



Department of the
Environment

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The Draft Local Government (Contracts and Compulsory Purchase) Bill

Consultation Document

December 2008

PROPOSAL FOR A LOCAL GOVERNMENT (CONTRACTS AND COMPULSORY PURCHASE) BILL

This Consultation Document seeks views on the Department's proposal for a Local Government (Contracts and Compulsory Purchase) Bill.

Comments should be sent by 12 March 2009 to:

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The following persons will be able to answer queries in relation to the Draft
Bill:

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LOCAL GOVERNMENT (CONTRACTS AND COMPULSORY PURCHASE) BILL

Purpose of the Consultation Document

1. The Department of the Environment is seeking views from consultees on its proposal for a Local Government (Contracts and Compulsory Purchase) Bill (the Bill) – see Annex A.

Aims of the Local Government (Contracts and Compulsory Purchase) Bill

2. The main aim of the Bill is to clarify the powers of district councils to enter into long-term service contracts with the private sector (e.g. Public Private Partnership (PPP) or Private Finance Initiative (PFI) contracts) and so remove any concerns contractors and financiers might have about entering into such contracts.
3. The powers to enter into long-term service contracts with the private sector will apply to all council functions. However, the Local Government (Best Value) Act (Northern Ireland) 2002 requires councils to make arrangements for continuous improvement in the way in which they exercise their functions, having regard to a combination of economy, efficiency and effectiveness. Councils will therefore have to demonstrate that such contracts represent value for money.

4. A second aim of the Bill is to enable councils to acquire land otherwise than by agreement (i.e. to vest land) for waste management purposes.

Background

5. The need for the Bill has arisen as a consequence of the EC Landfill Directive (1993/31/EC) which aims to prevent or reduce, so far as possible, negative effects on the environment from the landfilling of waste. The Directive sets out recycling targets for Member States to meet, requiring the volume of biodegradable waste being sent to landfill to be reduced to:
 - 75% of 1995 levels by 2010;
 - 50% of 1995 levels by 2013; and
 - 35% of 1995 levels by 2020.
6. It is imperative that councils meet the Landfill Directive targets to avoid possible infraction proceedings. In order to do so, new recycling facilities need to be constructed in Northern Ireland and all 26 district councils have formed themselves into three Waste Management Groups (i.e. joint committees as provided for in section 19(1) of the Local Government Act (Northern Ireland) 1972) to oversee the procurement of the necessary waste infrastructure. It is anticipated that a number of Mechanical Biological Treatment plants, Energy from Waste facilities and other recycling measures will have to be constructed.
7. One of the options under consideration by councils involves the private sector building the facilities and providing recycling services to councils by means of PPP/PFI contracts. The proposed legislation

needs to be in place by mid-2009 so that the necessary contracts can be awarded and the infrastructure provided in time to meet the Landfill Directive targets.

Earlier consultation

8. In April 2005, the Department established a Waste Infrastructure Task Force with the aim of canvassing and articulating the views of key stakeholders on the delivery of the Northern Ireland waste infrastructure network needed to meet the EC Landfill Directive targets. The Task Force was a partnership between central and local government and was ideally placed to elicit and take account of the views of councillors, the three Waste Management Groups and the Northern Ireland Local Government Association. In addition, the Task Force consulted directly with local government, through correspondence and an away day, on the legislative issues and other matters. The key stakeholders likely to be interested in this issue are therefore already well-briefed and are generally in agreement with the Department's proposal, which addresses concerns previously raised by the Task Force.

Details of the Bill

9. The Bill, which is similar to the Local Government (Contracts) Act 1997 in Great Britain, will:
 - clarify the power of councils to contract with the private sector;
 - enable councils to certify long-term service contracts giving private sector contractors and their financiers "safe harbour" protection (see clauses 2 and 5 below) from legal challenge, except by judicial or audit review;

- ensure that contractors will be compensated if contracts are ever set aside in such a review;
- minimise the likelihood that certified contracts will be set aside by means of a simple but rigorous certification procedure; and
- empower the courts to direct that such contracts shall continue to have effect notwithstanding that they were entered into unlawfully.

Clause 1

10. This clause clarifies the power of councils to enter into contracts for the provision of assets or services (or both) for the purpose of discharging any of their functions. Although this provision will enable councils to enter into PPP/PFI type contracts, it is not restricted to such contracts. Clause 1 also enables councils to enter into separate or collateral contracts with the financiers, or insurers of or trustees for the financiers, of the contracts. This will give a third party, who provided finance to a contractor, “step-in” rights in the event that the contractor produces an unacceptably poor performance, becomes insolvent or is otherwise unable to honour the contract.

Clause 2

11. This clause is the first of a two-staged approach providing “safe harbour” protection from legal challenge to private sector contractors and their financiers. It does so by introducing a presumption that a certified contract is legal for private law purposes. The clause provides that, even if a council had no power at all to enter into a contract or had abused a power it did have, a certified contract is presumed to be legal unless it is successfully challenged by means of a public law review (i.e. by judicial or audit review).

Clauses 3 and 4

12. These clauses set out the certification requirements a council must satisfy for a contract to be a certified contract. One of the requirements is that the contract will operate, or is intended to operate, for a period of at least five years. Clause 3 also provides that the Department may make regulations concerning certain certification requirements.

Clause 5

13. While clause 2 introduces the presumption that a certified contract is lawful, this clause preserves the right to challenge the lawfulness of such a contract. Such a challenge is restricted to public law challenge by means of judicial review or audit review. Clause 5 also provides the second stage in giving “safe harbour” protection to private sector contractors and their financiers. It does so by providing that where, on public challenge, a court takes the view that a certified contract is unlawful (because the council did not have the power to enter into the contract or had exercised any power improperly), the court may nevertheless decide that the contract can continue to have effect. In reaching such a decision, the court may take into account a number of factors, in particular the likely consequences for the financial position of the council and the provision of services to the public if a decision were made that the contract should not have effect.

Clauses 6 and 7

14. These clauses provide for special terms (i.e. relevant discharge terms) of a certified contract, whether the main or collateral contract, which come into play in the event that a court finds the contract to be unlawful and that it should be set aside. Clause 6 provides for terms to be agreed between the parties for this eventuality and clause 7 provides for the situation where no discharge terms have been agreed or where the court finds that such terms are unenforceable.

Clause 8

15. The Pollution Control and Local Government (Northern Ireland) Order 1978 (the 1978 Order) included the then local government legislative framework relating to waste on land. The 1978 Order contains powers enabling councils to vest land for any of their purposes in that Order. Subsequently, the Waste and Contaminated Land (Northern Ireland) Order 1997 (the 1997 Order) introduced a new statutory framework for waste on land, repealing many of the provisions in the 1978 Order. Although councils continue to have vesting powers in the 1978 Order for any of their remaining purposes in that Order, vesting powers were inadvertently omitted from the 1997 Order. Clause 8 provides that councils may vest land for any of their purposes in Part II of the 1997 Order.

Clause 9

16. The Department has made two orders constituting two of the three Waste Management Groups, or joint committees, as bodies corporate (i.e. arc21 and SWaMP2008). This clause amends those orders, to

apply certain provisions of this Bill to those bodies. The amendments will permit arc21 and SWaMP2008 to enter into certified contracts and vest land for waste management purposes.

Clause 10

17. This clause sets out the means by which the Department may make regulations in relation to certain certification requirements.

Clause 11

18. Clause 11 defines some terms used within the Bill.

Clause 12

19. This clause provides for certain provisions to come into operation when the Bill receives Royal Assent. This is essentially to enable the Department to make regulations and bring them into operation at the same time as other provisions in the Bill are commenced.

Clause 13

20. Clause 13 cites the short title of the Bill.

Human Rights

21. The Department believes that the proposed legislation is compatible with the Human Rights Act 1998.

Equality

22. Under the terms of section 75 of the Northern Ireland Act 1998, the Department carried out screening for equality impact and is satisfied that the proposed legislation will not lead to discriminatory or negative differential impact on any of the section 75 groups. A copy of the screening form can be viewed on the Department's website http://www.doeni.gov.uk/index/information/equality_unit/ps0_aprsept08-2.htm.

Regulatory Impact Assessment

23. The Department has not conducted a regulatory impact assessment as the proposed legislation does not give rise to any associated costs or savings on business, charities, social economy enterprises or the voluntary sector.

Rural Proofing

24. The Department has assessed the proposed measures and considers that there would be no differential impact in rural areas or on rural communities.

Freedom of Information Act 2000 – confidentiality of consultations

25. The Department may publish a summary of responses following completion of the consultation process. Your response, and all other responses to the consultation, may be disclosed on request. The Department can only refuse to disclose information in exceptional circumstances. Before you submit your response, please read Annex

B on the confidentiality of consultations. It gives guidance on the legal position about any information given by you in response to this consultation.

Alternative format

26. Should you require a copy of this Document in an alternative format, it can be made available on request in large print, disc, Braille and audiocassette. The Department's text phone number has also been included below to assist the hearing impaired. It may also be made available in minority languages for those who are not proficient in English.

Consultation

27. Comments should be sent by 12 March 2009 to Julie Broadway at the address below or by e-mail to julie.broadway@doeni.gov.uk. The following persons will be able to answer queries in relation to the Draft Bill:

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28. This Consultation Document is being circulated to persons and bodies listed in Annex C and is also available to view at http://www.doeni.gov.uk/index/local_government/lg_funding/local_government_consultations.htm.

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Draft Local Government (Contracts and Compulsory Purchase) Bill

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B I L L

TO

Make provision about the powers of district councils to enter into contracts and to acquire land otherwise than by agreement.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:

Contracts for provision of assets or services

Functions to include power to enter contracts

1.—(1) Every statutory provision conferring or imposing a function on a district council confers power on the district council to enter into a contract with another person for the provision or making available of assets or services, or both, for the purposes of, or in connection with, the discharge of the function by the district council.

(2) Where—

(a) a district council enters into a contract such as is mentioned in subsection (1) (“the provision contract”) under any statutory provision, and

(b) in connection with the provision contract, a person (“the financier”) makes a loan to, or provides any other form of finance for, a party to the provision contract other than the district council,

the statutory provision also confers power on the district council to enter into a contract with the financier, or any insurer of or trustee for the financier, in connection with the provision contract.

(3) This section and sections 2 to 7 apply to any contract which a district council enters into after [date of introduction].

Certified contracts

Certified contracts to be intra vires

2.—(1) Where a district council has entered into a contract, the contract shall, if it is a certified contract, have effect (and be deemed always to have had effect) as if the district council had had power to enter into it (and had exercised that power properly in entering into it).

(2) For the purposes of this Act a contract entered into by a district council is a certified contract if (and, subject to subsections (3) and (4), only if) the certification requirements have been satisfied by the district council with respect to the contract and they were so satisfied before the end of the certification period.

(3) A contract entered into by a district council shall be treated as a certified contract during the certification period if the contract provides that the certification requirements are intended to be satisfied by the district council with respect to the contract before the end of that period.

(4) Where a district council has entered into a contract which is a certified contract (“the existing contract”) and the existing contract is replaced by a contract entered into by it with a person or persons not identical with the person or persons with whom it entered into the existing contract, the replacement contract is also a certified contract if—

- (a) the period for which it operates or is intended to operate ends at the same time as the period for which the existing contract was to operate, and
- (b) apart from that, its provisions are the same as those of the existing contract.

(5) In this Act “the certification period”, in relation to a contract entered into by a district council, means—

- (a) in the case of a contract entered into before the day on which this section comes into operation, the period of 6 weeks beginning with that day;
- (b) in every other case, the period of 6 weeks beginning with the day on which the district council entered into the contract.

(6) Subsection (1) is subject to section 5 (special provisions about judicial reviews and audit reviews).

(7) The application of subsection (1) in relation to a contract entered into by a district council does not affect any claim for damages made by a person who is not (and has never been) a party to the contract in respect of a breach by the district council of any duty to do, or not to do,

something before entering into the contract, including, in particular, any such duty imposed by—

- (a) a statutory provision for giving effect to any Community obligation relating to public procurement; or
- (b) Article 19(1) of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992 (NI 6).

The certification requirements

3.—(1) In this Act “the certification requirements”, in relation to a contract entered into by a district council, means the requirements specified in subsections (2) to (4).

(2) The requirement specified in this subsection is that the district council must have issued a certificate (whether before or after the contract is entered into)—

- (a) including details of the period for which the contract operates or is to operate;
- (b) describing the purpose of the contract;
- (c) containing a statement that the contract is or is to be a contract falling within subsection (5) or (6);
- (d) stating that the district council had or has power to enter into the contract and specifying the statutory provision, or each of the statutory provisions, conferring the power;
- (e) stating that a copy of the certificate has been or is to be given to each person to whom a copy is required to be given by regulations;
- (f) dealing in a manner prescribed by regulations with any matters required by regulations to be dealt with in certificates under this section; and
- (g) confirming that the district council has complied with or is to comply with any requirement imposed by regulations with respect to the issue of certificates under this section.

(3) The requirement specified in this subsection is that the district council must have secured that the certificate is signed by any person who is required by regulations to sign it.

(4) The requirement specified in this subsection is that the district council must have obtained consent to the issue of a certificate under this section from each of the persons with whom the district council has entered, or is to enter, into the contract.

(5) A contract entered into by a district council falls within this subsection if—

(a) it is entered into with another person for the provision or making available of services (whether or not together with assets) for the purposes of, or in connection with, the discharge by the district council of any of its functions; and

(b) it operates, or is intended to operate, for a period of at least 5 years.

(6) A contract entered into by a district council falls within this subsection if it is entered into, in connection with a contract falling within subsection (5), with—

(a) a person who, in connection with that contract, makes a loan to, or provides any other form of finance for, a party to that contract other than the district council; or

(b) any insurer of or trustee for such a person.

(7) The Department may amend subsection (5) or (6) by regulations.

Certified contracts: supplementary

4.—(1) This section applies where the certification requirements have been satisfied by a district council.

(2) The certificate which has been issued shall have effect (and be deemed always to have had effect) as if the district council had had power to issue it (and had exercised that power properly in issuing it); and a certificate which has been so issued is not invalidated by reason that anything in the certificate is inaccurate or untrue.

(3) The district council shall secure that throughout the period for which the contract operates—

(a) a copy of the certificate which has been issued is open to inspection by members of the public at all reasonable times without payment; and

(b) members of the public are afforded facilities for obtaining copies of that certificate on payment of a reasonable fee.

Special provision for judicial reviews and audit reviews

5.—(1) Section 2(1) does not apply for the purposes of determining any question arising on—

(a) an application for judicial review, or

(b) an audit review,

as to whether a district council had power to enter into a contract (or exercised any power properly in entering into a contract).

(2) Section 2(1) has effect subject to any determination or order made in relation to a certified contract on—

- (a) an application for judicial review, or
- (b) an audit review.

(3) Where, on an application for judicial review or an audit review relating to a certified contract entered into by a district council, a court—

- (a) is of the opinion that the district council did not have power to enter into the contract (or exercised any power improperly in entering into it), but
- (b) (having regard in particular to the likely consequences for the financial position of the district council, and for the provision of services to the public, of a decision that the contract should not have effect) considers that the contract should have effect,

the court may determine that the contract has (and always has had) effect as if the district council had had power to enter into it (and had exercised that power properly in entering into it).

(4) In this section and sections 6 and 7 references to an application for judicial review include any appeal (or further appeal) against a determination or order made on such an application.

Relevant discharge terms

6.—(1) No determination or order made in relation to a certified contract on—

- (a) an application for judicial review, or
- (b) an audit review,

shall affect the enforceability of any relevant discharge terms relating to the contract.

(2) In this section and section 7 “relevant discharge terms”, in relation to a contract entered into by a district council, means terms—

- (a) which have been agreed by the district council and any person with whom the district council entered into the contract;
- (b) which either form part of the contract or constitute or form part of another agreement entered into by them not later than the day on which the contract was entered into; and
- (c) which provide for a consequence mentioned in subsection (3) to ensue in the event of the making of a determination or order in relation to the contract on an application for judicial review or an audit review.

(3) Those consequences are—

- (a) the payment of compensatory damages (measured by reference to loss incurred or loss of profits or to any other circumstances) by one of the parties to the other;
- (b) the adjustment between the parties of rights and liabilities relating to any assets provided or made available under the contract; or
- (c) both of those things.

(4) Where a district council has agreed relevant discharge terms with any person with whom it has entered into a contract and the contract is a certified contract, the relevant discharge terms shall have effect (and be deemed always to have had effect) as if the district council had had power to agree them (and had exercised that power properly in agreeing them).

Absence of relevant discharge terms

7.—(1) Subsection (2) applies where—

- (a) the result of a determination or order made by a court on an application for judicial review or an audit review is that a certified contract does not have effect; and
- (b) there are no relevant discharge terms having effect between the district council and a person who is a party to the contract.

(2) That person shall be entitled to be paid by the district council such sums (if any) as that person would have been entitled to be paid by the district council if the contract—

- (a) had had effect until the time when the determination or order was made; but
- (b) had been terminated at that time by acceptance by that person of a repudiatory breach by the district council.

(3) For the purposes of this section the circumstances in which there are no relevant discharge terms having effect between the district council and a person who is a party to the contract include (as well as circumstances in which no such terms have been agreed) circumstances in which the result of a determination or order of a court, made (despite section 6(4)) on an application for judicial review or an audit review, is that such terms do not have effect.

Acquisition of land otherwise than by agreement

Acquisition of land otherwise than by agreement

8. A district council may acquire land otherwise than by agreement for the purposes of Part 2 of the Waste and Contaminated Land (Northern Ireland) Order 1997 (NI 19).

Joint committees

Application of Act to certain joint committees constituted as bodies corporate

9.—(1) In the Local Government (Constituting a Joint Committee a Body Corporate) Order (Northern Ireland) 2004 (No. 49) after Article 6 insert—

“6A. The following provisions of the Local Government (Contracts and Compulsory Purchase) Act (Northern Ireland) 2009 shall apply to arc21 as they apply to a council—

- (a) section 1 (power to enter certain contracts);
- (b) sections 2 to 7 (certified contracts); and
- (c) section 8 (acquisition of land otherwise than by agreement).”.

(2) In the Local Government (Constituting a Joint Committee a Body Corporate) Order (Northern Ireland) 2008 (No. 310) after Article 6 insert—

“6A. The following provisions of the Local Government (Contracts and Compulsory Purchase) Act (Northern Ireland) 2009 shall apply to SWaMP2008 as they apply to a council—

- (a) section 1 (power to enter certain contracts);
- (b) sections 2 to 7 (certified contracts); and
- (c) section 8 (acquisition of land otherwise than by agreement).”.

(3) This section does not affect any power to amend or revoke the orders mentioned in subsection (1) and (2).

Supplementary

Regulations

10.—(1) No regulations shall be made under section 3(7) unless a draft of the regulations has been laid before, and approved by a resolution of, the Assembly.

(2) Any other regulations under this Act shall be subject to negative resolution.

(3) Regulations under this Act may contain such incidental, supplementary consequential, transitory or saving provisions as the Department considers necessary or expedient.

Interpretation

11. In this Act—

“an audit review” means—

- (a) an application or appeal under Article 19 of the Local Government (Northern Ireland) Order 2005 (NI 18) (application by auditor, or appeal by person objecting to accounts, for declaration as to unlawful item of account);
- (b) consideration by an auditor of whether to give a certificate under Article 20 of that Order (certificate about sum not accounted for or loss or deficiency caused by wilful misconduct) or an appeal under that Article; or
- (c) any appeal (or further appeal) against a decision made on an application referred to in paragraph (a) or on an appeal referred to in paragraph (a) or (b);

“the certification period” has the meaning given by section 2(5);

“the certification requirements” has the meaning given by section 3(1);

“the Department” means the Department of the Environment;

“regulations” means regulations made by the Department;

“statutory provision” has the meaning given by section 1(f) of the Interpretation Act (Northern Ireland) 1954 (c. 33).

Commencement

12.—(1) The following provisions come into operation on Royal Assent—

- (a) section 3 insofar as it confers power to make regulations;
- (b) section 10;
- (c) section 11;
- (d) this section; and
- (e) section 13.

(2) The other provisions of this Act come into operation on such day or days as the Department may by order appoint.

Short title

13. This Act may be cited as the Local Government (Contracts and Compulsory Purchase) Act (Northern Ireland) 2009.

The Freedom of Information Act 2000 – confidentiality of consultations

1. The Department may publish a summary of responses following completion of the consultation process. Your response, and all other responses to the consultation, may be disclosed on request. The Department can only refuse to disclose information in exceptional circumstances. Before you submit your response, please read the paragraphs below on the confidentiality of consultations and they will give you guidance on the legal position about any information given by you in response to this consultation.
2. The Freedom of Information Act gives the public a right of access to any information held by a public authority, namely, the Department in this case. This right of access to information includes information provided in response to a consultation. The Department cannot automatically consider as confidential information supplied to it in response to a consultation. However, it does have the responsibility to decide whether any information provided by you in response to this consultation, including information about your identity, should be made public or be treated as confidential.
3. This means that information provided by you in response to the consultation is unlikely to be treated as confidential, except in very particular circumstances. The Lord Chancellor's Code of Practice on the Freedom of Information Act provides that:

- the Department should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of the Department's functions and it would not otherwise be provided;
- the Department should not agree to hold information received from third parties "in confidence" which is not confidential in nature; and
- acceptance by the Department of confidentiality provisions must be for good reasons, capable of being justified to the Information Commissioner.

4. For further information about confidentiality of responses please contact the Information Commissioner's Office (or see website at: <http://www.informationcommissioner.gov.uk>).

List of Consultees

Age Concern NI

All Northern Ireland District Councils

An Munia Tober

arc21

Association of British Insurers

Association of Local Government Finance Officers

Association of Public Service Excellence

British Bankers Association

British Chamber of Commerce

Belfast Solicitors Association

Carers NI

Chief Local Government Auditor

Church of Ireland

Civil Law Reform Division

Coalition on Sexual Orientation

Community Relations Council

Confederation of British Industry

Construction and Employers Federation

Corporation of Insurance, Financial and Mortgage Advisers

Disability Action

District Judge - Magistrates Court

Equality Commission for NI

Equality Forum NI

Engineering and Employers Federation

Engineering and Employers Federation Northern Ireland

Federation of Master Builders

Federation of Small Businesses

Finance and Leasing Association

Food Standards Agency for Northern Ireland

Gingerbread

Help the Aged NI

HM Council of County Court Judges

HM Revenue & Customs

Human Rights Commission

Irish Bankers Federation

Law Centre (NI)

Local Government Staff Commission

MENCAP

Men's Project

MEPs

Methodist Church in Ireland

Ministry of Defence

MLAs

MPs

NI Assembly / Committee for the Environment

NI Association of Citizens Advice Bureaux

NI Chamber of Commerce and Industry

NI Council of Trade

NI Council for Voluntary Action

NI Gay Rights Association

NI Political Parties

NIC / ICTU

North Western Region Waste Management Group

Northern Ireland Bankers Association

Northern Ireland Court Service

Northern Ireland Finance House Association

Northern Ireland Judicial Appointments Commission

Northern Ireland Law Commission

Northern Ireland Local Government Association

Northern Ireland Ombudsman

Participation and the Practice of Rights Project

Presbyterian Church in Ireland

QUB – School of Law

RNIB

RNID

Save the Children

Secretary – Catholic Bishops of Northern Ireland

Society of Local Authority Chief Executives

Society of Procurement Officers

SWaMP2008

The Executive Council of the Inn of Court Northern Ireland

The General Consumer Council for Northern Ireland

The Law Society of Northern Ireland

The Northern Ireland Council for Ethnic Minorities

UU – School of Law

Women's Support Network

Youthnet