

A REVIEW OF PUBLIC PROCUREMENT

FINDINGS AND RECOMMENDATIONS

February 2002

[Note: This is the revised, final version of the Report originally presented to the Executive Committee in September 2001. It incorporates amendments to some of the recommendations and supporting text following public consultation. The amendments are sidelined in the Report.]

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1. INTRODUCTION

Terms of Reference

1.1 This Report is a response to the following terms of reference for a Procurement Review Implementation Team set up by the Minister for Finance and Personnel in February 2001:

“Having regard to commitments in the draft¹ Programme for Government to “develop and implement proposals to improve Public Procurement”, and in the Department of Finance and Personnel’s Equality Scheme, to:

- *consider the findings and recommendations of the Strategic Review of Procurement Policy and of Purchasing Arrangements within the Northern Ireland Civil Service Departments (1999);*
- *identify the scope to use public procurement in Northern Ireland to further local social and economic objectives within the context of current EC and international law relating to procurement; and*
- *make recommendations for implementation to the Minister for submission to the Executive Committee by June 2001, including an assessment of the equality impact of the proposed policy framework for procurement to be adopted by Northern Ireland public bodies.”*

A list of the Team members is at Annex A.

Summary of the Report

1.2 The Report represents the Team’s findings, conclusions and recommendations. It is in 5 parts, following this introduction. Chapter 2 sketches out the background to the current review, the desirability of formulating a new policy on procurement in Northern Ireland, the principles that should underpin this new policy, and some of the consequences of basing policy on these principles. Chapter 3 recommends a new set of institutional arrangements, reflecting the proposals in the *Strategic Review of Procurement Policy and of Purchasing Arrangements within the Northern Ireland Civil Service Departments* (the Capita report). Chapter 4 sets out a series of recommendations on various operational issues. The 3 Chapters together are intended to address the first element in the terms of reference.

¹ These were subsequently confirmed in the final Programme for Government agreed in February 2001.

- 1.3 In Chapter 5, we turn to consider some of the issues relevant to the integration of economic, social and environmental policy into procurement, and some of the implications (and modalities) of doing so. This is intended to address the second element in the terms of reference. We conclude (in Chapters 6 and 7) with some discussion on the arguments for and against providing some legislative underpinning to our recommendations and with a brief consideration of the important linkages we see between the first two elements in the terms of reference, and therefore between our recommendations.
- 1.4 The third element in the terms of reference, the need to undertake a full equality impact assessment of the new policy as a whole, will be completed after this report has been considered by the Minister. This will include full consultation on the likely impact of the policy on the promotion of equality of opportunity with those directly affected by the policy including the Equality Commission, public bodies, voluntary, community and trade union organisations.

Consultation and Other Issues

- 1.5 We have been conscious of this element in our terms of reference throughout our deliberations. In preparing these draft proposals we have consulted the Equality Commission and considered submissions to Government on this issue made by it and its predecessor bodies. In addition, members of the Review Team attended a workshop on procurement policy at a recent DFP Equality Conference. We have also taken account of recommendations made by the Standing Advisory Commission on Human Rights (SACHR) and the Northern Ireland Affairs Committee of the House of Commons.
- 1.6 The work of the Procurement Review Implementation Team takes place at a time when two other important initiatives which will be relevant to this work are underway.
- 1.7 The Taskforce on Employability and Long Term Unemployment, chaired by Dr Farren, is starting to examine a wide range of issues relating to Employability, and it will seek to create an action plan in this area which will integrate work across Northern Ireland Departments and Agencies. There is a clear linkage between the work of the Taskforce and recommendations that we make in Chapter 5 of this report in relation to the unemployed. We have not, because of the activities of this Taskforce, considered other ways to deliver more effective measures to address unemployment, and have stuck closely to our terms of reference which require us to consider public procurement.

- 1.8 The second initiative is the Review of Potential New Sources of Funding which is fulfilling the commitment in the Programme for Government and will by March 2002 have “reviewed the opportunities for the use of private finance in all major service provisions/ infrastructure projects to increase investment and provide innovative and best value for money solutions through Public and Private Partnerships and the Private Finance Initiative (PPP/ PFI)”. The review will also need to consider the roles of Departments in future work in this area, including the role of the Economic Policy Unit in the Office of the First Minister and Deputy First Minister, the Central Finance Group in the Department of Finance and Personnel and the central procurement organisation proposed in this report (Chapter 3).

Next Steps

- 1.9 Having concluded our work, the procedure we envisage is that when the report is submitted to the Minister of Finance and Personnel he will refer it to his Executive colleagues and issue it for public consultation. We would suggest a period for consultation of 2 months and that consultees should be asked to consider in particular the equality implications of our recommendations. Meanwhile, our own general assessment of the equality impact of our proposals is set out in Annex B. Given the need for a full equality impact assessment and the fact that this can only be completed after public consultation, we assume that the Executive will note our recommendations in principle at this stage. However, we consider that the process of putting in place the interim organisational and other institutional arrangements set out in Chapter 3 could and should begin now, pending the outcome of public consultation on the report, and we hope that the Executive will agree. Following the public consultation, we assume that the Executive will take final decisions on the report.
- 1.10 We anticipate that our recommendations will be implemented over a period of time. Further thought as to the practical outworking of some of them will be required and for others there will be a need to ensure that they are operationally feasible. We consider, for example, that it should take about 2 years from the formation of the new institutional arrangements to deliver the revised procurement policies. A summary of our recommendations is provided in Annex C and a select bibliography in Annex D.

2. TOWARDS A NEW PUBLIC PROCUREMENT POLICY IN NORTHERN IRELAND

Why a Revised Public Procurement Policy in Northern Ireland?

- 2.1 Several factors have led to the desirability of rethinking public procurement policy in Northern Ireland. The importance of public procurement has increased significantly in Northern Ireland. The public procurement market in Northern Ireland amounts to over £1.2 billion per year of government expenditure².
- 2.2 There have been significant changes in the purposes for which public procurement is used, in particular the contracting out of services during the 1990s. The methods of funding public procurement have diversified, with the introduction of PFI/PPP, and subsequently the “Best Value” initiative in local government, which although not yet formally legislated is in operation on a voluntary basis.
- 2.3 The Capita report found considerable variation in the quality of public procurement processes in Northern Ireland and recommended a radical overhaul of the way in which it is carried out. One of the major problems which Capita identified was that it was not possible to demonstrate that procurement in Northern Ireland was delivering “best value for money”, either in the level of its transaction costs or in the procurement decisions made. We consider that it is vital that, in the future, procurement in Northern Ireland should be consistently and demonstrably more efficient and effective in meeting customers’ needs. The recommendations we make in this report aim to achieve such efficiencies and achieve significant best value for money improvements, through a combination of policy and institutional reform. We aim to achieve more consistent and transparent practice, embodying such processes as Gateway Reviews and assessment against excellence models. These will facilitate benchmarking with OGC and other best practice organisations. In the United Kingdom, the Gershon Report proposed an equivalent revision of public procurement procedures, resulting in the establishment of a new institutional structure for public procurement carried out by Whitehall Departments.

² Based on estimates within the Capita Report, which acknowledged that information on procurement spend was not accurate: it is almost certainly an underestimate of procurement spend in Northern Ireland, applying the Gershon definition of procurement.

- 2.4 In these respects, changes in procurement in Northern Ireland are similar to those in the rest of the United Kingdom. In other respects, however, the position of procurement in Northern Ireland is significantly different. Expenditure on public procurement amounts to 24.3% of expenditure controlled by Northern Ireland Departments. Given that public expenditure is proportionately higher in Northern Ireland than in the rest of the United Kingdom, public procurement is likely to have a commensurately greater role in the Northern Ireland economy than in the rest of the United Kingdom.
- 2.5 Public procurement by Northern Ireland public bodies has become a devolved responsibility of the Northern Ireland Executive and Assembly, under the Northern Ireland Act 1998.
- 2.6 Finally, section 75 of the Northern Ireland Act 1998 introduced a requirement on all public bodies in Northern Ireland to have due regard to the need to promote equality of opportunity between a wide range of groups in carrying out their functions in Northern Ireland. This includes procurement. The House of Commons Northern Ireland Affairs Committee recommended that a review of public procurement should be carried out, taking account of this duty. The Northern Ireland Executive committed itself to that review in the Programme for Government.

Previous Public Procurement Policy in Northern Ireland

- 2.7 The previous policy relating to public procurement in Northern Ireland consisted mainly in complying with European Community and other international obligations, complying with United Kingdom law relating to public procurement, and Treasury guidance where applicable, but otherwise substantially leaving a considerable discretion to Northern Ireland Departments and other public bodies as to how procurement was carried out.

Constraints on Developing and Implementing New Policy in Northern Ireland

- 2.8 There are constraints on the Northern Ireland Executive in developing and implementing a revised policy on public procurement. The requirements of European Community law, and of the World Trade Organisation's *Government Procurement Agreement* (which applies to the United Kingdom), are mandatory and require that certain parts of the public procurement process follow very specific requirements. International relations and relations with the European Community are excepted matters under the Northern Ireland Act 1998³.
- 2.9 The Northern Ireland Act 1998 provides that the Secretary of State for Northern Ireland may decide not to submit for Royal Assent a Bill which contains a provision which he considers "would have an adverse effect on the operation of the single market in goods and services within the United Kingdom"⁴. If the Secretary of State considers that any subordinate legislation made, confirmed or approved by a Minister or Northern Ireland Department contains a provision which the Secretary of State considers "would have an adverse effect on the operation of the single market in goods and services within the United Kingdom" the Secretary of State may by order revoke the legislation⁵. There are also constraints arising from the Human Rights Act 1998 and the incorporation of the European Convention on Human Rights into Northern Ireland domestic law.
- 2.10 Lastly, in terms of development, section 75 of the Northern Ireland Act requires, as we have seen, that public bodies in Northern Ireland carry out their procurement functions paying due regard to the need to promote equality of opportunity. This requirement applies to all designated public bodies. These include all contracting authorities operating within devolved areas. It also includes other Whitehall Departments operating in Northern Ireland in areas that are not devolved, such as the Northern Ireland Office.

³ A Concordat has been agreed between the Northern Ireland Executive and the United Kingdom Government on Co-ordination of EU. International and Policy Issues on Public Procurement that, although not legally enforceable, is binding in honour. This provides in particular, in paragraph 3.3 that "the Northern Ireland Executive will seek to ensure that the policy and legal framework for public procurement in Northern Ireland complies appropriately with the UK's EU and international obligations and will not prejudice the UK's objective of seeking EU and international measures which are effective in opening procurement markets and which do not impose any unnecessary burdens or constraints on purchasers or suppliers".

⁴ Northern Ireland Act 1998, section 14(5)(b).

⁵ Northern Ireland Act 1998, section 26(4)(b).

- 2.11 Although procurement is a devolved responsibility, the Executive's legislative responsibility for procurement extends only to procurement carried out by contracting authorities within devolved areas, such as Northern Ireland Departments and their Agencies, Northern Ireland public corporations, Northern Ireland non-Departmental public bodies (including Health and Social Services Boards, Education and Library Boards, and Health Service Trusts), and local authorities. It does *not* include the Northern Ireland Office, or Whitehall Departments operating in Northern Ireland, such as the Ministry of Defence, where procurement operates under Treasury guidance. The proposed policies in this Report will therefore only apply to public bodies for which the Executive has legislative responsibility.

What is Public Procurement?

- 2.12 An important issue is whether the awarding of grants should be included within the activity of public procurement. There is a complex relationship between grants and procurement (narrowly defined). Suppose a grant is made by Department A to Body B and it uses some or all of that grant money to procure works, services or supplies. Where Body B is **a public body**, then we envisage that the principles we develop should apply to that body's procurement activity.
- 2.13 There is a more complex question, however: should the award of the grant by Department A to Body B itself be regarded as "procurement"? We understand that, in terms of accountability to the PAC and NIAO, little difference will arise between grant-giving and procurement narrowly defined. There are, however, 2 practical issues which have led us to conclude that we should define procurement more narrowly. The first is that the legal requirements applying to procurement are, in important respects, different from those attaching to grant giving by public bodies, particularly in the context of European Community law. The second is that the quantity and quality of information about grant-giving by Northern Ireland Departments is even thinner than that regarding procurement. The Capita Report, for example, did not include grant-giving for the purposes of the empirical research it carried out on procurement in Northern Ireland.
- 2.14 We have, therefore, taken a pragmatic approach to the issue and not included grant-giving within the scope of the meaning we attach to procurement, unless it would otherwise be included within the definition included in European Community law. We regard, however, many of the principles we suggest for procurement as equally applicable to grant-giving where appropriate and we **recommend** that the Procurement Board consider the implications of this report for grant-giving within the first 2 years of its operations.

- 2.15 We further **recommend** therefore that the following **definition of public procurement** should be adopted:

Public procurement is the process of the acquisition, usually by means of a contractual arrangement after public competition, of goods, services, works, and other supplies by the public service. This process spans the whole life cycle from initial conception and definition of the needs of the public service through to the end of the useful life of an asset or the end of a contract. Both conventionally funded and more innovative types of funded projects (for example PPP/PFI arrangements with the private sector) are included, as are the use of the private sector to deliver services previously delivered directly by the public sector (“contracting out”) and in-house consortia bidding in a public procurement process.

"Best Value for Money"

- 2.16 In developing a policy on public procurement for Northern Ireland public bodies, the principles that should guide public bodies in carrying out procurement need to be agreed first. The concept of "best value for money" is central to public procurement policy, but it is often misunderstood. Sometimes, it appears to be used as reflecting only "effectiveness" or "efficiency". We understand it in a wider, more encompassing sense as summing up the 12 principles we consider below. When a procurement process results in these principles being satisfied to an acceptable extent, we can say that the process has resulted in "best value for money". We **recommend**, therefore, that "**best value for money**" should be defined as "***the optimum combination of whole life cost and quality (or fitness for purpose) to meet the customer's requirement.***" This definition allows for the inclusion, as appropriate, of social, economic and environmental goals within the procurement process. We **recommend** that best value for money thus defined should be the primary objective of procurement policy. We also **recommend** that the Procurement Board and procurement staff in general (see Chapter 3) should work with audit to establish criteria for and identify methods of evidencing best value for money, as thus defined.

First Principles

2.17 We **recommend** that the following principles should be adopted as the basis of Northern Ireland public procurement policy in the future:

- i. **Transparency**: openness and clarity in policy and its delivery.
- ii. **Integrity**: no corruption, no collusion with suppliers or others.
- iii. **Competitive supply**: normally this will be best achieved by acquiring goods and services by competition unless there are convincing reasons to the contrary⁶.
- iv. **Effectiveness**: meeting the commercial, regulatory and socio-economic goals of government in a balanced manner appropriate to the requirement.
- v. **Efficiency**: ensuring that procurement processes are carried out as cost effectively as possible.
- vi. **Fair-dealing**: treating suppliers fairly and without unfair discrimination, including protection of confidentiality where required, and without imposing unnecessary burdens or constraints on suppliers and potential suppliers.
- vii. **Responsiveness**: meeting the aspirations, expectations and needs of the community served by the procurement.
- viii. **Informed decision-making**: basing decisions on accurate information and monitoring to see that requirements are being met.
- ix. **Consistency**: suppliers should, all other things being equal, be able to expect the same general procurement policy across the public sector in Northern Ireland.
- x. **Legality**: conformity to EC and other legal requirements.

⁶ Buying goods and services through competition remains the best way of ensuring the best price for the quality of service required. But it is not always appropriate nor cost effective for low value items, complex goods and services or where no well developed market exists. Increasingly, best value for money depends on combining value competition with innovative ways of procurement while managing the risks associated with innovation effectively, and drawing on latest advances in electronic commerce and good procurement practice (NAO Modernising Procurement).

- xi. **Integration:** joined-up government, meaning that procurement policy should pay due regard to other Northern Ireland government economic and social policies, rather than cut across them.
- xii. **Accountability:** effective mechanisms must be in place in order to enable Accounting Officers and their equivalents in other bodies to discharge their personal responsibility on issues of procurement risk and expenditure.

Some Policy Implications of Adopting These Principles

2.18 There are several implications of adopting these principles as the basis for a new public procurement policy. We **recommend** that:

- i. in assessing the extent to which Departments meet their procurement goals, both quantifiable and non-quantifiable or intangible costs and benefits should be taken into account on a whole life basis;
- ii. purchasers should, as a matter of enlightened self-interest, use their commercial influence to help improve the competitiveness of their suppliers;
- iii. although current legislative provisions derived from European law attempt to provide remedies for lack of fair-dealing, it is appropriate in the Northern Ireland context for anti-discrimination legislation to apply unambiguously to public procurement;
- iv. wider economic, social and environmental strategies and initiatives of the devolved administration in Northern Ireland should be more closely integrated into procurement policy;
- v. better information, management and monitoring systems should be established for more informed decision-making. There should be much more emphasis than before on contract management and systems need to be established to ensure this;

- vi. in respect of strategic procurements and policy in general, more consultation with the wider community and with other stakeholders in the procurement system, especially members of the public who will be directly affected by the outcomes of the procurement, should become integrated into the procurement process where appropriate. In particular, public bodies should be aware of the implications of the extensive public consultation requirements arising from section 75 of the Northern Ireland Act, and its application to their procurement function;
- vii. best practice in procurement should be generalised across the system, drawing on existing centres of expertise;
- viii. an authoritative source should provide comprehensive legal advice on procurement to Northern Ireland public bodies;
- ix. new institutional structures should be put in place to give effect to the principles discussed above;
- x. greater concentration should be placed on ensuring that appropriate procurement policies and principles cascade down the supply chain;
- xi. better trained and managed professional procurement teams are required in order to operate these principles, given the increasing complexity of procurement, and the need to exercise judgement in complex circumstances;
- xii. greater concern should be demonstrated with integrating the North-South, as well as the UK and European-wide procurement markets, if efficiency gains are to be optimised;
- xiii. greater collaboration between public bodies should take place in order to achieve efficiency gains realisable from aggregation. However, aggregation should not be seen as an end in itself. It should be pursued only to the extent that it meets the wider goals of procurement;
- xiv. the current Accounting Officer Memorandum, together with GANI etc, should be revised, as necessary, in order to reflect the new principles discussed above.

2.19 We further **recommend** that the policies and principles in this report, as developed and endorsed by the Executive, should apply to all Northern Ireland public bodies, including Northern Ireland Departments, non-Departmental public bodies (NDPBs), public corporations and local authorities in order to ensure appropriate consistency across the public sector. We are conscious, however, that we have not consulted with local authorities on any of these issues. We are particularly concerned, therefore, that local authorities and others should consider our recommendations and comment on their appropriateness from their experience.

3. NEW INSTITUTIONAL ARRANGEMENTS

Introduction

3.1 This Chapter sets out proposals for new procurement structures and organisation, building on the recommendations in the Capita report.

Overall Aim and Key Issues

3.2 The overall aim of the new arrangements is to achieve full implementation of the policy principles and other recommendations in this Report:

- i. ensuring that effective and credible policies are established and disseminated in an effective and credible way to all spending bodies deemed to be within the scope of the policy; and
- ii. monitoring progress towards improved procurement practices in a co-ordinated way.

3.3 Credibility will come if the policies are sensible, the overall organisation is clearly seen to have expertise and authority, and there is clear two-way communication rather than purely a "top-down" approach. This credibility must extend beyond the procurement community, and be clearly recognised within the user community at all levels.

Proposed Organisation

3.4 In line with the Capita report, we **recommend** a high level **Procurement Board** supported by a **Central Procurement Body (CPB)** in DFP. The CPB should interact with the wider community in Northern Ireland, the Northern Ireland public sector generally and with **Centres of Procurement Expertise** in particular.

3.5 The Capita report recognised that a number of Centres of Expertise already exist across the public sector and proposed that they should remain and work along with the CPB within a Procurement Framework. We recommend in addition later in this Chapter that a **Procurement Practitioners Group** should be formally established. The Group would provide a forum for the CPB to interact with the Centres of Expertise and others, be advised and informed by them, and facilitate networking between them on all procurement matters, whether general or specific. While there will be no institutional or structural link between the CPB and the Procurement Practitioners Group, it is expected that they will work collaboratively to improve performance and develop, inform and disseminate public sector procurement policy.

The Procurement Board

- 3.6 Given the importance of this procurement initiative and our view that procurement policy should apply to all Northern Ireland public sector organisations, we believe that the Procurement Board should be clearly responsible to the Northern Ireland Executive and accountable to the Northern Ireland Assembly. We also agree with the Capita report that it should be chaired by the Minister of Finance and Personnel, who would, as appropriate, clear policy proposals with other members of the Executive Committee and provide periodic progress reports on the application and monitoring of the policy and on progress with implementing the recommendations in this Report. We **recommend** accordingly.
- 3.7 We are convinced that a high level Board is essential and that there should be the maximum possible authority and accountability for procurement activity covered by the policy approved by the Executive Committee. We therefore agree with the Capita report that membership should comprise the Permanent Secretaries of Northern Ireland Departments, the Treasury Officer of Accounts, Director of the CPB and two "outside" experts, along with a Comptroller and Auditor General (C&AG) representative as an observer. There is also an argument that the Head of EPU, who has an oversight role on the development of joint financing of public expenditure, should be a member of the Board. We consider that Permanent Secretaries should serve on the Board in order for there to be sufficient authority to carry through these recommendations effectively.
- 3.8 It will be essential to ensure that the Procurement Board has authority/responsibility in all areas of the public sector covered by the procurement policy. If this is not the case, the Board membership should be widened as necessary to reflect the major areas of expenditure and accountability within the wider public sector.
- 3.9 We **recommend** that the roles and responsibilities of the Procurement Board should be:
- i. further development of the overarching public procurement policy proposed in this Report for Northern Ireland Departments, their Agencies and relevant public bodies;
 - ii. establishing the strategies and objectives for implementing the procurement policy, including PPP and PFI;

- iii. directing matters of public procurement policy and strategy approved by the Executive and making recommendations where appropriate to it;
- iv. ensuring adherence to legal obligations (including the implications of the Human Rights Act 1998 for procurement) and future development of EC legislation as they relate to procurement in the wider public sector;
- v. approving and monitoring the business plan and performance of the new CPB;
- vi. approving strategic targets for procurement performance, and monitoring progress against those targets, including the development of e-procurement;
- vii. ensuring that procurement policy pays due regard to the requirements of the Executive's wider policy commitments, including equality, New TSN and environmental standards;
- viii. monitoring implementation of procurement policy;
- ix. liaison with the Office of Government Commerce in accordance with the obligations mentioned in the Concordat on Co-ordination of EU, International and Policy Issues on Public Procurement.

The Central Procurement Body

- 3.10 We **recommend** that the roles and responsibilities of the CPB should be advising the Minister of Finance and Personnel on procurement matters and supporting the work of the Procurement Board by:
- i. developing and reviewing procurement policy proposals, in consultation with major stakeholders and Centres of Expertise, for endorsement by the Procurement Board and as appropriate, by the Executive;
 - ii. disseminating agreed policies to the public sector and monitoring their implementation;
 - iii. developing a common Strategic Procurement Framework;
 - iv. operating and maintaining a generic procurement process model;
 - v. developing management information on procurement expenditure;

- vi. collating/monitoring information on procurement performance across the public sector;
- vii. advising public sector procurers on the appropriate body to deal with high-value, strategically important procurements, whether this be the CPB, an appropriate Centre of Expertise or others;
- viii. maintaining a central expertise on the use of PFI and PPP;
- ix. providing procurement services, under Service Level Agreements, to Departments, Agencies and NDPBs which request them;
- x. developing the existing process for strategic management of key suppliers and in particular developing a "lead buyer" framework/network in collaboration with the Procurement Practitioners Group;
- xi. seeking out and promoting best practice in procurement from within the Procurement Practitioner Group or from the wider public sector, including promotion of necessary investment and taking account of particular constraints (for example, funding);
- xii. establishing and maintaining appropriate relationships with similar procurement organisations in England, Scotland, Wales and the Irish Republic, as well as Centres of Expertise and the private sector;
- xiii. supporting and encouraging Northern Ireland Departments, their Agencies and NDPBs to respond to the challenges and deliver the benefits of modern procurement; and
- xiv. promoting appropriate research on public sector procurement issues, and accessing methods of organisational learning and professional training for the benefit of wider Northern Ireland public sector procurement performance.

3.11 The Capita report proposed that the CPB should be located in DFP and that it should comprise, at least initially, 2 major groups (the Government Purchasing Agency (GPA) and Construction Service (CS)).

- 3.12 The Capita report also proposed that the high level structure should eventually, say in 2 to 3 years' time, incorporate the following elements:
- i. a Central Policy, Advisory and Support Group, incorporating training, best practice and research/organisational learning activities;
 - ii. a Major Projects Group, taking responsibility for PPP, construction, IT/IS and major service procurements not carried out by Centres of Expertise;
 - iii. a General Procurement Group, responsible for the procurement of other goods and services.
- 3.13 It is envisaged that, following Ministerial approval, the CPB will disseminate the overarching procurement policy and its further development to the public sector and periodically monitor implementation. The dissemination of policy will involve the Procurement Practitioners Group (see below) and the use of conferences, seminars or more general training.
- 3.14 We also envisage that the CPB will offer a fuller 'intelligent client' service to those parts of the public sector without in-house expertise, who are not receiving specialist or general procurement advice direct from an existing Centre of Expertise.
- 3.15 The issue of PPP and PFI is central to current procurement development, and it will be essential that the public sector has access to credible expertise. The Review of Potential New Sources of Funding, which is co-chaired by the Economic Policy Unit of OFMDFM and the Central Finance Group of DFP, will be examining the most effective organisation to retain PPP/PFI expertise. The Team believes that there are strong arguments that the CPB should be that organisation, as PPP/PFI is likely to be a major part of procurement policy in the foreseeable future. However, we recognise that the issue will not be fully resolved until Ministers have examined the conclusions of the Review of Potential New Sources of Funding.
- 3.16 We believe the issue of monitoring will also need further consideration. We envisage that the Procurement Board will require procurers within its remit to monitor their own performance, using a common framework for self-assessment such as the HM Treasury Procurement Excellence Model. If this is not to be the case, however, then common performance criteria will need to be developed by the CPB, in consultation with the family of procurement Centres of Expertise. While the CPB will not assess the performance of other procurers, whether or not they are

Centres of Expertise, it will facilitate the Procurement Board in its monitoring function by co-ordinating and collecting the appropriate information. Where procurers will not or cannot provide information on their performance, then the Procurement Board, on advice from the CPB, should consider and agree with the relevant Accounting Officer what mechanisms might be used to establish the level of procurement performance. It is also important in this context that internal and external audit is knowledgeable about the performance criteria and that where possible these should become an integral part of the internal and external audit process.

Centres of Expertise

- 3.17 A number of centres of specialist procurement expertise exist at the moment across the public sector in Northern Ireland. These were listed in the Capita report as Roads Service, Water Service, the Central Services Agency - Regional Supplies Service (CSA – RSS), Health Estates and the Education and Library Boards.
- 3.18 Generally, these Centres of Expertise have a focus on particular specialised areas and have good and long-standing links with their operational arms, their customer base and with similar specialised groups in GB and elsewhere. Their procurement activities are heavily interlinked with the area of responsibility which they support and we endorse the Capita report view that they are best co-located, as at the moment. We **recommend** accordingly. There will be other areas of expertise, for example the Northern Ireland Housing Executive. We **recommend** that an early task of the Procurement Board should be to agree the complete list, using the criteria outlined in paragraph 3.20.
- 3.19 It is also our view that the new organisational structures to be put in place should recognise and encourage these Centres whilst at the same time drawing on their expertise and identifying and sharing any best practice exemplars.
- 3.20 Centres of Expertise will be responsible for the implementation of procurement policy in their area. As a consequence they should be required to satisfy the Procurement Board that they have a unique procurement portfolio, an effective "intelligent client" competency, adequate expertise, an established and successful track record and a complaints procedure, and that they comply with appropriate standards. The methods/mechanisms by which Centres of Expertise could provide evidence to this effect can be proposed by the Procurement Practitioners Group, or can be encompassed more broadly by an assessment against the HM Treasury Procurement Excellence Model. We **recommend** that

the competency of Centres of Expertise should be reviewed by the Procurement Board on a periodic basis – say, a 3 year cycle.

3.21 Outside Northern Ireland, the Office of Government Commerce (OGC) is a significant Centre of Expertise in IT, telecommunications and potentially also in construction. Specific procurement advice and skills have been provided to public bodies in Northern Ireland in the past. OGC also has a significant relationship and influence on major IT suppliers, which is something that Northern Ireland could not successfully replicate because of its smaller market share. We would envisage therefore that the CPB, the Centres of Expertise and other public sector procurers in Northern Ireland would continue to access OGC frameworks and contracts, amended where appropriate to reflect local requirements.

3.22 Outside the Centres of Expertise, we would **recommend** that Northern Ireland Departments, their Agencies, NDPBs and public corporations, should carry out their procurement activities by means of documented Service Level Agreements with the Central Body or a relevant Centre of Expertise. Ultimately, the decision is for each Permanent Secretary who is accountable for procurement expenditure. In summary, however, we **recommend** that procurers should follow one of the following 3 routes for access to professional procurement services:

- i. use the CPB;
- ii. use a relevant Centre of Expertise;
- iii. seek recognition of own procurement services (whether in-house or provided through a third party) as a Centre of Expertise through the Procurement Board.

This mechanism should be applied by procurers for all routine and specialist procurements.

Procurement Practitioners Group

3.23 As considerable added value can be derived from these existing Centres of Expertise we **recommend** setting up a Procurement Practitioners Group (PPG) where representatives from the CPB and the Centres of Expertise would meet regularly to inform, test and develop policy and, where appropriate, operational issues.

- 3.24 Such an approach would ensure access to a very wide reservoir of knowledge from an established "family" of procurement experts and should draw the best from all those involved. We believe, more particularly, that:
- i. recognition of the importance of the Centres of Expertise will ensure their commitment and support;
 - ii. the involvement of Centres of Expertise will encourage others to recognise and support the systems and the policies which are developed and disseminated, and thus increase credibility;
 - iii. the existing interaction between Centres of Expertise and their counterparts elsewhere will ensure early warning, on a very wide front, of any cutting edge developments;
 - iv. the spenders who have used procurers outside this established family of experts will be encouraged to route more of their activity through the relevant Centre of Expertise, or through the CPB.
- 3.25 We **recommend** that the initial membership of the PPG should comprise the CPB, which would chair the Group, and the Centres of Expertise listed in the Capita report. Membership should be supplemented with representation from other bodies (for example, the Equality Commission), depending on the issues to be considered by the Group
- 3.26 We further **recommend** that the roles and responsibilities of the PPG should be to:
- i. contribute to the development of overarching procurement policy and the generic procurement process/model;
 - ii. collaborate with like organisations in Great Britain and the Irish Republic, share learning within the Group, and use information to inform/develop wider policy;
 - iii. assist in establishing a framework for savings targets and performance measures with customers/spenders, which meet the requirements of the Procurement Board;
 - iv. offer up areas of existing good practice for review/learning by the wider network of experts;
 - v. pilot leading edge developments on behalf of other Centres of Expertise;

- vi. develop proposals for operational policies and procedures which are in line with the overarching procurement policy for consideration by the CPB and Procurement Board;
- vii. establish and highlight constraints (including funding) which prevent implementation of overarching policy or particular good practice developments;
- viii. interact as necessary with the private sector including trade bodies.

Establishment of the Central Body

- 3.27 As already noted, the Capita report proposed that initially the existing procurement Agencies in DFP should be drawn together to form the CPB. The approach is similar to that in England following the Gershon Report, when the existing Whitehall Agencies and NDPBs were brought together to form the Office of Government Commerce (OGC).
- 3.28 We believe that this should be done in stages. The Construction Service procurement capability is focused on construction whilst the GPA have a more general procurement capability. The Construction Service's work covers the full extent of construction procurement – choice of procurement route, preparation of specification, appointment of construction team (consultants/contractor/sub-contractor and so on) check on delivery to specification. The Agency can also undertake design and maintenance activities. The GPA involvement, on the other hand, is generally focused on the provider appointment stage of general procurement.
- 3.29 In England, the Agencies and NDPBs making up the OGC were drawn together largely as they existed. An Alignment Review, after 12 months operation of the new arrangements, recommended restructuring and this has been approved by the GB Supervisory Board and has been implemented with effect from 1 April 2001.

- 3.30 We **recommend** that the most sensible way forward for introducing the proposed new organisational arrangements in Northern Ireland is to adopt the approach chosen by Gershon and implemented within Whitehall Departments. This would mean initially drawing together the Construction Service and Government Purchasing Agency, largely as they are but with a re-focus on procurement, under a single Director. The next step would be to undertake an alignment review which would recommend, within 6 months, the most appropriate structure for the future CPB and the functions it should discharge. The alignment review should include consideration of IT procurement and PPP/PFI expertise, taking account of the work of the E-Government Project Board and existing Centres of Expertise in this area.
- 3.31 To facilitate this process we consider that a small Implementation Group should be established temporarily in the Department of Finance and Personnel. The Group would take forward the recommendations in this Chapter, including the appointment of the Director of the proposed CPB. The Implementation Group would also be involved with the Director in the development of proposals for the future structure of the CPB - proposals which may well include absorbing the Implementation Group into the future CPB. During this transitional period and before the CPB structure is finally decided we **recommend** that the Construction Service Agency and Government Purchasing Agency should be drawn together into one body known as the Central Procurement and Construction Agency.
- 3.32 The model at Annex E sets out in organisational terms how the new Central Procurement and Construction Agency and the proposed Central Procurement Implementation Group in the Department might be drawn together. The Central Procurement Implementation Group would be compact and, until such time as the CPB is agreed and established, would draw assistance as required from the Central Procurement and Construction Agency – in much the same way as Accommodation and Construction Division currently draw substantial assistance from Construction Service on, for example, Building Regulation development. In effect, the specialist knowledge would be sourced from the new Agency, whose staff would undertake the bulk of the work. This specialist knowledge would include IT procurement and major projects.

Migration Plan

3.33 We **recommend** a sequence of steps as follows:

- i. set up the core group (the Central Procurement Implementation Group (CPIG)) in DFP. The Group would be tasked with taking forward the initial recommendations relating to organisation in this report, starting with the establishment of the Procurement Board and the appointment of the CPB's Director;
- ii. appoint the Director for the future CPB and establish the Procurement Practitioners Group. At this stage the GPA and Construction Service would be drawn together into one Agency (the Central Procurement and Construction Agency) under the new Director;
- iii. determine the most suitable structure for the CPB. This will be a matter primarily for the Procurement Board, in consultation with the Director and the CPIG. The Director will therefore have a major influence on the composition of the CPB which he/she will eventually lead. A 6 month period should be allowed for this process. The current Acting Chief Executives of the 2 Agencies would remain in post for the first 3 months of this period to assist the Director. Determination of the structure of the CPB should include an assessment of the totality of the services provided by the new Central Procurement and Construction Agency and how best they should be provided in the future. The exercise would replace the outstanding Reviews of the 2 existing Agencies;
- iv. implement the agreed CPB structure.

3.34 If the recommendations in this report are accepted, the Procurement Board, the CPB (in its initial form) and the Director could be in place within 8 months. A further 7 months would be required to establish the CPB in its final form (see Annex F).

4. OPERATIONAL PROCUREMENT PROCESSES AND PRACTICE

Introduction

4.1 In this Chapter, recommendations made by Capita in their report of December 1999 and accepted by the Executive in November 2000 are presented and endorsed by the Implementation Team. However, it is important to note that in the meantime a number of (we believe complementary) structural changes have occurred in the wider public sector procurement community including:

- the establishment and development of the Office of Government Procurement (OGC) as part of the UK Treasury (in England);
- the formation of the NHS Purchasing and Supply Agency (in England); and
- the establishment of a Procurement Board in Scotland accountable to the Scottish Parliament.

In addition, there is currently a review of public sector procurement taking place in Wales.

4.2 In the context of applying our proposals to District Councils in Northern Ireland, it is also important to note that a task force led by Sir Ian Byatt has carried out a review of local government procurement in England. Their report recommends improvements towards best practice procurement similar to ours, thus strengthening the case for their adoption by District Councils here.

4.3 We consider that, as Capita drew heavily on existing reports on UK procurement policy, in particular the Gershon Report, it is appropriate that OGC initiatives and the wider UK perspective on these matters are reflected here. We also refer (where appropriate) to reports by the National Audit Office, particularly *Modernising Procurement* (October 1999), *Construction* (2000) and *Consultancy* (2001), which reflect continuing change and improvement in practice, and provide detailed guidance on the development of a more progressive and supportive approach to procurement by audit. Where elements of the Capita report or these wider reports can (or should) be implemented by the new arrangements set out in Chapter 3 of this document, they are highlighted as recommendations. In addition, we identify “quick wins” where short term benefits may be achieved as a means of motivating the procurement community to full implementation of our recommendations, even ahead of any institutional changes being implemented.

- 4.4 We note finally in this introductory section that our proposals are fully in line with the principles set out in Chapter 2.

Strategic Issues

- 4.5 The Capita report (paragraph 2.2) advocated the development of a common strategic framework along similar lines to that proposed by Gershon and adopted by OGC:
- i. standard procurement process;
 - ii. common performance measures;
 - iii. key standards;
 - iv. common systems;
 - v. key values.
- 4.6 OGC has developed each of these areas further for implementation by Departments and Agencies in England and in the rest of the UK in respect of reserved functions (see OGC Alignment Review (November 2000)).
- 4.7 The common “overarching” policy for the Northern Ireland public sector is set out in Chapter 2 of this report. The structures set out in Chapter 3 should further develop this policy into a common strategic framework for application across all Northern Ireland public sector organisations. In particular, the development of common systems across the Northern Ireland public sector would require significant effort and investment, and the practicality and likely benefits of such single common systems must be established. We have already recommended above that the CPB in consultation with the PPG should be charged with developing a common strategic framework for procurement in the Northern Ireland public sector for approval by the Procurement Board, and with evaluating the benefits of common systems (Chapter 3, paragraph 3.10).
- 4.8 The Capita report (paragraph 2.2) recommended that responsibility for ensuring that procurement policy is adhered to should be set at Permanent Secretary level. We have already indicated that we regard the role of Permanent Secretaries on the Procurement Board as critical to the consistent application of procurement policy at every level of government in Northern Ireland and we therefore strongly endorse the Capita recommendation. The commitment of all levels of management will be needed to achieve better procurement.

- 4.9 We also endorse the recommendation of the National Audit Office (1999) report on Modernising Procurement that Departments and Agencies should give procurement staff the authority and management backing to influence all purchasing, especially that of goods and services critical to the operation of the organisation (paragraph 26.5). We therefore **recommend** that the CPB propose mechanisms to the Procurement Board which will have the effect of giving procurement staff in the CPB or the relevant Centre of Expertise the authority to influence all strategic procurement conducted by that area. We further **recommend** that the Procurement Board should review the efficiency and effectiveness of expenditure control mechanisms currently in force (for example, the Health Service “mini-code” (Capita report, paragraph 3.2.2).

Strategic and Routine Procurement

- 4.10 The Capita report (paragraph 8.2.2) recommended that guidelines should be formulated by the CPB for approval by the Procurement Board “for organisations to support the effective identification of *[strategic]* projects and the level of involvement for central procurement”. We **recommend** that these guidelines should be established by CPB in conjunction with PPG.

- 4.11 We further **recommend** that:

- i. opportunities for improvements should be sought with strategic suppliers, consistent with an enlightened supplier management policy, with the objective of delivering additional benefits, shared appropriately between customer and supplier (Capita report, paragraph 7.2); and
- ii. in planning and managing their procurement activities, public sector organisations should clearly distinguish strategic and routine requirements, adopt contract strategies appropriate to the nature of the requirement, and ensure that highly skilled and appropriately qualified staff are allocated to strategic contracts (Capita report, paragraph 7.7).

Principles of Good Practice

4.12 We endorse the following 6 principles of good practice identified in Modernising Procurement (NAO 1999 (paragraphs 2.8-2.34)):

- i. ***Have a procurement strategy***: a comprehensive procurement strategy should include an analysis of the key goods and services, and their cost, which a Department or Agency needs to deliver its outputs; an assessment of the way in which these goods are purchased; the performance of key suppliers; and the scope for price reductions and improvements in quality of service. The strategy should also consider the performance of the Department's purchasing unit and the potential to reduce processing costs through for example, using electronic commerce, procurement cards and framework agreements. The strategy should consider the scope to adopt innovative approaches to improve procurement while reliably managing associated risks.
- ii. ***Plan early and clearly agree requirements***: Early planning so that contract specifications for strategically important goods and services are clear and unambiguous is essential. Other benefits of planning early are that the procurement contract can more easily be tailored to customers' needs; the purchaser's bargaining power is increased; early consultation with suppliers can help ensure that the contract reflects latest technological breakthroughs and innovations; reliable risk management can be put in place, especially for more complex procurements such as major IT projects where risk management strategies covering specification through to delivery and successful implementation are required; and more time can be devoted to determining how the performance of suppliers of strategically important services will be assessed and built into contracts from the outset.
- iii. ***Actively manage contracts***: High value strategic procurements are generally more complex and carry greater risks. Too often procurement staff are brought into the procurement process too late, after key decisions have been taken. They need to be involved at an early stage to ensure that they understand market conditions, in particular cost drivers and the latest technological solutions; to identify the risks and develop risk management strategies to draw up tender specifications which are output based and reflect user needs; and to plan a contract management strategy with appropriate performance measures.

- iv. **Think about the supply chain:** A supply chain management approach is more likely to be useful for Departments and Agencies when:
- the existing supply market is organised in the form of a chain or network, for example major equipment purchases, major service contracts such as cleaning, and construction;
 - there are significant logistics or distribution aspects to the contract, for example delivery of suppliers to dispersed users such as local offices;
 - the procurement is high profile or sensitive requiring a close and active overview by contract managers, for example major equipment, IT and construction projects.

The costs of adopting supply chain management have to be assessed in terms of the likely benefits it will deliver. For example, the need for a possibly longer pre-tender phase in appraising suppliers' approach to managing their supply chain has to be compared to the potential for better product quality and lower costs in the longer term. Supply chain management is unlikely to be cost effective for ongoing supplies contracts of less than £100,000 in value. Values for services and works contracts will need to be determined. In many cases, it will probably be sufficient for Departments and Agencies to seek assurance from their key suppliers that they are actively managing their supply chains to reduce costs and improve quality and that this is reflected in the prices they pass on to their customers.

- v. **Seek continuous improvement:** there are two main ways of doing this:
- *building quality aspects in to contracts:* there is scope for making greater use of incentives, either to reward good performance or to discourage poor performance, in procurement contracts particularly where a service is provided. Expert procurement advice is needed to define the performance measures and incorporate these into the contract, but the advantages are considerable;

- *closer working with key suppliers*: for large scale contracts running for several years there would be advantages in working more closely with key suppliers in terms of improved quality of the product or service provided and reduced costs for mutual benefit.
- vi. **Monitor performance**: if clients are to have assurance that they are getting the best deal from their procurement of goods and services in terms of price, quality of service and supplier performance they need to have reliable information and systems to assess the performance of all stages of the procurement process. Without such information it is very difficult to benchmark prices to ensure that they remain competitive and to track whether each year the procurement of goods is improving and that efficiency targets and savings are being realised.

4.13 We **recommend** that the 6 principles of good practice be considered by the Procurement Board for adoption, through (where appropriate) the CPB and PPG, across all public sector organisations in relation to strategic requirements.

A Role in Major Projects

4.14 The Central Procurement Body should provide expertise, advice and a co-ordinating role, and where appropriate directly procure strategic requirements (for example, PPP projects, major information technology and systems programmes, property and accommodation projects and major service contracts). We **recommend** that:

- i. such types of procurement should be routed through either the CPB or an existing Centre of Expertise (for example, Health Estates for major Health Service construction projects); and
- ii. that further consideration should be given to the role of the CPB in establishing the potential for PPP/PFI (Capita report, paragraph 8.2.2) in the context of the work on the Review of Potential New Sources of Funding for the public sector.

4.15 We also **recommend** that:

- i. gateway reviews, as developed by OGC and adopted by all UK Government Departments, should be carried out at critical stages of project planning and development of all major capital projects;

- ii. a Northern Ireland version of Achieving Excellence goals and targets for new construction contracts should be developed and adopted, covering reductions in capital costs, construction times and cost reliability; removal of bottlenecks; development of benchmarking comparators; and improved supplier satisfaction by dates to be agreed (Capita report, Construction report No 2, paragraph 7.0).

Management of the Supply Base

- 4.16 We **recommend** that the Central Procurement Body (CPB) in conjunction with the Centres of Expertise should develop a common process to optimise the quality and performance of the supplier base and define their roles in the management of the overall relationship with suppliers (based on Gershon (1999))

Aggregation, Collaboration and Rationalisation

- 4.17 We **recommend** that the Procurement Board should request a more detailed analysis of purchasing requirements for each Department and that this should be co-ordinated by CPB and analysed to form the basis of a progressive process of aggregation and rationalisation (Capita report, paragraph 3.1.2). Opportunities for aggregation of services, for example consultancy, as well as goods contracts across wider geographical areas should be examined. We also **recommend** that, following the analysis, lead buyer arrangements (involving CPB and Centres of Expertise, contracting on behalf of the wider public sector in Northern Ireland) should be developed and agreed through PPG.
- 4.18 We further **recommend** that CPB should explore the adoption of appropriate product and supplier coding systems in order to facilitate aggregation, contract and supplier management and monitoring and evaluation (Capita report, paragraph 3.1.2). We recognise, however, that significant product and supplier portfolios have little commonality within the Northern Ireland public sector (for example, medical and surgical items, educational consumables, roads) and that this will need to be taken into consideration when reviewing the likely benefits to be derived.
- 4.19 Finally in this section, we **recommend** that collaborative opportunities should be developed by CPB and Centres of Expertise with parallel procurement bodies in Great Britain and the Irish Republic (Capita report, paragraph 3.1.2). Aggregation and collaboration should not, however, be pursued as aims in themselves, but only to the extent that they meet the objectives outlined above.

Management Information

- 4.20 The Capita report identifies the need for better management information on procurement. We therefore **recommend** that the Procurement Board should require Departments, Agencies, NDPBs and public corporations to develop better management information about:
- i. the amount they spend on procurement, on what, and with which suppliers. Such information can be co-ordinated by the CPB or the relevant Centre of Expertise;
 - ii. supplier prices, and benchmark these to ensure that they remain competitive;
 - iii. supplier performance more broadly;
 - iv. the cost of Departments', Agencies' and individual purchasing functions - the procurement overhead should be defined and reviewed by the Procurement Board to assess whether it remains reasonable;
 - v. improved measures for and means of recording transaction costs based on good staff time recording arrangements should be developed. This should apply to advisory activities as well as direct procurement. (Capita report, paragraph 4.2).
- 4.21 Procurement organisations should be resourced appropriately to provide such management information. Appropriate benchmarking programmes of prices, whole life costs, and broader indicators of supplier performance should be conducted to provide comparisons as part of continuous performance improvement (Capita report, paragraph 7.2).
- 4.22 We **recommend** the development of a common supplier database which can be accessed by the Northern Ireland public sector. Common supplier appraisal documentation (and accreditation) should also be developed for appropriate areas of common supplier use, across commodities commonly used by significant numbers of public sector organisations (Capita report, paragraph 3.2.2).
- 4.23 We **recommend** that the CPB should lead in the development of (and investment in) vendor rating with other procurement organisations. Vendor rating systems must be developed and applied with care, including working with suppliers to develop and operate such systems. There are already similar developments elsewhere. Consideration should be given to working in parallel with the Office of Government Commerce or with UK Departments or Agencies. Common vendor rating systems are likely

to be most effective where the maximum commonality of supplier base exists (Capita report, paragraph 5.2).

- 4.24 In some sectors of the supply market, the Procurement Board will need to determine whether the base of suppliers is broad enough to maintain competition and innovation. The Procurement Board should ensure that appropriate action is taken by the CPB and Centres of Expertise to stimulate the interest of potential suppliers (Gershon 1999).

Supplier Sourcing and Management

- 4.25 The Capita report (paragraph 5.34) found that tendering for Government contracts can be burdensome and costly to suppliers. Particular difficulties were the time required to complete documentation, inadequate information on likely expenditure by clients on call-off contracts, and difficulty in contacting staff with knowledge of specific contracting opportunities. These findings echo those of the DTI (2000), European Commission (1998) and Gershon (1999). Departments need to be more sensitive to the burdens which they place on suppliers especially in respect of tendering. The development of lead buyer arrangements and common supplier assessment processes should facilitate efficient management of tendering direct with one specified organisation.

- 4.26 We **recommend** that the CPB should develop sourcing strategies based upon best practice as set out below:

- i. procurement risk should be assessed as part of the development of a contract strategy, and managed by sharing identified risks appropriately between customer and supplier. In particular, responsibility for monitoring supplier performance should be allocated to the party best placed to do so, which will often be the Centre of Expertise/CPB or another organisation, depending on agreed lead buyer arrangements in place, rather than the customer. Duplication of responsibility for monitoring should be avoided. Monitoring and reporting arrangements must be identified at an early stage of contract planning and incorporated in the specification and tender documentation;
- ii. innovation by suppliers should be encouraged where appropriate, for example by not specifying requirements in a prescriptive manner, but by stating the required output and performance levels;

- iii. the CPB should encourage the development of more effective relationships with suppliers. This requires a less adversarial approach between both parties, particularly for strategically important suppliers with whom joint approaches to improving supply performance are necessary (Capita report, paragraph 5.2);
- iv. all suppliers should be given the opportunity to be debriefed on the outcome of the supplier selection process. This should have the effect of improving future bids, and contribute to the competitiveness of the supply market.

Management and Staff Resources

- 4.27 Apart from the GPA, CSA - RSS and other possible Centres of Expertise identified by Capita, opportunities for career progression within the procurement function are limited. Similarly, movement of staff between procurement organisations is hampered by differences in grading, pay and competences and qualifications required at various levels.
- 4.28 We **recommend** that the CPB, Centres of Expertise and PPG should facilitate the operation of an effective public sector procurement career path structure embracing staff from as wide a range of public sector organisations as is feasible by:
- i. identifying full-time procurement posts in those organisations;
 - ii. developing common sets of procurement competences necessary at various levels across procurement organisations;
 - iii. providing procurement staff with information on opportunities to transfer to posts in other organisations either on secondment or on a permanent basis;
 - iv. leading procurement staff development.
- 4.29 The Capita report (paragraph 4.1) found that whilst the GPA and CSA - RSS have significant proportions of appropriately qualified staff, the majority of procurement done outside of the central procurement organisations was being undertaken without the benefit of appropriate procurement expertise. A graduate level procurement qualification was the standard set for full-time procurement staff by the Comprehensive Spending Review paper 'Efficiency in Civil Government Procurement' (Treasury/Cabinet Office 1998, paragraph 5.12).

- 4.30 We **recommend** that the Procurement Board should ensure that pressure is maintained to increase the proportion of staff with procurement skills appropriate to their level of responsibilities. This should apply not only to staff of the CPB, but also to other organisations which carry out procurement.
- 4.31 Management should ensure that qualified procurement staff are appropriately rewarded, graded with sufficient seniority to take full responsibility for managing contracts and able to apply the expertise in best practice procurement they have acquired. This will also ensure satisfactory retention rates. Qualified procurement staff should be involved in critical procurements such as major service or Private Finance Initiative contracts where they could add the greatest value (based on Gershon 1999).

Electronic Procurement

- 4.32 Given the recommendations of Gershon (1999) and NAO (1999), and the significance of electronic commerce to the Modernising Government agenda, we **recommend** that the Procurement Board should ensure that electronic commerce becomes a standard way of doing business for Departments, Agencies, NDPBs and public corporations, by setting strategic targets for the adoption of electronic transactions (including the use of appropriate Procurement cards). Effort is needed to promote the benefits of electronic commerce to Departments and Agencies focusing in particular on the use of electronic publishing through the Government Procurement Website and other Departmental/Agency websites; tendering electronically; and monitoring prices and suppliers' performance. Doing business electronically offers the potential of faster purchasing and more reliable up-to-date information to secure better prices (NAO (1999), paragraphs 3.18 and 3.19).
- 4.33 The CPB and PPG should encourage further the initiatives to reduce the time spent on purchasing routine items. Procurement cards, electronic procurement and framework agreements can all help to reduce purchasing process costs and release procurement staff's time to target their expertise on higher value more strategically important goods and services. The Procurement Board, through the CPB and Centres of Expertise, should promote greater take-up of procurement cards in their respective areas of responsibility, particularly in those areas most likely to benefit significantly from using them.

4.34 In respect of e-procurement, the Capita report (paragraphs 6.2 and 6.3) recommended that:

- i. as many smaller value invoices as possible should be submitted through electronic data interchange (EDI) and matched electronically, with payment through the Bankers Automated Clearing System (BACS) using GPA and CSA systems;
- ii. the GPA should consider reducing its number of suppliers for selected product ranges on its EROS system;
- iii. the GPA should agree with Departments the use of Goods Received Notes as a means of triggering an electronic match with Purchase Orders and BACS payments;
- iv. if electronic invoicing is implemented, a cost benefit analysis should be carried out on transaction costs to compare purchasing card procedures with the EROS and other payment systems;
- v. suitable financial provision should be made available to CSA - RSS if the operation of the pilot purchasing card procedures is successful;
- vi. other e-commerce systems should be identified and assessed;
- vii. key standards should be established in respect of electronic procurement systems;
- viii. the CSA-RSS and the GPA should set up a network group within Northern Ireland to provide workshops and an advice forum for best practices in e-commerce.

The review team endorses these recommendations in broad terms and **recommends** that the Procurement Board should establish, as a matter of urgency, an e-commerce strategy which will allow this area of procurement to be developed in a co-ordinated and efficient manner.

Monitoring and Evaluation of Procurement Performance

4.35 We **recommend** that the Procurement Board should encourage the adoption of a common performance measurement system for procurement. The appropriateness of the Procurement Excellence Model developed by the Office of Government Commerce should be considered for this purpose (Capita report, paragraph 7.2).

- 4.36 Benchmarking should be built into management processes and undertaken on a regular basis (Capita report, paragraph 6.3).
- 4.37 The OGC has developed guidance on measurement of Best Value for Money from procurement. We **recommend** that the CPB and PPG should consider whether and how the methodology proposed may be implemented across all Northern Ireland public sector organisations.
- 4.38 The CPB and all public sector organisations engaged in procurement should continue to work in partnership with independent audit bodies, in particular the Northern Ireland Audit Office (NIAO) and the Local Government Auditor, as well as internal audit, as an integral part of performance improvement (Capita report, paragraph 8.3.2). In particular, a standard audit framework should be considered, which could be developed by these organisations for common application across procurers, the CPB and Centres of Expertise.

Quick Wins

- 4.39 Whilst many of the above recommendations for improvement will have medium and longer term benefits, some shorter term milestones are identified here. These will serve as signals to senior management and the procurement community that progress is being made and as motivation towards full implementation.
- 4.40 We **recommend** as follows:
- i. a 100% increase in the percentage of low value transactions conducted by purchase card;
 - ii. the establishment of a group to examine supplier coding;
 - iii. the adaptation and piloting of the Procurement Excellence Model, to assess its suitability for evaluating procurement performance in Northern Ireland;
 - iv. the adoption of the gateway review process;
 - v. the development and adoption of a Northern Ireland version of Achieving Excellence targets;
 - vi. the development of web-enabled public procurement, initially as part of the Office of Government Commerce pilot scheme. The Procurement Board could then review the output of the pilot, and that of other pilots in Centres of Expertise, to consider the way forward in this area.

4.41 Many of these initiatives are already in hand and it should therefore be possible to see early progress.

5. ECONOMIC, SOCIAL AND ENVIRONMENTAL POLICY IN PUBLIC PROCUREMENT

Introduction

- 5.1 In this Chapter we focus on the role of economic, social and environmental policy in procurement. The new circumstances sketched out earlier in this report open up the opportunity for these issues to be considered in greater depth in Northern Ireland than previously. Section 75 of the Northern Ireland Act requires this in respect of equality issues, and distinguishes the legal situation in Northern Ireland on this issue from the rest of the United Kingdom. In paragraphs 5.2-5.15 we provide background analysis of the complex issues involved; in paragraphs 5.16-5.40 we make specific recommendations.
- 5.2 Our terms of reference require us to “identify the scope to use public procurement in Northern Ireland to further local social and economic objectives within the context of current EC and international law relating to procurement.” We have interpreted our terms of reference to include environmental considerations in part because of the close similarity between the issues raised by such considerations and other economic and social policies, and also because a policy of integration of environmental considerations into public procurement already exists in Northern Ireland. As part of their reconsideration of policy on procurement in Northern Ireland, Ministers will wish to look at how far to continue this previous policy.
- 5.3 The inclusion of “local” in our terms of reference poses a potential problem because European Community requirements, as well as those of the WTO Government Procurement Agreement, prohibit the imposition of requirements that discriminate against external actual or potential suppliers. We have kept in mind, therefore, that serving local objectives is not permissible where it leads to such discrimination. All the policies recommended for inclusion within Northern Ireland procurement subsequently are not only public policy within Northern Ireland, but are also policy objectives of the European Community.

- 5.4 It is worth distinguishing between at least three somewhat different circumstances in which economic, social and environmental policies may arise in the context of public procurement:
- i. where economic, social or environmental policies are taken into account that are commercially relevant. Examples could include: where environmental issues such as “buying green” are taken into account in assessing whole life costs; where training of the workforce is considered as likely to reduce subsequent operating costs on the contract; where, in a school meals contract, concern for equality of opportunity leads an Education and Library Board to place heavy emphasis on suppliers’ proposals for increasing the take-up of free meals;
 - ii. where they are taken into account in order to further the effectiveness of certain policy goals that are central to a primary purpose of the procurement, for example when environmental protection issues are taken into account in the award of a contract for the safe disposal of waste chemicals by the Department of the Environment. In this context, the policy goal is of the essence of the contract. Social considerations can be incorporated into the definition of the subject matter of the contract where contracts pursue a social objective, in which case they are used to define the characteristic of the required service or product;
 - iii. where they are taken into account in order to further wider governmental or public policy objectives, ensuring that procurement policy should pay due regard to the Executive’s wider economic and social policies, rather than cut across them, for example by taking the policy of tackling social exclusion into account in the award of a contract by a Department for the construction of a building.

Some Arguments in Favour of Integration in Principle

- 5.5 Of these, the first and second are uncontroversial. Indeed, to some extent such integration does already exist, although the benefits of taking into account such factors in these contexts needs to be better understood by those involved in procurement in Northern Ireland, as well as how best to operate the first and second methods in a way which delivers the benefits and complies with EC law. Further discussion is necessary on the third. Several reasons may be put forward in favour of taking economic, social and environmental policy objectives into account in public procurement.

- 5.6 Public bodies award public contracts on behalf of the community that they serve. Integration is justifiable to ensure that the public service does not inadvertently support suppliers violating public policy goals. It is reasonable that the community should expect, for example, that public contracts should go to employers who provide equality of opportunity within the limits set by the law. Otherwise, the public sector as the client would face justifiable criticism from the community. For example, the public sector client may wish to be assured that any contractor winning public contracts complies with health and safety legislation.
- 5.7 We consider that it is wrong that a contractor who adheres, of his or her own accord, to public policy goals expressed in legislation should be disadvantaged when tendering for contracts because a competitor has managed to cut costs by failing to adopt such public policy. Infringement of legislation should not be rewarded by the public service in the form of contracts for companies responsible for such practices. The public sector needs to have processes that enable them accurately and fairly to discern, for example, whether those bidding for public contracts are complying with equality and health and safety legislation. A proportionate approach is needed. The public body needs assurance that the potential supplier is in compliance, but should avoid over-burdening firms with requests for unnecessary information. The issues for large scale public private partnerships may be different from those that apply to small-scale short-term contracts. And through a commitment to best value for money – as opposed to lowest price – they must motivate suppliers to put forward quality solutions. We consider that there should never be a competitive advantage for a bid that kept costs unduly low by cutting corners through non-compliance with basic legislation.
- 5.8 The award of public contracts cannot therefore be regarded simply as an economic activity by an administration as if it were equivalent to a private sector organisation. Integration is an important way of "mainstreaming" certain economic, social or environmental goals into the economy, given the incentives that are available to governments to require suppliers to give attention to such issues in their decision-making, and the importance of these incentives for suppliers. Academic research in other countries has shown that, under certain conditions, such integration can be effective in delivering public policy goals⁷.

⁷ See, for example, the review of studies in JJ Donohue III and J Heckman, "Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks", *XXIX Journal of Economic Literature* (1991), 1603 at 1635.

- 5.9 Integration is compatible with existing EC and international law within certain parameters: that the integration is transparent; that in order to comply with the EC Treaty the integration does not discriminate directly or indirectly between suppliers; and that all requirements as to process are complied with. These will be considered further below.
- 5.10 We **recommend**, therefore, a balanced approach: that public procurement should continue to pay due regard to economic, environmental, and social policies subject to the considerations and modalities discussed below.

Modalities: Principles

- 5.11 The question of *how best* to introduce economic, social and environmental policies, and *which* such policies should be integrated into the process of public procurement then becomes crucial.
- 5.12 We **recommend** several principles that should be taken into account that should guide these choices:
- i. modalities should be chosen that are *effective* in achieving best value for money and delivering this policy. This is likely to mean concentrating procurement resources on delivering only the most important policy goals so as not to overload the system. This is a crucial point. Not every public policy can, or should, be taken into account in procurement;
 - ii. the *transparency* of the requirements should be ensured. Potential suppliers should understand clearly from the outset what categories of information and service standards may be expected. They should be provided with adequate, accurate and timely information at all the relevant stages of the procurement process. Public bodies should ensure that all stages of the procurement process can be audited satisfactorily with reference to a clear, written policy on evaluating tenders and awarding contracts, which is publicly available and made available to all suppliers;

- iii. choosing which Government policies should be integrated will need to be carefully considered and justified, with the criteria clearly specified. Integration should be *selective and targeted* to achieve the best results. Integration does not mean that *all* such policies should be integrated, or in the same way, or to the same depth. Sometimes, integration may mean simply ensuring that public procurement decisions do not cut across other policies (ie negatively); in other cases it may mean that public procurement should be harnessed to help achieve other policy objectives (ie positively);
- iv. modalities should be chosen that are *legal* and are compatible with a reasonable interpretation of EC law. We have concentrated our consideration of legality under EC law to contracts above the thresholds where the Directives apply. There is more extensive discretion for contracting authorities below the thresholds, although the general principle of non-discrimination applies to all contracts in the EC, above or below the threshold, in order to comply with the EC Treaty, as do the other requirements regarding free movement, and so on. The European Commission has proposed extensive revisions to the Directives, and these are currently being considered by the European Parliament. Our current understanding of EC law will need to be reconsidered in the light of whatever package of reform measures eventually emerges⁸. It will be important to ensure, in particular, that suppliers from other Member States are not deterred from bidding, and that they are not discriminated against directly or indirectly by the criteria adopted;
- v. modalities should be chosen to make the policies *operational* and as consistent as possible with the other aspects and values of the procurement process, in particular the principles of transparency, clarity, consistency, integrity, effectiveness, and fair-dealing;
- vi. modalities should be chosen that are *justifiable*. Departments are accountable for their expenditure and, therefore, will need to determine whether any extra costs that may result (assuming that they will not be offset by savings over the longer term) are justified. The justification may be that Ministers have decided that the Government should or should not buy a particular substance or material that is or is not harmful to the environment, or made according to a particular process, or that certain policies are

⁸ It will be important to ensure that the development of the EC approach to these issues is sensitive to the Northern Ireland Executive's policy preferences. In particular, the (United Kingdom Government's) Office of Government Commerce should be encouraged to represent such policy preferences in discussions with the EC authorities, and Northern Ireland officials should be included in any substantive discussions with the Commission on these issues.

required by legislation to be taken into account, for example under the Fair Employment and Treatment Order 1998, or under section 75 of the Northern Ireland Act 1998.

Modalities: Options

5.13 The modalities of integration are varied. Several approaches are conceivable. In the next paragraphs, we outline various options. These could operate at either or both of two levels: as a matter of general government policy applicable to all or some contracts, or in relation to specific public procurement contracts at the discretion of each public body individually. After sketching out these options we turn to our recommendations as to how best to proceed in the future.

Modalities: Stage of Tendering Process

5.14 Several stages may be identified where linkage is possible. In identifying these stages, we attempt merely to provide a taxonomy of where such linkages have been made in other jurisdictions, and we have drawn on previous work in drawing up this taxonomy. We should not be seen to be approving all the approaches listed, nor accepting their legality under EC or, indeed, international law. Each of the options needs to carry a “health warning” in that respect. Each also needs careful consideration, as each has both advantages and disadvantages associated with it which would need careful weighing before it is adopted in any particular situation. Often the key issue lies in the detail of what constitutes good practice. Thus:

- i. qualification criteria may be adopted, specifying those who qualify and those who do not. Article 24 of the EC Works Directive provides, for example, that any contractor may be excluded from participation in the contract who, inter alia, has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority, or has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or those of the country of the contracting authority;
- ii. a second linkage may be made requiring tenderers to take account of socio-economic issues in the context of preparing their bids. Article 23 of the EC Works Directive provides, for example, that the contracting authority may state in the contract documents, or be obliged by a Member State to do so, the authority or authorities from which a tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force in the Member State,

region or locality in which the works are to be executed and which shall be applicable to the works carried out on site during the performance of the contract. The contracting authority which supplies this information shall request the tenderers or those participating in the contract procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the work is to be carried out;

- iii. *contractual conditions* or *specifications* could be adopted requiring the contractor to carry out particular policy aims in the course of the contract. For those contracts, taking into account the social or environmental aspect should not, in general, pose a problem from the point of view of the EC Directives on public procurement (provided the contract conditions do not otherwise contravene other principles of Community law, such as free movement, to ensure that the contract clauses do not discriminate against the ability of suppliers from other Member States to win the contract). The European Court of Justice (ECJ) has adopted this approach in the *Beentjes* case. Where a tenderer does not accept or cannot prove that it can meet such a condition, its tender may be considered unacceptable. Such conditions must be transparent and included in all relevant contract notices;
- iv. ability and willingness to adhere to the policy may be taken into account at the *award* stage. This has proven a more controversial and complex option than the other approaches discussed above. On the one hand, some have argued that this approach incorporates non-commercial criteria into the award stage and is therefore in principle objectionable. On the other hand, others have argued that evidence from other jurisdictions demonstrates that it is one of the most effective ways of integrating the social or environmental policy in issue. Within the award stage, there are several different approaches that *might* be taken:
 - one approach is to establish a *quota* of contracts which is set aside for suppliers of a particular type;
 - a second approach is to establish a *price preference* for certain types of bid, whereby the bid which bidder A submits, though higher than that of bidder B, is regarded as equal or lower to that of B, if A undertakes a particular social policy, or otherwise fits within a particular category;

- a third approach is that willingness or ability or past practice of the bidder is taken into account as a *tie-break* where otherwise equal tenders are in competition;
- a fourth approach is to *offer-back* to preferred suppliers to allow them to match the lowest bid of their non-preferred competitors.

5.15 We have said that the legality of these options needs careful consideration under EC law. The EC Directives on public procurement are currently being amended on foot of a proposal by the Commission, with the Commission, Council and Parliament ultimately having to decide in the next few months what position to take on the integration of social issues into procurement. What we say below, therefore, may need revision in light of any legislative amendments. In the context of the existing EC Procurement Directives, there are restrictions on what can be done at the award stage. Two different award criteria are permitted, namely the lowest price, or the “most economically advantageous tender.” If the latter is chosen by the contracting authority, the contract documents or the contract notice must include the award criteria it will apply in that context, where possible in descending order of importance. Criteria involving social considerations in the choice of the most economically advantageous tender are permitted, provided they are connected with the subject matter of the contract and that they provide an economic advantage for the contracting authority. In addition, in *Commission v France (Nord-Pas-de-Calais)*, judgment of the ECJ, 26 September 2000, the ECJ held that the “most economically advantageous” provision “does not preclude all possibility for the contracting authorities to use as a criterion [for award] a condition linked to the campaign against unemployment provided that the condition is consistent with all the fundamental principles of Community law” (paragraph 50). The Court has therefore recognised the possibility that award criteria might include social elements, provided they are non-discriminatory and transparent, although the precise significance of the case is subject to some dispute. It would appear at least that, after tenders have been evaluated on the basis of economic criteria, a contracting authority can decide between tenders considered equivalent on the basis of economic considerations by awarding the contract to the undertaking which satisfies certain social policy goals, thus permitting the approach discussed above. We understand that this is the interpretation of the case by the relevant Directorate General of the European Commission, although this area is one where discussions within the EC are continuing at a high level.

Modalities: Type of Procurement Contracts Covered

- 5.16 Integration might vary also in relation to the type of contracts covered. Policy integration might cover supplies contracts, or works contracts, or services contracts or all three. Integration might be limited to contracts above or below a threshold amount. The type of firm to which the additional requirements apply might also be specified, with firms employing only a certain number of employees being covered. Sub-suppliers might or might not be included. All the activities of the contractor might be covered, or only the activities of the contractor directly involved in carrying out the contract. Whatever the coverage, we **recommend** that the processes adopted for integration should be appropriate to the type of procurement contract.

Risk Assessment and Management

- 5.17 Some of the unease that such recommendations have occasioned in the past appears to be due to the extensive judgement that might be expected of contract managers, and their relative unfamiliarity with some of these issues in the past. There are, however, ways of viewing these challenges as giving rise to somewhat similar issues as managers have been expected to deal with previously, and will certainly be expected to be familiar with in the future.
- 5.18 Under the Modernizing Government initiative, the Cabinet Office is co-ordinating the development by Departments of procedures for risk assessment and management, including general procurement risks such as fraud or theft. This should provide the framework for identifying the wider risks arising from the failure to pursue (or the pursuit of) socio-economic and environmental goals by Northern Ireland public bodies. Such risk assessment might arise at an overall Departmental (or Executive Committee) level, for all contracts awarded by a Department (or the Executive), for example as the result of a reassessment occasioned by section 75 of the Northern Ireland Act 1998. Or such risk assessment might arise at the level of individual contracts, on a more ad hoc basis, especially those of high value or where there are particular opportunities or responsibilities to pursue socio-economic goals. In such cases, the contract manager, customers and other relevant bodies should assess these risks at an early stage. Risks such as bad publicity, the adverse effects of social exclusion on political stability, breach of the statutory equality duty, international criticism, and so on, may need to be weighed against the risk of challenge for breach of the EC Procurement Directives, litigation by disappointed suppliers, and so on. The outcome of such an assessment of the risks involved will in most cases not be an absolute decision one way or the other, but will require the exercise of informed judgement. We **recommend** that social, economic and environmental

issues should be assessed, and mechanisms for dealing with them identified, within a *risk management framework*. An important element of this, as we have already stressed, is the need for early planning in the procurement process. With early planning, we consider that the difficulties of integrating social, economic and environmental issues will be minimized.

Criteria for Selecting Areas of Policy

5.19 Our terms of reference ask us to make recommendations for implementation, as well as identifying the scope to use public procurement to further social and economic objectives. An important initial issue in implementation is *which* such social and economic objectives should be given priority in this context. These are issues that are the subject of genuine debate. On the one hand, some consider that the case for integration is strongest where the social, economic and environmental factors being considered are also commercially-relevant, in the sense that they are relevant to the quality and cost of whatever is being procured. However, international and European experience has tended to demonstrate that such linkages have been used more broadly in recent years in the context of environmental issues, discrimination issues, and the integration of the socially disadvantaged into employment. All these issues are central to EC social and environmental policy. They have also been highlighted in the *Programme for Government* and thus also are local social and economic objectives. The areas we have concentrated on in the following paragraphs are, therefore, areas of both local and EC priority action, and ones where there is also significant experience in linkage to public procurement policy, enabling Northern Ireland to build on previous experience.

Recommendations on Equality and Discrimination

5.20 The importance of procurement to the economy of Northern Ireland means that the relationship between procurement, equality and new TSN has attracted legitimate attention, given the importance of new TSN and equality in Northern Ireland public policy. We have considered how best such integration might take place, consistent with the principles discussed above, and taking into account particularly section 75 of the Northern Ireland Act 1998. We have also taken into account previous recommendations of the Fair Employment Commission, the Equal Opportunities Commission, the Equality Commission, and the Standing Advisory Commission on Human Rights.

- 5.21 There appears to be some uncertainty as to the extent to which the award of procurement contracts is subject to a requirement not to discriminate on grounds included in current Northern Ireland anti-discrimination provisions. We **recommend** that legislation should provide unambiguously that direct and indirect discrimination is prohibited in relation to procurement on these grounds. We anticipate that, where future legislation extends the grounds on which discrimination is prohibited, this should also be reflected in relation to procurement. This would be consistent with the general approach taken by existing anti-discrimination legislation in Northern Ireland, as well as being consistent with the EC Procurement Directives. Appropriate exceptions would need to be incorporated in order to permit the disabled-employment schemes discussed below to operate lawfully.
- 5.22 The Fair Employment and Treatment Order 1998 provides that, in situations where certain requirements under that Order are breached in a persistent and recalcitrant way, firms may be deprived of the ability to contract with public bodies until the firm comes into compliance. We believe that this provision has been enforced once since 1990, when it first came into operation, and the result was that the firm subsequently came into compliance. We **recommend** that equivalent sanctions for persistent and recalcitrant breach of the other anti-discrimination laws be enacted. This would mean that in those circumstances in which a tribunal or court held a firm to be breaching anti-discrimination legislation in a persistent and recalcitrant way, the firm would be deemed to be “in default”. Where the firm was in default, then the Equality Commission should be able to serve a notice on the firm stating that the firm is “not qualified”. Where that happens, then public authorities would be prohibited from entering into contracts with that firm. “So too, just as the Fair Employment and Treatment Order 1998 provides a system of appeals against being declared “not qualified”, including in certain circumstances to a tribunal, and ultimately to the ordinary courts, it would be necessary to provide an appeal to a tribunal and ultimately the ordinary courts where a firm was held to be “not qualified” in the context of the other anti-discrimination legislation referred to above. An appeal system is desirable for its own sake, but also (possibly) to comply with the Human Rights Act 1998” This is consistent with the provisions of the EC Procurement Directives, which permit the inclusion of qualification criteria, and the exclusion of suppliers guilty of grave professional misconduct. We note that the Better Regulation Task Force supported similar measures in making its recommendations on anti-discrimination, a position supported by the House of Commons Northern Ireland Affairs Committee in its Report on Fair Employment. The Task Force recommended Government “to use its purchasing and funding muscle to promote equality practices among suppliers to the public sector”. The Review continued: “If the public sector has a duty to set high standards in ensuring equality of treatment and opportunity as an employer, we believe it has an equivalent responsibility

as a purchaser of goods and services.” We further **recommend** that compliance with the anti-discrimination legislation should become a contract condition in all procurement contracts above and below the EC thresholds. Appropriate arrangements for monitoring this contract condition should be developed by the Procurement Board, in consultation with the Equality Commission and business interests, to ensure that an approach is developed that is proportional (ie sufficient to ensure compliance, but not unnecessarily over-burdensome). In particular, it will be necessary to ensure that tenders from other EC countries are treated on an equivalent basis to United Kingdom suppliers, a requirement now made considerably easier than hitherto because of the recent enactment of the EU Race Directive and Framework Directive on employment discrimination which, when they comes into force, will provide, together with the existing EU Directive, a gender equality, a common minimum anti-discrimination standard in employment throughout the European Union.

Recommendations on Disabled-Employment Schemes and Procurement

- 5.23 The UK has a scheme, known as the “Special Contracts Arrangement” designed to help workshops for disabled people compete for Government contracts. The scheme is consistent with both the Public Purchasing Policy Guidelines and EC Law and it applies to Government Departments and their Agencies. It applies only to contracts below the threshold of the EC/GATT rules and is open to qualified workshops for disabled people throughout the EU and European Economic Area. For a company to join the register, it must be a non profit distributing company that has at least 50% of the workforce registered as severely disabled, with the disabled employees making a genuine contribution to the business and being paid the equivalent wage as a non-disabled colleague.
- 5.24 Government buyers are asked to give special consideration to buying products or services from registered suppliers. The scheme involves a system known as “offer back” under which a registered supplier whose tender is unacceptable on price alone (ie quantity, volume and delivery are acceptable) should be given the opportunity to submit a revised tender for all or part of a contract. If the registered supplier is able to match the best offer, its revised tender may be accepted. This arrangement only applies to contracts below the EC threshold. We **recommend** that the Procurement Board should ensure that this scheme is well publicised and that procurement staff are instructed to apply it at every opportunity.

Recommendations on Unemployment

- 5.25 We **recommend** that particular emphasis be placed on the role that public procurement should play on tackling unemployment. Several reasons persuaded us to this particular linkage. First, significant attention has been given to the issue of unemployment in public policy, yet it remains a particular problem in Northern Ireland, with significant implications for equality. In itself, this situation suggests that the problem is complex and there are no “quick fixes”, but we believe that there are possibilities which should be exploited to harness the opportunities that arise through large scale procurements to contribute to the existing governmental action to tackle unemployment. Second, there is experience of operating such a linkage in other parts of the European Community, such as in France and the Netherlands, and this experience, and the forthcoming European Commission Communication on social issues in public procurement, may be drawn on to ensure success in Northern Ireland. Third, the reduction in unemployment is a policy goal of the European Community, and therefore one that can be applied without discrimination against suppliers and suppliers from other countries of the European Community. Fourth, it is a policy linkage with significant support from several public bodies that have considered the issue in the past, including the (former) Fair Employment Commission and the (former) Standing Advisory Commission on Human Rights. Needless to say, the linkage we propose is one among a number of government initiatives on unemployment. We do not consider that the linkage proposed should be regarded as a replacement for existing policies in Northern Ireland for tackling unemployment. We consider, rather, that such linkage should assist these other policies in being more effective.
- 5.26 We **recommend** that responsibility for integrating this policy into procurement practice should be allocated to the Procurement Board. All Departments, Agencies, NDPBs and public corporations should be required to include a section on this policy in their annual reports. It will be necessary for the Accounting Officer Memorandum, and equivalent documents to reflect these new policies. Indeed, it will be important for comprehensive guidelines to be prepared for decision-makers by the Procurement Board regarding all the issues dealt with in this section of the report.
- 5.27 We **recommend** that a pilot project should be instituted. This should involve a condition being included in certain contracts (see paragraphs 5.30 and 5.31) requiring suppliers to implement the plan accepted by the contracting authority on award of contract for utilising the unemployed in work on the contract, including work carried out by sub-contractors working on the contract. No specific proportion of unemployed to already employed should be specified, either minimum or maximum.

The definition of “unemployed” should be carefully considered, in consultation with the Equality Commission, so as not to discriminate indirectly against women. The definition should aim to include those not in full-time employment. The definition should also include “unemployed” from anywhere in the European Community (and beyond, in the case of a tenderer from outside the EC). Bidders should be required to produce a clear, specific and concise proposed unemployment utilisation plan showing (i) the bidder’s proposals for utilising the unemployed on the contract, and (ii) the bidder’s technical capacity to implement the proposals. Firms who have recently been recruiting from the unemployed should be able to present their approach as appropriate evidence. Failure to produce such a proposed plan should result in the bid being excluded from further consideration. The tender documentation should specify that the proposed plan should be submitted as part of the bid. The requirements should be clearly included in the bid specifications and all other relevant documentation. When the bid, which included the proposed plan, is accepted, carrying out the plan should become an integral part of the contract, and become a contract condition. Failure to comply with the plan, as submitted, should be subject to an appropriate and proportionate penalty, and it would be relevant to consider such failure in assessing future contract bids.

5.28 We **recommend** that adherence to this condition should also be taken into account at the award stage, and that this should be specified in the tender documentation. We further **recommend** that the feasibility and quality of the supplier’s plan to utilise the unemployed should be taken into account at the award stage where otherwise equivalent tenders who submit a plan are in competition.

5.29 We **recommend** that these requirements be confined for the first two years of operation to works contracts above £3.5m (but see paragraph 5.30 below), and considered subsequently in light of experience for inclusion in other types of contracts. We further **recommend** that this approach should apply to all Northern Ireland Departments, Agencies, NDPBs and public corporations and that it should be commended to local authorities for their consideration.

5.30 For the pilot to be capable of generating sufficient information on which to judge the success or otherwise of this approach, we **recommend** a critical mass of projects that will:

- i. provide a range of contract types;

- ii. offer a range of experience across the procurement activity for which Departments, Agencies, NDPBs and public corporations are responsible;
- iii. ensure consistency of application across Departments, Agencies, NDPBs and public corporations;
- iv. because of their value be likely to generate additional employment.

We believe that in order to meet these criteria there will need to be at least 20 projects and that at least one project should be contributed by each Department. We regard the threshold of £3.5m as an indicative minimum figure but we recognize that in some instances that it may be necessary or appropriate for some Departments to use instead substantial service contracts (say, above £0.5m) for the pilot.

- 5.31 We recognize that this recommendation is likely to involve suppliers in considering issues that they may not previously have considered (although there is evidence that some suppliers in the recent past in Northern Ireland have sought to recruit from the unemployed in constructing a work-force to work on public procurement works contracts). It will be important, if our recommendations above are to be successful, for relevant bodies in the public service to be involved in providing technical and, where relevant, other assistance to suppliers in drawing up their “unemployment utilisation plan”. We envisage a co-operative, partnership approach being adopted in which suppliers work with public bodies such as the Training and Employment Agency and the Equality Commission in order to enable the most effective plan to be adopted in the circumstances of the procurement project at issue, and subsequently in the implementation of the plan. In addition, schemes such as “Bridge to Employment” should be used as appropriate. Here, as elsewhere, the public sector should behave as an “intelligent client”. This includes taking a constructive approach to encouraging the supply base to improve standards, because this will improve best value for money in the long term. Such “groundwork” may be of particular importance in the context of the inclusion of social or environmental elements in the award criteria. The public sector client will need to ensure that suppliers are fully aware of the award criteria and the relative importance of particular factors. Early and accurate information will need to be provided to suppliers where it is expected that improvements will be achieved in the handling of environmental processes, so that they can build the cost of process improvements into their budgets and ensure that their bids are deliverable.

Procurement Board Role

5.32 We **recommend** that the Procurement Board should be tasked with drawing up a detailed set of guidance on these issues for Departments and other public bodies within the first six months of operation. It will also be necessary for the Procurement Board to institute a programme of education for potential suppliers for Northern Ireland public procurement contracts, to enable them to understand fully the new policies. It will be important that such education projects are accessible to potential suppliers from throughout the EC. The Board should also be tasked with considering how social and environmental considerations may best be further integrated, in consultation with interested parties. The Board should aim to produce a revised plan, building on experience gained over that time, within the first two years of its being established. We **recommend** also that the Procurement Board should be tasked with assessing the operation of the unemployment strategy recommended above, and making recommendations for its greater effectiveness, also within two years of the Board coming into operation. In doing so, it will be necessary for the Board to establish a properly funded action research project to accompany the pilot project. The pilot should be carefully monitored to gauge its success and key aspects of any good or bad practice which emerges from the pilot. Consideration should also be given to monitoring this initiative in the context of the North-South Implementation Bodies' procurement activities.

Recommendations on Environmental Purchasing

5.33 There is already in existence a policy for ensuring that environmental issues are integrated into procurement in the Northern Ireland public service. We enclose, at Annex G, the current Model Policy Statement for Greening Government Operations for Northern Ireland. We **recommend** that this Model Policy be re-issued with the support of the Executive Committee and its encouragement to put it into operation in each Department. We further **recommend** that the Procurement Body should be tasked with reviewing the procurement element of the policy, in consultation with Departments and other interested groups, within a year of its establishment.

Recommendations on Small and Medium-sized Enterprises (SMEs)

- 5.34 The European Commission has recognized the importance of SMEs, both for the general benefit of national economies and also in public procurement⁹. Among the barriers still hampering SMEs at EU level, lack of information is by far the largest problem. This barrier seems to reduce when a high percentage of employees within an enterprise have direct access to the Internet. Once the information gap is addressed, other barriers appear: projects are too large for SMEs; there are administrative burdens and high costs in preparing a bid. Indeed, the European Commission itself highlighted the problems faced by SMEs in its 1998 Communication¹⁰, such as a lack of information about potential contracts, inability to draw up business plans, mismatch between the size of the enterprise and the large size of the contracts. There is also anxiety about currency fluctuations and the need to meet standards, certifications and qualifications. We consider it important that SMEs get full support and are willing to bid for future contracts. The participation of SMEs in public procurement contracts is particularly important for the development of peripheral regions of Member States and the European Union.
- 5.35 The European Commission's definition of what constitutes an SME is based on a combination of the following criteria: number of salaried workers, turnover, balance sheet and independence. In order to be considered an SME an enterprise must have less than 250 salaried workers. More specifically, a business is considered to be a 'medium-sized enterprise' if it has between 50 and 250 employees and an annual turnover of under 40 million ECU or an annual balance sheet total of less than 27 million ECU. To be considered a 'small' enterprise a company must have less than 50 employees and an annual turnover of less than 7 million ECU or an annual balance sheet total of under 5 million ECU. A business with less than 10 employees will be considered a 'very small' enterprise. Another basic criterion for determining whether an enterprise is 'small' or 'medium-sized' is its independence, which means that a company cannot have 25% or more of its control in the hands of a large enterprise or jointly held by several large enterprises.

⁹ "SMEs have the potential to supply the additional competition, flexibility and capacity for innovation essential to the successful opening up of public procurement markets. Every effort to make public procurement more accessible for business should start off from the point of view of the SME" (European Commission, 1998, pp19).

¹⁰ EU Commission 1998.

- 5.36 In Northern Ireland there are estimated to be 84,620 SMEs employing 425,000 people and having a percentage turnover of 74.7%, the highest figures in any region of the UK¹¹. The findings of a survey carried out as part of the CAPITA report show that the problems with government purchasing identified by suppliers in Northern Ireland tend to cluster around three issues. First, the contract documentation is perceived to be burdensome to suppliers, with much time taken in filling in documentation with repetitive information. There is much scope for improvement in this context, and developments in e-Commerce and e-Procurement should help to remedy this situation¹². Second, the use of frameworks created expectations among suppliers that they would see a return on their investment in the contract. Suppliers need to be fully aware of the use of frameworks and purchasers should make this very clear to all successful suppliers on a framework contract. Third, suppliers queried the professionalism of purchasing staff. Even though the GPA give a commitment to have 75% or more of its staff educated to professional level, this may not be duplicated throughout all other Departments, and most of the adverse comments were not directed at central purchasing agency staff, but at staff and procedures in Departments. The concerns of SMEs were not with lack of support mechanisms for government purchasing, but with the actual contracting process. Actual contracting procedures for current suppliers are in need of modernization and modification in the ways that we discuss below.
- 5.37 Whilst there is no simple remedy for helping SMEs to participate more fully in public sectors and to draw the greater benefits from such an opening up, we **recommend** that more should be done within the existing EC framework for those responsible for public procurement to work with SMEs and better equip them for competing for public contracts. We **recommend** in particular that SMEs should be encouraged to participate in public sector contracts in ways which do not discriminate against larger firms and which help to improve increasing competition. Action is required on a wide range of issues that can assist SMEs to exploit their opportunities. The burden falls on competent authorities (government departments, local authorities, and economic development agencies) to raise awareness and provide all relevant information on both national and European public procurement contract opportunities. One approach by the GPA was to work with the Local Enterprise Development Unit (LEDU) and Industrial Development Board (IDB) to help small businesses to compete successfully for public sector business, for example, by organizing “Meet the Buyer” events, and these have taken place at various locations in Northern Ireland. We **recommend** that the Procurement Board should continue the outreach policy of the Government Purchasing Agency, but also that the Equality Commission and the Department of Enterprise,

¹¹ DTI, Support for Business – Help for Small Businesses and New Businesses, 2000.

¹² For example, the new directive on Electronic Commerce, European Communities, 2000.

Trade and Investment should specifically target SMEs with advice and assistance in the context of the new procurement policy recommended above. In addition, we **recommend** that contracting authorities should:

- i. improve access to relevant procurement information, making effective use of electronic means of transmission and receipt of contract documentation;
- ii. consider sub-dividing large contracts in appropriate circumstances so that small and medium companies can bid, whilst taking care that splitting contracts does not inadvertently reduce the contract value below EU procurement thresholds;
- iii. take a flexible approach when seeking quality assurance¹³;
- iv. give special attention to the prompt payment of invoices;
- v. ensure that enquiries from SME managers in relation to contract opportunities are directed to knowledgeable and qualified staff.

Recommendations on Contract Management

5.38 We have mentioned already the importance we attach to contract management generally. The importance of ensuring proper contract management is particularly apparent in the context of the issues we consider in this section of our report. We **recommend** that the new CPB should have appropriate post-contract-award mechanisms to provide assurance that *all* contract conditions are adequately monitored. We **recommend**, further, that for a Centre of Expertise to gain recognition as such, it too should satisfy the Procurement Board that it has adequate mechanisms in place to provide assurance that the conditions of the contract are adequately monitored and pursued. We **recommend** that this should include an internal mechanism for considering and resolving complaints by interested third parties that contract conditions have not been honoured.

5.39 The absence of statistical information on the award of procurement contracts is particularly troubling in the context of equality policy. We **recommend** that it should be one of the functions of the Procurement Board to develop a database of information relevant for assessing the success or otherwise of the policies recommended above.

¹³ For example, BS EN ISO 9000 (BS5750) is not a mandatory requirement for Government contracts and certification may be inappropriate for a number of small firms.

Compatibility with Existing Northern Ireland Legislation

5.40 The approaches sketched out above need to be considered not only in the context of EC law, but also in the context of existing Northern Ireland legislation. Amendments to existing domestic legislation will be necessary, and we have mentioned several already. One example arises in the context of local government procurement. Article 19 of the Local Government (Miscellaneous Provisions) (NI) Order 1992 specifies a range of issues that should not be taken into account in the procurement process, and empowers the Department to specify additional "non-commercial" matters. This provision would limit the extent to which some of the issues raised above would be able to be given effect to in local government procurement. We have not exhaustively researched whether there are other equivalent provisions that would limit other public bodies in a similar way, but it appears that Article 20 of the Education and Library Boards (Northern Ireland) Order 1993 has a similar restrictive effect on education and library boards. We **recommend** that these provisions should be amended appropriately to enable local government and other public bodies to comply with the recommendations made above.

6. COMPLIANCE ISSUES

Introduction

- 6.1 The Team has considered the extent to which compliance with the recommendations in this Report should be subject to legislation. The following paragraphs set out some arguments for and against legislating for compliance.

The Arguments for Legislation

- 6.2 First, a major area of public policy such as public procurement with an annual spend in excess of £1.2bn must be subject to rigorous scrutiny by the Assembly. Establishing the proposals in this report in legislation would give a signal to the public that procurement is now the focus of greater accountability and this would be particularly important following recent criticism by PAC.
- 6.3 As a principle, the rule of law requires that the exercise of public power should normally be authorised by statutory authority. Other aspects of public procurement are already subject to extensive legislative provisions arising from European Community law, so it could be argued that the institutional aspects and adherence to the overarching policy should be as well. Other European countries have a legislative underpinning for their procurement institutions and it may lessen the sense among public authorities that they are being singled out for unfair legislative attention.
- 6.4 Finally, public procurement is emerging into a much more complex policy environment and challenges to the traditional way of doing things are much more likely. A strong legislative basis for these proposals may help avoid unnecessary challenges. It would also strengthen the effectiveness of the Procurement Board in driving forward the new arrangements.

The Arguments Against Legislation

- 6.5 Against this, there is a case for adopting an approach in which administrative arrangements may be preferable, at least in the short to medium term.
- 6.6 First, there is still some uncertainty as to whether a legislative package would pass through the Assembly unscathed. There is a risk that achieving the correct balance could be difficult, resulting in legislation which is either over-prescriptive or anodyne.

- 6.7 Adopting a legislative approach may appear confrontational, particularly to non-Departmental bodies included within the remit of the policy. It may be seen as premature until the new institutional arrangements have settled down and much of the process-related aspects of the proposals are in place and evaluated for effectiveness. There is also the need to consider the likely impact of the review of public administration.
- 6.8 Finally, there is already in existence a well developed administrative framework within which public bodies are required to conduct their business (see Annex H). This includes arrangements for the promulgation of guidance; the appointment of senior officials responsible to the administration for the proper conduct of business; and mechanisms for external scrutiny and reporting.

Conclusion

- 6.9 On balance, the Team considers that, with the exception of the need to extend anti-discrimination legislation (Chapter 5, paragraph 5.22), the proposals in the Report should not be provided for in legislation at this stage. We **recommend**, however, that this should be kept under review by the Procurement Board and that further consideration should be given to what might be needed in legislation to underpin our proposals in the light of experience.

7. POSITIVE SYNERGIES: THE LINKAGES BETWEEN OUR RECOMMENDATIONS

- 7.1 We view our recommendations as a package of measures designed to address the separate elements in our terms of reference, but also to create positive synergies. We see the first and second elements in our terms of reference as linked in significant respects.
- 7.2 We view our organisational and operational recommendations as not only important in themselves, but also as providing a necessary (but not sufficient) basis for the more effective integration of public policy goals into procurement. The principles of competitive supply, effectiveness and efficiency are important for the delivery of the public policy goals we consider should be integrated into the procurement function. Without more professional procurement, the delivery of these public policy goals will be ineffective. We also consider that the savings that we believe should result from more cost-effective procurement can provide the opportunity to further some of the public policy goals we have considered.
- 7.3 We also view the modalities that will accompany greater integration of public policy into the procurement process as contributing important positive side-effects to the procurement process more generally, in terms of contributing to the values of fair-dealing, integrity, accountability, clarity, and informed-decision-making. We recognise that there are short-term costs associated with the greater integration of the social and economic goals into procurement. On the other hand, the failure to pursue such goals will be damaging in other ways, both generally and to the procurement function more specifically. In making these recommendations, we aim to increase the credibility of procurement, through its being seen as more responsive to the public's expectations.
- 7.4 The Team has not carried out an evaluation of implementing these recommendations. The initial organisational structures (that is, the Procurement Board and the Central Procurement Body) should not require additional resources, but the Procurement Board may need to appraise the implementation of individual processes and practices as they are taken forward. If Departments can achieve a 1% reduction in current estimated procurement expenditure it would yield £12 million of savings for reallocation by the Executive. A similar restructuring in England has yielded savings of the order of 2% of expenditure.
- 7.5 In short, we see our recommendations as a coherent and integrated package of measures, and we **recommend** them to Ministers on that basis.