

Part 3

Equality Conditions in Contracting across Europe.

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Introduction and context

The purpose of Part 3 is to examine recent and current attitudes and practice in promoting (modern) apprenticeships in public procurement across the UK and Europe. In terms of assessment, the approach has been to look for four elements within any interrogated policy or initiative: intent to address inequality and lack of diversity; mechanisms to achieve change; evidence of specific activity being implemented to bring about that change; and, identification of any discernible outcomes.

As will become apparent, in other parts of Europe particularly, there are seldom explicit efforts made to bring about greater labour market equality and diversity through public contracts. Further, data are not collected routinely into such activities. The result is that monitoring and evaluation of policies and practices particularly targeted on this agenda are not generally readily available for analysis. In some environments, this is because of a reluctance to capture information on individuals or groups based on their ethnicity, race, disability, religion or other characteristic which might be, or have been used, to discriminate against them. In the UK, although there is a tendency to regard collecting such personal information as less sensitive, data are still not always gathered as a matter of course. The following report interrogating policies and practices attempts to record where there are issues with research and evaluation due to missing information.

These considerations on data apart, there is a recognition across Europe that reducing inequalities in labour market participation are key to reducing unequal economic outcomes for groups within a broader government emphasis on enhancing employability as the main route out of poverty (Hills 2010; EHRC 2010; Government Equalities Office 2008). The Scottish Government is committed to tackling inequalities in labour market participation and access to employment-related training as exemplified in National Outcomes 2¹ and 7².

¹ National Outcome 2 refers to 'employment opportunities'. In relation to this Outcome, SG states that 'Realising the full potential of Scotland's people will require the wider attainment of higher skills, the removal of barriers to work, including support for carers, parents, disabled people, and minority and ethnic communities' (Scottish Government 2013a).

² National Outcome 7 refers to 'inequalities'. The SG has vowed to 'Take forward action to promote and advance equality and challenge discrimination and prejudice' (Scottish Government 2013b).

The Government Skills Strategy '*Skills for Scotland: A lifelong skills strategy*' similarly makes explicit the commitment to promoting equal access to, and participation in skills and learning 'for all'.

Modern Apprenticeships (MAs) are a key element of the Scottish Government's *Skills for Scotland* strategy, with over 25,000 apprenticeship places on offer over 2011/12 and an overall investment of £73m in 2011/12. MAs offer people aged over 16 paid employment combined with workplace training and off-the-job learning, in order to gain new and enhanced skills and recognised qualifications. In light of high levels of youth unemployment as well as signals (coming from Sector Skills Councils) about current and future skills shortages, it is not surprising that governments across the UK are expanding Apprenticeship programmes.

Equal participation in MAs provides an excellent opportunity to further equal participation in the labour market and reduce persistent levels of poverty experienced by certain equalities groups. However, low levels of participation of people from equalities groups in apprenticeship programmes present a serious challenge to this opportunity. The EOC investigation from 2003 found that MAs mirrored the gender segregation of jobs in the wider labour market and perpetuated gender segregation (Fuller, Beck, & Unwin, 2005; Miller, 2005; Thomson, McKay, Campbell, & Gillespie, 2005). Further research by Beck et al. (2006) revealed issues with regards to race, while the Equality Impact Assessment carried out by Skills Development Scotland in 2010 recognised 'the continuing low participation rates of the three equalities groups [ethnicity, disability, gender] in all National Training Programmes' (Robertson, 2010). The EHRC's own review found 'little change' with regards to gender and disability and a small increase in BME participation in MAs (Fuller & Davey, 2010). In England the proportion of apprentices declaring learning difficulty/disability fell significantly between 2005 and 2011 (Little, 2012). The persistence of gender segregation issues has been very recently re-stated in research by WiSE (2013, "Analysis of the Modern Apprenticeship Programme in Scotland").

While governments have no influence on the number and equality profile of apprenticeships created from within the private sector, the rise of the 'social benefit' agenda in public sector procurement (McCrudden 2004),

combined with the introduction of Public Sector Equality Duty (PSED) in 2011 provides two key elements that may potentially 'change the game'. The former element means that public authorities can stimulate the creation of more apprenticeships; the latter means that public authorities can (to some extent), and in fact should, influence the recruitment process in a way that new apprentices reflect the population profile in a more truthful and fairer way than has been so far, particularly with regards to equality groups.

The PSED is contained within section 149 of the Equality Act 2010. It requires those public bodies which are subject to the duty to have due regard to 'advance equality of opportunity between people who share a protected characteristic and people who do not share it'. Advancing equality of opportunity involves having due regard to the need to 'encourage people with certain protected characteristics to participate in public life or in other activities where their participation is disproportionately low' (EHRC 2013b, p7).

In terms of public procurement, the successful contractor is required to fulfil the requirements of the PSED in respect of the public function that it is performing. Although this is a statutory duty on the contractor, it would usually be set out in the contract conditions (Cabinet Office 2013). Spelling out the duty in the contract strengthens the public authority's legal position in case it was challenged. Similarly, the public body should ask the contractor to collect any evidence of compliance with PSED (for example, equality monitoring data); such evidence should be evaluated by the public body to make sure that the contractor is actually fulfilling PSED (EHRC 2013b).

From the point of view of organisations that have an interest in promoting equality – such as the EHRC - it is of great importance to know to what extent, and how PSED is adhered to in practice. What one wishes to know is what public bodies *intend*, what they actually *do*, and what the outcomes of their activity *are*. Is there a link between these elements? While the PSED purposefully does not prescribe in detail what duty holders should do, one would nevertheless hope, if not expect, that in the context of under-representation in Modern Apprenticeships the following sequence will occur:

- (a) The duty of paying ‘due regard’ to promoting equalities is ‘internalised’ by the agency that is a duty holder, resulting in the agency genuinely *intending* to promote equality;
- (b) Having this genuine intention results in the agency actively re-thinking which of its tools can be used to alleviate inequalities, and as part of this, procurement activity is identified as an opportunity for improving outcomes for under-represented groups;
- (c) The agency’s Equality Officer and/or the procurement team identify which equality groups are under-represented in relevance to the sector in which works/services are going to be carried out, and creatively plan what positive actions could be successfully employed in recruitment. They then formulate special contractual conditions which ask the contractor to carry out these positive actions, and to collect relevant evidence.
- (d) The contractor carries out the actions described in special equality conditions. The evidence collected by the contractor (e.g. copies of job adverts; equality monitoring data) is used by the agency’s Equality Officer and/or procurement team to evaluate whether the contractor has fulfilled its contractual obligations.

In this context, the EHRC has commissioned a team of researchers from Heriot-Watt University to carry out a study into the extent to which equality conditions are actually used by public bodies, and their effectiveness on the ground. This report contains findings from the study.

UK

As part of our investigation into what, if any, equality conditions are required by public bodies when carrying out procurement in Modern Apprenticeships, we have approached thirteen public authorities, of which ten replied to our inquiry. Among the respondents, seven are Scottish (Scottish Enterprise, Highlands & Islands Enterprise, Creative Scotland, Transport Scotland, Scottish Natural Heritage, City of Edinburgh Council and Glasgow City Council) while three are based in England (Camden Borough Council, Transport for London, The Highways Agency). We have additionally reviewed a sample of Single

Outcome Agreements and other policy documents for Scottish Local Authorities.

Transport for London

TfL has identified severe skills shortages in the Transport Industry and recognised that by providing the industry with a diverse pool of apprentices two positive outcomes would be achieved: the industry would be provided with a skilled and sustainable workforce for the future, while at the same time high levels of youth unemployment in the city (particularly in BAME communities) could be reduced. Hence it can be said that a mixed business and moral case for diversity is the driver for TfL to seek positive equality outcomes for apprenticeships created as a result of TfL procurement.

TfL harnessed its significant supplier chain network to provide employment, training and apprenticeships opportunities for young BAME Londoners which are under-represented in the transportation and engineering sector. TfL have a Supplier Skills Team (SST) whose role it is to work with suppliers to assist them in maximising the skills and employment opportunities that arise from TfL contracts. The SST has worked with over 100 TfL suppliers since 2009 and has generated over 2400 Apprenticeships. 38 per cent of apprentices within TfL's supply chain are currently BAME (the national average is 10.7 per cent³; 47% of London's residents aged 16-24 were non-White in 2011⁴). Two specific projects (Vital Rail and Cleshar) have achieved even better outcomes as 69 per cent of young apprentices employed on them were BAME. As well as Vital Rail and Cleshar wishing to reflect TfL's values to ensure that 'we are reflecting the community within which we serve', they also sought to attract local young people to their apprenticeships due to the shift pattern nature of work. Considering the scale of London's diversity, local recruitment enabled these two companies to fairly readily tackle under-representation of BAME apprentices.

TfL's success in creating apprenticeship opportunities for BAME groups has been achieved not via the inclusion of special equality conditions in

³ http://www.thedataservice.org.uk/NR/rdonlyres/69EFC69B-C189-46C4-93C4-6B161D744073/0/March2013_Apprenticeship_Starts.xls (data for 2011/12, accessed 04 May 2013).

⁴ <http://www.nomisweb.co.uk/census/2011/DC6201EW> (accessed 10 May 2013).

contracts but rather by advising and supporting suppliers with their apprenticeship recruitment activity on a voluntary basis. Where relevant, TfL require that their Tier One contractors monitor and report back on the diversity data of their staff.

The sustainability of Vital Rail and Cleshar apprenticeships cannot be evidenced yet as these particular apprentices have not yet completed their Track Maintenance Apprenticeships. However TfL expects that when they do they will progress on to either a Level 3 Apprenticeship or into another permanent role within the business. Importantly, in SST's opinion their activities have not only supported young people into available apprenticeships, but have also worked to challenge industry perceptions and have begun to change the way in which their suppliers recruit.

Glasgow Commonwealth Games

Glasgow is the largest and most deprived of all Scottish cities: of all datazones in the 5% most deprived datazones in Scotland, 45.5% were found in Glasgow City in SIMD 2012 (SG 2013c), with a large number of these being in the East of the city. Since the mid-1970s efforts have been made to re-develop the inner city and tackle urban problems. Clyde Gateway Urban Regeneration Company, established in 2007, is the latest vehicle to have been created to regenerate the East End. It is looking to implement a large investment programme over a period of 20 years (2007-2027) to create new jobs, housing and inward investment.

The regeneration of the East End was given impetus in 2007 when Glasgow won the bid for hosting the 2014 Commonwealth Games. (The Scottish Government and Glasgow City Council – both covered by the specific PSED – are contributing £298 million towards the cost of staging the Games; see GCC n.d.). As one of the key aspects of Games-related economic regeneration in the East End is increasing employment opportunities, taking on apprentices has been a feature of construction projects associated with the Commonwealth Games. Delivered through the Glasgow City Council's Community Benefits in Procurement (CBIP) policy, the Commonwealth Apprentices Initiative (CAI) has been targeted at specific equalities groups within the city as part of the Youth Employability Partnership. Since the launch of the programme, over

2,000 young people have taken up apprenticeships on the construction and delivery of key Games venues. It is also supported by the Commonwealth Jobs Fund and Commonwealth Graduate Fund.

Many strategies across the City underpin the focus on equalities in employability. Overall, the City's employment strategies focus effort on young people and ensuring early experiences of unemployment are avoided and positive post-school destinations are delivered. Most recently, the Equality Outcomes commit the authority to increasing the number of apprenticeships and ensuring they reflect the diversity of the City's population and target specific groups such as BAME young people, those accessing disability benefits, and lone parents.

Glasgow City Council was contacted for further details of these programmes as well as for data related to equalities monitoring of apprenticeships delivered by the CAI. No information was forthcoming timeously. However, examples of good practice delivered through CBIP include sustained apprenticeships for 18 care leavers and the use of social enterprise providing work support to disabled people in contracts such as catering.

The City of Edinburgh Council

The City of Edinburgh Council has included the prioritisation of equalities and diversity in employment as part of its broader Sustainable Procurement Policy, including working with SMEs supporting BAME groups, disabled people and women to secure contracts. It is also committed to delivering apprenticeships to support the More Choices More Chances group since the policy was implemented 2011.

Although it is a relatively new policy the authority are beginning to make an impact. In tender processes for major procurement packages, such as the council house building programme 21st Century Homes, the Edinburgh's Hogmanay events, the extension to the Edinburgh International Conference Centre and refurbishment of the Assembly Rooms the Council asked bidders to describe what community benefits in procurement they would deliver, for example: committing to providing work placement or training opportunities to those in education; recruitment of long-term unemployed, disadvantaged or young people; providing opportunities for involvement in the event/in delivering the

event to community organisations/social enterprises/SMEs; and proposals to provide outreach/educational events or programmes with the communities (e.g. schools, community groups) closely associated with or impacted by the event. Answers to these questions are used to assess tenders. At least 15 modern apprenticeships have been delivered across a number of projects and many more jobs provided for new entrants to the labour market. However, in its Invitations to Tender the CEC does not specifically mention 'under-represented groups' or equality groups other than 'young people', hence not pushing bidders to consider under-representation by gender, ethnicity or disability. Recent examples of the Council's procurement activity suggest that in their tenders bidders do offer to employ young people but not other equality groups which may be under-represented. There is no formal monitoring system.

Scottish Enterprise

While the Scottish Enterprise requires contractors to provide specific community and social benefit proposals where appropriate to the projects, it only 'encourages' that they look at apprenticeships and other training or work experience for the unemployed or disadvantaged. The agency also emphasised that they 'always look to ensure that we do not discriminate in anything we ask for'. We can interpret that SE does not use its procurement powers to create apprenticeships, and is averse to promoting positive action in recruitment.

Transport Scotland

The recent drafting of the contract documents for the Forth Replacement Crossing has been used as a model for recent Transport Scotland projects, particularly in relation to apprenticeships. Under this project, an obligation was placed on the contractor to secure a minimum number of site based apprenticeships. An iterative approach was followed where the initial estimate of the number of opportunities that it was considered could be created was based on a simple analysis of the number of graduates and apprentices employed by civil engineering contractors relative to their turnover. This estimate was then refined in consultation with the industry and other relevant organisations to arrive at a target of 5%, which was considered to strike the right balance between the

contractual requirements and the contractor's ability to provide such training places. The number of training positions was subsequently revised following discussions with the tenderers during the procurement process to arrive at the final targets incorporated into the contract.

The clause relating to apprenticeships does not specifically relate to equalities. With regards to this, Transport Scotland places an obligation upon the contractor to comply with the relevant labour Laws, 'including the Race Relations Act 1976'. It is surprising that one piece of expired piece of equalities legislation is mentioned in TS's contracts while the Equality Act 2010 is not.

With relevance to the PSED, TS places an obligation upon the contractor to provide monthly progress reports, demonstrating their compliance with the training and employment opportunities, together with details of employee's gender, ethnic origin, time since last employment and details of any training programmes. Any failure by the contractor to meet their contractual obligations may result in money being withheld from contract payments until remedial action has been agreed. Transport Scotland has stated that there have been no problems of this nature to date on the Forth Replacement Crossing project as the Contractor is meeting or exceeding their obligations.

The Highways Agency

The Highways Agency's official policy recognises the legal duty that the Agency holds with regards to the promotion of diversity and equal opportunities. However, the second statement in the following quote also suggests an institutional 'buy-in': 'We and our supply chain must fulfil the legal duty to promote equality and eradicate any discrimination or harassment. We will continue to work with our suppliers to develop the full scope of diversity'.

The Agency carry out equality analysis on their contracts to be able to provide clear evidence that genuine due regard has been given to the Public Sector Equality Duty (PSED). The Agency has a standard clause relating to apprenticeships which can be inserted into any contract where it is deemed appropriate:

"The [Contractor/Supplier/Provider] takes all reasonable steps to ensure that for every £20,000,000 (twenty million pounds) paid to the [Contractor/Supplier/Provider] under this contract, at least one employee employed To Provide the [Works/Services] (which may include employees of the [Contractor/Supplier/Provider], any Subcontractor or supplier of the [Contractor/Supplier/Provider]) is on a formal apprenticeship programme under which he gets on and off the job training and gains a nationally recognised qualification."

The Agency does not employ contract-specific equality clauses about promoting equal participation of under-represented groups. Instead, a standard clause is used:

"Where possible in Providing the Works, the [Contractor/Supplier/Provider] co-operates with and assists the Employer to satisfy its duty under the Discrimination Acts to eliminate unlawful discrimination and to promote equality of opportunity between persons of different racial groups and between disabled people and other people".

However, if the equality analysis identifies any areas which require action then these may be dealt with via the use of an Inclusion Action Plan which is developed by the contractor with support from the Highways Agency's Project Sponsor and which then forms part of the performance measurement tool for the contract. Importantly for this report, the Inclusion Action Plan requires the contractor to:

"Seek ways to support, throughout the supply chain, the creation of apprenticeships, internships, work pairings, and college and workplace training places giving consideration to using these opportunities to encourage under-represented groups to join the sector", and "Take reasonable steps to attract, recruit and develop a workforce that is balanced in terms of groups with 'protected characteristics' at all levels within the organisation".

The Inclusion Action Plan is a starting point and can be adapted to address other elements which it is felt are relevant to an individual contract.

From the above description two points are of particular relevance for our report. Firstly, while the Highways Agency aims to ‘develop the full scope of diversity’ and recognises its duties under the PSED, the fact that its equality clauses are standard rather than contract-specific suggests that it does not actively guide contractors on promoting equal participation in apprenticeships (for example by stating which equality groups it expects the contractor to target in recruitment). Secondly, asking for one apprentice for every £20m value of the contract (including the possibility of making an existing employee into an apprentice) seems strikingly unambitious and as such is suggestive of the fact that the Agency does not see its procurement power as a tool for alleviating youth unemployment.

Highlands and Islands Enterprise, Creative Scotland, Scottish Natural Heritage, Camden Borough Council

The above-mentioned public authorities do not routinely ask contractors to employ apprentices.

Summary of UK findings

Our inquiry has revealed that five out of the ten public authorities that responded to our inquiry do sporadically ask contractors to recruit apprentices, and four (City of Edinburgh Council, Glasgow City Council, The Highways Agency and Transport for London) are aware of the potential of using procurement to achieve equality in Apprenticeships (and more widely, in labour market participation). However, none of the agencies use special equality conditions routinely.

The study has revealed that as it stands, the link between intention, activity and outcome does not meet expectations laid down by the designers of the PSED. While three organisations being studied (TfL, GCC and CEC) could be said to hold an intention to promote equal participation in the labour market, two of them (TfL and GCC) have actively taken action while only one (TfL) could actually provide evidence on the effectiveness of its actions.

The Transport for London’s case has provided particularly useful insights. Firstly, TfL’s drive for promoting equal participation predates the

PSED. Secondly, TfL has preferred to take a voluntary rather than a contractual route, with seemingly good results. This latter point does not rule out the contractual route as an effective one, but suggests it should not be seen as the only route. Furthermore, the fact that TfL approaches the monitoring of equality outcomes seriously confirms a genuine intention to further positive equality outcomes.

The case of Transport for London, when compared to other authorities shows that if an organisation has not purposefully set out to achieve equal participation, it is not likely to. This highlights the role of intention and institutional 'buy-in'.

However, even those authorities that genuinely intend to promote equal participation in apprenticeships via procurement may still need to surmount a number of obstacles on their way to achieving the desired outcome. The most obvious one is that - as we have seen in Parts 1 and 2 - the data on which equality groups are under-represented in a given sector (and in MAs) may be difficult to find, or may simply be non-existent. Capacity may be another barrier, including overloaded procurement officers and the absence of a dedicated equality officer. If no dedicated equality officer is employed, procurement teams may not be aware of inequalities in a given sector or may lack knowledge of where to look for equality data.

Finally, many authorities reviewed here seem to be lacking ambition with regards to the number of apprentices they ask contractors to recruit. Indeed, some organisations do not request any, which suggests the lack of recognition of procurement as a tool in combating youth unemployment. The Highways Agency's formula £20m delivering one apprentice is symptomatic here, as is the fact that it is more common to ask potential contractors to suggest how many apprentices they are prepared to take, instead of imposing a quota. Transport Scotland's experience with The Forth Replacement Crossing procurement suggests that in some industries, potential contractors may be opposing recruiting high numbers of apprentices.

Policy, Practice and Experiences elsewhere in Europe

As established at the outset in the Introduction to Part 3, while there is a recognition in the UK of the need to collect data on participants and beneficiaries of targeted actions in public procurement, this is the exception across other Member States of the European Union and neighbouring countries. Similarly, as will be demonstrated in the following sections, the promotion of improved equality and diversity in the labour market and in training especially tends to be addressed in different ways in different countries. Indeed, the long-established and formal training and apprenticeship systems in Germany, Austria and some other nations tend to offer alternative routes into the labour market for some excluded or disadvantaged groups.

Overall, in many economies across Europe the policy intent of greater equality and diversity is apparent but the collection and evaluation of data much less so, in comparison with the UK, as information is not regularly collected on equalities groups. In this section, where policies, practices and experiences elsewhere in Europe are examined to inform what lessons there might be for Scotland and the UK, these research challenges are considered towards the conclusion.

In a report on 'Apprenticeship supply in the Member States of the European Union', the European Commission has suggested that 'Apprenticeship-type schemes facilitate rapid school-work transitions for students in comparison to exclusively school-based VET [vocational education and training] schemes' (CEC, 2010). However, their comprehensive literature review confirms that 'access to apprenticeship-type studies is subject to important biases in terms of gender, ethnic origin or ability considerations', and there is clear evidence of segregation by gender and ethnicity in some specific apprenticeship-type studies and professions. Young people with a 'migration background' also face more difficulties in accessing (company-based) vocational training.

Such aspects of exclusion are assessed by Ebersold. In particular, he argues that:

Despite the diversification of VET opportunities and progress made in providing students with SEN⁵ with the same opportunities as their non disabled peers, difficulties still remain.... [including] Access to apprenticeship remains indeed difficult. (Ebersold, 2012, p1)

Waldschmidt and Meinert (2010) come to similar conclusions in the case of Germany where 90% of the school leavers with cognitive disabilities end up in sheltered workshops. Norway has a history of recognising and actively attempting to address discrimination in the training and vocational labour markets (OECD, 1997). It is noted, however, that:

immigrants who have Norwegian as their second language and pupils with special training needs and handicapped have greater difficulties than the lot when it comes to obtaining an apprenticeship place ... Girls may have greater difficulties than boys getting an apprenticeship contract within certain male-dominated professions. (OECD, 1997, p40)

For school-leavers generally, those with lower academic grades are in danger of exclusion from such formalised training and some Member States (e.g. Denmark, France, Germany, United Kingdom) have taken a number of public initiatives to counteract this effect (CEC, 2010, p126-127).

The conclusions to the European Commission report (CEC, 2010) are of note in the context of this research on public procurement in that there is, at best, oblique reference to using contracts pro-actively to encourage better integration. The Commission highlights the widespread concerns of dilution e.g. apprentices being recruited as a source of cheap labour, while there remain important biases as discussed above. In addressing such policy objectives as inclusion, equality and diversity, they recommend that Member States should be encouraging wider participation in apprenticeships:

'basically through the provision of special support measures for this group of students (ad-hoc training places, special transition training programmes, extra

⁵ SEN – special educational needs

support programmes, etc.) or the support to enterprises to incorporate these individuals into their training supply. (CEC, 2010, p130)

This clearly does not envisage a role for public procurement or new legislation to coerce employers but rather suggests a more passive approach. Confirming the dominating consideration given to competitiveness as a rationale for any labour market action, they conclude:

Finally, policy makers and enterprises should take actions to counteract future skilled labour shortage problems identified in several EU Member States (for instance, favouring the integration of foreign workers into the national enterprises). (CEC, 2010, p130)

Such a weak commitment at the EU level to explicit inclusive policies and laws to promote equality in apprenticeship schemes is consistent with the widespread adoption of basic International Labour Organisation (ILO) standards. As a minimum, therefore, the ILO Convention 94 seems to have been fairly universally adopted as an essential requirement in public procurement:

The Labour Clauses (Public Contracts) Convention and the accompanying Recommendation have their origins in legislation introduced in Great Britain at the turn of the 20th century and similar legislation later adopted by the United States regarding the use of “fair wages” clauses in government contracts. Convention No. 94 and Recommendation No. 84 were adopted in 1949, at the time of the post-Second World War reconstruction, soon after the creation of the United Nations and the World Bank. (ILO, 2008, p5)

The UK origins of this Convention and its long history are interesting in the context of this report. Recognising that there have been significant changes in the public procurement environment in recent times, the ILO has argued that:

At the national level, new forms of government contracting have appeared, notably “public–private partnerships” (PPPs), which involve complex legal and financial arrangements to ensure the funding for and carrying out of large infrastructure projects, especially in the transport, energy, telecommunications, public health, waste management and water distribution sectors. (ILO, 2008, p9)

They continue that, by 2008, there had also been a move towards ‘sustainable public procurement’ which can:

drive social improvements - whether this is guaranteeing good working conditions for publicly contracted construction workers ..., providing new employment opportunities for marginalised groups ... (Procura+ Manual – A guide to cost-effective sustainable public procurement, 2nd ed., 2007, quoted in ILO, 2008, p10).

This Convention, which appears in many of the reports uncovered in this research, therefore does not make specific reference to apprenticeships, training or other forms of vocational education:

In short, Convention No. 94 does not establish labour standards but requires that existing standards in a district/industry be effectively applied. The aim of the Convention is to remove wages and working conditions from the price competition necessarily involved in public tendering. (ILO, 2008, p15)

The Convention does not preclude more demanding social clauses being inserted into public procurement contracts, so for example there may be:

affirmative action measures with a view to promoting the employment of women or of vulnerable groups. In practice, a number of countries use public procurement contracts to pursue broader social policy objectives, such as the promotion of employment for long-term

unemployed, young persons, disabled or migrant workers, etc. (ILO, 2008, p25)

Two comments are required here to compare the wording of this convention to the interpretation in the UK. Here, examples of 'affirmative action measures' as positive discrimination, in the form of exclusive rights to particular jobs etc., are in the main deemed to be illegal although positive actions are generally permitted. Also, while this statement suggests 'in practice' some countries use contracts to attempt to address inequality and lack of diversity, the reality may be less obvious, and the lack of data makes this difficult to confirm in other cases as discussed above. At local or regional levels, in Norway for example, the organization and management of training has been the responsibility of specific social partner bodies, in the Norwegian case – 'vocational training committees'. In the 1990s, these were:

assigned a new, important and extensive task, namely responsibility for assigning apprentices to enterprises. This made it necessary for the committees to work actively with the branch organisations and enterprises to draw up needs analyses and overviews of available apprenticeship places. (OECD, 1997, p68)

It therefore fell to them to assist in the inclusion agenda, rather than through public procurement means.

In almost all cases where ILO Convention 94 is explicitly incorporated into public procurement it is presented as almost a 'do no harm' approach. Since 2008, when the ILO 'Practical Guide' published, it might well be expected that there has been no pressure from employers and contractors to adopt clauses to promote inclusion of disadvantaged groups in employment. Recent history indeed would not support such improvements, which tend to be introduced when labour markets are tight during prolonged periods of expansion and so of labour and skill shortages. The experiences in Norway and the Netherlands are indicative of such cyclical effects (Dropping et al., 2000).

Reports on various social clauses in different EU countries reveal that none includes apprenticeships or training, and they tend to be dominated by pay issues (Schulten et al., 2012). Some do include

‘vocational training’ and/or ‘gender equality’ and/or ‘disabled people’, but clearly these are secondary to terms and conditions for mainstream members of the labour force, reflecting the ILO Convention.

No suggestion is offered in reports by such commentators as Dropping et al. (2000) that public procurement might have had a role in pursuing this objective of integration but also the moves towards an individualised approach is consistent with the employability agenda, where the onus is on the individual and their advisors to make their way in the labour market.

A collective of organisations representing the disadvantaged in the labour market (ENAR et al., 2009) have argued for a more pro-active approach to public procurement with social clauses used to:

stimulate labour market participation of ethnic minorities by demanding training and on the job learning as an execution condition for sizeable and long lasting contracts. A percentage of the estimated working hours can be set aside for training and on the job learning. In this way it can overcome offer side barriers on the part of ethnic minorities. The quality of the training can be a subcriterion for the award of the contract. (ENAR et al., 2009, p2)

So, moves to improve the status and position of, for instance, disabled people in the Netherlands in the 1990s were challenged by employers so that a weaker set of outcomes was the result. More general labour clauses in Danish public contracts were seen as almost costless in some cases in Aarhus. However; ‘social clauses in public procurement have little influence on the suppliers’ price... According to suppliers lifting a social responsibility is today an integrated way of working and therefore not something that causes costs to rise’ (CEMR, 2011, p4). This limited evidence of the manageable greater expense involved in including social clauses in public procurement is neither well disseminated nor accepted as it seems not to have convinced wider adoption of such positive actions. So, while there may be some indirect evidence that could be applied by governments to persuade social partners to re-evaluate their opposition to such obligations, more B2B (business –to-business)

knowledge exchange on the social and corporate costs and benefits of equality and diversity seems necessary if change is to be promoted.

The Council of European Municipalities and Regions (CEMR) (2011) offer suggestions that Greece, Luxembourg, Sweden and Scotland all have made use of social clauses though there is no specific mention of apprenticeships in these. In a 'Joint Statement' in June 2011, the direction of travel was indicated by the CEMR-Employers' Platform (CEMR-EP) and European Federation of Public Service Unions (EPSU) welcoming the EC Guide on socially responsible public procurement. Amongst other principles, they specifically endorsed the following definition in the guide:

- to promote employment opportunities (for example, youth employment, gender balance, long-term unemployed, migrants, people with disabilities);
- to promote decent work;
- to promote compliance with "social and labour rights", including collective agreements (CEMR, 2011, p2)

Revealing that a different and more pro-active use of contracting could be proposed, in the European Parliament report on 'Developing the full potential of public procurement – best value for money' (2011), the Committee on Employment and Social Affairs has called on the Committee on the Internal Market and Consumer Protection to recognise that:

public procurement, if used effectively, could be a real driver in promoting quality jobs, wages and conditions as well as equality, in developing skills and training...

The Committee continues that such measures:

Underlines the importance of ... including skills and training requirements, such as apprenticeship, traineeships and adult learning schemes, in contracting specifications as a long-term strategy...; stresses, however, that these latter actions must be directly linked to the subject matter of the contract and be proportionate

and economically advantageous; [and they continue that] the text of the directives needs to be more specific in terms of improving access for persons with disabilities

So, again, while there is a positive call in this report to use public procurement to raise levels of equality and diversity in training and apprenticeships, this is qualified by reference to economic considerations and 'best value for money'.

This evolving consensus in Europe that public procurement could be used to promote social and economic inclusion and diminish segregation in occupational labour markets is consistently tempered, therefore, by a domineering competitiveness agenda, even where there is no clear evidence that such policies might raise costs and so damage private interests. Turning to examples of where there have been initiatives in this field, it will be apparent that these remain limited in scope and application. As a caveat, it should be noted that not all these initiatives follow directly from the ILO Convention but have their drivers in national social contracts.

Examples of initiatives

Reproduced from CEMR (2011):

DENMARK

For some time in Denmark, there has been public and political attention directed at securing available apprenticeships for disadvantaged groups, this focus has been mostly targeted on ethnic minorities and to some extent also at women in the most male dominated sectors. But according to Stine Thidemann Faber, Associate Professor, Head of Centre for Equality, Diversity and Gender (EDGE), Aalborg University, Denmark:

the debate has not led to any political actions as such, and ... public contracts have not been used in Denmark as a way of changing the ways of working of private employers with regard to training and employing.
(personal communication, 2013)

In reviewing the literature and statistical underpinnings generally on the costs and benefits of addressing discrimination in Denmark, Emerek and

Jørgensen highlight the lack of policy and direct activities by government – and so of any indication that public procurement should be used to address this. They quote from the conclusions of a report by the British Council & MPG (2011) on policies for the integration of migrants and confirm that:

The main weakness is the State's few equality policies. Previous action plans, diversity programmes and platforms are good practice but temporary and not translated into the public duties that are increasing across Western Europe and North America (Emerek and Jørgensen, 2011, p19)

Overall, in the case of Denmark, Emerek and Jørgensen complain that the majority of studies only refer to the issue of ethnic minorities; however, they continue that LGBT issues have been given some focus in the business world. Tellingly, the concerns for other disadvantaged groups in the labour market are limited so that 'Disability is not discussed [apart from in the form of]... more flexible job opportunities – and jobs on special conditions' (2011, p20).

At the base of the general absence of pro-active use of policy and strategies, there is a lack of recognition of discrimination actually taking place in Denmark and moreover in the cases where it does happen the opinion is that 'it should be solved between the involved actors, e.g. the workplace, the immigrant and the trade union' (Emerek and Jørgensen, 2011, p22). Again, where there are initiatives in Denmark several have only recently been introduced so that data to verify successful outcomes are not as yet available. As before, as data are not collected routinely in many areas, there is no benchmark against which to assess improvements or appropriate population targets.

Generally, the preferred option for dealing with a lack of diversity in apprenticeships and the labour market is confined to sheltered employment, passive legislation (that is Acts, policies and practices that are not targeted specifically at addressing equality and diversity issues in a pro-active way) and individualised solutions. There is no recognition nor experience that conditions in public procurement contracts could have a positive role.

As with other European states, Denmark has ratified ILO Convention No. 94. The convention can be applied in all public tenders but, as is common across the continent, only has a binding effect in relation to government procurement. Nevertheless, several municipalities have decided to incorporate the provisions of the Convention into their procurement strategy. Frederiksberg Municipality, for example, has adopted a social clause, which is applicable when contracting out (Frederiksberg Kommune, 2010):

... Furthermore the social clauses aim to encourage the contract holder to establish apprenticeships within the construction area, where appropriate". (Source: Frederiksberg Municipality Plan)

Further detail is made available in

Frederiksberg 8th November 2010: Open record, local council, Main principles for the use of procurement / outsourcing in Frederiksberg , and Plan procedures, competitive exposure, capacity utilization (2011-2014).

Similarly, there are a few instances of sheltered employment and subsidies for taking on vulnerable groups during boom times but these seem to disappear as markets start to become easier for employers and as demands to address youth unemployment exclude other groups. Austria, Germany and Luxembourg have such examples of sheltered workshops and similar activities which are beyond the scope of this report. Instead, we now turn to present a set of policies and practices in public procurement which might offer lessons for Scotland.

FRANCE

The example from the City of Nantes below (CEC 2013) illustrates how a procurement framework has opened a space for social enterprises to work directly with the private sector in helping disadvantaged people into employment. The city of Nantes in North West France has been known for nearly 15 years as a leading innovator in using social clauses in public procurement to provide entry level jobs for the long term unemployed.

France revised its public procurement rules in 2006 allowing the condition that part of the work must be delivered by a specific target group. Nantes Metropole and surrounding suburban administrations awarded contracts using this clause. Work has included swimming pools, roads, bus routes, and a media centre. The types of trades comprise mason assistants, carpenters, painters, building workers, pavers, green space maintenance staff, plumbers, metal workers, plasterboard, and external cleaners.

The city has also encouraged the development of support structures for individuals. The 'Entreprise d'insertion' trains and prepares them to get jobs emerging in the private sector. In 2008, amongst other elements of these contracts:

- 183 contract operations contained a social clause;
- 75% of beneficiaries were accompanied by a local insertion company (a type of training and employment social enterprise).

The Nantes example illustrates how public works contracts can deliver a double benefit: the work that needs to be done, such as a road, as well as jobs and apprenticeships for excluded people.

Interestingly this is the only example offered in this very recent publication of using public procurement as a social innovation, even then it appears that there is minimal reference to apprenticeships; the interventions are for intermediate labour market schemes, social enterprises and similar active labour market projects. Equally notable was that this was the only reference to any publication proffered by the combined members of several LinkedIn groups covering 'European Public Procurement Network', 'Apprenticeships4All: Diversity in Apprenticeships', and 'EMSAAL - Skills Anticipation for Adult Learning' as well as through an open call.

THE NETHERLANDS: 'Social return' in the Netherlands

Social return on investment refers to a kind of non-financial value creation, typically in terms of social and environmental impacts. In the Netherlands the term "Social Return" specifically refers to the insertion of clauses in procurement tenders which stipulate that a minimum amount of money (usually 5% of the annual value) will be used for

various kinds of apprenticeships and for “work and learn” contracts for people who have a “greater distance from the labour market”.

People are explicitly defined by their distance from the labour market, as defined by various kinds of benefit take-up, to avoid unlawful discrimination. Although people who are selected as ‘at greater distance from the labour market’ often have minority ethnic backgrounds ⁶, selection criteria for social return are normally based on various types of benefit take-up, particularly benefits associated with unemployment and/or disability.

Over half of Dutch provinces are currently including social return clauses in procurement (Andriessen & Brouwer, 2012), and over 60% of municipalities are estimated to do so (Andriessen, Brouwer, & Smit, 2011). According to the new procurement law (1st of April 2013), National Government is obliged to include social return clauses in all tenders with a value above 250,000 Euro. Public sector bodies as well as private companies also have a number of other legal pressures to ensure a diversity of recruitment for apprenticeships and employment.

Effectiveness of Social Return

A number of concerns have been raised regarding the effect of the widespread adoption of social return clauses on specific sectors. Small and medium sized companies have reported considerable difficulty in being awarded government contracts due to social return obligations in procurement. While small companies may already employ many people who may be demographically similar to those defined to be “at a distance from the labour market” the characteristics of the existing labour force is not normally taken into account in social return clauses. Smaller companies often found it impossible to take on new employees or apprentices for a single assignment, which had in their view created an unfair competitive advantage for large companies (Andriessen, Giesen, & van Wijk, 2012).

Specific problems may also arise in sectors where much of the contract price is taken up by the costs of delivery, for example in infrastructure. It is argued that this leads to unrealistically high rates of social return on

⁶ Phone conversation with Jacobien Muntz-Beekhuis from Pianoo, expertise centre in procurement.

the labour portion of the contract price. Some municipalities additionally impose rates which are far above the 5% requirement. The city of Rotterdam, for example, uses rates up to 50% (Andriessen, Giesen, & van Wijk, 2012).

Aside from the potential unequal effects on small and medium-sized companies, the focus on the employment of new apprentices or staff as opposed to an overall diverse labour force threatens some of the broader objectives of social return. When applied to temporary assignments, social return may offer very little prospect for the long-term employment of the people it aims to help. Companies which succeeded in winning contracts with social return clauses may find themselves in a situation where they have to get rid of already employed vulnerable employees in order to attract people who fall within the criteria (i.e. benefit recipients). Also, social return obligations often work as a short-term fix, with obligations lasting only for the duration of the contract.

Independent research organisation 'TNO – Innovation for Life', is campaigning for a different system to promote more diverse and inclusive labour market participation, through a better recognition of the systems companies already have in place to support groups which are distant from the labour market. A national system for the evaluation of the sustainable participation of 'people at a distance from the labour market' is currently being developed by TNO.

Legal and policy pressures on diversity of recruitment for Apprenticeships

Apprentices in the Netherlands are typically taken on by private and public sector bodies using a specific labour contract. As such, normal legislation pertaining to recruitment applies⁷. The Dutch 'Prohibition of Discrimination' has a number of exceptions which allow for affirmative action. For example, the prohibition on discrimination does not apply if the discrimination is a specific measure which seeks to employ women or persons belonging to a particular ethnic or cultural minority, where such discrimination is in reasonable proportion to that goal. Therefore, different forms of affirmative action can be used to reach inclusion

⁷ Information in this section was provided by the FNV (The united labour unions)

targets. Quotas are only permitted for women, some ethnic groups, disabled people and chronically ill people.

Young people in education or training, as well as long-term unemployed in a reintegration project are one of the target groups. An employer is entitled to subsidy for every employee who:

- is following practical training as part of an apprenticeship under a “learning and working contract” between the employer, the employee and the educational institution;
- is undertaking work carried out in the context of training on the basis of an educational contract between employer, employee and further education college;
- is a formerly unemployed person following a designated training programme towards an entry-level qualification

A variety of other incentives are used to promote diversity in particular industries. For example, employers in the construction sector and the painting sector benefit from lower unemployment insurance for apprentices with short-term contracts, giving employers an incentive to employ apprentices rather than other short-term contractors.

Until 2004, Dutch employers had a legal obligation to record the diversity of their work force as well as the actions they were taking to encourage greater diversity. This obligation, under the “Together Act” (law for the encouragement of labour force participation of minorities) expired in 2004. Yet, although the “Together Act” has expired, many collective labour agreements still include special provisions for schools and provisions for the participation of target groups which derive from their previous legal obligations. Such 'outdated' provisions are gradually disappearing as labour agreements are updated, and are being replaced by, or complemented with provisions relating to career and reintegration opportunities more generally. These agreements differ considerably from the old ones, in the sense that they no longer refer to specific target groups, and instead emphasise the duties of the employer to ensure that everyone in the industry has equal opportunities.

The extent to which this replacement process has taken place differs by sector, and in some sectors almost all collective agreements still include requirements to encourage the participation of people from target groups. Where collective agreements still include such clauses, it is a legal duty of both employers and employees to contribute to the implementation of such obligations.

Case study of sustainable procurement: Garbage collection in the municipality of Arnhem – Netherlands

In 2011, the municipality of Arnhem decided to put out a tender for the collection of garbage together with the municipalities Westervoort and Rheden. The municipality of Arnhem decided to add specific social return requirements in their tender, with respect to both environmental as well as social objectives. The contract was awarded in early 2012.

In collaboration with Consultancy bureau “Project Social Return”, which forms part of the municipality, the tender included a number of environmental requirements as well as social objectives.

Intent

The main social return objective was to provide work for people with a relatively large distance to the labour market, through a sustainable procurement policy. In this case, Arnhem chose to focus on the employment of people with a great(er) distance to the labour market. These people were identified as the recipients of ‘WWB benefit’, a benefit for employed and unemployed people, which raises low incomes to the minimum living requirement. This objective would be achieved by creating regular jobs, apprenticeships and work experience places for recipients of this benefit.

Mechanism

Through the terms of the contract, the chosen contractor was given responsibility for meeting its “Social Return” obligations, and was thus responsible for the recruitment and placement of the candidates. However, the Consultancy office “Project Social Return” was available as a point of contact to assist with the recruitment of staff who satisfied the target requirements. “Project Social Return” will also supervise,

monitor and report on the meeting of the social return obligations in the contract.

The contractor is obliged to spend a minimum of 5% of the annual value of the contract on the deployment of WWB benefit recipients. A minimum of 50% of this amount must be used for salaries. A maximum of €3000 per person can be used for training costs.

Activities

There was considerable support and enthusiasm for both the social and environmental sustainability objectives. The “Project Social Return” played a successful mediating role in selecting people from the target group. It was noted that there needs to be an ongoing evaluation of how realistic the requirements for social return are at the front end of delivery. The employer must ultimately decide whether people are suitable.

Evaluation

It is not certain at the moment whether all the requested social return activities can be carried out. Some of these problems are related to the city of Arnhem’s adoption of austerity targets, which has reduced the budget for waste collection. No overall evaluation of the meeting of the social return obligations is currently available.

Conclusions

The research of policy and practice across the UK and Europe, and of social democratic environments particularly, has revealed that there is very limited evidence that public procurements are used pro-actively anywhere as a vehicle to promote greater equality and diversity in (modern) apprenticeships. The almost universal adoption of the ILO Convention 94 has provided the foundations for a basic set of rights, but these have tended not to be cascaded down the urban and government hierarchy through legislation. Moreover, as argued by the ILO (2008), in the context of significant expansion of public-private partnerships there has been a failure to include binding clauses for greater equality and diversity in modern apprenticeships. This lost opportunity is especially important in the UK given the large scale promotion of PPP and PFI schemes in many areas of public services, and in Scotland through the initiatives pursued by the Scottish Futures Trust. The very length of

these schemes - typically twenty or thirty years – has made them ideal for overcoming the difficulties of reconciling the duration of apprenticeships and the pursuit of short-term austerity ‘savings’ through contracting out.

We have found much more evidence of the use of ‘social benefits’ in procurement to alleviate youth unemployment than to promote participation of other equality groups under-represented in the labour market. Organisations tend to passively stick to standard equality clauses (which ask the contractor not to discriminate and to promote equality). This means that an opportunity to promote equal participation is in practice likely to be missed, as it is left to the contractor to become familiar with the nature and extent of inequalities at play, and then to formulate appropriate positive actions.

Our analysis of UK case studies has highlighted the importance of institutional ‘buy-in’ with regards to promoting equal participation. To put it straightforwardly, if an organisation does not purposefully set out to achieve equal participation, it is not likely to be achieved. In our view this does not hold promise for taking punitive action against authorities that have not ‘bought into’ the equalities agenda.

Apart from the lack of genuine intention, UK and European case studies have revealed poor practice in relation to monitoring contractors’ recruitment activity, as well as the general lack of ambition in relation to the number of apprenticeships that are being sought. On this latter point, Scotland could learn from the Netherlands where at least 5% of the contract’s value is meant to be used for recruiting individuals who are ‘distant from the labour market’. Asking for one apprentice for every £20m of the contract’s value (as practiced by the Highways Agency) has none other than a marginal effect on equality groups under-represented in the labour market.

Even where authorities are more ambitious in how many apprenticeships are created, the Dutch experience clearly warns that sustainability may be the Achilles’ heel of trying to improve labour market participation via employment on short-term contracts.

It remains to be seen what effect the recent guidance (‘Buying better outcomes’, EHRC 2013b) is going to have on groups under-represented

in Modern Apprenticeships. Our recommendation would be to add an example to the Guidance describing the following hypothetical case:

‘A public body contracted the delivery of a construction project which included the recruitment of apprentices. The procurement team and the Equality Officer liaised during the initial stages of the procurement process and identified that women, ethnic minorities and disabled people are under-represented in the construction sector. They also formulated positive actions that held promise for attracting applicants from these three groups. As a result, the contract included a special clause stating that the contractor ought to advertise available apprenticeship positions in media sources targeting these groups, as well as to word the advertisement in an inviting way. The contract also asked the contractor to collect evidence on gender, ethnicity and disability status of applicants and apprentices appointed, as well as for copies of adverts and information on whether apprentices were offered employment at the end of their contract’.

While both the PSED and the ‘social benefit’ agenda in procurement are still in their early days, difficulties ‘on the ground’ uncovered in this study suggest that a more effective solution may lie elsewhere. Keep (2013) recommends following the Nordic model(s) of employment and economic policy as integral to achieving a ‘broad range of social and economic goals’. Interestingly, in the context of small nations generating ‘more and better jobs and more productive and competitive workplaces’ (Keep, 2013, p22), it is their overall economic and social systems that are applied to achieve these objectives, rather than resort to piecemeal and short-term public contracts. This embedding of strategic and system-wide objectives contrasts with the occasional initiatives pursued through public procurement that we have found in the UK.

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