See; M.E. Porter and M.R. Kramer, '*Creating shared value. In Managing sustainable business*' (Springer, Dordrecht, 2019) 323.

<sup>164</sup> See M.E. Porter and M.R. Kramer (n 163).

incorporation of the social criteria. One of the reasons for the success of this case study is the motivation and commitment of the individuals involved. All parties appeared equally motivated and invested in making the contract a success.<sup>165</sup> The Buy Social team were aware that they were introducing additional operational tasks to the services sector and introduced some measures to support the contractors carrying out the social clauses.<sup>166</sup> The unit established a brokerage website to remove the administrative burden and costs of recruiting the new entrant trainees independently.<sup>167</sup>

While the brokerage site offers support on the fulfilment of the social criteria, the Buy Social team attempted to build a strong relationship with the contractor from the start of the contract.<sup>168</sup> When this procurement competition was being designed, the construction sector was experienced in assessing and monitoring the implementation and operation of the social criteria, however, the services sector was not familiar with managing the targeted recruitment and training requirements. The team developed a generic monitoring '*intelligent*' excel sheet which procurers download to check the implementation of the clause.<sup>169</sup> This information is updated monthly by the contractor's project manager. The information is inputted into a reporting tool on etenders.gov.ni platform. Using this platform, '*we [the public body] can run reports on the value of contracts, how many work weeks were delivered, how many people were employed to deliver them.*'<sup>170</sup> These reports include a profile on the new employees,

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<sup>165</sup> Interview with the CEO, NOW Group (n 102); See Interview with the Operations Director, G4S Northern Ireland (n 102).

<sup>166</sup> Interview with Legal Counsel, Buy Social Unit (n 43).

<sup>167</sup> The brokerage website assists contractors in finding suitability trained '*new entrant*' employees. If this case study is to be replicated by other public bodies, the contracting authority should put supports, akin to the brokerage site, in place to aid to compliance with the social requirements. Contracting authorities should not place undue administrative on SMEs. See Commission, '*Think Small First*' - A "*Small Business Act*" for Europe' (Communication) COM (2008) 0394.

<sup>168</sup> Interview with Development Officer, Buy Social Unit (n 8) The Development Officer participated in every stage of the procurement cycle.

<sup>169</sup> The intelligent excel sheet is used to analyse, report and manage contract performance. Interview with Development Officer, Buy Social Unit (n 7).

<sup>170</sup> Interview with Development Officer, Buy Social Unit (n 7).

distinguishing whether the employees fall within the social clause's definition.<sup>171</sup>

If other public bodies would like to replicate the case study, they should ensure that a motivated employee is appointed to manage and control the inclusion of social criteria. Spence and Baden et al. further call for businesses to play a greater role in the *design* of socially responsible criteria.<sup>172</sup> Both contractors in this case study expressed a desire to change the current subcontractor considerations. The contractors voiced their support for scored subcontractor criteria in the tender stage. Both contractors recognised the importance of sustainable supply-chains and argued that this was often overlooked in procurement processes. The contractor's expressed frustration with certain elements of the community benefit clause. The companies argued for *greater* sanctions for non-compliance with such clauses. This is an interesting approach for a contractor to call for a more stringent application of social clauses.<sup>173</sup> Contracting authorities wishing to introduce social criteria, should, therefore, engage with the private sector to design bespoke criteria for all forms of public contracts.

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<sup>171</sup> SIB, CPD and the Buy Social Unit should monitor and review these reports closely to assess what impact the social criteria is having on the supply chain and local employment market. As youth employment continues to fall, the public bodies will need to assess the appropriateness of the targeted recruitment and training clauses. For a discussion on the evaluating sustainability in the supply chain see; M.J. Hutchins and J.W. Sutherland, '*An exploration of measures of social sustainability and their application to supply chain decisions*' (2008) 16(15) *Journal of Cleaner Production* 1688.

<sup>172</sup> L. Spence, '*Business ethics and social responsibility in small firms*' in E. Chell, M. Karataş-Özkan, '*Handbook of research on small business and entrepreneurship*' (Edward Elger, Cheltenham, Northampton, UK, MA, USA, 2014) 374; D. Baden, I. Harwood and D. Woodward, '*The effects of procurement policies on 'downstream' corporate social responsibility activity: Content-analytic insights into the views and actions of SME owner-managers*' (2011) 29(3) *International Small Business* 259.

<sup>173</sup> See Interview with the CEO, NOW Group (n 102); See Interview with the Operations Director, G4S Northern Ireland (n 102). The contractors called for the contracting authority to set-aside elements of the contract for SMEs. While this is not possible under EU law, the contracting authorities should use this feedback when reviewing the use of the social criteria. The public bodies should also engage with the suppliers when reviewing or developing new social criteria. See also; E. Vigoda, '*From responsiveness to collaboration: Governance, citizens, and the next generation of public administration*' (2002) 62(5) *Public Administration Review*, 527; J.W. Selsky and B. Parker, '*Cross-sector partnerships to address social issues: Challenges to theory and practice*' (2005) 31(6) *Journal of Management* 849.

In line with the National Children’s Hospital case study findings, these findings also indicate the need for procurement practice to recognise the importance of facilitating *all* forms of businesses in the public market. CPD is leading the way in introducing government guidance notes supporting the inclusion of social enterprises in public contracts. Initial policy documents were introduced in 2001 and were updated in 2016.<sup>174</sup> CPD actively encourages the use of SME and social enterprise friendly criteria in public procurement practices. The Buy Social unit focuses on the inclusion of community benefit clauses, which as we have seen, can facilitate social enterprise participation. However, a wider argument questions whether such clauses should be included in supplies and services contracts or should be restricted to construction or works contracts.<sup>175</sup> This research argues that social criteria should be included in both works and services contracts. The inclusion of social criteria in this services contract facilitated SME participation in the public contract. If it was not for the social criteria, it is unlikely that the social enterprise would have tendered for the main contract or any subcontracts. This debate is limited in Northern Ireland as recent policy developments require the inclusion of employment clauses in all types of works, supplies and services contracts.<sup>176</sup> However, the argument still exists in Ireland. The 2013 ‘*Social Clauses Bill*’ failed to gain enough momentum to pass the Bill into legislation.<sup>177</sup>

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<sup>174</sup> See CPD Policy Government Notes;  
*A Guide for Social Economy Enterprises* (2011) PGN 01/11  
*Helping Small and Medium Sized Enterprises (SMEs) and Social Economy Enterprises (SEEs) access Public Sector contracting opportunities* (2011) PGN 02/11  
*Public Procurement: A Guide for Small and Medium Sized Enterprises (SMEs)* (2012) PGN 02/12  
*Helping SMEs Benefit from Subcontracting Opportunities* (2012) PGN 06/12  
*Abnormally Low Tenders* (2013) PGN 03/13  
*Integrating Social Considerations into Contracts* (2016) PGN 01/13  
*Innovation in Public Procurement* (2017) PGN 02/17  
*Human Rights in Public Procurement* (2018) PGN 03/18.

<sup>175</sup> R. Macfarlane and M. Cook, ‘*Achieving community benefits through contracts: Law, policy and practice*’ (Policy Press, 2002).

<sup>176</sup> *Integrating Social Considerations into Contracts* (2016) PGN 01/13.

<sup>177</sup> Note, the Bill is still under review, but it is unlikely that it will succeed to the next stage. The majority of private members bills are not enacted. See B. Farrell, ‘*The political role of cabinet ministers in Ireland. Cabinet ministers and parliamentary government*’ (Cambridge University Press, Cambridge, 1994) 73.

## 6.9 Conclusion

Vesel argues that large companies tendering for large contracts are incentivised to submit low bids which price SMEs out of the market.<sup>178</sup> This case study demonstrates that the division of larger contracts into smaller lots and the inclusion of social clauses and considerations facilitated the participation of two forms of social enterprises in the public contract. One of the original reasons for comparing the NCH procurement documents and contracts with the Buy Social ancillary catering and cleaning contract was that they both contained similar, nearly mirror images, community benefit clauses. Both approaches have facilitated SME participation in the public contracts either as main contractors or subcontractors.

The difference between the two case studies is the use of community benefit clauses to promote social enterprise engagement in the market as an equal consortium partner. The findings suggest that large enterprises should consider partnering with social enterprises when bidding for large contracts which include community benefit clauses. The large companies may not have the expertise to facilitate, or be interested in, the wider community goals of the targeted recruitment and training requirements and partnering with social enterprises will alleviate concerns the company might have about meeting the employment-based targets.

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The political drive appears to have furthered declined with the reduction in the unemployment rates and an increase in the construction sector growth.

<sup>178</sup> T. Vesel, 'Addressing social considerations in PP: best practices for fighting social dumping in Slovenia' in G. Piga and T. Tátrai, 'Public procurement policy' (Routledge, Abingdon, Oxon; New York, NY, 2015) 39.

## Chapter Seven Smart Dublin Case Study

### 7.1 Introduction

When this research commenced in 2014, there was an urgent economic and political need to assist SMEs' recovery from the financial crisis.<sup>1</sup> As time passed, this need diminished, SMEs have recovered from the financial crisis<sup>2</sup> and are becoming more successful in their endeavours to enter the public market.<sup>3</sup> However, limited research is available on the relationship between innovative start-ups and public procurement in Ireland. This case study examines the impact the emerging role of the 'Smart Dublin' programme is having on the Irish public procurement landscape. Traditionally, innovative SMEs and start-ups have been hindered from tendering for public sector contracts.<sup>4</sup> There are a number of reasons for this, procurers tend to favour standardised tender documents that set standard financial and qualification criteria.<sup>5</sup> SMEs and start-ups

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<sup>1</sup> See Commission, 'Evaluation of SMEs' access to Public Procurement Markets in the EU.' (2010) Final Report; Commission 'SMEs' access to public procurement markets and aggregation of demand in the EU 2014.' (2014) Final Report.

<sup>2</sup> 2017 witnessed the greatest number of new company registrations in one year in Ireland. 22,354 were registered in the state in 2017 according to the *Annual Review 2018 Business Barometer*. However, there are a number of hurdles facing SME growth. Access to finance is one of the key challenges faced by newly established business. PCP offers a solution to this problem, offering innovative enterprises limited financial support and an opportunity to develop and test their proposed solutions. See Commission, 'Pre-commercial Procurement: driving innovation to ensure sustainable high-quality public services in Europe' (Communication) COM (2007) 0799 final.

<sup>3</sup> See Office of Government Procurement, 'Public Service Spend and Tendering Analysis' (2013). Available at; <http://www.procurement.ie/sites/default/files/ogp-public-service-spend-tendering-analysis-2013-1.pdf> Last accessed 1<sup>st</sup> June 2016.

<sup>4</sup> A. Erridge, 'Public procurement, public value and the Northern Ireland unemployment pilot project' (2007) 85(4) Public Administration 1023; A. Erridge and S. Hennigan, 'Sustainable procurement in health and social care in Northern Ireland' (2012) 32(5) Public Money and Management 363.

<sup>5</sup> See Office of Government Procurement, 'National Public Procurement Framework' *Public Procurement Guidelines for Goods and Services*. (2019) Version 2.1. Accessible at this link; <https://ogp.gov.ie/national-public-procurement-policy-framework/> Last accessed 2<sup>nd</sup> June 2019.

are often prohibited from tendering for the public contracts as they fail to meet the mandatory selection criteria.<sup>6</sup>

The Smart Dublin initiative was launched in 2016 and is tasked with engaging with citizens, researchers and businesses to develop intelligent internet solutions to address societal challenges, such as flooding, illegal dumping and bathing water quality. This case study scrutinises Smart Dublin's approach to conducting low-value research and development (R&D) contracts. The research questions to what extent does the use of PCP facilitate SME participation in public procurement. This case study critically examines the procurement process used by Smart Dublin. A PCP procedure was used to generate solutions to improve cycling rates in Dublin city. In particular, the research examines what impact the use of PCP processes has on SME engagement. This case study is exploratory and interpretative in nature.<sup>7</sup> Interviews with the key public procurer and contracted companies were conducted over two-years.<sup>8</sup> The tender documents were studied in detail.<sup>9</sup> The evidence from this case study suggests that the use of lots and PCP procedures facilitates SME participation. Innovative ICT start-ups successfully entered the public market. The innovative procedure resulted in five companies been awarded €12,500 contracts, with four out of the five companies successfully awarded a second €25,000 contract.

This chapter opens with an overview of the Smart Dublin programme and continues by offering a detailed analysis of the completed tender. A '*Small Business Innovation Research*' (SBIR) PCP competition was conducted, it sought to increase the number of cyclists in Dublin city by 25%. The chapter concludes by summarising the research results. The case study

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<sup>6</sup> K. Karjalainen and K. Kemppainen, '*The involvement of small-and medium-sized enterprises in public procurement: Impact of resource perceptions, electronic systems and enterprise size*' (2008) 14(4) *Journal of Purchasing and Supply Management* 230.

<sup>7</sup> As outlined in Chapter Four Methodology, the research adopts a socio-legal approach.

<sup>8</sup> Interviews were conducted on-site and by telephone. Four interviews were conducted with the Smart Dublin Programme Manager and the CEOs and Managing Directors of the awardee companies.

<sup>9</sup> These documents were made available to any interested party on [www.etenders.gov.ie](http://www.etenders.gov.ie). These documents were shared openly with the researcher, data was gathered during and after the completion of the competition.

offers an empirical assessment of a PCP procedure used for the smart cities programme. The results of this investigation show that socially responsible procurement practices can encourage start-up growth.

## 7.2 Smart Cities and Public Procurement

The overall objective of the smart cities initiatives is to improve city life for citizens, businesses and stakeholders.<sup>10</sup> The cities work in collaboration with all interested stakeholders to develop bespoke solutions for individual cities challenges.<sup>11</sup> The Smart Dublin programme was adopted in 2016 and has similar objectives to existing global initiatives. The programme has four objectives to; provide better services, promote innovative solutions, improve economic activity and to increase collaboration and engagement with all stakeholders in the city.<sup>12</sup> Smart Cities works with citizens, businesses and academia to transform innovative solutions into reality.<sup>13</sup> The initiative was founded by the four Dublin Local Authorities, Dublin City Council, South Dublin County Council, Fingal County Council and Dun Laoghaire-Rathdown County Council, to provide innovative solutions to the city's challenges. Smart Dublin works with smart technology providers, third level institutions and citizens to find smart solutions to improve city life. The initiative works in collaboration with Intel, IBM, Maynooth University, LERO, the Irish Software Research Centre, Connect Networks of the Future, Docklands Business Forum, DCU, Kingspan Senson, Enterprise Ireland, Insight and the Programmable City.

The Directive encourages the use of co-financed R&D initiatives, acknowledging that eco-innovation and social innovation are core drivers

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<sup>10</sup> H. Schaffers, N. Komninos, M. Pallot, B. Trousse, M. Nilsson and A. Oliveira, '*Smart cities and the future internet: Towards cooperation frameworks for open innovation*. In *The future internet assembly*' (Springer, Berlin, Heidelberg, 2011) 431.

<sup>11</sup> J. Lee and H. Lee, '*Developing and validating a citizen-centric typology for smart city services*' (2014) 31 *Government Information Quarterly* S93.

<sup>12</sup> Smart Dublin is an initiative of the four Dublin Local Authorities.

<sup>13</sup> H. Chourabi, T. Nam, S. Walker, J.R. Gil-Garcia, S. Mellouli, K. Nahon, T.A. Pardo, and H.J. Scholl, '*Understanding smart cities: An integrative framework*' (2012) In 2012 45th Hawaii international conference on system sciences 2289.



of future growth.<sup>14</sup> However, the Directive only applies to research and development activities which are solely funded by the public authority and the exclusive right to use the developed product or service is retained by the contracting authority.<sup>15</sup> PCP involves asking suppliers to propose a new solution. Suppliers offer to share the initial benefits of the new solution with the contracting authority, the public body is not permitted to retain exclusive use of the designed service.<sup>16</sup> The company will own the developed service and should commercially exploit their product post completion of the contract. Contracting authorities must ensure that the process does not include elements of State Aid, they can do this by undertaking a competitive, open and transparent process.<sup>17</sup>

PCP is the process used to procure research and development services.<sup>18</sup> Pantilimon Voda defines PCP as the successive development of a marketable product or service with the risks shared between a private operator and a public body under market conditions.<sup>19</sup> Companies and public bodies must both accept an element of risk in these processes, both sides or one side may decide not to prototype the service post the completion of a solution exploration stage.<sup>20</sup> The PCP ends when the solutions developed are market-ready, this stage is followed by the

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<sup>14</sup> Public Sector Directive, recital 47, arts 2(1), 67(2), 70, 76(2); See Commission, ‘*Europe 2020: A strategy for smart, sustainable and inclusive growth.*’ (2010) COM 2020 final.

<sup>15</sup> Public Sector Directive, recital 35, art 14. See also; COM (2007) 799 final.

<sup>16</sup> If the public body requires exclusive use of the proposed solution and will be fully responsible for the numeration of the solution design and prototyping, the public body is required to comply with the applicable procurement Directives. Procurers seeking defence solutions may require exclusive use of a developed solution.

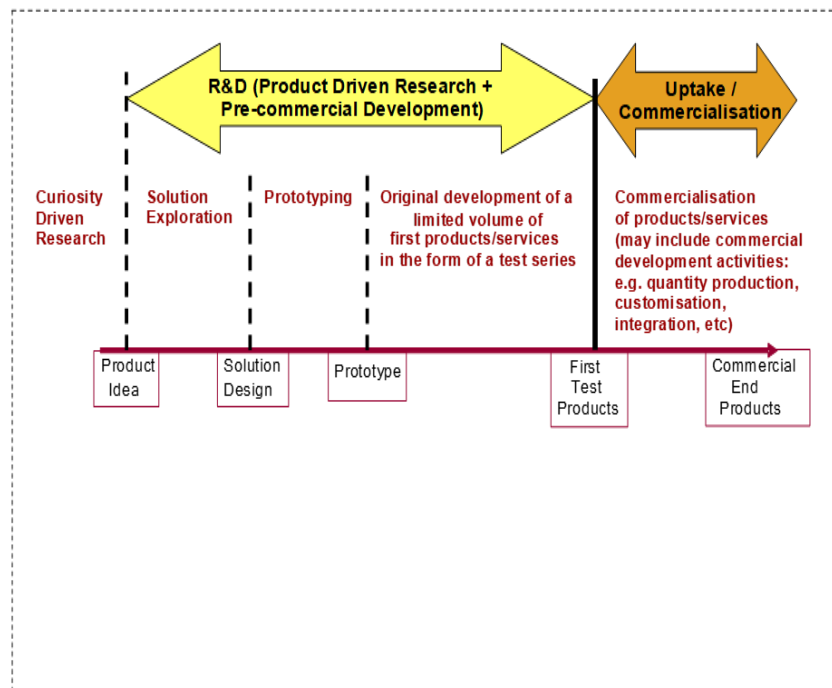
<sup>17</sup> See Commission, ‘*Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest.*’ (Staff Working Paper) SWD (2013) 53 final/2.

<sup>18</sup> COM (2007) 799 final.

<sup>19</sup> O.S. Pantilimon Voda, ‘*Innovative and sustainable procurement: framework, constraints and policies*’ in C. Bovis, ‘*Research handbook on EU public procurement law*’ (Edward Elgar Publishing, 2016) 228; See also; J. Edler and L. Georghiou, ‘*Public procurement and innovation—Resurrecting the demand side*’ (2007) 36(7) Research Policy 949.

<sup>20</sup> This prevents PCP being viewed incorrectly as a ‘grant’ scheme.

completion of a tender competition for a traditional public supply, services or mixed contract.<sup>21</sup> Figure 1.0 below illustrates a PCP procedure.



*Figure 1.0 Typical Product Innovation Cycle*

*Taken from Communication from the Commission: Pre-Commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe*

Most PCP takes place over three successive stages before the contracting authority completes a competitive tender for the developed solution. The first stage involves the identification of innovative solutions. Phase two allows for the prototyping of the proposed solution. This phase allows for the development and assessment of shortlisted solutions.<sup>22</sup> The final stage tests the product or service on a small scale. Once the contracting authority

<sup>21</sup> J. Rigby Review of pre-commercial procurement approaches and effects on innovation. Nesta Working Paper No. 13/14 (*Manchester Institute of Innovation Research, Manchester Business School, University of Manchester, 2013*).

<sup>22</sup> See O.S. Pantilimon Voda (n 19) 229.

is ready to purchase the developed and tested commercial solution, they are required to comply with the applicable Directives and implementing national legislation.<sup>23</sup> Even if the proposed contract falls below the advertising thresholds, the contracting authority must uphold the principle of non-discrimination.<sup>24</sup>

PCP is suitable in cases where there is a ‘*market failure*’, where there is no available product or service which could effectively meet the public sector needs.<sup>25</sup> The public sector, therefore, needs to support and share the costs and risks with private entities to develop new ways to meet the public needs and to address societal challenges.<sup>26</sup> The research case study examines the SBIR ‘*Smart Dublin Cycle Challenge*’ PCP process. The contracting authority sought the assistance of the private market to help design innovative software solutions to improve cycling rates in the city. Interested economic operators were asked to design services or products which would improve cycling safety and reduce the potential of cycling-related thefts.<sup>27</sup> In this case study, Smart Dublin was not the only source of demand for the proposed services and goods. This was not a monopoly situation.<sup>28</sup> The research makes the assumption that the PCP process was initially conducted in a ‘*dependent*’ market, where the public buyer was the main purchaser of these types of services and goods in 2016 in Dublin city. The positive prototyping and piloting of these specific services paved the road for the creation of a ‘*commercial*’ market.<sup>29</sup> Cyclists and other public bodies will become the target market for the awardee companies.

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<sup>23</sup> COM (2007) 799 final.

<sup>24</sup> COM (2007) 799 final. R&D contracts are exempt for the Public Sector Directive, however, the procurers must comply with the fundamental principle of non-discriminatory.

<sup>25</sup> L. Miles and J. Rigby, ‘*Demand-led innovation*’ (Innovation Policy Challenges for the 21st Century. Routledge, 2013) 36.

<sup>26</sup> See O.S. Pantilimon Voda (n 19) 216.

<sup>27</sup> Request for Tender, *Specifications*.

<sup>28</sup> A monopolistic market exists in situations where there is one dominant economic operator. See A.C. Harberger, ‘*Monopoly and resource allocation*. In *Essential Readings in Economics*’ (Palgrave, London, 1995) 77.

<sup>29</sup> A. Sánchez Graells, ‘*Public procurement and the EU competition rules*’ (2nd edn Bloomsbury Publishing 2015) 45.

Smart Dublin will no longer be the dominant buyer at the end of the process.

According to Edler and Georghiou, this could be considered a form of catalytic procurement, whereby the private sector is requested to develop a product or service to assist the contracting authority in achieving a stated goal.<sup>30</sup> Apostol further suggests that at the end of a catalytic procedure, the public sector demand for the service will be eliminated and private consumers will exclusively use the solution.<sup>31</sup> This classification appears to define the process used in the case study.<sup>32</sup> The contracting authority never stated from the outset that it intended to conduct a procurement competition to purchase the commercialised products or services at the end of the PCP stage.<sup>33</sup>

Alternatively, the procedure could also be classified as a co-operative procurement, as the development and prototyping of the new product or service are of mutual benefit to the end-user, supplier and public body.<sup>34</sup> The process was undertaken to fulfil item 98 of the Action Plan for Jobs (APFJ) 2016 which tasked Enterprise Ireland with the responsibility of carrying out SBIR projects.<sup>35</sup> However, it is more accurate to classify the procedure as ‘*catalytic*’, as the underpinning characteristic of this competition was the purchase, development and support of highly-technologised software and products to improve cycling safety and

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<sup>30</sup> J. Edler and L. Georghiou, ‘*Public procurement and innovation—Resurrecting the demand side*’ (2007) 36(7) *Research policy* 949 See also; C. Edquist and L. Hommen, ‘*Government technology procurement and innovation theory*’ (1998) *Innovation Systems and European Integration Research Project Report*.

<sup>31</sup> A.R. Apostol, ‘*Pre-commercial procurement in support of innovation: regulatory effectiveness*’ (2012) 21(6) *Public Procurement Law Review* 213.

<sup>32</sup> Interview with Jamie Cudden, Smart Cities Programme Manager, Dublin City Council (Dublin, Ireland, 24<sup>th</sup> April 2016).

<sup>33</sup> Neither the Request for Tender or accompanying forms referred to the possibility of the contracting authority purchasing the commercial ready product at the end of the process. When referring to the scope of the pre-commercial procurement process in the request for tender, the contracting authority noted; ‘*This is an excellent opportunity to establish an early customer for a new technology and to fund its development*’ (section, 4).

<sup>34</sup> See J. Edler, and L. Georghiou (2007) (n 30).

<sup>35</sup> Department of Jobs, Enterprise and Innovation. National ‘Action Plans for Jobs 2016’. (2016) Action 98. <https://dbei.gov.ie/en/Publications/Publication-files/Action-Plan-for-Jobs-2016.pdf> Last accessed 11<sup>th</sup> June 2019.

cycling rates. It is unlikely that the contract will be continuously ‘re-bought’.<sup>36</sup> Defining the PCP process accurately will assist interested economic operators in assessing whether it is economically viable to develop a new product or service for the public sector. Economic operators will need to identify the target market for the developed product or service when the PCP has ended, will the public sector be the main target market and if so, is there a demand from other public bodies to purchase the innovative solutions. Additionally, the economic operator should consider if there is a wider demand from the private sector.<sup>37</sup>

### 7.3 Cycling Challenge

The case study examines a low-value procuring competition conducted by the Smart Dublin initiative. The purpose of this PCP procedure was to improve cycling rates across the Dublin region and in the city centre. An overriding goal of the Smart Dublin initiative is to facilitate 25% of all journeys made in the city to be by bicycle.<sup>38</sup> The tender was published on the etenders.gov.ie centralised procurement site on 8<sup>th</sup> March 2016. The process fell outside the remit of the Directives and implementing Irish legislation.<sup>39</sup> However, to encourage competition, the call for competition was freely and openly advertised on the national eTenders platform.<sup>40</sup> A simplified version of the open procedure was adopted to reduce the administrative burden faced by SMEs.<sup>41</sup> Similarly, to an open procedure,

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<sup>36</sup> See L. Hommen and M. Rolfstam, ‘Public procurement and innovation: towards a taxonomy’ (2008) 8(3) *Journal of public procurement* 17.

<sup>37</sup> It is therefore important for contracting authorities to carefully indicate whether it plans to purchase the developed solutions through the use of a competitive procedure at the end of the pre-commercial stage.

<sup>38</sup> Request for tender, section 2.

<sup>39</sup> The contracting authority was required to comply with the TFEU principles and soft-law measures. The competition embodied many of the provisions set out in Circular 10/2014, ‘Initiatives to Assist SMEs in Public Procurement’ 2014. The competition was conducted in an open manner and the selection criteria was set in a proportionate manner.

<sup>40</sup> See Interview with the Smart Cities Programme Manager (n 32) See also provisions set out in Circular 10/2014, ‘Initiatives to Assist SMEs in Public Procurement’ 2014.

<sup>41</sup> Open forms of competitions are conducive to SME participation. See; A.H. Glas and M. Eßig, ‘Factors that influence the success of small and medium-sized suppliers in public procurement: evidence from a centralized agency in Germany’ (2018) 23(1) *Supply Chain Management: An International Journal* 65.

the competition was open to all interested economic operators.<sup>42</sup> Dublin City Council was responsible for carrying out the competition.

The pre-commercial invitation to tender sought to find low cost, smart and innovative solutions to increase the number of cyclists in the region and the city.<sup>43</sup> In particular, the invitation to tender requested ‘*technology data driven proposals* which aim to; improve the use of existing cycling data to inform the solution, produce new cycling data to understand the issues better, address cycling safety including actual accidents and perceptions of safety and address bike safety including cycle parking and bicycle theft.’<sup>44</sup> The Smart City programme was building on the success of the 2003 DublinBikes scheme which resulted in a 43% increase in cycling rates.<sup>45</sup>

The invitation to tender was quite informative, it outlined that Smart Dublin was in particular interested in developing and funding ideas which assisted; tracking bicycle routes, travel times, parking, monitoring cycling behaviour, offered inclusive cycling ideas and reduced bicycle accidents and theft.<sup>46</sup> The Smart Dublin team had conducted market research to assess what products and services were readily available on the market. The research activities assisted the team in designing the list of what types of products or services would potentially meet their procuring needs.<sup>47</sup>

The PCP was carried out in two-stages. The first phase was launched on 8<sup>th</sup> March 2016 and was concluded within three months. The purpose of

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<sup>42</sup> See Public Authorities Regulations, reg 27.

<sup>43</sup> See Interview with the Smart Cities Programme Manager (n 32).

<sup>44</sup> Request for Tender, section 3.3.

<sup>45</sup> See Interview with the Smart Cities Programme Manager (n 32); See also; B. Caulfield, ‘*Re-cycling a city—Examining the growth of cycling in Dublin*’ (2014) 61 Transportation research part A: policy and practice 216; P. Carroll, B. Caulfield and A. Ahern, ‘*Exploring a case of car usage and ownership reduction in Dublin through car-shedding interventions*’ (2017) In Universities Transport Study Group (UTSG) Conference, Dublin 1-12.

<sup>46</sup> Request for Tender, section 3.2.

<sup>47</sup> See Interview with the Smart Cities Programme Manager (n 32); Regulation 40 of the Public Authorities Regulations allows for contracting authorities to conduct market consultations with a view to preparing the call for competition notices. However, the contracting authority must always uphold the principle of equal treatment. Economic operators involved in the market consultations must not receive favourable treatment or confidential information.

the first phase sought to assess the technical feasibility of a proposed concept. Successful applications at this stage were awarded €50,000 (between companies) for a maximum of three months to develop the proposed concept.<sup>48</sup> During this period, the companies were expected to ‘provide a robust, evidence based case for the viability of their proposed solution.’<sup>49</sup> Originally, only two applicants would progress to Phase Two of the competition. At this stage, the companies were offered an additional €50,000 (including VAT) to further develop their solution aiming for commercial implementation. The invitation to tender clearly outlined that this was not a grant system and payments were made on the successful completion of agreed milestones.<sup>50</sup>

The PCP process was classified as an SBIR challenge. Link and Scott define SBIR as a partnership between a public body and a private entity or entrepreneur, where the public body funds the private sector R&D projects.<sup>51</sup> The public body embodies entrepreneurial characteristics by accepting ‘*innovative risks*’, contracting authorities offer public money to develop a solution which is not guaranteed to succeed.<sup>52</sup> This risk is significantly lower or absent in standard public goods or services contracts.

The process itself incorporated best practice set out in European and national policy to make the tender stage more conducive to small business participation.<sup>53</sup> The competition was conducted by electronic means, using the submission tool on etenders.gov.ie. While, the Directive

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<sup>48</sup> Request for Tender, section 5.

<sup>49</sup> Request for Tender, section 5; See Interview with the Smart Cities Programme Manager (n 32).

<sup>50</sup> See Interview with the Smart Cities Programme Manager (n 32) This is one of the key differences between the purchase of R&D and the use of state-aid activities. See A. Sanchez Graells, ‘*Public Procurement and State Aid: Reopening the Debate?*’ (April 10, 2012). Public Procurement Law Review, Forthcoming. Available at SSRN: <https://ssrn.com/abstract=2037768> Last accessed 3<sup>rd</sup> March 2019.

<sup>51</sup> A. Link and J. Scott, ‘*Government as entrepreneur: Evaluating the commercialization success of SBIR projects*’ (2010) 39(5) Research Policy 589.

<sup>52</sup> See A. Link and J. Scott (n 51).

<sup>53</sup> See Commission, ‘*Think Small First*’ - A “*Small Business Act*” for Europe’ (Communication) COM (2008) 0394; Commission, ‘*European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts*’ (SWP) COM (2008) 2193; Circular 10/2014, ‘*Initiatives to Assist SMEs in Public Procurement*’ 2014.

imposes e-procurement requirements for above-threshold contracts, these requirements do not extend to low-value contracts. Although, as suggested by Albano et al.'s e-procurement practices also facilitate small business participation in low-value contracts.<sup>54</sup> A tax clearance certificate was only required to be produced upon the award of the contract. The Request for Tender (RFT) was designed in a simple, proportionate and straightforward manner.<sup>55</sup> It comprised of; details of lead applicant or organisation, title and abstract for publication, description of proposed idea or technology, technical project summary, economic viability, the current state of the art and intellectual property, project management and methodology, technical team and expertise and application finance. There were no minimum requirements set. The request for tender was not prescriptive, allowing suppliers to dedicate their time to describe how their proposed solution would improve cycling rates in Dublin.<sup>56</sup>

Companies were given the freedom to set their own project milestones and to identify risks and mitigation actions related to them. A guidance document was attached to the RFT, offering helpful instructions on how to answer each section. The invitation to tender was accompanied by a 48-page document outlining the current cycling landscape in Ireland and reiterating that the purpose of the initiative is to tackle congestion, reduce pollution and greenhouse emissions and to generate health and wellbeing benefits. In compliance with the pre-tender procurement requirements, the contracted businesses, for the most part, retained the intellectual property generated from the project.<sup>57</sup> From the outset, all forms of suppliers were encouraged to bid on an equal footing, the traditional barriers to tendering

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<sup>54</sup> G.L. Albano, F. Antellini Russo, G. Castaldi and R. Zampino, 'Evaluating Small Businesses Performance in Public e-Procurement: Evidence from the Italian Government's e-Marketplace' (2015) 53(1) *Journal of Small Business Management* 229.

<sup>55</sup> This demonstrates how the social objectives of the Directives can be pursued in below threshold contracts.

<sup>56</sup> See Interview with the Smart Cities Programme Manager (n 32) The contracting authority aimed to make the process easy for micro-businesses to bid for the contract.

<sup>57</sup> COM (2007) 799 final. Companies must be able to exploit the developed product or service. See also; C. Edquist and J.Zabala-Iturriagoitia, 'Pre-commercial procurement: a demand or supply policy instrument in relation to innovation?' (2015) 45(2) *R&D Management*.



were removed, the tender submission forms were user-friendly and were supported by a weight of additional information.<sup>58</sup>

The contracts could only be awarded to registered companies or charities. However, the main contractor could subcontract to unregistered pre-start-up companies. Applications were also accepted from Universities which could demonstrate a route to market and which designed a viable plan to commercialise project results.<sup>59</sup> Tenderers were required to declare that the company was not bankrupt and not the subject of proceedings for a declaration of bankruptcy. Tenderers were required to state that they had fulfilled relevant social security and tax obligations and had not been convicted of fraud, money laundering or corruption.<sup>60</sup> While the application was designed to be accessible to all, some interested parties expressed concern over the tax clearance requirements and the definition of legal entities.<sup>61</sup> This is a concern pre-start-ups might face, especially in circumstances where the start-up is set up as a part of a University-funded venture and is not incorporated on an individual basis.<sup>62</sup> However, it would be risky for a contracting authority to contract with an unregistered company. A contracting authority even when spending small amounts of public money must ensure that they achieve value for taxpayers' money.<sup>63</sup> In contrast to the flexibility of the selection criteria, the procurer closely controlled the financial criteria. The justification of costs was broken down into seven sections (labour costs, material costs, capital equipment costs, subcontract costs, travel costs, indirect costs and other costs). Suppliers were not informed of the allocation of marks to each category.

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<sup>58</sup> However, during the supplier interviews one company did state that they would have preferred if the tender response document was not in a Word format. Interview with Sile Ginnane, Co-founder, FluidEdge (By phone, 24<sup>th</sup> July 2018).

<sup>59</sup> Many start-ups and pre-start-ups are established in Universities, the companies tend to exploit University-assigned inventions. See S. Shane and T. Stuart, '*Organizational Endowments and the Performance of University Start-ups*' (2002) 48(1) Management Science 154.

<sup>60</sup> This is reflective of the social, labour and environmental compliance requirements set out in the Public Authorities Regulation, regs 18(4), 57.

<sup>61</sup> See Interview with the Smart Cities Programme Manager (n 32).

<sup>62</sup> Large number of start-ups are '*spun-out*' of Universities invention labs. See S. Shane and T. Stuart (n 59).

<sup>63</sup> See Office of Government Procurement, '*National Public Procurement Framework*' *Public Procurement Guidelines for Goods and Services*. (2017) Version 1.

An assumption can be made to suggest that this decision was made to ensure the procurers received competitive pricing as well as high-quality bids.<sup>64</sup>

#### 7.4 Challenge Outcomes

Market consultations were completed instead of using Prior Information Notices (PINs).<sup>65</sup> The consultations had a dual purpose, they were first used to assist the procuring team in completing their assessment of current market offerings and secondly the market-sounding exercises informed potential suppliers of the upcoming competition.<sup>66</sup> One of the winning companies stated in the research interview that if it were *'not for the market consultations'* they would not have known about the competition.<sup>67</sup> This company did not search for public contracts on the eTenders site, as they believed that they could not effectively compete for even the lowest value contracts (€25,000 for supplies and services) advertised on the site. The company praised Dublin City Council's efforts in advertising the market consultations and for working closely with the local Chambers of Commerce to promote the consultations.<sup>68</sup>

At the request for tender stage of the competition, 98 companies submitted an *'expression of interest'* which translated into 23 completed applications. 14 companies out of these 23 were invited to pitch their ideas for 10 minutes.<sup>69</sup> The pitch process was completed over two days and was conducted in partnership with Enterprise Ireland. The companies included spin-outs, self-employed, consultancy services based in Ireland and

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<sup>64</sup> See Interview with the Smart Cities Programme Manager (n 32) The procurer was motivated to generate competition in the market place.

<sup>65</sup> PINs have since been used for the SMART Bins competition and only generated a limited number of responses. Interview with Jamie Cudden, Smart Cities Programme Manager, Dublin City Council (Dublin, Ireland, 20<sup>th</sup> June 2017).

<sup>66</sup> See COM (2008) 0394.

<sup>67</sup> See Interview with the Co-founder, FluidEdge (n 58).

<sup>68</sup> See Interview with the Co-founder, FluidEdge (n 58).

<sup>69</sup> See Interview with the Smart Cities Programme Manager (n 65).

France.<sup>70</sup> Proposals were marked on confidence and quality.<sup>71</sup> At this stage, the procurers had only planned to award exploratory contracts to three companies. However, five companies were awarded funds for their proposed solutions, Ambie, See Sense, FluidEdge, Hidnseek and Smart Charge LTD. The companies displayed ‘*real enthusiasm*’ and offered ‘*outstanding quality*’ solutions.<sup>72</sup> Each company was awarded €12,500 to develop their solution over three months. The flexibility of the approach benefitted the contracting authority and awardee companies.

The first awardee ‘*Ambie*’ proposed the ‘*BikeLook*’ solution. BikeLook is a software device which monitors bicycle usage and reduces the chances of theft.<sup>73</sup> BikeLook aims to improve cycle safety by installing sensors on bike racks and bicycles across the city. In the occurrence of a bicycle being stolen, the sensor sends a notification to the bicycle owner. Once the sensors have been placed throughout the city, the sensors will be able to locate and track a stolen bicycle within a 450m range of any one of the sensor racks in the city. The solution is operated using an app.<sup>74</sup>

The second awardee ‘*FluidEdge*’ proposed the ‘*Liberty Bell*’ solution, a software device which records cyclists actual or perceived obstacles. Liberty Bell aims to improve cycling safety by gathering and analysing cyclists and pedestrians’ movements throughout the city. One of the novel elements of the solution is the technologies ability to gather qualitative data on unreported ‘*near-misses*’ incidents which deter or scare cyclists.

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<sup>70</sup> See Interview with the Smart Cities Programme Manager (n 65) The competition did not generate interest from large-sized enterprises, presumably this was due to the value of the contract and the potential requirement to share new product or services solutions with the public body or with potential competitors. Large organisations have the financial capacity to conduct this level of R&D internally. Whereas, this form of R&D funding is critical to the survival and development of small or micro enterprises. See also; See Commission, ‘*Europe’s next leaders: the Start-up and Scale-up Initiative*’ (Communication) COM (2016).

<sup>71</sup> Request for Tender, section 6.

<sup>72</sup> See Interview with the Smart Cities Programme Manager (n 65); Smart Dublin, Published Case Studies.

<sup>73</sup> See Interview with the Smart Cities Programme Manager (n 65); Smart Dublin, Published Case Studies.; Smart Dublin, Published Case Studies; available; <https://smartdublin.ie/smart-stories/> Last accessed 20/06/2019

<sup>74</sup> See Interview with the Smart Cities Programme Manager (n 65); Smart Dublin, Published Case Studies; available; <https://smartdublin.ie/smart-stories/> Last accessed 20/06/2019

The technology pinpoints areas and locations of concern for the cyclists in a cost-efficient manner.<sup>75</sup> It is clear that participation in the public competition has benefited the company, since completing the pilot contract Liberty Bell won the 2017 Colorado Department of Transportation International ‘*Road X Bicycle and Pedestrian Challenge*’.<sup>76</sup>

The third awardee ‘*Hidnseek*’, a French company, offered a solution which aims to design low-power devices to track assets remotely and to generate real-time data. The software device is attached to a bicycle and measures GPS co-ordinates and environmental conditions. Data gathered can easily be integrated with other data sources, allowing the company, Smart Dublin and DCC to obtain a rounded understanding of the cycling conditions and cycle theft rates in the city.<sup>77</sup>

The fourth awardee ‘*Limeforge LTD.*’ created the ‘*See.Sense*’ software tracker. The tracker designed in Northern Ireland is placed inside an ‘*ICON*’ light which is attached to bicycles. 500 cyclists participated in a pilot run, and participants were offered to purchase the product at a subsidised rate of €20.00. The tracking device is placed onto the bicycle and uses Bluetooth to connect to the bicycle owner’s Android smartphone. The tracking device sends alerts to the owners’ phone and notifies next of kin of the exact location of any accidents.<sup>78</sup> The *See.Sense* additionally gathered anonymised and aggregated cycling data. The novel element of the solution is the safety measure of an ‘*ICON*’ light, which reacts to the environment. The light becomes stronger in hazardous situations, such as exiting a roundabout, meeting oncoming vehicles with full headlights on or passing through busy intersections. The lightweight product has long

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<sup>75</sup> See Interview with the Smart Cities Programme Manager (n 65); Smart Dublin, Published Case Studies; available; <https://smardublin.ie/smart-stories/> Last accessed 20/06/2019.

<sup>76</sup> See Interview with the Co-founder, FluidEdge (n 58).

<sup>77</sup> See Interview with the Smart Cities Programme Manager (n 65); Smart Dublin, Published Case Studies; available; <https://smardublin.ie/smart-stories/> Last accessed 20/06/2019.

<sup>78</sup> See Interview with the Smart Cities Programme Manager (n 65); Smart Dublin, Published Case Studies; available; <https://smardublin.ie/smart-stories/> Last accessed 20/06/2019.

battery life and is the winner of many global innovation awards.<sup>79</sup> The fifth awardee ‘*MC2 Smartcharge LTD.*’ offered a data harvesting software tool to track and log bicycle use in the city. The purpose of this tool is to assist cyclists in finding bicycle parking facilities and predicting the safest routes for cyclists’ journeys. The companies are classified as small and micro-entities.<sup>80</sup>

The second phase was launched as part of the ‘*Dublin Cycling Campaign*’ six months later. One of the key learning outcomes for DCC from the first phase of the competition was the organisation of payments. During the first phase, irregular payments were made upon the receipt of invoices. This created an unnecessary administrative burden for both the Council and the suppliers. For the second phase, the Council paid 50% of the funds at the start of the project and released the remaining 50% upon completion of the contract. The flexibility of the PCP allowed for the contracting authority to quickly respond to this problem by introducing changes to the contractual conditions at the second stage of the competition.<sup>81</sup>

The five suppliers pitched to progress to the second phase. The Smart Dublin’s team ‘*expectations were exceeded*’, each company aptly displayed progressive growth and development within a short period of time and with minimal financial investment.<sup>82</sup> The purpose of the second phase pitches was to assess the suppliers’ ability to commercialise their solutions and their plans to enter into the private market. The contracting authority had budgeted to fund two companies at this phase; however, due to the quality of the proposals and solutions offered contracts were ultimately offered to four of the suppliers.<sup>83</sup> Each company received €25,000 in the second phase. DCC suggested that it “*might be more*

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<sup>79</sup> See Interview with the Smart Cities Programme Manager (n 65); Smart Dublin, Published Case Studies; available; <https://smartdublin.ie/smart-stories/> Last accessed 20/06/2019

<sup>80</sup> See Interview with the Smart Cities Programme Manager (n 65); Smart Dublin, Published Case Studies; available; <https://smartdublin.ie/smart-stories/> Last accessed 20/06/2019

<sup>81</sup> O.S. Pantilimon Voda (n 19) 229

<sup>82</sup> See Interview with the Smart Cities Programme Manager (n 65).

<sup>83</sup> See Interview with the Smart Cities Programme Manager (n 65).

*beneficial*” to increase this figure to €50,000 for future competitions.<sup>84</sup> The flexible, straightforward and open PCP facilitated SME participation in the public market. The flexible nature of the procedure allowed for important changes to be introduced at the second stage of the competition.

## 7.5 Research Findings

The objective of this research is to question whether the inclusion of social considerations and clauses in procurement procedures facilitates SME participation in public markets. It questions whether the use of community benefit clauses, subcontractor considerations, use of lots and use of PCP activities encourage SME participation. A community benefit clause was not included in this competition. The use of PCP is directly assessed in this case study, with the subcontractor considerations and use of lots indirectly assessed.

The findings suggest that the decision to use a PCP procedure resulted in the awarding of public contracts to five small companies and the subsequent award of second prototyping contracts to four of these companies. By adhering to the fundamental principles of transparency, non-discrimination, equal treatment and proportionality, the contracting authority encouraged cross-border competition amongst small businesses.<sup>85</sup> 23 completed tenders were submitted from spin-outs, self-employed, consultancy services and start-ups. These forms of companies are generally excluded from the public procurement markets.<sup>86</sup> Recent industry reports suggest that SMEs are primarily interested in tendering for low-value contracts awarded by contracting authorities based in the locality of the SMEs.<sup>87</sup> This suggests that SMEs only bid locally. This

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<sup>84</sup> See Interview with the Smart Cities Programme Manager (n 65).

<sup>85</sup> Additionally, following best practice set out in; Commission, ‘*European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts*’ (SWP) COM (2008) 2193; Circular 10/2014, ‘*Initiatives to Assist SMEs in Public Procurement*’ 2014.

<sup>86</sup> See Commission, ‘*SMEs’ access to public procurement markets and aggregation of demand in the EU 2014.*’ (2014) Final Report.

<sup>87</sup> See Commission, ‘*Evaluation of SMEs’ access to Public Procurement Markets in the EU.*’ (2010) Final Report; Commission, ‘*SMEs’ access to public procurement markets and aggregation of demand in the EU 2014.*’ (2014) Final Report; A. Flynn and P. Davis, ‘*Investigating the effect of tendering capabilities on SME activity and performance in*

research does not necessarily conform to these suggestions; the results show that a French company was interested in and was successfully awarded a low-value public contract.<sup>88</sup>

This suggests that PCP competitions can contribute to cross-border trading in the Single Market. The highly technical nature of the contract is more than likely the contributing factor for this finding. Innovative start-ups specialising in developing services may find it easier and financially attractive to compete for PCPs in other Member States.<sup>89</sup> This finding bodes well for innovative start-ups as more public bodies are adopting Smart City programmes across the EU, creating new opportunities for the companies. This supports the overall objective of the Directive to promote competitive cross-border trade in the Single Market.

It is difficult to assess the use of lots as an individual independent measure in this case study. A form of ‘lots’ are inherently built into PCP procedures; the processes involve the assessment of a number of solutions. An interesting finding is an approach taken by the contracting authority to increase the number of solutions it accepted at stage one and stage two.<sup>90</sup> At both stages, the contracting authority offered more contracts than it planned to, suggesting that the procedure successfully facilitates SME participation in a flexible manner.

Similarly, to the use of lots, it is difficult to assess the subcontracting consideration in isolation. This is primarily due to the low-value nature of the contract; €12,500 may not warrant the need to subcontract a significant proportion of the contract. Subcontracting was strongly encouraged by Smart Dublin, only requiring the lead contractor to provide organisational

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*public contract competitions*’ (2017) 35(4) *International Small Business Journal: Researching Entrepreneurship* 449.

<sup>88</sup> This is likely due to the global nature of start-ups. A recent survey completed by the European Commission suggest that 88% of start-ups focus on ‘internationalising’ their products or services. See; Commission, ‘*Europe’s next leaders: the Start-up and Scale-up Initiative*’ (Communication) COM (2016) Strasbourg, 22 November.

<sup>89</sup> For a broader discussion on the ability of start-ups to source international funding see; Ø. Moen, ‘*The born globals: a new generation of small European exporters*’ (2002) 19(2) *International marketing review* 156.

<sup>90</sup> See Interview with the Smart Cities Programme Manager (n 65).

details such as registered company name and VAT registration number in their tender submission. The invitation to tender stated; ‘*We particularly welcome applications that enable small companies to participate within the supply chain.*’ which encouraged Smartcharge LTD. to subcontract with another micro company to develop their solution.<sup>91</sup>

The research argues that the use of PCP facilitates SME participation in the public market. In particular, the procedures encourage the participation of innovative young start-ups and entrepreneurs. PCP encouraged the participation of SMEs, which are typically hindered and limited from bidding for and winning public contracts.<sup>92</sup> Working on the public contracts has had a positive impact on the awardee companies. The awardee companies have subsequently received funding from other sources. Building on their successful partnership with Smart Dublin. BikeLook received €50,000 further funding from Enterprise Ireland. Fluidedge incorporated ‘Liberty Bell’ as a separate company, which was subsequently successfully awarded a USD 75,000 innovation contract with Colorado Department of Transport.<sup>93</sup> One thing to note about this case study is the fact that this will be a ‘*once-off*’ purchase. DCC does not wish to control or maintain these cycle services, and it is hoped that the companies post completion of the public contract will become active sellers in the private market.<sup>94</sup> This will reduce future costs for the city. The contract will hopefully have fostered competition in the market place as several businesses were progressed to stage two of the contract.

This case study demonstrates the successful use of innovative change in the public sector. The literature review analysed a number of frameworks set out by the OECD, European Commission and academics which identified strategies for achieving innovation in public sector services and operations. The OECD’s observatory of public sector innovation suggests

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<sup>91</sup> Request for Tender, section 5; Interview with Michael Berry, Chief Technical Officer, SmartCharge (By phone, 25<sup>th</sup> July 2018).

<sup>92</sup> See Interview with the Co-founder, FluidEdge (n 58).

<sup>93</sup> See Interview with the Co-founder, FluidEdge (n 58).

<sup>94</sup> See C. Edquist and J.Zabala-Iturriagoitia (n 57).



that innovation in the public sector will successfully take place in circumstances where; there is an individual innovator, who is supported by their organisation, a willingness to adopt new practices and to improve the underlying legislative framework.<sup>95</sup> A 2013 European Commission report on ‘*Powering European Public Sector Innovation.*’, additionally argues that a lack of coordinated support and administratively burdensome legislation are the key barriers to public sector innovation.<sup>96</sup> Sorensen and Torfing’s framework on public sector innovation, further builds on these observations, emphasising the importance of forming collaborative partnerships.<sup>97</sup> Public-sector bodies must assist innovative partners in developing and testing new solutions which should be then disseminated across the public sector.<sup>98</sup>

The contracting authority in this case study successfully implemented innovative changes to the procurement structures. The contracting authority implemented provisions which reflect the measures set out by the OECD and the Commission. The changes introduced were led by an individual innovator, the Smart Cities Programme Manager, who was supported by DCC, the Smart Cities Team and arguably by the participating economic operators.<sup>99</sup> One common finding derived from the research interviews highlighted the vital role the Programme Manager played in implementing change in DCC. The Programme Manager’s enthusiasm, dedication and knowledge is a critical factor in the success of the Smart Dublin programme.<sup>100</sup> The awardee companies reflected on the

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<sup>95</sup> OECD *The Innovation Imperative in the Public Sector: Setting an Agenda for Action* (OECD, Publishing, Paris, 2015).

<sup>96</sup> Commission, ‘*Powering European Public Sector Innovation: Towards a New Architecture Report of the Expert Group on Public Sector Innovation*’ (Luxembourg: Publications Office of the European Union, 2013).

<sup>97</sup> E. Sorensen and J. Torfing, ‘*Enhancing collaborative innovation in the public sector*’ (2011) 43(8) *Administration and Society* 868.

<sup>98</sup> See Interview with the Smart Cities Programme Manager (n 65) The Smart Dublin programme has started disseminating the project findings nationally and internationally with other Smart Cities programmes.

<sup>99</sup> See Interview with the Smart Cities Programme Manager (n 65).

<sup>100</sup> See Interview with the Co-founder, FluidEdge (n 58) Interview with the Chief Technical Officer, SmartCharge (n 91) This further supports the view that public sector change is driven up motivated and supported champions. See; S. Fernandez and H.G. Rainey, ‘*Managing successful organizational change in the public sector.* In *Debating Public Administration*’ (Routledge, 2017) 7.

importance of the ‘*voluntary buy-in*’ from all partners of the project.<sup>101</sup> During the research interviews, the Smart City Programme Manager identified five specific requirements for the successful implementation of an SBIR competition;

*You need the right person, you need to build a good relationship, ability to access infrastructure, easy payments systems and an understanding that it is not ‘free money’.*<sup>102</sup>

DCC, the Smart Team and the economic operators were committed and engaged with the PCP. This is a determinable factor to the success of this case study. If this PCP case study is to be replicated by other public bodies, the contracting authorities should attempt to replicate the underpinning supporting relationship between the public body and the private sector.<sup>103</sup> DCC’s commitment to the companies was further displayed in the effort that was put into the launch of the competition which took place in the Mansion House, in Dublin city.<sup>104</sup> DCC approached this contract in a truly collaborative manner. This finding supports Lee et al.’s empirical studies on public sector innovation, which suggest that a public body’s capacity to innovate is directly related to its willingness to collaborate with the private sector.<sup>105</sup> This was also a key finding from the research studies, the interviewed companies each commented on the trusting, supporting and educational relationship developed with the Smart City Programme Manager throughout the contracts.

Enthusiasm for ‘*doing things differently*’ was expressed by the contracting authority and awardee companies.<sup>106</sup> All parties were committed to conducting business in a collaborative and supportive manner. Risks were

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<sup>101</sup> See Interview with the Co-founder, FluidEdge (n 58) Interview with the Chief Technical Officer, SmartCharge (n 91).

<sup>102</sup> See Interview with the Smart Cities Programme Manager (n 65).

<sup>103</sup> See World Bank, ‘*World Bank Group Support for Innovation and Entrepreneurship: An Independent Evaluation*’ (Washington, D.C, World Bank, 2014) 81.

<sup>104</sup> See Interview with the Smart Cities Programme Manager (n 65).

<sup>105</sup> S.M. Lee, T. Hwang and D. Choi, ‘*Open innovation in the public sector of leading countries*’ (2012) 50(1) Management decision 147.

<sup>106</sup> See Interview with the Co-founder, FluidEdge (n 61) Interview with the Chief Technical Officer, SmartCharge (n 91).

borne by both sides, with some of the risks transforming into fruitful commercial products. The PCP procedure was conducted in a simple, straightforward manner. The procedure upheld the fundamental principles, resulting in achieving cross-border trade.<sup>107</sup>

Additionally, the case study implemented the OECD and Commission's recommendations to reduce the legislative and administrative burden for both the procurer and supplier. The Public Sector Regulations did not apply to the case study. The procurement was governed by soft-law policy and guidance documents.<sup>108</sup> It is '*best practice*' in Ireland to use the OGP's standardised '*Request for Tender*' templates.<sup>109</sup> The contracting authority chose not to use these documents, creating their own documents to best suit the PCP competition. The documents used reflected the social spirit of the Directive, the documents were designed in a manner which aimed to promote competition amongst all forms of companies. Interested economic operators based in other Member States could freely and easily access the call for competition notices.<sup>110</sup> Tenderers were asked to meet proportionate financial and professional criteria. The simple structure of the tender allowed for tenderers to focus on the proposed solution for the public body. The document successfully embodied the best practices set out in the Commission's PCP and Code to Facilitating SME Participation guidance policies.<sup>111</sup>

However, the Smart Dublin programme has not fully incorporated Sorensen and Torfing's recommendation for other public-sector bodies to

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<sup>107</sup> Furthermore, due to the '*global*' nature of start-ups, EU contracting authorities should consider conducting joint PCP programmes to promote further competition and drive wide-scale innovative developments. For a discussion on joint procurement, see; G.L. Albano, G. Spagnolo and M. Zanza, '*Regulating joint bidding in public procurement*' (2008) 5(2) *Journal of Competition Law and Economics* 335.

<sup>108</sup> Namely, the OGP policies and Dublin City Council's internal operational policies.

<sup>109</sup> The templates aim to promote harmonised procedures which reduce administrative costs for both contracting authorities and public bodies. The templates do not promote the sourcing of innovative solutions. See Office of Government Procurement, '*National Public Procurement Framework Public Procurement Guidelines for Goods and Services*.' (2019) Version 2.1.

<sup>110</sup> The notices were published on the etenders.gov.ie platform.

<sup>111</sup> See COM (2008) 0394; Commission, '*SMEs' access to public procurement markets and aggregation of demand in the EU 2014*.' (2014) Final Report.

replicate the innovative practices.<sup>112</sup> It could also be argued that it is not within the cities remit to suggest how other authorities should conduct their procurement activities. Perhaps, this is a task which could be undertaken by the OGP in Ireland or the CPD in Northern Ireland. Smart Dublin openly shares the results of their ‘*challenge competitions*’ by hosting and attending events nationally and internationally to demonstrate the results of the programme.<sup>113</sup> The programme engages with Universities, with local community stakeholders and with businesses of all sizes but to further replicate the success of the PCP and to facilitate SMEs further the initiative should be shared and replicated by other cities and large towns across Ireland.<sup>114</sup> Although it should be noted that the programme is actively engaged with other Smart Cities programmes. DCC has recently joined the ‘*SynchroniCity*’ which explores how innovative solutions can improve urban living standards. Over 40 cities are participating in the programme, and DCC is currently collaborating with Antwerp and Manchester to run a follow-up ‘*Smart Cycling Project*’. This project is ongoing and aims to map cycling trends in the cities.<sup>115</sup>

To further embed these socially-sustainable practices, this research suggests that Smart Dublin and the DCC should consider conducting future PCP activities in partnership with other contracting authorities. It is also possible for the contracting authority to conduct procurement competitions with public bodies based in other Member States.<sup>116</sup> Collaborative competitions have the potential to replicate the success of this case study on a grand scale, assisting innovative companies accessing valuable public contracts.<sup>117</sup> Start-ups will benefit from the capital

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<sup>112</sup> See E. Sorensen and J. Torfing (n 97).

<sup>113</sup> The programme publishes ‘*open data*’ on the Dublinked Open Data Platform. See European Communities (Re-use of Public Sector Information) (Amendment) Regulations 2015 of 24 November 2015, reg 5.

<sup>114</sup> As suggested by E. Sorensen and J. Torfing (n 97).

<sup>115</sup> This programme will run from June – August 2019. For more information on the ‘*SynchroniCity*’ programme, please see; <https://synchronicity-iot.eu/cities-pilots/> Accessed 21/06/2019

<sup>116</sup> However, it should be noted that it is uncertain if this form of partnership would increase costs and it may suit larger companies over smaller start-ups and increase legal uncertainty.

<sup>117</sup> See G.L. Albano, G. Spagnolo and M. Zanza (n 107).

injection and the development and testing of the proposed solution. This, in turn, will support the start-ups' growth. Value for taxpayers' money will be achieved when low sums of capital are invested in improving the innovative capabilities and structure of public services.

Building on the experience gained from the contract, two of the awardee companies have subsequently been successful in tendering for smart cities contracts in Northern Ireland and in the US. An ability to grow quickly and to maximise the commercialisation of a developed solution is the key determinable factor to a start-ups chances of survival.<sup>118</sup> Unfortunately, start-ups have an extremely high failure rate, with the majority of EU start-ups failing to survive past the crucial two-three year operational stage. Supporting start-ups financially at the early stages of incorporation will improve their chances of long-term survival.<sup>119</sup> Improving start-ups access to public contracts has the potential to support start-up growth rates which in turn will lead to the creation of new jobs.<sup>120</sup> Start-ups create significantly more jobs than small businesses.<sup>121</sup> However, concerns have been raised about the sustainability of the jobs created by start-ups due to their instability and chances of failing within the first two years of incorporation.<sup>122</sup> However, when start-ups successfully scale-up, their employment growth rate is generally regarded as significant.<sup>123</sup>

## 7.6 Conclusion

Overall, this case study successfully demonstrates that the use of PCP facilitates SME participation in public procurement. Moreover, PCP is used as a flexible tool to find new digital solutions to public-sector challenges. A limited amount of public funds was used to improve long-

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<sup>118</sup> S. Birley and P. Westhead, 'A taxonomy of business start-up reasons and their impact on firm growth and size' (1994) 9(1) *Journal of Business Venturing* 7.

<sup>119</sup> N. Huyghebaert, 'On the determinants and dynamics of trade credit use: empirical evidence from business start-ups' (2006) 33(1-2) *Journal of Business Finance & Accounting* 305.

<sup>120</sup> P. Davidsson and M. Henrekson, 'Determinants of the prevalence of start-ups and high-growth firms' (2002) 19(2) *Small Business Economics* 81.

<sup>121</sup> Start-ups in general employ 7 people, and small businesses employ 2-3 people.

<sup>122</sup> J. Haltiwanger, R.S. Jarmin and J. Miranda, 'Who creates jobs? Small versus large versus young' (2013) 95(2) *Review of Economics and Statistics* 347.

<sup>123</sup> See J. Haltiwanger, R.S. Jarmin and J. Miranda (n 122).

term cycling rates in Dublin city while subsequently supporting start-up growth. This procurement procedure is an important example of how procurement can be used to support an inclusive, innovative and sustainable economy.

An implication of this finding may suggest that once the start-ups develop their solutions to a commercial level, the public sector will no longer need to purchase the innovative solution.<sup>124</sup> In this example, citizens can now avail of the safe cycling tools, and the city can use the data gathered during the contract stage to shape future policy on promoting cycling rates. Overall, the establishment of Enterprise Ireland's national PCP initiative '*Small Business Innovation Research (SBIR) Ireland*' and the introduction of Smart Cities programmes by DCC and Limerick City Council has created new entry routes into public markets for small businesses. These findings are compared with a '*Smart Belfast*' competition in the next chapter.

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<sup>124</sup> This is a form of catalytic procurement. See L. Hommen and M. Rolfstam, '*Public procurement and innovation: towards a taxonomy*' (2008) 8(3) *Journal of Public Procurement* 17.

## Chapter Eight Smart Belfast Case Study

### 8.1 Introduction

Northern Ireland is facing an uncertain future, the state is operating without a government since January 2017, and the threat of a ‘hard’ Brexit looms in the background. Public procurers continue their daily operational tasks while procurement policy is at a standstill.<sup>1</sup> SMEs are the backbone of the economy and supporting them will encourage stability and growth in these uncertain times.<sup>2</sup> Over 132,000 SMEs operate in the state. Export-orientated science and technology companies dominate the sector.<sup>3</sup> In recent years, the state has introduced measures to promote the development of innovative technology companies and innovation in the public sector.<sup>4</sup> A 2010 European summary assessment report noted that the state was performing slightly below the other Member States in facilitating ‘*innovation finance*’ and encouraging ‘*collaboration and networking*’ in the sector.<sup>5</sup> To address these concerns, the state has encouraged the use of ‘Small Business Research Initiatives’ (SBRI) R&D contracts. From the period of 2009 – 2015, over 2,200 SBRI contracts with a combined value of over £270 million were concluded by over 70 public bodies.<sup>6</sup>

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<sup>1</sup> Take for example, a draft proposal for a *Buy Social Value Act* has been put on hold since the collapse of the devolved government in 2017.

<sup>2</sup> See Federation of Small Businesses and Ulster University, ‘*The contribution of small businesses to Northern Ireland*’ (2015). Available at; <https://www.fsb.org.uk/docs/default-source/Publications/the-contribution-of-small-businesses-to-northern-ireland.pdf?sfvrsn=1> Last accessed 15<sup>th</sup> April 2019.

<sup>3</sup> See Statista, ‘*Number of small and medium enterprises (SME) in the private sector in Northern Ireland from 2010 to 2018*’ (2018). Available at; <https://www.statista.com/statistics/668790/number-small-and-medium-businesses-northern-ireland/> Last accessed 15<sup>th</sup> April 2019.

<sup>4</sup> See Northern Ireland Executive, ‘*Innovation Strategy for Northern Ireland 2014-2025*’. (2014) Innovate UK.

<sup>5</sup> L.R. León, K. Männik, B. MacAulay, ‘*Summary Assessment of Northern Ireland*’ (2013) ESIC European Service Innovation Centre Report.

<sup>6</sup> See Innovate UK Government Challenges, *Ideas from Business, Innovative Solutions - SBRI* (2014). <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachmen>

In 2016, Belfast City Council implemented a ‘*Smart Cities*’ initiative for this first time, building on the success of the SBRI contracts.<sup>7</sup> The programme aims to encourage cross-sectoral innovation, working in collaboration with the private sector, academia and community to develop data-driven technologies to improve public services and urban living.<sup>8</sup> This chapter is tasked with reviewing the programme’s early procurement practices. The case study chosen is directly comparable with the Smart Dublin cycling challenge. This chapter reviews an SBRI challenge for ‘*Maximising Business Revenue Rates*’ by Belfast City Council, under the smart city umbrella. This challenge was the first procedure used by the state in procuring a solution for a smart city initiative. In a similar manner to the Dublin competition, a two-stage PCP competition was used.<sup>9</sup>

The purpose of this study is to examine whether the use of PCP is conducive to the participation of SMEs in the public market. SMEs, especially, start-ups and social enterprises operating in Northern Ireland face similar barriers to participation as their Irish counterparts do, they are hindered by the lack of knowledge of contract opportunities, lack of tendering skills, lack of experience, and lack of insurance and financial capability to carry out the contract.<sup>10</sup> This case study questions if the use of social considerations in innovative procedures assists SMEs in overcoming these barriers.

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t\_data/file/436237/CO-011\_SBRI\_JUN15\_Brochure\_WEB\_FINAL.pdf Last accessed 16th June 2019.

<sup>7</sup> The Smart City objectives were formalised in the Belfast City Council, ‘*Supporting Urban Innovation - The Smart Belfast Framework 2017 to 2021*’. The framework was adopted to support the implementation of the *Belfast Agenda*. The *Belfast Agenda* is the city’s first community plan, developed by city partners, residents and community organisations. It sets out long-term priority goals for the city. See The *Belfast Agenda*; <https://www.belfastcity.gov.uk/council/Communityplanning/BelfastAgenda.aspx> Last accessed 16th June 2019.

<sup>8</sup> See the *Smart Belfast Framework 2017 – 2021* (n 7).

<sup>9</sup> The procedure used reflected the PCP set out in the Commission’s guidelines. See Commission, ‘*Pre-commercial Procurement: driving innovation to ensure sustainable high-quality public services in Europe*’ (Communication) COM (2007) 0799 final

<sup>10</sup> R. Fee, A. Erridge and S. Hennigan, ‘*SMEs and government purchasing in Northern Ireland: problems and opportunities*’ (2002) 14(5) *European Business Review* 326; K. Loader, ‘*Is public procurement a successful small business support policy? A review of the evidence*’ (2013) 31(1) *Environment and Planning C: Government and Policy* 39.



The research was conducted over two years, the request for tender and sample contracts were reviewed, and interviews were conducted with the lead project manager and with an awardee company.<sup>11</sup> The case study is exploratory in nature.<sup>12</sup> The case study findings contribute to current literature, as they indicate that small businesses are at the forefront of developing innovative solutions to public challenges.<sup>13</sup> Four small companies were awarded a £5,000 at phase one, and two companies were awarded a £50,000 at phase two to prototype and test the proposed solutions.<sup>14</sup> One of the awardee companies identified approximately £0.5million of unpaid business revenue rates for the Council, and subsequently used the experience gained from the contract to win a further six SBRI competitions, one of which was awarded by Smart Dublin.<sup>15</sup> The initial results indicate that the use of PCP procedures by smart cities initiatives encourage SME participation in the public market.

The chapter is divided into three parts; the first section offers an overview of the operation of the smart cities programme and the second section reviews the PCP process in detail and briefly analyses the challenge findings. The third section analyses the research findings in more detail and pays particular attention to the importance of classifying different forms of PCP.

## 8.2 Smart Cities in Northern Ireland

The Smart Belfast initiative was adopted in 2016 and tasked Belfast City Council (BCC) with forming and managing partnerships with industry, in particular with the SME sector, academia and with the community to develop creative, technical and digital solutions using data science to

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<sup>11</sup> These documents were made available freely on the Sourcing NI platform. See <https://e-sourcingni.bravosolution.co.uk/web/login.shtml> Last accessed 16th June 2019.

<sup>12</sup> As with the other chapters, the research explored the public sector and SME responses to the use of the pre-commercial procurement.

<sup>13</sup> C. Richter, S. Kraus and P. Syrjä, 'The Smart City as an opportunity for entrepreneurship' (2015) 7(3) *International Journal of Entrepreneurial Venturing* 211.

<sup>14</sup> Interview with Deirdre Ferguson, Senior Consultant, Smart Cities Team (By phone, 28<sup>th</sup> June 2017).

<sup>15</sup> Interview with Conor Dumigan, Head of Data Analytics Solutions (By phone, 27<sup>th</sup> July 2018).

address policy goals.<sup>16</sup> The initiative was inspired by the successes of similar projects conducted namely in Dublin, New York City in the US<sup>17</sup>, Santander in Spain<sup>18</sup> and Barcelona in Spain<sup>19</sup> Additionally, the programme was explicitly inspired by Bristol City Council's procuring activities, Westminster's smart parking scheme, and Transport for London's ticketless public transport scheme, and Glasgow's smart street lighting programme.<sup>20</sup> In particular, the operational framework focuses on replicating SBRI challenges similar to that conducted by Smart Dublin. The framework outlines eight guiding principles aligning with the goals set out in the Belfast Agenda. The principles include the development of innovative data infrastructure, eco-systems and data security.<sup>21</sup> Importantly, one of the principles requests Smart Belfast participants to avoid focussing on technology-led outcomes and to instead focus on environmental, social and economic outcomes. Another essential principle encourages participants to strengthen and support local technology businesses and entrepreneurs.<sup>22</sup>

The guiding principles are supported by a series of interlinked streams, aimed at building governance structures, developing an internal team, communicating and engaging with all stakeholders to develop an innovative network.<sup>23</sup> When deciding to use PCP, contracting authorities are encouraged to consider;

*..the size of potential impacts and costs, risks, stakeholders, likely funding sources or potential business model, known barriers to*

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<sup>16</sup> See the *Smart Belfast Framework 2017 – 2021* (n 7).

<sup>17</sup> Digital NY is the official public-private online hub of the New York City start-up and technology ecosystem. See <https://www.digital.nyc/about> Last accessed; 17th June 2019.

<sup>18</sup> See J. Gutiérrez Bayo, '*International Case Studies of Smart Cities: Santander, Spain*' (2016) Inter-American Development Bank.

<sup>19</sup> Barcelona's Digital City's strategy focuses on '*investing in digital public infrastructures that can enable higher-quality public services and usher in a more sustainable and collaborative economy and society.*' See <https://ajuntament.barcelona.cat/digital/en> Last accessed; 17th June 2019.

<sup>20</sup> See R. Cowley, S. Joss and Y Dayot, '*The smart city and its publics: insights from across six UK cities*' (2018) 11(1) *Urban Research & Practice* 53.

<sup>21</sup> See the Belfast Agenda (n 7).

<sup>22</sup> See the Belfast Agenda (n 7) 12.

<sup>23</sup> See the Belfast Agenda (n 7).

*feasibility and mitigation planned, assessment of delivery channel, i.e. open competition vs. collaborative partner delivery, offer a route to market for commercial partners.*<sup>24</sup>

This indicates that the State supports the use of strategic procurement and will actively support innovative procurement in circumstances where there is adequate market demand and availability. Some of the potential projects that the programme plans to conduct include; understanding visitor trends, a public transport challenge, building an integrated employment pathway, establishing a Belfast Innovation Hub Network, understanding the future labour market, a Belfast health and leisure passport, a circular economy ‘grand’ waste challenge, predicting anti-social behaviour and leveraging the public estate.<sup>25</sup>

When the first challenge ‘*Maximising Business Revenue Rates*’ was conducted by the initiative, the programme was in its infancy, and the ‘*Smart Belfast*’ title was not used at this stage. The initiative was referred to as ‘*Belfast Smart City Programme*’.<sup>26</sup> Belfast City Council (BCC) will be referred to as the contracting authority to avoid any confusion with the two titles. BCC was the lead procuring partner on the contract.

### 8.3 Maximising Business Revenue Rates Competition

This low-value comparative case study scrutinises a PCP competition for ‘*Maximising Business Rates*’ in Belfast city. Approximately 45% of the City Council’s income is generated through the collection of domestic and commercial rates.<sup>27</sup> There are two separate bodies responsible for the collection, distribution and management of business revenue rates in Northern Ireland. BCC is responsible for managing and distributing collected rates to improve local services and facilities. Land and Property Services (LPS) provided the data groundwork for the scheme; it is

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<sup>24</sup> See the *Smart Belfast Framework 2017 – 2021* (n 7) 27.

<sup>25</sup> See the *Smart Belfast Framework 2017 – 2021* (n 7).

<sup>26</sup> For a brief period, the programme was also referred to as ‘*Smarter Belfast*’.

<sup>27</sup> Belfast City Council, Land and Property Services Northern Ireland, Rates 2016 – 2017. Openly available at; <https://www.belfastcity.gov.uk/council/rates/rates2016.aspx> Last accessed 16th June 2019.

responsible for the collection and management of land and property information. LPS is responsible for the processing and management of revenues for the state.<sup>28</sup> The Future Cities Catapult facilitated the design of the SBRI process. Future Cities Catapult is a private organisation whose primary objective is to advance urban innovation and business growth to ‘*make cities better.*’<sup>29</sup> BCC requested the help of Future Cities Catapult to design the innovative process. BCC was the public procurer for the competition.<sup>30</sup>

As with the Smart Dublin case, this contract fell outside the remit of the Public Contract Regulations.<sup>31</sup> The contracting authority could award the contract on the basis of cost alone or on the best price:quality ratio. However, Rigby highlights that there are problems associated with using ‘*costs*’ as a defining feature of research and development contracts, particularly around setting available funds.<sup>32</sup> Contracting authorities should set their maximum allowance for the challenge transparently at the start of the competition; this requires the contracting authority to have a good level of knowledge of the marketplace.<sup>33</sup> Calculating potential costs might prove problematic for procurers who do not have the expertise to estimate potential figures. Structured market soundings could assist procurers in calculating estimate costings.<sup>34</sup> Definitions of PCP offered in the literature tend to focus on the processes of the procedure avoiding direct references to costings; for example, Pantilimon Voda defines PCP as the successive development of a marketable product or service with the risks shared between a private operator and a public body under market

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<sup>28</sup> The rate collection system was reviewed after the recent Local Government Reform. See;

<https://www.belfastcity.gov.uk/council/localgovernmentreform/localgovernmentreform.aspx> Last accessed 16th June 2019.

<sup>29</sup> Future Cities Catapult is a non-profit organisation which assists public bodies in implanting Smart changes. See; <https://futurecities.catapult.org.uk/> Last accessed 16<sup>th</sup> June 2019.

<sup>30</sup> Invitation to Tender, SBRI\_001.

<sup>31</sup> Public Contracts Regulations, reg 14.

<sup>32</sup> J. Rigby, ‘*Review of pre-commercial procurement approaches and effects on innovation*’ (2013) Manchester Institute of Innovation Research: Manchester.

<sup>33</sup> In order for the contracting authority to set a proportionate budget, the procurers should have some knowledge of the general costs to design and develop apps.

<sup>34</sup> Public Contracts Regulations, reg 40.

conditions. The PCP ends when the solutions developed are market-ready, this stage is followed by a traditional public supply or services contract competition.<sup>35</sup> Process-driven definitions offer contracting authorities the flexibility they need to design proportionate and relevant contract objectives and cost structures.

BCC's definition of PCP does not help distinguish if the PCP used in this competition was a catalytic or co-operative procedure. This case study could be classified as a co-operative PCP; it involved the development and prototyping of a bespoke solution which was of mutual benefit to the councils, LPS, BCC and the companies delivering the solution.<sup>36</sup> The contract is referred to as an '*innovation and development project*' carried out under the pre-commercial principles and not under the Public Contracts Regulations.<sup>37</sup> The contracting authority procured the research and development services and goods under market conditions. The contracting authority does not enjoy exclusive rights and usage of the developed innovative solution.<sup>38</sup> Therefore, the contracts are defined as a public services contract and should not be classified as a State Aid activity, even though the public body is using public money to assist small businesses in developing and testing their innovative ideas. This again demonstrates the underlying '*partnership*' trait of the competition; each party must invest in the proposed solution from the outset.<sup>39</sup> The competition did not constitute State Aid as the contracting authority bought the goods and services at a fair market price, the competition was conducted openly, and the contracting authority did not enjoy exclusive use of the developed products and services.<sup>40</sup>

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<sup>35</sup> O.S. Pantilimon Voda, '*Innovative and sustainable procurement: framework, constraints and policies*' in C. Bovis, '*Research handbook on EU public procurement law*' (Edward Elgar Publishing, 2016) 228. See also; COM (2007) 799 final.

<sup>36</sup> Invitation to Tender, SBRI\_001.

<sup>37</sup> Public Contracts Regulations, reg 14.

<sup>38</sup> Invitation to Apply, T1707, SBRI 007 Sample Contract. This is a fundamental requirement for pre-commercial procurement activities. See also; COM (2007) 799 final

<sup>39</sup> M.A.B. Blay, '*The strategic use of public procurement in support of innovation*' (2014) 9 Eur. Procurement & Pub. Private Partnership L. Rev. 3.

<sup>40</sup> Invitation to Apply, T107, SBRI FAQ. See also; D.C. Dacian and B. Racolta, '*Comparing Legal Instruments for R&D&I: State Aid and Public Procurement*' (2017) 12 Eur. Procurement & Pub. Private Partnership L. Rev. 408.

Although the advertised contract fell outside of the EU rules due to their research and development nature, the subject-matter of the contract still had the potential to create a cross-border interest.<sup>41</sup> Consequently, the contracting authority adhered with the fundamental TFEU principles of transparency, equal treatment, proportionality and non-discrimination. In upholding these principles, the advertised request for bids clearly stated that the competition was open to any economic operator based in the EU. The documents did not extend these statements further to include economic operators based in states which are members of the WTO GPA. This was not significantly important at the time; however, depending on how the Brexit trade negotiations are carried out, this may become more important in the future for public contracts.<sup>42</sup>

Overall, the contracting authority sought to procure cost-effective data-led solutions which would maximise the income generated from the collection of business rates in the city. The tender submission document was 12 pages long, similarly to the Smart Dublin challenge, it concentrated heavily on the proposed solution and potential product or service development.<sup>43</sup> It was primarily outcome-based and did not onerously focus on the capability and experience of the tenderers.<sup>44</sup> Open-ended questions allowed for tenderers to dedicate the majority the application to outline the public benefit of their proposed solution.<sup>45</sup> The contracting authority offered examples on ways the collection of rates could be maximised. Economic operators were encouraged to develop solutions to; increase identification of occupancy states of non-domestic properties; identification of businesses; identification of the functions of non-domestic properties; identification of occupants of non-domestic

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<sup>41</sup> Case C-59/00 *Vestergaard* [2001] ECR I-9505.

<sup>42</sup> On the 27<sup>th</sup> February 2019 the WTO approved the UK's request to join the WTO Agreement on Government Procurement once it leaves the EU.

<sup>43</sup> As with this competition, Rigby suggests that PCP competitions should not be driven by costs and should be designed to promote innovative solutions. See J. Rigby (n 32).

<sup>44</sup> Invitation to Tender, SBRI\_001.

<sup>45</sup> C. Perry, '*Supporting SME access to public procurement opportunities*' (2011) 12(1) Research and Information Service Research Paper 12.

properties and identification of mechanisms to issue invoices to new properties.<sup>46</sup>

Even though this is an entry-level contract, the request for tender documents embedded the guidance offered in the recitals of the Directive on the facilitation of SME participation in public contracts.<sup>47</sup> The competition was open to all forms of legal entities including pre-start-ups, universities, charities and non-commercial organisations. As with the Smart Dublin case study, these companies are normally excluded from public contracts due to lack of operational and financial capabilities.<sup>48</sup> Interested economic operators were asked to identify if any components of the proposed work required the recruitment of subcontractors or specialised consultants.<sup>49</sup> If the contractor wished to subcontract any element of the contract during the performance stage, they were required to seek prior permission from BCC.<sup>50</sup> Subcontractors are required to meet the BCC's standards to ensure the suitability of contractors.<sup>51</sup>

The invitation to apply and accompanying documents were freely advertised on the ESourcingNI portal. The process was conducted electronically, phase one commenced on 19<sup>th</sup> August 2016 and closed on 26<sup>th</sup> August 2016.<sup>52</sup> The competition was conducted over two phases: the purpose of the initial phase was to test the technical feasibility of the proposed solutions. An initial £30,000 was made available with the intention of funding five to six businesses during the first phase. Phase one was conducted over six weeks. A further £100,000 was offered at

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<sup>46</sup> Invitation to Apply, SBRI 001.

<sup>47</sup> See Commission, *European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts* (SWP) COM (2008) 2193.

<sup>48</sup> R. Fee, A. Erridge and S. Hennigan, *SMEs and government purchasing in Northern Ireland: problems and opportunities* (2002) 14(5) *European Business Review* 326.

<sup>49</sup> Invitation to Apply, T107 SBRI FAQ.

<sup>50</sup> Invitation to Apply, T1707, SBRI 007 Sample Contract.

<sup>51</sup> Invitation to Apply, T1707, SBRI 007 Sample Contract. Similarly, with the Smart Dublin case study, it is unlikely that such low-value contracts would require the need of subcontractors.

<sup>52</sup> Invitation to Apply, SBRI 001.

phase two, with the intention of funding two to three businesses to develop and test prototypes.<sup>53</sup>

Interested suppliers were provided with a detailed breakdown of the scoring matrix for Phase One.<sup>54</sup> There were seven individual assessment criteria, each with a weighting of 10 or 20 marks.<sup>55</sup> Overall, a qualitative award criterion was used to assess the tenderer's capability to deliver a sustainable solution. Interested economic operators were not informed of any sub-weightings. Instead, the request for tender document stated the number of marks that were available for each category, such as proposed solution, technical approach, innovative nature of the proposal, applicant's capability to carry out the contract, applicant's skill sets, cost breakdown and commercialisation plans.<sup>56</sup>

Confidentiality and protection of product development and intellectual property (IP) is a core issue for tenderers bidding for innovative contracts.<sup>57</sup> Tenderers were requested to identify any commercially sensitive information in the bid, outlining any implications the publications or disclosure of such information may have on the company. The contracting authority endeavoured to maintain confidentiality while also recognising their potential obligations under the Freedom of Information Act (FOIA) 2000.<sup>58</sup> In terms of IP, the contracting authority owns the '*background*' IP used during the contract performance stage.<sup>59</sup>

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<sup>53</sup> Interview with the Senior Consultant, Smart Cities Team (n 14).

<sup>54</sup> Interview with the Senior Consultant, Smart Cities Team (n 14) Detailed feedback assists SMEs in improving their tendering skills. See A. Flynn and P. Davis, '*Firms' experience of SME-friendly policy and their participation and success in public procurement*' (2016) 23(3) *Journal of Small Business and Enterprise Development* 616.

<sup>55</sup> Invitation to Apply, SBRI 001.

<sup>56</sup> While contracting authorities must disclose the weightings attached to the award criteria, procurers are not required to disclose all sub-criteria weightings. See *Easycoach Limited v Department of Regional Development* (NIHC, McCloskey J, 28 February 2012); *Clinton t/a Oriel Training Services v Department for Employment and Personnel* (NIQB 2 – NICH, McCloskey J, QBD, 24 January 2012).

<sup>57</sup> J. Edler and L. Georghiou, '*Public procurement and innovation—Resurrecting the demand side*' (2007) 36(7) *Research Policy* 949.

<sup>58</sup> Invitation to Apply SBRI 001 See the Freedom of Information Act 2000.

<sup>59</sup> Invitation to Apply, section 16.2 The contract states that the contractor grants the contracting authority a '*UK wide irrevocable, royalty-free non-exclusive licence to use the Foreground IP, together with any Background IP supplied by the contractor during the Project that is required to use the Foreground IP at a fair and reasonable market price.*' Background IP refers to existing IP owned by the awardee companies and



The contractor remains the owner of all ‘*foreground*’ IP; however, contractors granted a royalty-free non-exclusive license to the contracting authority to use the technology developed.<sup>60</sup> The contractor is encouraged to commercially exploit the final results of the project to generate revenue or capital.<sup>61</sup> Robust monitoring and reporting requirements were included to ensure timely project progression and protection of commercially sensitive information; the suppliers were required to submit progress interim reports alongside any verbal or written reports requested explicitly by the contracting authority.<sup>62</sup> Interested economic operators were made aware that the competition was not a grant scheme to develop and support the innovative company. A public services contract was originally planned for the end of the procedure, and it has yet to be procured.<sup>63</sup>

Contractors received monthly payments in this contract. Interested economic operators were made aware of this payment schedule at the tendering stage.<sup>64</sup> This should have eliminated any concerns the operators had about financial security. A clear payment schedule is essential in these forms of procedures, as economic operators were ultimately investing in the development and prototyping of a new bespoke good or service. A clear payment schedule would have eased the administrative difficulties faced by Smart Dublin during the contract performance stage of the cycling competition.<sup>65</sup>

In adherence to national policy, the request for tender asked interested economic operators to make themselves ‘*aware*’ of BCC’s ‘*Good*

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Foreground IP refers to new technologies developed by the company while working on the public contract. See H.R. Hertzfeld, A.N. Link and N.S., ‘*Vonortas Intellectual property protection mechanisms in research partnerships*’ (2006) 35(6) *Research Policy*, 825.

<sup>60</sup> Invitation to Apply, SBRI 001. See also; COM (2007) 799 final.

<sup>61</sup> Invitation to Apply T1707 SBRI 007 Sample Contract. See also; V. Lember, T. Kalvet and R. Kattel, ‘*Urban competitiveness and public procurement for innovation*’ (2011) 48(7) *Urban Studies* 1373.

<sup>62</sup> Invitation to Apply, T1707, SBRI 007, Sample Contract.

<sup>63</sup> Interview with the Senior Consultant, Smart Cities Team (n 14).

<sup>64</sup> Invitation to Apply T1707 SBRI 007 Sample Contract Section 4 (20).

<sup>65</sup> See Chapter 7, section 7.3.

*Relations Strategy*'.<sup>66</sup> The strategy aims to promote equality and good relations in every aspect of public work to improve Belfast citizen's quality of life and business environment. Principles of fairness, equality and respect underpin all public activities and policy in the state.<sup>67</sup> The strategy outlines the city's commitment to transforming itself from a city of historical '*division*' to a city that is '*shared by all*'.<sup>68</sup> A social dimension is evident throughout the request for tender documents, the tender upheld national and European policy on SME engagement and required tenderers to make themselves familiar with city policy on equality and business ethics.<sup>69</sup>

#### 8.4 Challenge Outcomes

Four companies were awarded a £5000 contract at the first phase, two of the winning companies '*Analytics Engines*' and '*RF Proximity Ltd.*' are based in Belfast, one company '*NQuiringminds Ltd.*' is based in Southampton and the final awardee '*The Behaviouralist*' is based in London.<sup>70</sup> Phase I of the project lasted six weeks. Two companies were awarded contracts at the second phase of the competition, Analytics Engines and NQuiring Minds.<sup>71</sup> A qualitative assessment was used in Phase II. Contractors final project report formed part of the assessment. In the final project report, contractors were required to outline milestones met or missed, to outline costs and to discuss the reasons for developing and prototyping the tested concept.<sup>72</sup> This approach, similar to the Smart Dublin example was a proportionate and straightforward procedure. Payment at phase II was based on the completion of project milestones.<sup>73</sup>

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<sup>66</sup> The Good Relations Strategy sets out public bodies' obligations under Section 75 of the Northern Ireland Act 1998.

<sup>67</sup> See Belfast City Council, '*Equality and Good Relations Strategy - Promoting equality and good relations. A shared, peaceful, welcoming and open city.*'

<sup>68</sup> See Belfast City Council *Equality and Good Relations Strategy* (n 67) 1.

<sup>69</sup> Best practices are compiled in the Department of Finance and CPD Northern Ireland, '*Public Procurement Policy*' (2014) Version 11.

<sup>70</sup> Interview with the Senior Consultant, Smart Cities Team (n 14).

<sup>71</sup> Detailed competition findings are only available from Phase II. This case study focuses on what impact the PCP had on SME participation.

<sup>72</sup> Invitation to Apply, T1707 – SBRI – 009; Interview with the Senior Consultant, Smart Cities Team (n 14).

<sup>73</sup> Interview with the Senior Consultant, Smart Cities Team (n 14).

Analytics Engines developed an analytical software system ‘*COBALT*’ which used ‘*multiple data points and advanced analytics to identify businesses*’ failing to pay the correct revenue rates.<sup>74</sup> The COBALT system quickly increased efficiencies for the City Council by identifying £390,000 of unclaimed non-domestic businesses rates in its first two weeks of operation. Over £500,000 unclaimed rates were identified within six months of operation. It has been suggested that the system additionally increased inspection efficiency rates by 250%.<sup>75</sup> The developed solution assists the city council in identifying; properties listed as vacant by occupied, contact details of business owners, domestic properties operating as non-domestic and new businesses that have just opened.<sup>76</sup>

Analytics Engines is a small company with 17 employees based in Belfast. The company has successfully been awarded data analytical led contracts for six similar innovative public contracts, one of which was awarded by Smart Dublin.<sup>77</sup> In this case, the company were awarded a contract under an SBRI competition to develop innovative solutions to tackle illegal dumping in the city. Using historical data, Analytics Engines are currently designing a new software tool to predict the location and timing of illicit dumping in the county.<sup>78</sup>

The company was successfully awarded a phase I SBRI contract by Innovate UK.<sup>79</sup> The Innovate UK challenge centred on identifying mechanisms to utilise machine learning or artificial intelligence to improve the efficiency and effectiveness of its operations. Additionally, the company has won a health analytics related contract with the EU funded ‘Meaningful Integration of Data Analytics and Services’ (MIDAS)

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<sup>74</sup> Interview with the Head of Data Analytics Solutions (n 15).

<sup>75</sup> Smart Belfast, ‘*Published Case Studies.*’ <https://smartbelfast.city/story/> Last accessed 20<sup>th</sup> June 2019.

<sup>76</sup> Interview with the Head of Data Analytics Solutions (n 15).

<sup>77</sup> Interview with the Head of Data Analytics Solutions (n 15) This further demonstrates the ability of PCP to promote cross-border trade.

<sup>78</sup> Interview with the Head of Data Analytics Solutions (n 15). This is a tool which the company could potentially sell to public bodies in all Member State, further demonstrating the internationalisation potential of start-ups. See Commission, ‘*Europe’s next leaders: the Start-up and Scale-up Initiative*’ (Communication) COM (2016).

<sup>79</sup> Interview with the Head of Data Analytics Solutions (n 15).

project. MIDAS focuses on improving the use and gathering of healthcare data to assist with the development of healthcare policy and improve cost-efficiencies in the healthcare sectors. Ulster University leads the project and partners of the project include Dublin City University, Arizona State University, the UK's NHS and Ireland's HSE. NI public bodies awarded two further contracts to the company.<sup>80</sup> Overall, Analytics Engines estimates that the experience working on the BCC contract helped the company successfully bid for six further SBRI competitions. This case study shows that facilitating innovative small businesses and start-ups in public procurement can support business growth.

Another awardee, NQuiringminds developed innovative '*data analysis and workflow management tools*' to maximise the income generated from '*business revenue rates collection management systems*'.<sup>81</sup> The data analytics company was founded in 2010.<sup>82</sup> They have successfully been awarded a number of Smart Cities contracts and government and industry awards, including an Innovate UK '*Parliamentary Nomination for Productivity Innovation*', an SBRI contract for the UK Future Cities Data Integration Platform, a public contract for Transport Solutions in London, a public contract with Southampton City Council for the development of data monitoring and gathering for domestic energy and housing sensors for council-owned domestic dwellings and a contract with the UK based charity '*Center Point*' to gather data to improve homelessness reporting.<sup>83</sup> Further research could be conducted to assess the long-term economic impact of facilitating start-up and innovative small business participation

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<sup>80</sup> This further demonstrates that PCP can be effectively used to drive societal change by involving all community, public, academic and business stakeholders. See L. Dale-Clough, '*Public procurement of innovation and local authority procurement: procurement modes and framework conditions in three European cities*' (2015) 28(3) *Innovation: The European Journal of Social Science Research* 220.

For more information on the MIDAS project see; <http://www.midasproject.eu/> Last accessed 20<sup>th</sup> June 2019.

<sup>81</sup> Interview with the Senior Consultant, Smart Cities Team (n 14) Smart Belfast, '*Published Case Studies*.' <https://smartbelfast.city/story/> Last accessed 20<sup>th</sup> June 2019.

<sup>82</sup> See <https://nquirminds.com/> Last accessed 20<sup>th</sup> June 2019.

<sup>83</sup> As with Analytics Engines, PCP contracts offer innovative companies a secure source of income, which assists the company's transition from a start-up to a scale-up. See N.M. Bocken, '*Sustainable venture capital—catalyst for sustainable start-up success?*' (2015) 108 *Journal of Cleaner Production* 647.

in public procurement. Assessments should evaluate the impact the participation had on employment generation and business growth.

### 8.5 Research Findings

The central thesis research question asks if the use of social criteria and innovative practices facilitates SME participation. Both of the PCP case studies share some common findings. The findings suggest that the use of PCP facilitates SMEs who are typically excluded from the public market. The Smart Cities approach differs from previous SBRI practices as it has an overall objective of improving the technology infrastructure of the city.<sup>84</sup> It is not solely concerned with the development of innovative small businesses. Smart Cities tend to operate in partnership with large technology organisations such as IBM and Siemens.<sup>85</sup> Both Smart Cities case studies have adopted social business practices by implementing low-value PCP contracts. Both city councils and partnering organisations appear proactive in trying to develop sustainable demand-led innovative competitive markets.<sup>86</sup>

As with the Smart Dublin case study, it is difficult to assess ‘lots’ as a direct independent measure. The PCP involved the awarding of multiple contracts to successful tenderers. While both PCP cases, encouraged the use of subcontractors, the BCC case study did not directly facilitate SMEs in the supply chain. Interestingly, this case required the contractors to seek approval from BCC to subcontract any element of the work. It is unclear what internal procedures BCC follow for approving or rejecting subcontracting requests.<sup>87</sup>

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<sup>84</sup> R. Kitchin, ‘*The real-time city? Big data and smart urbanism*’ (2014) 79(1) *GeoJournal* 1.

<sup>85</sup> D. McNeill, ‘*Global firms and smart technologies: IBM and the reduction of cities*’ (2015) 40(4) *Transactions of the Institute of British Geographers* 562.

<sup>86</sup> During the interviews, both procurers commented that they designed flexible and proportionate procedures to generate competition to secure best value for money.

<sup>87</sup> Presumably, this criterion would reflect the selection criteria set out in the Invitation to Tender; for example, rejection for declarations of bankruptcy or criminal convictions.

This case study also applies the strategies for public sector innovation set out by the OECD,<sup>88</sup> European Commission<sup>89</sup> and Sorensen and Torfing.<sup>90</sup> BCC was committed to adopting new practices, they built on the existing simplified SBRI pre-commercial procedures and worked in partnership with Future Cities Catapult.<sup>91</sup> Similarly, to each of the other three case studies, the innovative procurement was driven by a motivated and dedicated small team.<sup>92</sup>

At the heart of both programmes, there is a public acceptance that the services can be delivered through different mediums. Both the contracting authority and tenderers accepted the risks in implementing change in the public sector. The small procurement team were motivated to improve public sector services.<sup>93</sup> Public officials were publicly supportive of the actions taken by the team. At the time the second phase of the competition was launched, the then Finance Minister Máirtín Ó Muilleoir said;

*Rates are a vital source of public revenue. Money raised through our rates funds our schools, hospitals and other essential public services and so I welcome this investment in the development of cutting edge technology to help us maximise rates revenue.*<sup>94</sup>

with the Economy Minister Simon Hamilton stating;

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<sup>88</sup> OECD, *The Innovation Imperative in the Public Sector: Setting an Agenda for Action* (OECD, Publishing, Paris, 2015).

<sup>89</sup> Commission, *Powering European Public Sector Innovation: Towards a New Architecture Report of the Expert Group on Public Sector Innovation* (Luxembourg: Publications Office of the European Union, 2013).

<sup>90</sup> E. Sorensen and J. Torfing, *Enhancing collaborative innovation in the public sector* (2011) 43(8) *Administration and Society* 868.

<sup>91</sup> Interview with the Senior Consultant, Smart Cities Team (n 14).

<sup>92</sup> S. Fernandez and H.G. Rainey, *Managing successful organizational change in the public sector.* In *Debating Public Administration* (Routledge, 2017) 7.

<sup>93</sup> B.E. Wright, R.K. Christensen and K.R. Isett, *Motivated to adapt? The role of public service motivation as employees face organizational change* (2013) 73(5) *Public Administration Review* 738.

<sup>94</sup> Finance Minister O' Máirtín, *Belfast and LPS invest in big data projects to Maximise Business Rates Revenue in Belfast* 8<sup>th</sup> December 2016. <https://www.finance-ni.gov.uk/news/belfast-and-lps-invest-big-data-projects-maximise-business-rates-revenue-belfast>. Last accessed 19th April 2019.

*The project is an example of the kind of lean innovation which SBRI can help the public sector apply to policy and operational issues. There is significant scope to apply data analytics to improve public services and also boost the economy, and I hope to see more of these kinds of projects in future.*<sup>95</sup>

Both procedures were conducted in a proportionate two-stage manner; both the procurer and the suppliers accepted the risk that the proposed solution might fail. The contracting authority accepted the risk of not achieving value for taxpayers' money in circumstances where the solution failed. Fortunately, the contracting authority and awardees reaped the rewards of the successful development of the proposed solutions. The developed products offered improvements to public services and assisted the start-ups in developing innovative products which have been successfully used by other public bodies.

Although, the procurers did not adopt Sorensen and Torfing's recommendation to disseminate the competition findings to other public-sector bodies.<sup>96</sup> From the outset, the solutions developed would be suitable for duplication by other local authorities and city officials. Other contracting authorities would have to conduct a full tender competition for the solution, framing the tender specifications on the challenge findings. The public procurement directives do not allow for the subsequent, direct purchase of the solutions development post-completion of the PCP stage. A full competitive procedure is required to ensure compliance with applicable national instruments.<sup>97</sup> As with the Smart Dublin findings, innovation will flourish when there is co-operation and sharing of results and information between public bodies.<sup>98</sup>

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<sup>95</sup> Economy Minister Simon Hamilton, *'Belfast and LPS invest in big data projects to Maximise Business Rates Revenue in Belfast'* 8<sup>th</sup> December 2016. <https://www.finance-ni.gov.uk/news/belfast-and-lps-invest-big-data-projects-maximise-business-rates-revenue-belfast>. Last accessed 19<sup>th</sup> April 2019. See also; S. Fernandez and H.G. Rainey (n 92).

<sup>96</sup> See E. Sorensen and J. Torfing (n 90).

<sup>97</sup> See O.S. Pantilimon Voda (n 35) 226 See also; COM (2007) 799 final.

<sup>98</sup> As both programmes are in the infancy stage, post-thesis research will follow the disseminating impacts of the Smart Cities teams.

Another finding suggests that the adoption of simplified PCP procedures and the upholding of the fundamental principles facilitated competition within the UK.<sup>99</sup> Literature and recent assessment reports indicate that SMEs tend to bid for contracts within their local regions.<sup>100</sup> Rigby suggests that SBRI activities support the development of local technology companies, due to the low value of the initial contract and short-timeframes for developing their product or service.<sup>101</sup> However, these case studies indicate that Smart Cities PCPs can facilitate the participation of SMEs from outside the local region. This may bode well for the successful contractors, as they can use this experience to bid for similar contracts in other Smart Cities, as we saw with Analytics Engines. Cross-border trade enhances competition for contracting authorities, which may result in improved tender submissions and offerings.<sup>102</sup>

Similarly, to the Smart Dublin study, this case study highlights the importance of classifying the type of PCP. PCP is put forward as the key driver for delivering research and development services by the European Commission.<sup>103</sup> A significant proportion of literature focuses on the relationship between PCP and innovation, questioning whether the demand-led instrument is effective in producing innovative solutions. This research concerns itself more with the actual process of the PCP. Contracting authorities enjoy a degree of flexibility in how they conduct processes.<sup>104</sup> The Smart Dublin case study could be classified as a

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<sup>99</sup> Advertising the contract openly, use of non-discriminatory, proportionate criteria. See; COM (2007) 799 final.

<sup>100</sup> See Commission, *'Evaluation of SMEs' access to Public Procurement Markets in the EU.'* (2010) Final Report; Commission, *'SMEs' access to public procurement markets and aggregation of demand in the EU 2014.'* (2014) Final Report; A. Flynn and P. Davis, *'Investigating the effect of tendering capabilities on SME activity and performance in public contract competitions'* (2017) 35(4) *International Small Business Journal: Researching Entrepreneurship* 449.

<sup>101</sup> See J. Rigby (n 32).

<sup>102</sup> C.Bovis, *'The new public procurement regime: a different perspective on the integration of public markets of the European Union'* (2006) 12(1) *European public law*, 73.

<sup>103</sup> See; COM (2007) 799 final.

<sup>104</sup> J. Edler and L. Georghiou, *'Public procurement and innovation—Resurrecting the demand side'* (2007) 36(7) *Research Policy* 949 See also; C. Edquist and L. Hommen, *'Government technology procurement and innovation theory'* (1998) *Innovation Systems and European Integration Research Project Report*. ([www.tema.liu.se/tema-t/sirp/PDF/322\\_1.pdf](http://www.tema.liu.se/tema-t/sirp/PDF/322_1.pdf)).



catalytic PCP, it was designed to address a social problem, and to date, the procurer has not tendered for the purchase of the commercialised products or services. The awardee companies interviewed appeared satisfied with this approach, as they used the experience gained to develop new services, which in turn, they sold onto other public authorities and private consumers.<sup>105</sup> Significant short and medium-term benefits were recorded from their participation in the challenge. Catalytic PCP is very suitable for companies that can sell their developed solution to the private sector.<sup>106</sup>

Suppliers should be informed at the start of the process, at the request for the tender stage, that a catalytic procedure is being undertaken as this type of procedure may not be suitable for suppliers, which plan to sell their services to the public sector. Awardee companies in this case study developed bespoke solutions for BCC to collect and identify business revenue rates. This is not a service which would generate private sector demand. This contract could be classified as a co-operative process. Most PCP takes place over three successive stages before the contracting authority completes a competitive tender for the developed solution.<sup>107</sup> The first stage involves the identification of solutions; phase two allows for the prototyping of the proposed solution. This phase allows for the development and assessment of shortlisted solutions.<sup>108</sup> The final stage tests the product or service on a small scale. These case studies were conducted over a two-phase competition. Post-completion of the PCP stage, contracting authorities can decide if they have a need to purchase the commercially ready products or services. If the contracting authority

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<sup>105</sup> The awardee companies have been able to use the technology developed to secure additional public contracts. See Chapter 7, section 7.4.

<sup>106</sup> C. Edquist and J.Zabala-Iturriagoitia, 'Pre-commercial procurement: a demand or supply policy instrument in relation to innovation?' (2015) 45(2) R&D Management.

<sup>107</sup> L. Hommen and M. Rolfstam, 'Public procurement and innovation: towards a taxonomy' (2008) 8(3) Journal of Public Procurement 17; V. Lember, T. Kalvet and R. Kattel, 'Urban competitiveness and public procurement for innovation' (2011) 48(7) Urban Studies 1373.

<sup>108</sup> See; COM (2007) 799 final.

has a need to purchase the goods or services, a full tender competition must be conducted.<sup>109</sup>

The difference between both the Smart Cities case studies is the contracting authorities plans to conduct a full tender competition at the end of the PCP. Smart Dublin have clearly informed the tenderers that the authority has no current plans to conduct a competitive procurement competition to procure the developed services.<sup>110</sup> BCC indicated that it would consider conducting a competitive procurement procedure post the completion of the PCP. One of the winning bidders from the Belfast case study emphasised that the company would only secure a financial return from the developed solution if they could successfully tender for a public services contract.<sup>111</sup> The company invested in the bespoke solution for BCC with the hope that they could commercially tender the service to the public body.<sup>112</sup>

This raises an additional question, if public authorities are going to undertake a co-operative PCP, should they indicate when they plan to undertake a full tender competition at the end of the research and development process? At the time of writing, neither of the Smart Cities pre-commercial procedures were followed by a '*public procurement of innovation*' process. SMEs bidding in co-operative procedures need to carefully assess the level of risks they are willing to accept, if the solution does not succeed or if it does succeed and the full tender competition is not conducted, will they be able to absorb any financial losses internally.

In preserving competition in the internal market, it is not permissible for the public body to purchase or to continue using the commercial ready

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<sup>109</sup> At this stage, the contracting authority can no longer rely on Public Contracts Regulations, reg 14. The contracting authority will be purchasing a public supplies or services contract.

<sup>110</sup> Interview with Jamie Cudden, Smart Cities Programme Manager, Dublin City Council (Dublin, Ireland, 20<sup>th</sup> June 2017).

<sup>111</sup> Interview with the Head of Data Analytics Solutions (n 15) Although, the company has used the experience gained from the contract to win further contracts with other public bodies.

<sup>112</sup> Interview with the Head of Data Analytics Solutions (n 15).

product or service.<sup>113</sup> One of the companies interviewed made an interesting comment regarding the cost set out by another public body conducting an SBRI competition in Northern Ireland; the company suggested that the available costs outlined in the call for competition did not reflect the ‘*challenge specifications*’. The company was happy to exit the competition after phase I. According to the European Commission PCP communication, public authorities should clearly state their maximum budget allocations in the tender advertising documents. This will ensure compliance with state aid rules.<sup>114</sup> One recommendation for public procurers when considering conducting a PCP procedure is that they should indicate to suppliers what type of process they plan to use and clearly indicate the maximum budget allocation for the individual contracts.

## 8.6 Conclusions

This case study successfully demonstrates that the use of PCP facilitates SME participation in public procurement. In particular, the PCP facilitated innovative small businesses and start-up participation in the public market. This case study, like the Smart Dublin case study, demonstrates that PCP can be used as an effective tool to find new digital solutions to public-sector challenges, delivering the Single Market goals at a local level. As in the Smart Dublin case study, the Smart Belfast procurement actions should be shared and replicated by other cities and large towns across Northern Ireland. However, it is important for future PCP programmes to inform the market if the public body has funds to purchase the developed solution at the end of the prototyping and testing stages. Overall, PCP should be used to support start-up growth, creating a

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<sup>113</sup> Although, a continuation process is permissible using the ‘*innovation partnership*.’ Contracting authorities should consider this approach if they plan to conduct a complex smart project. See Public Contracts Regulations, reg 31.

<sup>114</sup> If the contract was not purchased at current market prices, the procedure could potentially fall within the state aid remit of Art. 107(1) TFEU. See Commission, ‘*Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest.*’ (Staff Working Paper) SWD (2013) 53 final/2.

flexible, proportionate and easy public market entry route for innovative small businesses.

## Chapter 9 Discussions and Findings

### 9.1 Introduction

The purpose of the thesis is to assess which measures facilitate SME participation in public procurement. Specifically, the research asks if the inclusion of community benefit clauses, the division of large contracts into smaller lots, the inclusion of subcontractor considerations and the use of PCP facilitate SME participation in public contracts. This chapter summarises and discusses the core thesis findings. The chapter opens with a synopsis of the reasons for pursuing this study of enquiry using a cross-country comparative case study approach. The research findings suggest the use of lots, community benefit clauses, subcontractor considerations and use of PCP facilitates SME participation. The research further suggests that the effectiveness of the socially-driven competitions is dependent on a supportive policy environment and motivated public sector ‘*champions*.’ The thesis concludes by calling for public procurers to incorporate social criteria in public procurement to facilitate SME participation.

### 9.2 Thesis summary

SMEs are consistently described as the backbone of EU economies, and this description is not made without merit.<sup>1</sup> SMEs represent approximately 99% of all enterprises operating in Europe and are hailed as essential initiators and catalysts for the development, design and implementation of

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<sup>1</sup> P. Alajääskö and A Roodhuijzen, ‘Eurostat, Structural business statistics and global value chains’. ISSN 2443-8219 Micro data linking in business statistics. Eurostat online publication. Available at; [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Microdata\\_linking\\_in\\_business\\_statistics\\_-\\_introduction#Statistics\\_on\\_small\\_and\\_medium-sized\\_enterprises\\_-\\_Dependent\\_and\\_independent\\_SMEs\\_and\\_large\\_enterprises](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Microdata_linking_in_business_statistics_-_introduction#Statistics_on_small_and_medium-sized_enterprises_-_Dependent_and_independent_SMEs_and_large_enterprises) Last accessed; 29<sup>th</sup> April 2019.

innovative goods and services.<sup>2</sup> This is due to their proximity to local markets and their organisational and financial flexibility.<sup>3</sup> European Commission evaluation reports estimate that SMEs hold 46% of the public market share, which is relatively small considering their importance in the business economy.<sup>4</sup> Weaknesses associated with working with SMEs include lack of financial guarantees and technical capabilities. SMEs chances of successful tendering for public contracts are dependent on the type of procurer, size and value of the contract, type of procedure and evaluation methods.<sup>5</sup> However, there is a positive societal impact for facilitating SMEs as they contribute heavily to local employment generation.<sup>6</sup>

Large scale research conducted on behalf of the Commission concludes that local and regional authorities award a higher proportion of public contracts to SMEs than those awarded by central departments.<sup>7</sup> SMEs stand a greater chance of winning contracts with a value falling below the EU financial advertising thresholds. Contracts with an estimated value close to or exceeding the thresholds which are divided into proportionate lots encourage SME participation. Open tender procedures are the most conducive procedure for encouraging SME participation. While the restricted procedure and the former negotiated procedure also facilitate SME participation to some extent, the competitive dialogue competitions disincentivise SMEs from bidding.<sup>8</sup> SMEs on average bid for contracts

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<sup>2</sup> Note start-ups are the primary drivers of innovation. See Commission, *'Europe's next leaders: the Start-up and Scale-up Initiative'* (Communication) COM (2016).

<sup>3</sup> S. Roper, *'Product Innovation and Small Business Growth: A Comparison of the Strategies of German, U.K. and Irish Companies'* (1997) 9(6) *Small Business Economics* 44.

<sup>4</sup> See Commission *'SMEs' access to public procurement markets and aggregation of demand in the EU 2014.'* (2014) Final Report.

<sup>5</sup> See Commission *'Evaluation of SMEs' access to Public Procurement Markets in the EU.'* (2010) Final Report.

<sup>6</sup> P. Schreyer, *'SMEs and Employment Creation: Overview of Selected Quantitative Studies in OECD Member Countries'* OECD Science, Technology and Industry Working Papers, No. 1996/04 (OECD Publishing, Paris, 1996). <https://doi.org/10.1787/374052760815>. Last accessed; 29<sup>th</sup> April 2019.

<sup>7</sup> See Commission (2014) (n 4).

<sup>8</sup> The percentage of contract gained by SMEs operating in an open procedure is 38%, this reduces to 6% in competitive dialogues. Competitive dialogues by their very nature are only suitable for complex large scale contracts. See Commission (2010) (n 5).

which fall below the advertising thresholds.<sup>9</sup> Limited information is available on the number of start-ups and social enterprise participating in public contracts.<sup>10</sup> Research tends to focus on the impact start-ups, and social enterprises have on national economies.<sup>11</sup>

A cross-border comparative case study was adopted to review public works and services contracts concluded in Ireland and Northern Ireland. Both states have adopted policies to promote SMEs in the marketplace and more recently the two regions have focussed on the adoption of Smart Cities objectives and the inclusion of community benefit clauses in above-threshold contracts.<sup>12</sup> The case studies reflect these recent changes, assessing to what extent the adoption of innovative procedures and socially driven competitions facilitate SMEs in gaining a share of a public contract. The combined findings indicate that the use of lots, PCP procedures and the inclusion of subcontractor protection considerations and community benefit clauses facilitate all forms of SMEs. These measures promoted SME engagement when they were supported and driven by motivated public-sector champions, who were committed to implementing effective change in the organisation. Domestic and internal policies supported the successful implementation of socially responsible public procurement.

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<sup>9</sup> K. Loader, '*SME suppliers and the challenge of public procurement: Evidence revealed by a UK government online feedback facility*' (2015) 21(2) *Journal of Purchasing and Supply Management* 103.

<sup>10</sup> The exception to this is research conducted by C. Edquist; A. Erridge; M. Loosemore, L. Preuss and R. Rothwell. These contributions have been significantly relied on throughout the thesis.

<sup>11</sup> Notable contributions include; J.A. Baum, T. Calabrese and B.S. Silverman, '*Don't go it alone: Alliance network composition and startups' performance in Canadian biotechnology*' (2000) 21(3) *Strategic management journal* 267; N. Bosma, M. Van Praag, R. Thurik, R. and G. De Wit, '*The value of human and social capital investments for the business performance of startups*' (2004) 23(3) *Small Business Economics* 227; C. Borzaga and J. Defourny, J. eds., '*The emergence of social enterprise*' (Psychology Press, Vol. 4, 2004); J. Battilana and M. Lee, '*Advancing research on hybrid organizing—Insights from the study of social enterprises*' (2014) 8(1) *The Academy of Management Annals* 397.

<sup>12</sup> It should be noted again that while both states have adopted socially responsible public procurement policies and some public bodies have adopted Smart City objectives, Northern Ireland has adopted a more structured policy approach to facilitating community benefit clauses in large public contracts.

### 9.3 Definition of SMEs

An important research finding highlights a problem with the broad definition of ‘SME’ adopted in public procurement policies. European and national policies on public procurement tend to treat SMEs as a homogenised group.<sup>13</sup> Medium sized-enterprises are defined as any business entity which employs fewer than 250 employees and has an annual turnover not exceeding €50million. Small businesses are business entities which employ fewer than 50 employees and have an annual turnover not exceeding €10million. Micro-enterprises are business entities which employ fewer than ten employees and have an annual turnover not exceeding €2million.<sup>14</sup> The number of employees and turnover rate categorises businesses. The research findings indicate that there is a greater need for public bodies to conduct procedures which are conducive for appropriate forms of businesses; for example, including provisions which encourage social enterprises, start-ups, pre-start-ups and research groups in innovative or low-value contracts. This might require contracting authorities to re-evaluate the criteria used to award contracts. Contracting authorities should consider reviewing the emphasis placed on demonstrating ‘*profits*’ in the selection criteria.<sup>15</sup>

Irish public procurement policy serves to facilitate SMEs into traditional public-sector markets.<sup>16</sup> These policies do not make any distinction between conventional SMEs and social enterprises. Bernie Walsh who

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<sup>13</sup> L.J. Spence, ‘*CSR and small business in a European policy context: The five “C” s of CSR and small business research agenda*’ (2007) 112(4) *Business and society review* 533; J. Wyld, G. Pugh and D. Tyrrall, ‘*Can powerful buyers “exploit” SME suppliers?*’ (2012) 19(2) *Journal of Small Business and Enterprise Development* 322.

<sup>14</sup> See Commission, ‘*Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises* (notified under document number C(2003) 1422)’ (2003) OJ L 124/36, annex 2.

<sup>15</sup> Public Sector Directive, art 58(3) prevents contracting authorities from setting financial criteria which exceeds two times the estimated contract value, except in duly justified cases.

<sup>16</sup> See Circular 10/2014, ‘*Initiatives to Assist SMEs in Public Procurement*’ 2014.



operates one of the oldest established forms of social enterprises in Dublin claims;<sup>17</sup>

*Social enterprises are not like other businesses. You can't treat them the same. They need different resources. It's like comparing two schoolchildren. One child goes to school happy, fully dressed, fed, with all his school books and lunch. The other child goes to school hungry, without all his uniform and books, without lunch and tired from being up half the night listening to his parents fight. It's the same with social enterprises. They don't have the same resources as private businesses do. They work with the most disadvantaged people, working in the areas with the highest level of poverty. Social enterprise need all of the same inputs and outputs as any other enterprise but have an added dimension.*<sup>18</sup>

Social enterprises experience the same problems in tendering for public contracts as SMEs do, along with additional issues unique to their sector.<sup>19</sup> A primary difference between the two forms of companies is how they value success and profit.<sup>20</sup> Procurers are encouraged not only to consider profits calculated on financial gains alone and are also encouraged to view profit from a return on social investment calculation.<sup>21</sup> Procurers are

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<sup>17</sup> Bernie Walsh, CEO Sunflower Recycling, Dublin Ireland. This quote was obtained with permission from a Dublin City Social Enterprise Committee Meeting, 12<sup>th</sup> September 2018.

<sup>18</sup> Ms. Walsh further commented that '*comparing enterprises and social enterprises is like comparing Fred Astair and Ginger Rogers, she did everything he did, but in high heels and backwards. But he got all the recognition*'. See (n 17).

<sup>19</sup> S. Munoz, '*Social enterprise and public sector voices on procurement*' (2009) 5(1) Social Enterprise Journal 69; A. Argyrou, '*Providing Social Enterprises with Better Access to Public Procurement: The Development of Supportive Legal Frameworks*' (2017) 12 Eur. Procurement & Pub. Private Partnership Law Rev 310.

<sup>20</sup> P.W. Ryan and I. Lyne, '*Social enterprise and the measurement of social value: methodological issues with the calculation and application of the social return on investment*' (2008) 2(3) Education, Knowledge & Economy 223.; R. Millar and K. Hall, '*Social return on investment (SROI) and performance measurement: The opportunities and barriers for social enterprises in health and social care*' (2013) 15(6) Public Management Review 923.

<sup>21</sup> M. Aiken, '*Towards market or state? Tensions and opportunities in the evolutionary path of three UK social enterprises*' in M. Nyssens, ed., '*Social enterprise: At the crossroads of market, public policies and civil society*' (Routledge, New York and London, 2006) 259; J. Defourny, and M. Nyssens, '*Social enterprise in Europe: At the crossroads of market, public policies and third sector*' (2010) 29(3) Policy and Society 231.

encouraged to set proportionate financial specifications and to use a most economically advantageous tender award criteria or a life-cycle approach; this is expected to assist all SMEs in tendering for the advertised contract.<sup>22</sup> The Directive, national implementing instruments and national policies include several provisions supporting both SMEs and social enterprises participation in the public markets.<sup>23</sup> The social enterprise provision relates primarily to the setting aside of contracts for sheltered workshops.<sup>24</sup> However, social enterprises should not have to rely on set-asides to enter the market. There are opportunities for social enterprises, voluntary organisations and charities to contract with public bodies. Northern Ireland had adopted a specific policy on encouraging social enterprise participation in public contracts.<sup>25</sup> The Irish Office of Government Procurement (OGP) is encouraged to replicate the policy approach taken by the Northern Irish Central Procurement Directorate (CPD).

Similarly, innovative start-ups face additional difficulties to traditional SMEs in tendering for public contracts. Notably, in circumstances where they are offering innovative services or goods, which have not previously been bought or utilised by the public sector. Circular 10/14 '*Initiatives to assist SMEs in public procurement*' encourages Irish public procurers to promote innovative solutions by allowing for variants to specifications

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<sup>22</sup> Public Sector Directive arts 67 and 68.

<sup>23</sup> The main Public Sector Directive provisions include;

Art. 18(2) Mandatory social clause

Art. 20 Reserved contract

Art. 40 Preliminary market consultations

Art. 42(1) Technical specifications and accessibility requirements

Art. 46 Division of contracts into lots

Art. 56 Choice of participants and award of contracts

Art. 57 Exclusion grounds

Art. 67 Contract award criteria

Art. 69 Abnormally low tenders

Art. 70 Conditions for performance of contracts

Art. 71 Subcontracting.

<sup>24</sup> Public Sector Directive, art 20. See also; Case C-70/95 *Sodemare* [1997] ECR I-03395; Case C-113/13 *Spezzino* [2014] pub. electr. EU:2014:2440.

<sup>25</sup> See CPD Policy Government Notes;

A Guide for Social Economy Enterprises (2011) PGN 01/11

Helping Small and Medium Sized Enterprises (SMEs) and Social Economy Enterprises (SEEs) access Public Sector contracting opportunities (2011) PGN 02/11.

where possible.<sup>26</sup> Procurers are additionally urged to consider the design of output-orientated functional requirements which enable the suppliers to offer innovative suppliers or services.<sup>27</sup> The fundamental flaw with this approach is that it only encourages participation from innovative companies which have the capacity and experience to meet the minimum financial, professional and capacity criteria. These specifications alone will not promote start-up participation in public contracts. The findings from the two Smart Cities case studies demonstrate that the start-ups could not meet these criteria and sought to find a different entry route to market. PCP practices offer an efficient solution for start-ups and innovative companies in tendering for initial contracts, to trial and develop solutions which assist in improving public services and living and business standards.<sup>28</sup> Both states have pursued the use of SBIR and SBRI activities over the last five years. The Smart Cities initiatives are new to both countries. It is an ideal time for both countries to review national policy and guidance documents on innovative procurement for low-value contracts, offering guidance on how to conduct PCP procedures.

#### 9.4 Lots

The European Commission inserted Article 46 in the Directive to promote SME competition in the Single Market by encouraging public procurers to divide large contracts into smaller lots.<sup>29</sup> Ireland and the UK did not gold plate the transposition of this article, adopting the least prescriptive measures.<sup>30</sup> Both statutory instruments implementing the Directive did not transpose the option of requiring contracting authorities to award large contracts in the form of separate lots. Contracting authorities retain the

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<sup>26</sup> See also; Office of Government Procurement, '*National Public Procurement Framework Public Procurement Guidelines for Goods and Services.*' (2019) Version 2.1.

<sup>27</sup> See Office of Government Procurement (n 26).

<sup>28</sup> Public Sector Directive reg 46.

<sup>29</sup> Public Sector Directive, recital 39 and art. 46(2). Overall, the findings lean towards Spagnolo and Yukins argument calling for contracting authorities to retain the freedom to choose when it is suitable to split large contracts into small lots based on their procuring expertise and market knowledge, and both procuring teams enjoy this freedom of choice. G. Spagnolo and C. Yukins, '*Lots – the Economic and Legal challenges of centralised procurement.*' Colloquium in G. Piga and T. Tátrai, '*Public procurement policy*' (Routledge, Abingdon, Oxon; New York, NY, 2015) 61.

<sup>30</sup> Public Authority Regulations reg 46; (UK) Public Contracts Regulations reg 46.

freedom to choose when to use lots.<sup>31</sup> Lots were used in the National Children's Hospital and Buy Social case studies.

In the National Children's Hospital case study, the use of lots did not encourage SME participation. This was due to the size, value and specialised nature of the heterogeneous lots. The National Children's Hospital case study findings support Trybus's theory that SMEs will only benefit from the use of lots when the lots are of proportionate size and value.<sup>32</sup> The use of lots impacted the awardee consortium's decision to bid for the contract in the Buy Social case study. The case study demonstrates that social enterprises can enter the market and win a lot of a large contract if they partner with a private organisation. The research outcome suggests that the combination of the use of lots and community benefit clauses facilitated the social enterprise successfully tendering for the services and supplies contract.

Recent empirical research by Glas et al. contests Nicholas and Fruhmann's claim that the use of lots is an SME-friendly initiative, arguing instead that there is no underlying empirical evidence on which to base this claim.<sup>33</sup> Furthermore, Glas and Eßig assert that there is a disconnect between European legislation and policy and public procurement, summarising that the use of lots does not improve SMEs chances of successfully tendering for public contracts.<sup>34</sup> While this research does not provide large-scale empirical evidence to dispel or support the empirical findings put forth by Glas and Eßig, the Buy Social finding indicates that the use

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<sup>31</sup> Contracting authorities are still required to report their reasons for not using lots. Public Authority Regulations reg 46(1); (UK) Public Contracts Regulations reg 46(1).

<sup>32</sup> M. Trybus, 'The Promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective of the New Public Sector Directive?' in Chapter in F. Lichère, R. Caranta and S. Treumer (eds.), 'Modernising Public Procurement: The New Directive' (Djøl: Copenhagen, 2014), 255; M. Trybus, 'The Division of Public Contracts into Lots under Directive 2014/24: Minimum Harmonisation and Impact on SMEs in Public Procurement?' (2018) 43(3) European Law Review 313.

<sup>33</sup> C. Nicholas and M. Fruhmann, 'Small and medium-sized enterprises policies in public procurement: time for a rethink?' (2014) 14(3) Journal of Public Procurement 328; A.H. Glas and M. Eßig, 'Factors that influence the success of small and medium-sized suppliers in public procurement: evidence from a centralized agency in Germany' (2018) 23(1) Supply Chain Management: An International Journal 65.

<sup>34</sup> See A.H. Glas and M. Eßig (n 33).

of lots had a *positive* impact on the consortium's decision to bid for the contract.

Regarding the two Smart Cities case studies, the division of public contracts into smaller lots is embedded in the choice to use PCP. Nine micro-enterprises participated in initial solution exploration contracts. However, the success of the participation of the companies in the public contracts was as a result of the procedure chosen not the deliberate decision to divide the contracts into smaller lots.<sup>35</sup> Overall, the use of lots did assist the social enterprise in gaining access to the public market in the Buy Social case study. The research findings demonstrate that the division of large contracts into smaller lots will facilitate SME participation once other measures encouraging participation are included in the procurement competition. Other measures can include the use of community benefit clauses, use of subcontractor considerations and use of innovative procedures. Despite this finding, this section concludes by agreeing with Glas et al.'s call for further empirical research to be conducted on the impact the use of lots has on SME engagement in contracts which fall above and below the EU thresholds.<sup>36</sup> Lots, in and of themselves, have limitations facilitating SME participation, but the case study research findings tentatively suggest that, in combination with other social criteria, such as community benefit clauses, they can be effective.<sup>37</sup>

### 9.5 Community benefit clauses

The case studies findings differed on what impact the use of community benefit clauses has on SME engagement. The targeted recruitment and training clauses included in the National Children's Hospital case study did not facilitate SME participation at the tender stage or the contract performance stage.<sup>38</sup> By contrast, the community benefit clause included

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<sup>35</sup> If lots were not used, only two companies could potentially win the contracts.

<sup>36</sup> See A.H. Glas and M. EBig (n 33).

<sup>37</sup> The use of open procedures, *Best Price: Quality* award criteria, proportionate financial and qualification selection criteria may also assist the effective use of lots. See also; See Commission, 'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts' (SWP) COM (2008) 2193.

<sup>38</sup> To date. The researcher will monitor the impact of the social criteria post completion of the thesis.

in the Buy Social case study had a direct impact on a social enterprise's decision to bid for a high-value contract in partnership with a large private enterprise. The primary finding associated with this measure is the suitability of community benefit clauses in promoting social enterprise participation in large-scale contracts. This finding directly builds on Loosemore's research outlining the socio-economic benefits associated with facilitating social enterprises in UK construction contracts.<sup>39</sup> The finding builds on this argument, by demonstrating that social enterprises can equally succeed in delivering socio-economic benefits in *services* contracts, as either a consortium partner or as a subcontractor.<sup>40</sup> The findings specifically note that the use of community benefit clauses has a direct impact on social enterprise participation.

The inclusion of the community benefit clauses in the two case studies benefitted the local communities through the creation of new jobs. In circumstances where the use of social objectives generated benefits for the local community, it would be wise for public bodies to persist with community benefit clauses. Although the clauses did not directly facilitate for-profit SME participation, the National Children's Hospital and the Buy Social case studies illustrate that community benefit clauses are not solely imposed on the main contractor.<sup>41</sup> The clauses are also included in subcontracts. Therefore, SMEs will need to review their abilities to meet social objectives when bidding for subcontracts. In some cases, this might mean formalising what they already do, such as organising apprenticeships or by accepting interns from local public employment agencies or schools.<sup>42</sup>

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<sup>39</sup> M. Loosemore and D. Higgon, *Social enterprise in the construction industry: Building better communities* (Routledge, 2015); M. Loosemore, 'Building a new third construction sector through social enterprise' (2015) 33(9) *Construction Management and Economics* 724; M. Loosemore, 'Social procurement in UK construction projects' (2016) 34(2) *International Journal of Project Management* 133.

<sup>40</sup> This includes the socio-economic benefits delivered by the Benefit-Corporation accredited subcontractor.

<sup>41</sup> The community benefit clauses may still have an impact on SME participation in the supply-chain.

<sup>42</sup> Brooks comments that SMEs already engage with socially responsible activities without naming or acknowledging the importance of the activities. See S. Brooks, 'The

SMEs that consider adopting community benefit clauses into their internal operations may increase their chances of successfully bidding for future works contracts or subcontracts, which include socially-driven clauses.<sup>43</sup> Take for example the following hypothetical scenario;

*Two hypothetical small construction companies have equal experience and success in tendering for public works contracts both as main contractors and as subcontractors. Both are aware of recent inclusions of targeted recruitment and training clauses in large works contracts awarded by local contracting authorities. Company A decides that compliance with such community benefit clauses would increase operational costs disproportionately and makes the decision that it is not economically viable to adopt recruitment and training clauses. Company B expresses the same fears as Company A but recognises that the community benefit clauses are a requisite to winning certain public works contracts. As public bodies are increasingly using targeted recruitment and training clauses, Company B strategically adopts private employment and training clauses.*

*A hypothetical works contract is advertised by a local authority which includes mandatory targeted recruitment and training clauses. Company A and Company B both bid for the contract. Company B can demonstrate experience of complying with private employment and training clauses, giving Company B an automatic advantage over Company A. Additionally, Company B is the more desirable subcontractor.*

SMEs planning on tendering for public contracts or tendering to enter the supply chain as subcontractors should consider reviewing the suitability and financial viability of meeting social criteria as part of their operations.

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*practice and construction of corporate social responsibility among small to medium sized enterprises in South Wales* (2004) 17(1) Contemporary Wales 162.

<sup>43</sup> Perrini et al. suggest that SMEs can quickly and effectively adopt a social agenda. See F. Perrini, A. Russo and A. Tencati, 'CSR strategies of SMEs and large firms. Evidence from Italy' (2007) 74(3) Journal of Business Ethics 285.

SMEs may improve their chances of successful tendering, by implementing private employment and training clauses, investing in a domestic CSR policy or exploring potential partnerships with social enterprises. This finding supports arguments put forward by researchers examining the reasons why SMEs would engage with CSR related activities in general. It supports arguments raised by Webb, suggesting that businesses should attempt to pre-empt policy changes to improve their competitiveness by adopting and implementing similar operational practices in advance of the adoption of policy changes.<sup>44</sup> Additionally, this finding supports arguments raised by Tátrai, Walker and Preuss contending that the sustained use of particular clauses will eventually become standard operational practices.<sup>45</sup> If contracting authorities continue to incorporate community benefit clauses, SMEs will need to view these clauses as ‘*commercial*’ criteria’; if they wish to work on the contract either as a contractor or a subcontractor, they will need to comply with the community benefit clauses.<sup>46</sup>

However, it is not realistic for SMEs to develop plans and strategies by themselves, particularly micro-enterprises. If public bodies plan to incorporate community benefit clauses widely, they should adequately inform and support suppliers in achieving these goals.<sup>47</sup> The public sector cannot shift full responsibility of achieving the social employment goals onto private operators. Such an approach has the potential to distort

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<sup>44</sup> K. Webb, ‘*Understanding the voluntary codes phenomenon*’ (2004) *Voluntary codes: Private governance, the public interest and innovation*, 3; K. Webb 2 *Voluntary codes: private governance, the public interest and innovation*. (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2014).

<sup>45</sup> H. Walker and L. Preuss, ‘*Fostering sustainability through sourcing from small businesses: public sector perspectives*’ (2008) 16(15) *Journal of Cleaner Production* 1600; G. Piga and T. Tátrai, ‘*Public procurement policy*’ (Routledge, Abingdon, Oxon; New York, NY, 2015); T. Tátrai, ‘*Stages of development towards sustainable public procurement*.’ In *International Public Procurement* (Springer, Cham 2015) 271.

<sup>46</sup> H. Walker and L. (2008) 16(15) (n 45); D. Baden, I. Harwood and D. Woodward, ‘*The effects of procurement policies on ‘downstream’ corporate social responsibility activity: Content-analytic insights into the views and actions of SME owner-managers*’ (2011) 29(3) *International Small Business* 259.

<sup>47</sup> The Northern Ireland Buy Social Unit formulate the community benefit clauses for public procurers and manage a brokerage tool to assist contractors in meeting their recruitment targets.



market competition and increase tendering costs.<sup>48</sup> This research recommends that in circumstances where national policy requires public bodies to consider pursuing community benefit clauses in public procurement, national procurement bodies should offer support for SMEs. *Intertrade Ireland* offers public procurement support and training to SMEs in Ireland and Northern Ireland. Specific social benefit ‘*upskilling*’ training could potentially be offered at Intertrade Ireland’s ‘*Meet the Buyer*’ or ‘*Go-to-tender*’ training and networking events.<sup>49</sup> This form of training would support SMEs in tendering for future public contracts.

Additionally, support would be required to assist the winning bidder and subcontractor in carrying out the community benefit requirements. The Buy Social public body in Northern Ireland successfully supports both public procurers and economic operators in designing and carrying out targeted recruitment and training requirements.<sup>50</sup> The interviewed contractors expressed their appreciation for the support services.<sup>51</sup> Likewise, in the National Children’s Hospital case study, a dedicated community benefits officer was appointed to assist with the design and implementation of the targeted recruitment and training requirements and is responsible for engaging with the contractor and with the wider community to deliver the social benefits requirements.<sup>52</sup> However, training on the use of community benefits clauses would assist the general SME population in bidding for public contracts which incorporate social clauses.

Overall, the research findings indicate that the use of community benefit clauses in the Buy Social case study demonstrates that targeted

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<sup>48</sup> A. Sánchez Graells, ‘*Public procurement and the EU competition rules*’ (2nd edn Bloomsbury Publishing 2015) 9.

<sup>49</sup> The all-island networking events are offered freely to SMEs. There is a small charge for the training seminars. The Go-to-Tender training seminars are hosted by specialist procurement training entities.

<sup>50</sup> The Buy Social Unit was established under the remit of the Strategic Investment Board to assist with the effective delivery of procurement policy goals. See CPD Public Guidance Note, ‘*Integrating Social Considerations into Contracts*’ (2016) PGN 01/13.

<sup>51</sup> Interview with Maeve Monaghan, CEO NOW Group (by phone, 26<sup>th</sup> October 2016) and Interview with Brendan Flynn, Operations Director, G4S Northern Ireland (by phone, 10<sup>th</sup> November 2016)

<sup>52</sup> See NCH ‘*Harnessing the Potential – Report*’ (2015).

recruitment and training clauses facilitated social enterprise participation in public contracts and had an overall positive impact on employment rates. Similar clauses included in the National Children’s Hospital case study did not directly facilitate SME or social enterprise engagement, however, as the targeted recruitment and training requirements are being successfully met, it is imaginable that this success may encourage other public bodies to replicate and implement community benefit clauses in their tendering practices.<sup>53</sup>

## 9.6 Subcontractor considerations

Findings from three out of the four case studies, excluding the Smart Belfast case study, indicate that subcontractor considerations facilitate SME participation in the supply chain. The National Children’s Hospital case study demonstrates a strong link between the inclusion of subcontractor considerations and the participation of SMEs. The voluntary subcontractor considerations in this case study require the main contractor to host *Meet the Buyer* events and to consider SME participation in the supply chain. To date, the awardee company has only published subcontracting information for the enabling stage of the works contract. The early findings conclude that 93% of all subcontracts were awarded to SMEs, 32% of which were awarded to companies based in Dublin 8 and 12, this equates to approximately €500,000.<sup>54</sup> Subcontracts were awarded to local micro-enterprises based in the area to erect hoarding and to provide salvage facilities. This finding does not support Trybus’s remarks that SMEs do not wish to enter a public contract as a subcontractor as they do not wish to be controlled and managed by a larger entity.<sup>55</sup>

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<sup>53</sup> As suggested by E. Sorensen and J. Torfing, ‘*Enhancing collaborative innovation in the public sector*’ (2011) 43(8) *Administration and Society* 868.

<sup>54</sup> Interview with Ingrid McElroy, Community Benefit Programme Manager, National Paediatric Hospital Development Board Fitzpatrick, Director for Project Management and Project Controls (Dublin, Ireland, 8th August 2018).

<sup>55</sup> M. Trybus, ‘*The Division of Public Contracts into Lots under Directive 2014/24: Minimum Harmonisation and Impact on SMEs in Public Procurement?*’ (2018) 43(3) *European Law Review* 313.

The Buy Social case study findings indicate that subcontractor considerations will support SME participation when incorporated with other social criteria. The unique combination of the three social criteria; division of large contracts into smaller lots, use of community benefit clauses and subcontractor considerations created optimal competition for social enterprises to enter the market and supply chain.<sup>56</sup> The two Smart Cities research findings support this combination test. In these case studies, the use of PCP with its inherent use of lots and overriding innovative socio-economic Smart Cities goals created unique opportunities for start-ups and micro-enterprises to enter the public market and develop solutions to current societal challenges.<sup>57</sup>

The research demonstrated the success of implementing voluntary subcontractor considerations in public contracts, and the research further argues that there is a need for key procurers to maintain a monitoring role during the contract performance stage. At the time the research methodology was designed, the research did not extend the assessment to examining compliance with statutory and additional subcontractor requirements, such as the prompt payments requirements or the potential to make direct payments to subcontractors.<sup>58</sup> However, these issues are of current and growing importance to the UK and Irish economies with the recent collapse of large construction companies. Recent developments in the UK and Irish construction sectors have highlighted concerns and risks associated with procurement procedures and management of public works contracts. In January 2016, the UK's second largest construction

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<sup>56</sup> The combination of social criteria additionally demonstrates the public bodies commitment to generating competition amongst all forms of SMEs in the public market. The public body relied on the SME friendly provisions set out in the Directive to secure the Value for Money objectives set out in national policy. See Department of Finance and CPD Northern Ireland, '*Public Procurement Policy*' (2014) Version 11. Available at: <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/ni-public-procurement-policy-version-11-august-2014.pdf> Last accessed 25<sup>th</sup> April 2019.

<sup>57</sup> The flexible approach adopted by Smart Dublin allowed for the awarding of additional contracts. Interview with Jamie Cudden, Smart Cities Programme Manager, Dublin City Council (Dublin, Ireland, 24<sup>th</sup> April 2016).

<sup>58</sup> The UK and Irish S.I.'s transposing the Public Sector Directive did not implement the option requiring contracting authorities to pay subcontractors directly for works completed. The research did not assess the prompt payments laws in the case studies. See Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions OJ L 48/1.

company, Carillion Plc., collapsed with a debt pile of over £1.5 billion. This resulted in the loss of jobs, non-completion of public contracts and non-payments to subcontractors.<sup>59</sup> This research is not tasked with investigating how these procurement competitions were conducted nor how these contracts were managed. However, it is a crucial time for procurers to review how they implement and monitor voluntary subcontractor criteria in the request for tenders and contract performance clauses. This research calls for contracting authorities to strengthen the connection between the tender-stage and the contract performance stage.<sup>60</sup> Contracting authorities involved in the case studies have been involved in the tender design and evaluation and are engaged and motivated to ensure compliance with the social criteria during the contract performance stage.<sup>61</sup>

This research examined whether the inclusion of subcontractor protection considerations facilitated SME participation in public procurement. The findings positively show that subcontractor considerations actively encourage SME participation in the supply chain. The research argues that the voluntary subcontractor considerations used by the Buy Social and the National Children's Hospital case studies connected the tendering stage with the contract performance stage, requiring the contractors to embody the social tendering objectives throughout the management of the contract.

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<sup>59</sup> D. Rogers, 'Not-so-sudden death: How Carillion disguised its ailing finances just enough' (2018) 9(2) *Construction Research and Innovation* 44; S. Wren-Lewis, 'What Carillion's collapse tells us about public sector outsourcing' (2018) *British Politics and Policy* at LSE.

<sup>60</sup> Each of the case studies had one or more 'champions' driving the social change, these champions were involved in each stage of the procurement cycle. This is discussed further in section 9.10 of this chapter.

<sup>61</sup> The 'champions' identified in the case studies were the driving forces for successful change in the public contracts. See; S. Fernandez and H.G. Rainey, 'Managing successful organizational change in the public sector.' In 'Debating Public Administration' (Routledge, 2017) 7.

## 9.7 Pre-commercial procurement

Approaches taken by the Smart Cities teams were outcome focussed, driven by environmental, social and economic outcomes.<sup>62</sup> The Dublin competition sought to improve cycling rates in the city, while the Belfast competition sought to improve internal operational practices. The National Children's Hospital and the Buy Social studies scrutinise the tendering processes for pecuniary contracts, which had an objective of providing the construction of a children's hospital and the provisions of catering, cleaning and ancillary services contracts. Both contracts were concerned with what impact the significant figures of public money would have on local economies. Both contracts prioritised the promotion of targeted recruitment and training of at-risk young unemployed persons. The Smart Cities case studies are concerned with concluding public contracts to develop technology-based goods and services to assist in developing solutions for societal problems.

Smart City programmes in Ireland and Northern Ireland are using PCP practices to engage with start-ups, local communities, large corporations and academia to develop innovative mechanisms to improve urban city living standards. PCPs offers innovative small businesses, microenterprises and start-ups an entry route into the public market.<sup>63</sup> These companies under standard tendering procedures would be hindered from successfully bidding for low-value public contracts.<sup>64</sup> However, the use of PCP practices undertaken by the two Smart Cities case studies resulted in nine start-up companies successfully winning public services and supplies contracts. Four of these companies used this work experience to successfully bid for further public-sector work with Smart City programmes in the other Member States and the US. From the Smart

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<sup>62</sup> N. Vergoulias, 'Smart Cities: Is Cutting-Edge Technology the Method to Achieving Global Sustainable Goals?' (2017) 32(2) *Journal of Environmental Law and Litigation* 271.

<sup>63</sup> J. Edler and L. Georghiou, 'Public procurement and innovation—Resurrecting the demand side' (2007) 36(7) *Research Policy* 949.

<sup>64</sup> E. Uyarra, J. Edler, J. Garcia-Estevez, L. Georghiou, and J. Yeow, 'Barriers to innovation through public procurement: A supplier perspective' (2014) 34(10) *Technovation* 631.

Dublin competition, an awardee company received €50,000 further funding from Enterprise Ireland and another awardee company incorporated the developed solution as a separate company, which was subsequently successfully awarded a USD 75,000 innovation contract with Colorado Department of Transport.<sup>65</sup> An awardee company from the Smart Belfast case study has successfully been awarded data analytical led contracts for six similar innovative public contracts.<sup>66</sup> A second awardee company has successfully been awarded an SBRI contract for the UK Future Cities Data Integration Platform, a public contract for Transport Solutions in London, a public contract with Southampton City Council, alongside government and industry awards, including an Innovate UK '*Parliamentary Nomination for Productivity Innovation*.'<sup>67</sup> Participating in the Smart Cities contracts is having a significant impact on the economic viability and growth of the enterprises. The public funds were essential to the development and prototyping of the enterprise's new goods and services, and the public contracts assisted the small enterprises and entrepreneurs in developing their abilities to enter the private market as a competitive entity.<sup>68</sup>

Apostol argues that public authorities do not widely use PCP activities due to fears of legal uncertainty and the burden of conducting a new competitive procedure at the end of the project.<sup>69</sup> These case studies demonstrate that PCP procedures are an effective tool for improving public services and can facilitate innovative start-ups participation in the public market. Smart Dublin's choice to award additional contracts demonstrates the flexibility of the procedure. The procurer could tailor the

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<sup>65</sup> See Smart Dublin, Published Case Studies.; available; <https://smardublin.ie/smart-stories/> Last accessed 20<sup>th</sup> June 2019.

<sup>66</sup> Interview with Conor Dumigan, Head of Data Analytics Solutions (By phone, 27<sup>th</sup> July 2018).

<sup>67</sup> Smart Belfast, *Published Case Studies*. <https://smartbelfast.city/story/> Last accessed 20<sup>th</sup> June 2019.

<sup>68</sup> Start-ups will grow quicker than other forms of SMEs, which results in creation of new jobs. The capital injection and the testing of the service will assist start-ups growth and chances of survival. See Commission, '*Europe's next leaders: the Start-up and Scale-up Initiative*' (Communication) COM (2016) Strasbourg, 22 November.

<sup>69</sup> A.R. Apostol, '*Pre-commercial procurement in support of innovation: regulatory effectiveness*' (2012) 21(6) Public Procurement Law Review 213.

competition outcomes to work with more competitors, and this may not have been possible under traditional public procurement competitions.<sup>70</sup>

This research recommends widespread use of PCP to facilitate start-up participation in public contracts and to improve public sector services.<sup>71</sup> This finding builds on Edler and Georghiou, Hommen and Rolfstam, Lember, Kalvet, and Kattel's call for increased use of PCP to realise significant improvements to public sector operations.<sup>72</sup> This recommendation comes with one warning; public procurers should indicate to suppliers what type of process they plan to use. The Smart Dublin case study was a catalytic PCP; it was designed to address a social problem; the procurer did not intend to tender for the purchase of the commercialised products or services.<sup>73</sup> Smart Dublin utilised a low sum of public funds to reduce the need for the public body to invest in this area in the future. The Belfast case study is described as a co-operative procurement, whereby the development and prototyping of the new product or service are of mutual benefit to the end-user, the supplier and public body. Public bodies normally have a need to purchase the developed solution at the end of the PCP stage.<sup>74</sup> The start-ups have invested up-front in the Belfast case with the hope of selling the commercially ready product to the Council. By defining which form of procedure is being conducted will assist start-ups and SMEs in evaluating whether it is beneficial to submit a proposal.

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<sup>70</sup> Research and Development contracts are generally exempt from the Public Sector Directive, art 14. However, contracting authorities can adopt flexible competitive processes when carrying out innovation partnerships. Public Sector Directive, art 31.

<sup>71</sup> Improving start-up participation will support high-rates of employment growth. See M. Henrekson and D. Johansson, '*Gazelles as job creators: a survey and interpretation of the evidence*' (2010) 35(2) *Small Business Economics* 227.

<sup>72</sup> J. Edler and L. Georghiou, '*Public procurement and innovation—Resurrecting the demand side*' (2007) 36(7) *Research Policy* 949.; *Public procurement and innovation: towards a taxonomy* (2008) 8(3) *Journal of Public Procurement* 17; V. Lember, T. Kalvet and R. Kattel, '*Urban competitiveness and public procurement for innovation*' (2011) 48(7) *Urban Studies* 1373.

<sup>73</sup> See L. Hommen and M. Rolfstam, '*Public procurement and innovation: towards a taxonomy*' (2009) 9(1) *Journal of Public Procurement* 17.

<sup>74</sup> See J. Edler, and L. Georghiou (n 72).

## 9.8 Voluntary or Mandatory approaches

Current literature which examines the promotion of social objectives in business activities dismisses the ‘*mandatory versus voluntary*’ debate. The literature argues that the distinction between the two approaches are largely exaggerated, outdated and often oversimplifies important issues.<sup>75</sup> However, this research cannot ignore the distinction between the ‘*mandatory and voluntary*’ implementation of the social criteria used in the case studies. The community benefit clauses were included as *mandatory contractual performance clauses*. The *subcontractor considerations* were incorporated in a *voluntary manner*, encouraging the main contractor to support SMEs in the supply chain. Interestingly, both approaches facilitated SME participation in the public contracts studied.

Arguably the community benefit clauses are delivering the desired objectives, the contractors are creating new job opportunities for unemployed people and for young people who are not in education or apprenticeship programmes.<sup>76</sup> Suitable training is offered to the employees, which will assist the employees or interns in finding permanent employment positions when the contract is completed. Thus, the employees will become successful contributors to the economy.<sup>77</sup> If the research was to assess the effectiveness of the use of community benefit clauses, the research would conclude that the mandatory approach is extremely efficient. Targets set by both the National Children’s Hospital and Buy Social unit are being met and in some cases, exceeded. It is therefore imaginable that public bodies will continue to support the mandatory use of community benefit clauses. This research asks a separate question; it asks what impact the inclusion of community benefit clauses

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<sup>75</sup> F. Wettstein and S. Waddock, ‘*Voluntary or mandatory: That is (not) the question: Linking corporate citizenship to human rights obligations for business*’ (2005) 6(3) *Zeitschrift für Wirtschafts- und Unternehmensethik* 304.

<sup>76</sup> This is evident in the both the National Children’s Hospital and Buy Social case studies. See also V. Sutherland, A. McTier, A. Glass and A. McGregor, ‘*Analysis of the impact and value of community benefit clauses in procurement*’ (University of Glasgow, eprints, 2015).

<sup>77</sup> R. Macfarlane and M. Cook, ‘*The Scottish Government: Community Benefits in Public Procurement: a Report Demonstrating the Methodology for Including Targeted Recruitment and Training Clauses in Public Sector Contracts*’ (2008).



has on SME participation in public procurement. The use of contractual community benefit clauses facilitated a social enterprise in a large contract in Northern Ireland. As discussed already, if it were not for the inclusion of the social clause, the social enterprise and large organisation would have never formed a partnership. The social enterprise further indicated that they favoured the mandatory approach adopted and further called for the inclusion of mandatory penalty clauses for non-compliance with the requirements laid out in the clause.<sup>78</sup>

The research findings acknowledge that the inclusion of mandatory community benefit contractual clauses can facilitate social enterprise participation in public procurement. The use of mandatory clauses promoted SME participation in the Buy Social case study and did not promote SME participation in the National Children's Hospital's construction contract. One reason for this could be due to the lack of policy support and limited experience of using community benefits in Ireland.<sup>79</sup> Northern Ireland adopted strategic policies on the use of socially-driven public procurement and legislative bills on social procurement were drafted before the government collapsed.<sup>80</sup> This research argues that mandatory community benefit clauses are more effective where there is a supportive policy environment.

Additionally, the research findings suggest that the use of voluntary subcontractor considerations support SME participation. This research did not examine the subcontractor provisions relating to payments of subcontractors, as this provision impacts SMEs which have already entered the public contract through the supply-chain.<sup>81</sup> This research is interested in the facilitation of SMEs into the supply-chain and focuses on

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<sup>78</sup> Interview with Maeve Monaghan, CEO NOW Group (by phone, 26<sup>th</sup> October 2016) and Interview with Brendan Flynn, Operations Director, G4S Northern Ireland (by phone, 10<sup>th</sup> November 2016).

<sup>79</sup> There is growing political support for the regulation of community benefit clauses. A *Public Services and Procurement (Workers' Rights) Bill 2017* is currently at the second stage of review.

<sup>80</sup> Although, a community benefit focused policy was adopted in 2013 and updated in 2016. See *Integrating Social Considerations into Contracts* (2016) PGN 01/13.

<sup>81</sup> However, the researcher plans to conduct empirical research in this area.

examining the use of subcontractor considerations during the procurement design, request for tender and contractual performance stage. The National Children's Hospital and Buy Social case studies included voluntary subcontractor provisions which requested the main contractor to consider supporting SMEs in the supply chain. Arguments in favour of mandatory requirements assert that full compliance is only met when social objectives are incorporated as contractual requirements.<sup>82</sup> However, it would have been a violation of the fundamental principles of the TFEU to insert such voluntary requests as mandatory clauses.

Davies and Crane claim that procurers can ensure high levels of compliance with socially related criteria when they are included voluntarily.<sup>83</sup> The voluntary subcontractor considerations included in the National Children's Hospital and Buy Social case studies facilitated SME participation in the supply chain. Holmlund and Kock's observations suggest that large companies are motivated to implement social practices in response to procurers' *buying preferences*'.<sup>84</sup> This is evident in both of the high-value case studies.<sup>85</sup> The main contractor in the National Children's Hospital contract hosted '*Meet the Buyer*' events to inform locally-based SMEs of potential future subcontracting opportunities; the contractor invited a local SME to join the contractor's internal business support and training initiative.<sup>86</sup> Within six months of contract

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<sup>82</sup> A.I. Anand, '*Voluntary vs mandatory corporate governance: Towards an optimal regulatory framework*' (2005) in American Law & Economics Association Annual Meetings 44.

<sup>83</sup> I.A. Davies and A. Crane, '*Corporate social responsibility in small-and medium-size enterprises: investigating employee engagement in fair trade companies*' (2010) 19(2) Business Ethics: A European Review 126.

<sup>84</sup> M. Holmlund and S. Kock, '*Buyer dominated relationships in a supply chain-a case study of four small-sized suppliers*' (1996) 15(1) International Small Business Journal 26.

<sup>85</sup> Williamson et al. and by Revell and Blackburn similarly conclude that suppliers' motivation to incorporate socially-related objectives is intrinsically linked to the business environment and supporting regulation. See D. Williamson, G. Lynch-Wood, and J. Ramsay, '*Drivers of environmental behaviour in manufacturing SMEs and the implications for CSR*' (2006) 67(3) Journal of Business Ethics 317; A. Revell and R. Blackburn, '*The business case for sustainability? An examination of small firms in the UK's construction and restaurant sectors*' (2007) 16(6) Business Strategy and the Environment 404.

<sup>86</sup> One of the networking events was conducted in partnership with Enterprise Ireland. Lee et al. assert that public bodies should collaborate with all stakeholders to fully embed

commencement, the main contractor had awarded over €500,000 worth of subcontracts to SMEs. The voluntary subcontractor considerations are having a direct and verifiable impact on the local economies in Dublin 8 and 11. These findings suggest that voluntary subcontractor consideration promote SME participation in supply-chains of above-threshold contracts.

Public procurers wishing to replicate the success of this element of the contract should consider including voluntary subcontractor considerations into public contracts. Baden et al. and Spence call for public procurers to design social criteria in partnership with the businesses.<sup>87</sup> The National Children's Hospital case study demonstrates the benefits of developing a strong relationship with the local community and interested economic operators. A dedicated social benefits manager was appointed who connects community groups, local SMEs and social enterprises with the hospital group. Community and business committees were established before the design and publication of the request for tender.<sup>88</sup> The initial social plans were presented to the committees and their advice and recommendations assisted in the design and implementation of the socially led considerations and clauses.<sup>89</sup> Furthermore, the committee's role was not diminished post the award of the contract, the committees now play an essential role in monitoring compliance of the social objectives and will assist in the design of criteria for future hospital operational contracts.<sup>90</sup>

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the social changes. See S.M. Lee, T. Hwang and D. Choi, '*Open innovation in the public sector of leading countries*' (2012) 50(1) *Management Decision* 147.

<sup>87</sup> L.J. Spence, '*CSR and small business in a European policy context: The five "C"s of CSR and small business research agenda*' (2007); 112(4) *Business and Society Review* 533 D. Baden, I. Harwood and D. Woodward, '*The effects of procurement policies on 'downstream' corporate social responsibility activity: Content-analytic insights into the views and actions of SME owner-managers*' (2011) 29(3) *International Small Business* 259.

<sup>88</sup> See also; Lee et al. (n 86).

<sup>89</sup> It is important to note that the public procurers were willing to engage with public procurers based in other Member States. The procurers engaged with Scottish procurers to learn from their experiences of implementing targeted recruitment and training clauses. The sharing of best practices between contracting authorities is encouraged in the OECD *The Innovation Imperative in the Public Sector: Setting an Agenda for Action* (OECD, Publishing, Paris, 2015).

<sup>90</sup> Interview with Ingrid McElroy, Community Benefit Programme Manager, National Paediatric Hospital Development Board Fitzpatrick, Director for Project Management

The winning contractors in the Buy Social case study additionally adopted socially conscious buying practices which reflected the procuring practices of the public body. A subcontract was awarded to a B-corp company. The Buy Social case study also illustrates that the inclusion of voluntary subcontractor considerations facilitates SME participation.<sup>91</sup> Overall, the use of voluntary subcontractor considerations is having a positive impact on SME engagement. The success of the voluntary subcontractor considerations is dependent on the commitment of all stakeholders.<sup>92</sup> This research argues that public procurers should consult with interested economic operators and communities to assist all stakeholders to 'buy-in' and support the social goals of the public bodies to develop a competitive SME driven supply chain.

### 9.9 Legislative and Policy Support

This research accepts that the objectives of public procurement legislation have evolved from purely economic goals to include social objectives. Contracting authorities are complex actors<sup>93</sup>; they are entering markets as important buyers and are additionally tasked with the pursuit of achieving their perceived conception of 'VfM'.<sup>94</sup> The maturity of the social objectives of the legislation supports public procurers in achieving their tendering goals.<sup>95</sup> However, the interviewee participants from the National Children's Hospital and Buy Social case studies described initial concerns about incorporating social criteria into their tendering

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and Project Controls (Dublin, Ireland, 8th August 2018) The committees will be involved for the remainder of the contract.

<sup>91</sup> This suggests that the inclusion of the social criteria has changed the culture of the large organisation. Procurers are leading by example and influencing the private sector See C. McCrudden, 'Using public procurement to achieve social outcomes' (2004) (4) Natural Resources Forum 257-267.

<sup>92</sup> See I. Henriques and P. Sadorsky, 'The relationship between environmental commitment and managerial perceptions of stakeholder importance' (1999) 42(1) Academy of Management Journal 87.

<sup>93</sup> C. McCrudden, 'Buying Social Justice. Equality, Government Procurement and Legal Change' (Oxford University Press, New York, Oxford 2007).

<sup>94</sup> N. Dimitri, "'Best value for money" in procurement' (2013) 13(2) Journal of Public Procurement 149.

<sup>95</sup> H. Walker and N. Jones, 'Sustainable supply chain management across the UK private sector' (2012) 17(1) Supply Chain Management: An International Journal 15.

practices.<sup>96</sup> The National Children’s Hospital Community Benefit Manager acknowledged that the procurers were initially reluctant to include any social criteria which would increase legal uncertainty, tender costs or administrative burden for interested economic operators and the public body.<sup>97</sup> The Buy Social interviewee participants referred to the initial ‘*strained*’ relationship with CPD which did not improve until pilot projects were conducted, and policy was adopted clarifying the permissible use of social criteria in Northern Ireland.<sup>98</sup>

Policy support differed in both the Northern Irish and Irish case studies.<sup>99</sup> The Buy Social case study highlights the importance policy support has on the use of social criteria. There are two key developments which shaped the Northern Irish public procurement landscape. Firstly, the landscape was shaped by the enactment of the English and Welsh Social Value Act<sup>100</sup> and the Scottish Buy Social Act.<sup>101</sup> Plans were made for the implementation of a similar law in Northern Ireland, which has been suspended since the collapse of the government.<sup>102</sup> Secondly, the adoption of the Buy Social Unit and the subsequent adoption of community benefits policies shaped the strategic use and acceptance of the use of social criteria in public procurement.<sup>103</sup>

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<sup>96</sup> Interview with Richard Fitzpatrick, Director for Project Management and Project Controls, NPHDB (Dublin, Ireland, 10 June 2017); Interview with Ingrid McElroy, Community Benefit Programme Manager, National Paediatric Hospital Development Board Fitzpatrick, Director for Project Management and Project Controls (Dublin, Ireland, 10 June 2017); Interview with Hollie Carroll, Development Officer, Buy Social Unit (Belfast, Northern Ireland, 5<sup>th</sup> October 2016).

<sup>97</sup> Similar barriers to the use of socially-sustainable procurement have been expressed by; E. Fisher, ‘*The Power of Purchase: Addressing Sustainability through Public Procurement*’ (2013) 8 Eur Procurement & Pub Private Partnership L Rev 2; J. Hasselbalch, N. Costa and A. Blecken, ‘*Examining the relationship between the barriers and current practices of sustainable procurement: a survey of UN organizations*’ (2014) 14(3) Journal of Public Procurement 361.

<sup>98</sup> Interview with Hollie Carroll, Development Officer, Buy Social Unit (Belfast, Northern Ireland, 5<sup>th</sup> October 2016); Interview with Anna Grey, Legal Counsel, Buy Social Unit (Belfast, Northern Ireland, 5<sup>th</sup> October 2016).

<sup>99</sup> Northern Ireland has adopted policies to promote the strategic use of socially responsible public procurement. See CPD Government Policy Note, ‘*Integrating Social Considerations into Contracts*’ (2016) PGN 01/13.

<sup>100</sup> Social Value Act (UK), 2012.

<sup>101</sup> Procurement Reform (Scotland) Act, 2014.

<sup>102</sup> A draft proposal for a *Buy Social Value Act* has been put on hold since 2017.

<sup>103</sup> See CPD Government Policy Note, ‘*Integrating Social Considerations into Contracts*’ (2016) PGN 01/13.

Policy supports for the use of social criteria in Ireland is somewhat lacking. When the National Procurement Service was in operation, the soft-law '*Circular 10/10 Facilitating SME Participation*' was introduced to great success.<sup>104</sup> The non-binding document was widely adopted, and the impact of its success is still visible. It is common practice for public bodies to upload request for tenders on the etenders website.<sup>105</sup> Since the OGP commenced operations in 2014, policy creation and adoption has been somewhat limited, with the focus shifting more towards the centralisation and the management of large-scale contracts with accompanying framework agreements.<sup>106</sup> One reason for this was the practical need to firstly recruit and train new employees while simultaneously designing and managing centralised contracts. Over the initial commencement period of operations, the OGP introduced measures to assist aggrieved SMEs.<sup>107</sup> More recently, the OGP adopted an overall procurement guide in 2017<sup>108</sup> and a social considerations policy document in 2018.<sup>109</sup> These soft-law measures have a strong focus on encouraging SME participation. However, the guidance is silent as to whether public bodies should incorporate community benefit clauses into their practices.<sup>110</sup> The document does not pay attention to the importance of social enterprises or start-ups in the public market.

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<sup>104</sup> Now incorporated into Circular 10/2014, '*Initiatives to Assist SMEs in Public Procurement*' 2014.

<sup>105</sup> This is a soft-law requirement and there is no regulation in place requiring contracting authorities to advertise below-threshold contracts on the national advertising platform. Although, McDermott J recently accepted that Circular soft-law requirements create enforceable obligations. See *Copymoore Ltd & ors -v- Commissioners of Public Works of Ireland* [2016] IEHC 709 para 28.

<sup>106</sup> The OGP concentrates on the use of framework agreements, choosing not to use dynamic purchasing systems. See Office of Government Procurement, '*Communications Strategy 2018 – 2020*'. 2.

<sup>107</sup> Circular 10/2014, '*Initiatives to Assist SMEs in Public Procurement*' 2014.

<sup>108</sup> The national framework was revised in 2019. See; the Office of Government Procurement, '*National Public Procurement Framework*' *Public Procurement Guidelines for Goods and Services*. (2019) Version 2.1.

<sup>109</sup> Office of Government Procurement, '*Social Considerations in Public Procurement*.' OGP. (2018). Accessible at this link; <https://ogp.gov.ie/information-notes/> Last accessed 16<sup>th</sup> May 2019.

<sup>110</sup> The '*Social Considerations*' information note informs contracting authorities on how to include social criteria in tender competitions and public contracts, however, there is no policy requiring contracting authorities to adopt socially-responsible practices. See OGP (2018) (n 109).

Concerning start-ups and innovative SMEs, both Ireland and Northern Ireland have actively supported the use of SBIR and SBRI competitions.<sup>111</sup> Guidance documents have been drafted by trade institutions offering advice on the economic and social value of the pursuit of innovative public services.<sup>112</sup> Both contracting authorities relied on the experience gained by other public bodies using these procedures to influence their PCP competitions. Both case studies relied on existing practices to guide their processes.<sup>113</sup> Policy support for Smart Cities is promoted at a regional level, encouraging the development of a ‘*Smart Union*’.<sup>114</sup> Smart Cities policies are driven at local levels, where public procurers have adopted initial plans to improve urban living standards in their cities.<sup>115</sup> It is this commitment to the overall social goal, which allows for public bodies to take risks, to work with innovative start-ups and with the voluntary sector to develop bespoke solutions for the contracting authority.<sup>116</sup>

Arguably, the supports for innovative procurement are less controversial than the use of community benefit clauses.<sup>117</sup> The public sector

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<sup>111</sup> The Smart Cities programmes in Dublin and Belfast have used the SBRI and SBIR PCP procedures to engage with innovative start-ups. The programmes are operating in co-operation with the start-ups to develop solutions to societal problems.

<sup>112</sup> Intertrade Ireland runs an *All-Island Innovation Programme* offering innovation lectures, masterclasses and annual conferences with international speakers to inform both regions on the latest developments in innovation practices and theories.

<sup>113</sup> Interview with Jamie Cudden, Smart Cities Programme Manager, Dublin City Council (Dublin, Ireland, 24<sup>th</sup> April 2016).

<sup>114</sup> See Commission, ‘*Pre-commercial Procurement: driving innovation to ensure sustainable high-quality public services in Europe*’ (Communication) COM (2007) 0799 final; See Commission, ‘*A Digital Single Market Strategy for Europe*’ (Communication) COM (2015) 0192 final; Department of Jobs, Enterprise and Innovation, National (Ireland) ‘*Action Plans for Jobs 2016*’. (2016) Action 98; . <https://dbei.gov.ie/en/Publications/Publication-files/Action-Plan-for-Jobs-2016.pdf> Last accessed 11<sup>th</sup> May 2019; Belfast City Council, ‘*Supporting Urban Innovation - The Smart Belfast Framework 2017 to 2021*’. The framework was adopted to support the implementation of the *Belfast Agenda*. See *The Belfast Agenda*.

<sup>115</sup> A.T. Chatfield and C.G. Reddick, ‘*Smart City Implementation Through Shared Vision of Social Innovation for Environmental Sustainability: A Case Study of Kitakyushu, Japan*’ (2016) 34(6) *Social Science Computer Review* 757.

<sup>116</sup> R.K.R. Kummitha and N. Crutzen, ‘*How do we understand smart cities? An evolutionary perspective*’ (2017) 67 *Cities* 43.

<sup>117</sup> A reason for could be the perceived increased legal risk of including non-economic criteria in high-value contracts. The community benefit clauses in the case studies were attached to above-threshold contracts. The full remit of the Public Sector Directive applied to these contracts. However, the rules were not applicable to the low-value PCP innovative contracts.

interviewee participants referred to some initial hesitance from the legal advisors on designing new processes. However, the scope of the R&D activities is exempt from the public procurement rules. Therefore, the Directive did not apply to the procedures. The procedures were required to comply with the fundamental principle of non-discrimination and with national guidance documents.<sup>118</sup> The combination of regional and national policies and the value of the contracts assisted the Smart Cities programmes in adopting innovative procedures.<sup>119</sup> The procedures embody the SME friendly objectives of the Directive and the SBA.<sup>120</sup>

Regional policy support offers depth to the EU rules. However, perhaps it is time to reassess the importance of public procurement in Europe. Public procurement is referred to in many pieces of social and economic policies as an *'important vehicle'* to drive change in society.<sup>121</sup> Some of the key policy documents such as the guidance document on PCP, social enterprises and the Buy Social guide are outdated.<sup>122</sup> The documents have not been updated since the adoption of the updated Directive. The Buying Social guide is currently under review.

It is important for the policies to be updated, and this research encourages the policies to refrain from treating SMEs as a homogenised group. Specific advice on the permissible use of social criteria would assist SMEs, social enterprises, start-ups, and the third sector enter into more

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<sup>118</sup> See COM (2007) 0799 final.

<sup>119</sup> See Department of Jobs, Enterprise and Innovation, National (Ireland) *'Action Plans for Jobs 2016'*. (2016) Action 98; Belfast City Council, *'Supporting Urban Innovation - The Smart Belfast Framework 2017 to 2021'*. (2017). The framework was adopted to support the implementation of the *Belfast Agenda*. See *The Belfast Agenda*; <https://www.belfastcity.gov.uk/council/Communityplanning/BelfastAgenda.aspx> Last accessed 16<sup>th</sup> June 2019.

<sup>120</sup> See Commission, *'Think Small First' - A "Small Business Act" for Europe'* (Communication) COM (2008) 0394. See also; See Commission, *'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts'* (SWP) COM (2008) 2193.

<sup>121</sup> See Commission, *'Europe 2020: A strategy for smart, sustainable and inclusive growth.'* (2010) COM 2020 final; Commission, *'Single Market Act II Together for new growth.'* (Communication) COM (2012) 0573 final.

<sup>122</sup> See COM (2007) 0799 final; Commission, *'Buying Social A Guide to Taking Account of Social Considerations in Public Procurement'* (Guide) SEC (2010) 1258, final; Commission, *'Social Business Initiative Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation'* (Communication) COM (2011) 0682 final.



inclusive and accessible public markets, thus aligning to the overall goals of the EU. This would assist public procurers in understanding the wide remit of the goals outlined in the opening paragraphs of the Directives, assisting them in implementing the wider Single Market goals in a proportionate, measurable local manner.<sup>123</sup>

### 9.10 Role of procurers and impact on procurers

The successful implementing of change in public procurement is dependent on the political willingness and individual leadership.<sup>124</sup> Informed public officials will drive social changes in procurement when there is a political will to solve public sector challenges.<sup>125</sup> Once the informed and supported officials successfully pilot new procedures, it is more likely that other public bodies will replicate the changes.<sup>126</sup> Lack of institutional support will inhibit the effectiveness of the socially-driven changes introduced by the contracting authority.<sup>127</sup>

A common finding from each of the four case studies is the importance of developing and maintaining a partnership between the public body and the business entities when attempting to achieve social and innovative procurement practices. Each public body, when interviewed agreed that they were *'trying to do something new, trying to do something differently.'*<sup>128</sup> Contract awardees indicated that they *'felt supported'* by

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<sup>123</sup> Public Sector Directive, recital 2 calls for procurers to make better use of public procurement in support of common societal goals.

<sup>124</sup> J. Smith, G. Andersson, R. Gourlay, S. Karner, B.E. Mikkelsen, R. Sonnino and D. Barling, *'Balancing competing policy demands: the case of sustainable public sector food procurement'* (2016) 112 *Journal of Cleaner Production* 249.

<sup>125</sup> P. de Oliveira, J.A. Doll, C.N.H. O. Balaban, P. Jiang, M. Dreyfus, A. Suwa, R. Moreno-Peñaranda and P. Dirgahayani, *'Green economy and governance in cities: assessing good governance in key urban economic processes'* (2013) 58 *Journal of Cleaner Production* 138; M.B. Rise, and A. Steinsbekk, *'Long Term Effect on Professionals' Knowledge, Practice and Attitudes Towards User Involvement Four Years After Implementing an Organisational Development Plan: A Controlled Study'* (2016) 11(3) *PloS One*.

<sup>126</sup> L. Nogueiro and T.B. Ramos, *'The integration of environmental practices and tools in the Portuguese local public administration'* (2014) 76 *Journal of Cleaner Production* 20.

<sup>127</sup> S. Brammer and H. Walker, *'Sustainable procurement in the public sector: an international comparative study'* (2011) 31(4) *International Journal of Operations & Production Management* 452.

<sup>128</sup> Versions of these phrases were used throughout the interviews. Each of the public 'champions' were motivated to achieve long-term value for taxpayers' money. The

the public body.<sup>129</sup> The public body remained in close connection with the businesses during the contract performance stage. In the National Children's Hospital case study, a dedicated manager liaises closely with the winning bidder and their appointed social benefits manager, along with the NCH and NPHDB, and the SME, social enterprises and community stakeholders. An environment of transparency, professionalism and respect has been developed and maintained.<sup>130</sup> In the Buy Social case study, the awardee consortium expressed gratitude and satisfaction with the Buy Social led supporting 'Brokerage' website.<sup>131</sup> G4S indicated that this tool has made the targeted recruitment and training requirements easy to achieve, assisting them in recruiting appropriately trained employees and trainees.<sup>132</sup> Awardee companies working on separate contracts have also expressed satisfaction with the brokerage site.<sup>133</sup>

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implementation of socially responsible public procurement is dependent on the commitment of motivated champions. See; S. Fernandez and H.G. Rainey, 'Managing successful organizational change in the public sector.' In 'Debating Public Administration' (Routledge, 2017) 7.

<sup>129</sup> Each of the public bodies put supports in place to help the contractors meet the social criteria and to develop the innovative solutions. This ranged from establishing lists of potential new entrant trainees in partnership with state and private recruitment agencies, hosting subcontractor information events and networking events with other interested stakeholders. The success of the social elements of the contract is dependent on a working relationship between the public body and contractors. See S. Cicmil and D. Marshall, 'Insights into collaboration at the project level: complexity, social interaction and procurement mechanisms' (2005) 33(6) Building Research & Information 523; J. Barraket, R. Keast, and C. Furneaux, 'Social procurement and new public governance' (Routledge, 2015).

<sup>130</sup> The interviewed awardees commented that the public contracts differed to other public contracts completed. The main difference being the commitment of the public sector champions to deliver the social objectives.

<sup>131</sup> The Brokerage website is managed and controlled by the Buy Social unit. See <https://buysocialni.org/contractors/find-a-broker/> Last accessed 28<sup>th</sup> March 2019.

<sup>132</sup> Interview with Brendan Flynn, Operations Director, G4S Northern Ireland (by phone, 10<sup>th</sup> November 2016). Presumably, this will be of benefit to both the new entrant trainee and the contractor. The trainee will be motivated to be in a paid employment position in an area which they trained to work in and the contractor will then reap the benefits of having an engaged and motivated employee. For a discussion on the benefits of motivated employees see; S. Ramlall, 'A review of employee motivation theories and their implications for employee retention within organizations' (2004) 5(1/2) Journal of American Academy of Business 52.

<sup>133</sup> Interview with Hollie Carroll, Development Officer, Buy Social Unit (Belfast, Northern Ireland, 5<sup>th</sup> October 2016). The contractor in charge of a £68.3 million 'Gas to the West' contract is retaining a significant proportion of the 'new entrant trainees' employed to meet the social criteria. The company is offering the employees specialised 'gas pipe laying' training and has offered many employees full-time paid positions in the company. The employees are gaining a valuable skill set which will assist them gaining employment elsewhere, if they choose to leave the company.

The commitment of the public-sector individuals is central to the success of these case studies. The pursuit of socially-driven public procurement could have had a negative impact on procurers, as such procedures have the potential to increase costs, administrative burden and legal complexity.<sup>134</sup> The relationship between the contractors and public bodies was an essential factor in the successful implementation of the social criteria and development of innovative solutions.<sup>135</sup> The key personnel involved in the design of the social criteria and PCP procedures were equally involved in the tender award and contract performance stages. The public sector champions were engaged with the social objectives of the public contract from the beginning and actively sought to achieve the targets. Supports were put in place to assist the awardee companies in achieving the social requirements.<sup>136</sup> The motivated public sector champions actively publicised their procurement activities.<sup>137</sup> Each of the four contracting authorities showcases companies' success on their websites and at conferences. The PCP awardees have benefitted from the advertising the companies received from participating in the public contracts. This raised the company's public profiles. Additionally, the procurers support the awardees by inviting them to attend corporate networking events and conferences to introduce the start-ups to potential international business partners. Procurers are the drivers of change in the public bodies. The National Children Hospital's Community Benefits Programme Manager (CBPM) connected the project with the community. Building on the success of the initial contracts, the Coordinator concluded two further contracts using '*set-aside*' requirements.<sup>138</sup>

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<sup>134</sup> A. Sánchez Graells, '*Public procurement and the EU competition rules*' (2nd edn Bloomsbury Publishing 2015) 9.

<sup>135</sup> P. Bansal and K. Roth, '*Why companies go green: a model of ecological responsiveness*' (2002) 43(4) *Academy of Management Journal* 717.

<sup>136</sup> See a list of the supports (n 129) See also; S. Cicmil and D. Marshall (n 129).

<sup>137</sup> I am deeply grateful to the public bodies for sharing these case studies with me, for letting me examine the tender documents and for participating in the interviews.

<sup>138</sup> The contracts were awarded to a social enterprise post completion of a competitive procedure, relying on reg 20, Public Authorities Regulations. This form of controlled competition is rarely used in Ireland. As briefly mentioned earlier, it appears that only NUI Galway, the National Children Hospital construction board and the Irish Prison Service are actively relying on Public Sector Authorities, reg 20 to support social enterprise participation in public contracts.

It is now important that these case studies are disseminated to a broader audience.<sup>139</sup> The case studies demonstrate the use of lots, use of community benefit clauses, use of subcontractor considerations and use of PCP facilitates SME participation. The social criteria do not demand preferential treatment for SMEs and instead *'level the playing field'* for SMEs to compete to enter the public markets. Not only does the use of these social criteria support SME participation, but the use of the criteria has also resulted in the generation of new jobs and the improvement of public services. These procedures should be replicated and used by other public sector bodies to yield lasting impacts for the Irish and Northern Irish economies. The centralised procurement bodies, the OGP and the CPD alongside with the Buy Social unit, should take responsibility for the dissemination and duplication of the case study results.

#### 9.11 Future Research

When the data for this thesis was gathered, the case studies were ongoing and in some contracts are still ongoing. The next stage of the research is to assess the long-term impact of the use of the social criteria. The research plans to trace what impact the case studies are having on other public bodies purchasing activities, questioning if the success of these projects has shaped procurement expenditure in Ireland and Northern Ireland. Other elements of the National Children's Hospital procurement approach have been less successful, and the research intends to question what problems are associated with conducting competitive socially responsible procurement in a volatile construction sector.

#### 9.12 Final Concluding Remarks

The thesis concludes in the same manner as it started, by recognising the important role SMEs play in public procurement. SMEs are the generators of innovation and drivers of local employment. However, given their significance and dominance in the Single Market, they are

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<sup>139</sup> The dissemination of the research results will improve procurers' understanding of the impact of socially responsible public procurement practices. See J. Enders, *'Border crossings: Research training, knowledge dissemination and the transformation of academic work'* (2005) 49(1-2) Higher Education 119.

disproportionately underrepresented in public contracts. The Directive and supporting policies outline a number of provisions to assist the facilitation of SMEs in public procurement. Academic literature has continuously shown that measures such as the use of electronic procurement, use of open procedures, awarding contracts on a MEAT basis rather than on cost alone and the use of self-declarations support SMEs in successfully tendering for public contracts. Recently, there has been an increase in the use of community benefit clauses in large scale works and services contracts, and an increasing use of PCP procedures to improve urban living standards. This research builds on this knowledge by examining what impact the recent changes are having on SME participation in public contracts.

The research argues that the use of lots, use of community benefit clauses, use of subcontractor considerations and the use of PCP facilitates SME participation. The social criteria will effectively support SME participation when supported by policy and dedicated public sector champions. The research argues that the procedures used in the case studies should be replicated by other public bodies to generate large-scale change in public markets. Furthermore, the research calls for contracting authorities and policy to recognise the different needs of various categories of SMEs. SMEs should not be treated as a homogenised group. The needs of a small start-up differ significantly than that of a medium-sized company. As the definition of SMEs extends to micro-enterprises, innovative start-ups and social enterprises, policymakers must adequately promote criteria which facilitates all forms of SMEs. The research finally concludes by encouraging contracting authorities to continue to promote SME participation in public contracts to enhance competition, to use innovative solutions to improve public sector services and generate local employment and economic growth. Public bodies are encouraged to adopt the specific recommendations listed below.

*Policy blueprint for promoting SME participation in public procurement based on empirical research*

The long-term objective of this research is to facilitate SME participation in Irish and Northern Irish public contracts. Facilitating SME participation in public contracts will benefit the economic operator, the public body and the wider community. Current literature and policy on supporting SME participation in public contracts tend to focus on the promotion of fair and open competitive tender procedures. The literature and policy consistently calls for procurers to;

- use open, straightforward and electronic procurement procedures;
- set relevant and appropriate selection and qualification criteria;
- offer clear and fair communication;
- openly advertise contract opportunities and contract notices;
- participate in pre-market engagement activities;
- provide useful and accurate feedback to unsuccessful tenderers;
- and designate redress options for aggrieved unsuccessful tenderers.

All policy documents should continue to be based on these fundamental objectives. These core principles will level the playing field for SMEs competing against larger companies. This research builds on these foundations by reviewing how different forms of social criteria facilitate all forms of SMEs in public procurement. The research questions what impact ‘the division of large contracts into small ‘lots’; the use of community benefit clauses; the use of subcontractor considerations; and the use of pre-commercial procurement (PCP) procedures’ has on SME participation. Current literature and policy offer supports to SMEs, which have the ability to compete for advertised contracts and offers assistance on how to ease the tender requirements and experience for SMEs. This research offers a broader perspective, and it assesses how different criteria assists SMEs entering contracts which they are normally excluded from, such as large contracts and assists SMEs in entering the public market for

the first time. The research does not focus primarily on improving SMEs' tendering skills and abilities and focuses on how public procurers can design more inclusive and socially conscious procurement practices to facilitate SME participation.

The research findings suggest that there are four ways SMEs can enter the public market. SMEs can enter the public market as;

- 1) The main contractor - in this circumstance the SME tenders for a contract as an individual company. The SME has the individual capacity and capability to carry out the contractual specifications.
- 2) As part of a consortium - this occurs where an SME partners with another economic operator. This occurs where two or more companies pool their resources to meet the tender and contract specifications.
- 3) As a subcontractor - in circumstances where an SME cannot meet the tender or contract specifications, the SME can gain entry to the public contract by carrying out subcontracts for the awardee company.
- 4) Certain contracts may be set-aside for certain types of SMEs, namely, social enterprises. In this circumstance, the SME competes against similar forms of companies to tender for the set-aside contract.

Current public procurement policies focus on improving tender practices for SMEs, this research suggests that a broader approach should be adopted. Policies should be updated to reflect and support various forms of SMEs entering the public market via the four key routes; as a main contractor, as a consortium partner, as a subcontractor, and by competing for set-aside contracts. This research uses empirical evidence to assess how various forms of SMEs can enter the public market through these different routes. The research suggests that current policies on SME participation in public procurement should focus on supporting SMEs

enter the market rather than solely focusing on improving tender techniques.

The research calls for public procurers to consider;

- 1) Promoting the inclusion of community benefit clauses in high-value contracts to facilitate social enterprise participation.
- 2) Promoting the inclusion of subcontractor considerations in all procured public supplies, services and works contracts to facilitate the general SME population enter public contracts.
- 3) Promoting the use of PCP to encourage start-up participation in public markets.
- 4) Promoting the division of large contracts into smaller, proportionate and relevant lots to facilitate all forms of SME participation.

To facilitate all forms of SME participation in public procurement, procurers need to consider including social criteria in all contracts, including high and low-value contracts. SMEs can contribute to high-value contracts, by tendering as part of a consortium with one or more economic operators or tendering for subcontracts from the main contractor. The inclusion of community benefit clauses in high-value contracts will assist the public body in using public funds to support the development of an inclusive, competitive and sustainable economy. The use of innovative PCP procedures will result in the improvement of public services and will support the development of a knowledge-based economy. Policy thus far has neglected the important role all forms of SMEs, including start-ups and social enterprises, can play in the public market. Training and tender supports should be offered to both public procurers and SMEs to support the effective implementation of policy changes. It is no longer viable to view public procurement as a tendering task alone which prioritises the awarding contracts on the basis of costs. It is time for procurers to re-think their purchasing objectives and use the limited amount of public funds in a more strategic manner, which facilitates the participation of SMEs in public contracts.





## Appendix A: Advertising Thresholds

Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU in respect of the application thresholds for the procedures for the award of contracts

Directive 2014/24/EU on public procurement:

<b>Central Government authorities</b>	Works contracts, subsidised works contracts	€5,548,000	
	All services concerning social and other specific services listed in Annex XIV	€750,000	
	All subsidised services	€221,000	
	All other service contracts and all design contests	€144,000	
	All supplies contracts awarded by contracting authorities not operating in the field of defence	€144,000	
	Supplies contracts awarded by contracting authorities operating in the field of defence	Concerning products listed in Annex III	€144,000
		Concerning other products	€221,000
<b>Sub-central contracting authorities</b>	Works contracts, subsidised works contracts	€5,548,000	
	All services concerning social and other specific services listed in Annex XIV	€750,000	
	All other service contracts, all design contests, subsidised service contracts, all supplies contracts	€221,000	

Retrieved from the European Commission, *Internal Market, Industry, Entrepreneurship and SMEs, The European Single Market*; Public Procurement; [https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds\\_en](https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en)

## Appendix B: Public Procurer Interview Questions

### *Public Procurer Interview Questions*

Q1. Please describe the general procurement process used by the Council.

Q2. Which tendering procedure do you ordinarily use in the case of procuring supplies and services contracts **valued above** €207,000?

Q3. Which tendering procedure do you ordinarily use in the case of procuring supplies and services contracts **valued below** €207,000?

Q4. How important do you consider the following factors when procuring services, supplies or works contracts;

- a) Small and Medium Size Enterprises (“SMEs”) access
- b) Innovation in public contracts
- c) Environmental sustainability
- d) Local economy sustainability
- e) Engaging with the not-for-profit sector

Q5. Do you break contracts into lots wherever possible in order to facilitate SME access?

Q6. Are you flexible in the type of proof of financial capacity you accept?

Q7. Do you ensure that pre-qualification criteria are relevant and proportionate to the circumstances of the contract?

Q8. Do you encourage joint bidding among SMEs?

Q9. What award criteria do you mostly use? For example, lowest price, most economically advantageous tender, life cycle costing.

Q10. Have you previously (or would you consider) attaching local conditions to certain public contracts? (For example, including employment conditions to construction contracts)

Q11. Have you previously (or would you consider) setting aside contracts in certain circumstances? (For example, setting aside contracts for sheltered workshops or sheltered employment workshops.)

Q12. If at all, how do you protect sub-contractors?

Q13. Have you previously organised pre-commercial procurement activities? Pre-commercial procurement is defined as the purchasing of research and development of new innovative solutions.

Q14. Have you any experience in designing, prototyping or testing new products and services with suppliers?

## Appendix C: Supplier Interview Questions

Could you please describe what your company does?

Was this your company's first time working on a public contract?

If not, what was your company's experience in tendering for public contracts?

Could you please describe your experience of tendering for the [case study] contract?

Did you face any barriers when tendering for the contract?

Could you identify any factors which assisted your company in tendering for the contract?

What impact has the participation in the contract had on your company?

Did you subcontract any element of the contract?

## Appendix D List of Interviewees

### *List of Interviewees*

- Interview with Jamie Cudden, Smart Cities Programme Manager, Dublin City Council (Dublin, Ireland, 24<sup>th</sup> April 2016)
- Interview with Ingrid McElroy, Community Benefit Programme Manager, National Paediatric Hospital Development Board Fitzpatrick, Director for Project Management and Project Controls (Dublin, Ireland, 10 June 2016)
- Interview with Charlotte May-Simera, Researcher in NUI Galway (By phone, 8th August 2016)
- Interview with Dr. Olga Martin-Ortega, Reader in Public International Law, University of Greenwich, School of Law (By phone, 12<sup>th</sup> August 2016)
- Interview with Michael Smyth, Managing Director of the awardee company ‘Saol Café’ (By phone, 11<sup>th</sup> August 2016)
- Interview with Hollie Carroll, Development Officer, Buy Social Unit (Belfast, Northern Ireland, 5<sup>th</sup> October 2016)
- Interview with Anna Grey, Legal Counsel, Buy Social Unit (Belfast, Northern Ireland, 5<sup>th</sup> October 2016)
- Interview with Björn Claeson, Director, Electronics Watch (By phone, 10<sup>th</sup> October 2016)
- Interview with Nuala Griffiths Development Officer, Buy Social Unit (Belfast, Northern Ireland, 5<sup>th</sup> October 2016)
- Interview with Maeve Monaghan, CEO NOW Group (By phone, 26<sup>th</sup> October 2016)
- Interview with Brendan Flynn, Operations Director, G4S Northern Ireland (By phone, 10<sup>th</sup> November 2016)
- Interview with Richard Fitzpatrick, Director for Project Management and Project Controls, NPHDB (Dublin, Ireland, 10 June 2017)
- Interview with Ingrid McElroy, Community Benefit Programme Manager, National Paediatric Hospital Development Board Fitzpatrick, Director for Project Management and Project Controls (Dublin, Ireland, 10 June 2017)

- Interview with Jamie Cudden, Smart Cities Programme Manager, Dublin City Council (Dublin, Ireland, 20<sup>th</sup> June 2017)
- Interview with Deirdre Ferguson, Senior Consultant, Smart Cities Team (By phone, 28<sup>th</sup> June 2017)
- Interview with Sile Ginnane, Co-founder, FluidEdge (By phone, 24<sup>th</sup> July 2018)
- Interview with Michael Berry, Chief Technical Officer, SmartCharge (By phone, 25<sup>th</sup> July 2018)
- Interview with Conor Dumigan, Head of Data Analytics Solutions (By phone, 27<sup>th</sup> July 2018)
- Interview with Ingrid McElroy, Community Benefit Programme Manager, National Paediatric Hospital Development Board Fitzpatrick, Director for Project Management and Project Controls (Dublin, Ireland, 8<sup>th</sup> August 2018)
- Interview with Siobhan Cafferty, Social Enterprise Project Manager, Irish Prison Service (By phone 19<sup>th</sup> December 2018)

## Appendix E: Public Procurer Survey Questions

### *2014 Buyer Survey Questions*

- How many years have you worked as a public sector buyer or have had some involvement in buying?
- Please indicate which of the following best describes your role
- Does your role involve performing any of the following activities?
- Have you undertaken buying-related training within the last 3 years?
- Do you hold a qualification in purchasing, supply chain management, or related area?
- In what type of public sector organisation are you employed?
- Does your organisation deliver services at a predominantly at a local, regional or national level?
- Supplier development is any activity that a buyer undertakes to improve a supplier's performance. Please indicate development activities that you have given to suppliers in the last 12 months
- Are you familiar with the content of any of the following circulars and policies concerning public procurement in Ireland?
- Which tendering procedure do you ordinarily use in the case of;
- *A supplies and general services contract worth under 25,000 euro?*
- *A supplies and general services contract worth between 25,000 and 125,000 euro?*
- *A works and related services contract worth under 50,000 euro?*
- *A works and related services contract worth between 50,000 and 250,000 euro?*
- What percentage of the total number of contracts issued by you for the year ending 2013 has been won by Irish-based SMEs? SME is defined as a firm having 1-250 employees.
- What percentage of the total number of contracts issued by you for the year ending 2013 has been won by firms based outside the Irish Republic?
- How important do you consider the following factors when procuring supplies, services or works? (1 = no importance and 5 = highly important)
- *SME access; Innovation; Environmental sustainability; Local economy sustainability; Engaging with the not-for-profit sector*
- Please state your level of agreement with the following statements;



- *I break contracts into lots wherever possible in order to facilitate SME access*
- *I am flexible in the type of proof of financial capacity I accept (e.g. regarding number of years of turnover)*
- *I ensure that pre-qualification criteria are relevant and proportionate to the circumstances of the contract*
- *I encourage joint bidding among SMEs*
- Do you allow suppliers at the time of tendering only to declare that they have;
- *The relevant and proportionate financial capacity which is necessary to undertake the contract*
- *The relevant and proportionate insurance capacity which is necessary to undertake the contract*
- Are you using the National Procurement Service's Standardised Suite of Documents for tendering?
- Why are you not using the National Procurement Service's Standardised Suite of Procurement Templates?
- Do you purchase from national framework agreements?
- What is the reason(s) for not purchasing from framework agreements put in place at national level?
- To what extent does your organisation provide feedback to unsuccessful firms after a contract has been awarded?
- In what form does your organisation provide feedback to suppliers?
- Please indicate your knowledge of the following pieces of Public Procurement Legislation;
- *S.I. 329 of 2006 implementing EU Public Procurement Directive 2004/18/EC*
- *S.I. 50 of 2007 implementing EU Public Procurement Directive (Utilities Sector) 2004/17/EC*
- *S.I. 130 of 2010 / S.I. 131 of 2010 implementing EU Public Procurement Remedies Directive 2007/66/EC*
- *S.I. 339 of 2011 European Communities (Clean and energy-efficient Road Transport Vehicles) Regulation 2011*
- *S.I. 62 of 2012 European Union (Award of Contracts Relating to Defence and Security) Regulations 2012*
- What impact do you believe the Public Procurement Directives (incl. Remedies Directive) have had on the following;
- *Transparency and clarity in the procurement process*
- *SME participation in the procurement process*
- *Competition between suppliers*
- *Costs involved in the procurement process*

- What impact has the implementation of the Remedies Directive into Irish law in 2010 had on legal challenges for your organisation?
- Do you undertake the following relevant checks when you award a contract?
- *Tax Clearance Certificate*
- *Insurance Certificates*
- *Previous Employment Law Compliance*
- *Economic and Financial Company Reports*

## Appendix F: Supplier Survey Questions

### *2014 Survey Supplier Questions*

- What is the legal form of your firm?
- How many staff are employed in your firm?
- What was the annual turnover of your firm for the most recent financial year in which accounts were submitted?
- Which sector does your firm belong to?
- Please specify the industry to which your firm belongs?
- How many years has your firm been trading?
- In which jurisdiction is your firm based?
- What is the predominant market focus of your firm?
- How many years' experience does your firm have in tendering for public sector contracts?
- How is the tendering process managed in your firm?
- How many public sector contracts did your firm tender for in 2013?
- How many public sector contracts did your firm win in 2013?
- What percentage of public sector contracts tendered for throughout 2013 did your firm succeed in winning?
- On a scale of 1-7, where 1 = no success whatsoever and 7 = highly successful, where does your firm rank in winning public sector contracts?
- What percentage of your firm's annual revenue over 2013 has come from winning public sector contracts?
- What is the typical value of a public sector contract your firms goes after?
- Did you or someone in your firm undertake tender-related training during 2013?
- Are you familiar with the content of the following procurement-related circulars and policy guidance documents issued by the Irish government?
- *Circular 10/10 Facilitating SME Participation in Public Procurement*
- *Green Tenders - An Action Plan of Green Public Procurement*
- Does your firm find out about available public sector contracts in Ireland through any of the following means?
- *Request for Quotation (RFQ) from public sector procurers*
- [www.etenders.gov.ie](http://www.etenders.gov.ie)
- *Websites of public sector organisations*
- *Press (local/national)*

- *Word of mouth*
- Of the total number of Irish public sector contracts that your firm tendered for over the last 3 years, what percentage came to your attention through [www.etender.gov.ie](http://www.etender.gov.ie)?
- *Has your firm tendered for public sector contracts in any of the following jurisdictions outside the Irish Republic in the last 3 years?*
- *Please state your level of agreement with the following statements in respect of public procurement in Ireland*
- *Contracts are divided into lots in order to facilitate SME access*
- *Contracting authorities are flexible in the type of proof of financial capacity they accept (e.g. regarding number of years of turnover)*
- *Pre-qualification criteria are relevant and proportionate to the circumstances of the contract*
- *Joint bidding among SMEs is encouraged*
- When tendering for Irish public sector contracts is it your experience that....
- Your firm only has to declare that it meets the financial capacity criteria at the initial tendering stage?
- Your firm only has to declare that it meets the relevant insurance criteria at the initial tendering stage?
- Have any of the following issues posed a problem for your firm when tendering?
- *Identifying available public sector contracts*
- *Communicating with public sector buyers*
- *Understanding questions asked in the request for tender documentation*
- *Costs of compiling a tender (incl. time)*
- *Meeting financial capacity requirements*
- *Meeting insurance requirements*
- *Organisational capacity for managing a contract*
- *Requirements for professional qualifications/accreditations (incl. health and safety)*
- *Requirements for previous experience in supplying to public sector*
- *Finding a partner firm in which to make a joint bid for a contract*
- Please state your level of agreement with the following statement
- Receiving feedback from public sector buyers helps me to improve my future tender submissions?

- Please indicate your knowledge of the following pieces of Public Procurement Legislation
- *S.I. 329 of 2006 implementing EU Public Procurement Directive 2004/18/EC*
- *S.I. 50 of 2007 implementing EU Public Procurement Directive (Utilities Sector) 2004/17/EC*
- *S.I. 130 of 2010 / S.I. 131 of 2010 implementing EU Public Procurement Remedies Directive 2007/66/EC*
- *S.I. 339 of 2011 European Communities (Clean and energy-efficient Road Transport Vehicles) Regulation 2011*
- *S.I. 62 of 2012 European Union (Award of Contracts Relating to Defence and Security) Regulations 2012*
- Has your firm initiated any legal challenges under the Remedies Directive?
- Was the challenge successful?
- Do you believe that any of the following factors act as a barrier for unsuccessful tenderers to initiate a legal challenge under the Remedies legislation? Tick all that apply.
- *Cost of legal representation*
- *Reputational risk*
- *Duration of legal proceedings*
- *Time period provided to initiate a challenge*
- *Lack of knowledge of the Procurement and Remedies legislation*
  
- In your experience, do contracting authorities undertake the following relevant checks before signing the contract?
- *Tax Clearance Certificate*
- *Insurance Certificates*
- *Previous Employment Law Compliance*
- *Economic and Financial Company Reports*

## Appendix G: Research Participant Information and Consent

### ***Participant Information Sheet***

#### ***Research Request***

We invite you to take part in the Irish Research Council funded Ph.D. research project ‘Facilitating Small and Medium Size Enterprise (SME) participation in Public Procurement.’ The research will be carried out by the doctoral candidate Emma McEvoy. The research is supervised by Prof. Michael Doherty, Department of Law, Maynooth University.

#### ***Research Overview***

Public bodies spend billions of Euro purchasing goods and services, making procurement an important lever for achieving societal goals. The research examines the relationship between public procurement and small and medium size enterprises (“SMEs”). Public procurement refers to the procedures by which public bodies purchase goods, services or construction works. The research questions to what extent the inclusion of social clauses in public procurement facilitates SME participation. Whilst SMEs represent 99% of all businesses in the EU, SMEs are disproportionately represented in public markets. SMEs are faced with administrative and financial barriers when competing for public contracts (European Commission, 2014). European Public Procurement Directives include a number of social clauses which encourage small business participation, such as the permissible division of large contracts into smaller lots, use of local conditions and setting aside of certain contracts. The research investigates the extent to which the inclusion of social clauses in public contracts facilitates SME participation. Improving the relationship between SMEs and public procurement is intended to bring about increased value to the European economy, stimulate higher growth and increase job opportunities.

A primary aim of the research is to address the core problems faced by public bodies in facilitating SME friendly policies in their tendering practices. Secondly, the research recognises that there is a gap in significant literature and aims to contribute to the level of understanding of the strategic role of European procurement to both academics and practitioners. A cross-national comparative case study approach is adopted to assess the impact of the inclusion of social clauses in public contracts. Four individual Irish and UK case studies which have included a variety of social clauses in their tendering procedures will be evaluated.

### ***Research Methodology***

The research adopts a triangulation approach, relying on cross-national comparative case studies. The mixed-method triangulation approach allows for the research to effectively examine the legislative and practical impact of including social clauses in public contracts. A primarily qualitative approach is adopted, interviews and focus groups with key public procurers and small businesses will be conducted to gain a true understanding of the issues facing the inclusion of social clauses in public contracts.

Each case study will examine whether the following five independent social clauses have a positive or negative impact on facilitating SMEs in procurement procedures. The following social clauses were identified during the literature review stage;

Division of large contracts into smaller “lots”

Use of Pre-commercial procurement - Allowing SMEs to prepare for tender competitions and to inform public buyers of any new innovative good or service

Protection of Sub-contractor rights - Allowing SMEs to successfully gain a proportion of a large contract

Use of Sheltered Workshops - Encouraging social enterprises to enter the public market

Inclusion of Local Conditions -For example, encouraging winning contractors to employ long-term unemployed people

The case study findings will allow for the research to establish a framework for analysing the impact of the inclusion of social clauses in public contracts on SME engagement.

### ***Research output***

The researcher recognises the vital importance of disseminating research at regular intervals throughout the life cycle of the project. Research will be disseminated through the submission of conference papers and publication of academic and practitioner papers.

### ***Data protection and confidentiality***

#### **1. Data collection**

Your interview will be recorded on a digital audio recorder, and subsequently transcribed. If you do not wish to be audio recorded, you may still undertake an interview. In this case, the researcher will take notes for review. In both cases

you can request a copy of your interview transcript. After you have reviewed the text, it will then be anonymised.

## **2. Data usage**

Only the researcher and her supervisor will see the original transcriptions. The anonymised data will be included in the Ph.D. thesis, academic publications, presentations and teaching case studies. Participants will receive draft copies of any publications and can request for any misleading or misinterpreted information to be deleted prior to publication.

## **3. Confidentiality**

All data is strictly confidential, and will be stored securely on encrypted laptop in Room 46, Ground Floor, New House Building, South Campus. Only the researcher will have access to the data. The audio and text files will be securely stored in accordance with university protocol, and destroyed after ten years in accordance with the Maynooth University Research Integrity Policy.

It must be recognised that, in some circumstances, confidentiality of research data and records may be overridden by courts in the event of litigation or in the course of investigation by lawful authority. In such circumstances the University will take all reasonable steps within law to ensure that confidentiality is maintained to the greatest possible extent.

## **4. Withdrawal from the study**

Your participation is entirely voluntary. If you feel uncomfortable due to any part of the study you can withdraw your consent at any time. This includes during or after the interview, including after reading the transcript.

If during your participation in this study you feel the information and guidelines that you were given have been neglected or disregarded in any way, or if you are unhappy about the process, please contact the **Secretary of the Maynooth University Ethics Committee** at [research.ethics@nuim.ie](mailto:research.ethics@nuim.ie) or +353 (0)1 708 6019. Please be assured that your concerns will be dealt with in a sensitive manner.



### *Consent Sheet*

I hereby declare that I agree that any information ticked below, which has evolved as part of the interview today may be included in the Ph.D. thesis and research dissemination publications, such as academic journal articles, presentations and teaching case studies.

Information indicated as **confidential** will only be used internally in the research, this information will neither be cited nor will it be published, neither partially nor completely.

1.	I consent to mentioning my name as interview partner in publications
2.	I consent to stating my institution in publications relating to my name
3.	I consent to mentioning my name for quotes from the interview
4.	I consent to sharing pictures that are taken during the course of the interview
5.	I have read and understood the information sheet
6.	I understand that my participation is completely voluntary
7.	I understand that I am free to withdraw from the study at any stage
8.	I understand that I am not obliged to answer any questions if I don't want to
9.	I have had the opportunity to ask questions and all my questions have been answered.
10.	I consent to participating in this study.

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