

# Innovative social value

David Hansom, Partner, London

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- How do you create a golden opportunity to procure social value through your contracts?
  - What creative ways are there to evaluate and measure it, e.g. the Apprenticeship levy?
  - How do you enforce it if the supplier doesn't carry through?

- In the next 20 minutes
  - What does social value really mean?
  - The legal framework
    - Public procurement rules
    - Public Services (Social Value) Act / The Compact
  - How to incorporate and enforce

# What does social value really mean?

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- “Social value” is a developing concept
  - Measures which promote “social and environmental well-being” (*PS(SV) Act 2012*)
  - “Looking beyond the price of each individual contract and [...] the collective benefit to a community when a public body [...] awards a contract” (*Social Value UK*)
  - “Using public expenditure to achieve societal goals” (*European Parliament – Modernisation of Procurement paper 2016*)

- In-built tension between UK policy and EU law
  - UK Govt- “Buy British”; Open Public Service agenda; Social Value Act; Equality duty; Localism Act
  - EU law – Europe 2020 focus on procurement to improve society
  - Local preference requirements which are discriminatory may breach
    - TFEU prohibitions on barriers to trade - Articles 28 and 56
    - TFEU principles in reg 18 Public Contracts Regulations 2015 – non-discrimination and equality of treatment

- Directive 2014/24/EC and Public Contracts Regulations 2015
  - Recital 40 “*environmental, social and labour law provisions*” at selection and tender stages
  - Recital 36 “*social businesses*” and sheltered workshops – contracts can be reserved to certain organisations under light touch regime
  - Regulation 70 – can use “*innovation-related, environmental, social or employment-related considerations*” tender criteria provided related to subject matter
  - Regulation 74 light touch regime

- Light touch regime
  - Social and other services defined by CPV codes
  - Higher threshold of £589,148 ex VAT
- Reserved contracts
  - Regulation 77
  - Specific CPV codes
  - Qualifying criteria for participation
  - Maximum 3 year duration

- Public Services Social Value Act 2012
- Contracting authorities obliged to consider how procurement “might improve the economic, social and environmental well-being” and how to incorporate
- English contracting authorities for above threshold services
- Partially repeals s. 17 LGA 1988 (prohibition from considering non commercial factors)
- Duty is to consider, not to build in

- Can look social value at SQ, tender and even post-tender
- SQ
  - Project specific amendments to Part 3 not requiring notification
- Tender
  - Build in as quality and/or price requirements?
- Post tender
  - Reg 30 – can negotiate on “*social, environmental and innovative aspects*” post tender in CD, provided no new minimum standards introduced

- What we can do
- Criteria must be “relevant and proportionate” to value / type of contract
  - Response times on site
  - Local worklessness co-ordinator to promote opportunities alongside wider recruitment
  - Requirement to tender sub-contracts in small lots
  - Skills provision / apprenticeships indirectly benefit local market

- Discriminatory measures/requirements vulnerable to challenge
  - Size of tenderer as criteria
  - “Supplier must be based in local area”
  - “x% of employees must be from local community”
  - Cannot require tenderers to have a certain corporate social or environmental responsibility policy in place
- C115/14 - *Regiopost v Stadt Landau* – minimum wage payments
- C-368/10 - *Commission v Netherlands* – coffee machines

- Part or all of costs over life of product, service or works
- Acquisition; energy usage; maintenance costs; end of life costs; environmental/social impact (reg 68(1))
- Need “*objectively verifiable and non- discriminatory criteria*”
- Not unduly favour/disadvantage any particular bidder/type
- Criteria/method must be in procurement documents (reg 68(3))

- Tender commitments must be captured in contract
  - Comply with specification?
    - Apprenticeship Levy and cost capture
    - Service Level Agreements
    - Key Performance Indicators
    - Payment/bonuses linked to milestones
    - Right to terminate/force sub-contracting
    - Benchmarking/soft market testing – but beware

- Low/no cost ways to promote through contract
  - Open days/training events
  - Charitable staff time
  - Work experience link via local schools/ further education?
- Local Compact will often set out local priorities and needs

- High hurdle for ancillary social benefit could
  - leave you with no compliant bids
  - make all bids unaffordable
  - lead to challenges / complaints
- In practice
  - Soft market testing explores what market can offer/ you can afford
  - Below threshold generally low risk if no cross border interest
  - Hard to see how challenge could be successful if bidders buy in and don't complain quickly

- Social value an overused term but still underused in practice?
  - Think social value early and use light touch regime if you can
  - Link to local objectives/Compact
  - Build into procurement at SQ and tender
  - Worthless if you don't enforce in contract

- Brexit
  - Procurement regime in UK may change over time
  - More focus on home/local provision and social factors?
  - Developing role of third sector in community contracts
  - Macron - “Buy European Act”/EU27 response?



# David Hansom

Partner

[dhansom@vww.co.uk](mailto:dhansom@vww.co.uk)

0207 665 0808



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