

# How do you enforce social value obligations?

How do you incorporate social value metrics into tender documents  
that ensure fairness across bidders?

**SIMON TAYLOR**

Whitepaper  
September 2022

- Evolving basis in law for applying social value to procurements
- How do you introduce social value fairly
- Enforceability of social value guidance
- Who can sue and what remedies are available
- NPPS under Procurement Bill



- Requires public authorities to *consider* at the pre-procurement stage
  - how what is to be procured might improve the economic, social and environmental wellbeing of the relevant area
  - how in conducting the procurement it might act to secure that improvement
  - whether to consult on the above

# What social value obligations apply to procurement? PPN 06/20



- PPN 06/20
  - instruction to *evaluate* social value
  - mandated on central govt bodies, NDPBs, Exec. Agencies from 1 January 2021
  - draws on best practice in local government
  - applies to all above threshold procurements under PCRs (not UCRs) - services, supplies, works
  - commercial teams to pick from menu of policy themes and outcomes
- Focus on economic, social and environmental targets



- **Covid 19 Recovery**
  - supporting local communities and workplace conditions
- **Tackling economic inequality**
  - create new businesses, skills, jobs eg in deprived areas in UK
  - increase supply chain resilience and capacity eg start-ups
- **Fighting climate change**
  - eg working towards net zero greenhouse emissions
- **Equal Opportunity**
  - reduce disability gap, tackle workforce inequality
- **Wellbeing**
  - Improve community integration

- **Stages at which it is applied**
  - from planning - awareness building, market assessment & engagement,
  - to draft specification and tender documents
  - to evaluation and award
  - to contract management and reporting
  - ‘a golden thread’ of social value

- Each policy outcome comes with a selection of ‘oven ready’ tools

- Model award criteria and sub-criteria

MAC 4.1 – Deliver additional environmental benefits in the performance of the contract including working towards net zero greenhouse gas emissions

- Model evaluation questions

Describe the commitment your organisation will make to ensure that opportunities under the Contract deliver the policy outcome and MAC

- Model response guidance for tenderers

- Reporting metrics - model KPIs

- **Minimum weighting of 10% of total score**
  - except where pre market engagement indicates that this would significantly reduce competition due to lack of maturity in developing social value
  - then may be 10% of quality score
  - can be higher than 10% if market mature and proportionate
- **Measurable commitments to be contractualised**
  - record and monitor performance through contract life



- Users to consider when deciding which policy outcomes to apply to a procurement:
  - whether the model award criteria, model evaluation questions and reporting metrics are related to the subject-matter of the contract
  - whether they are proportionate to the contract and
  - whether they comply with equal treatment and transparency principles
- Aims to use procurement to support key social outcomes
- But “overarching objective” of Govt’s commercial activities will remain best commercial outcome

# How will the PPN be enforced? By Government?



- “Compliance support”
  - Cabinet Office Controls team will monitor compliance during the spend controls process
  - Public Procurement Review Service (Cabinet Office) to conduct spot checks, can intervene in ongoing procurements or make recommendations if procurement completed (but not if legal action being taken)

# How will the PPN be enforced? In the Courts?



- *R (Good Law Project Ltd & Ors) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Chamberlain J) applying *R (Lumba) v SoS Home Dept.* [2011] UKSC 12
  - “Failure to follow published policy, absent good reason for departing from it, is an established ground for judicial review....  
*A common law duty*”
  - breach of Government’s Transparency Policy (which advised that contracts be published within 20 days of contract award)
  - GLP had standing (not the MPs) and entitled to a declaration though not a mandatory order (as SoS “*moving close to complete compliance*”)

# Failure to apply guidance lawfully at tender stage



- Claims if authority omits to apply social value guidance at all
- Claims if the authority applies guidance over-zealously:
  - discriminatory - extra points for using local employers in supply chain? A condition which could only be met by UK bidders?
  - not contract related - building a community centre where contract is to provide social housing maintenance?
  - disproportionate - high weighting for environmental policy factors in an immature market?
- Breach generally apparent from tender docs
  - beware limitation rules

# How will the PPN be enforced? By whom?



- A tenderer?
  - may be prudent to issue in both Admin Court and TCC to ensure that public law remedies available
- A body with sufficient interest in procurement
  - no requirement that personally affected
  - likely absence of another challenge is a factor
  - gravity of departure from law justify a public law remedy?
  - campaigning body such as GLP
  - MPs? Not in *GLP v SoS Health* but that was because GLP was best placed to bring the challenge and had standing

# What are the sanctions?



- Declaration of unlawful failure to apply social value guidance
- Mandatory order requiring public body to apply the guidance to a given procurement
  - discretionary public law remedy
- If breach of PCR 2015, remedy can be set aside of the action or decision or order to amend tender docs if contract not entered into
- Or damages to unsuccessful tenderer

## Clause 12, Procurement Bill

- Minister may publish a statement setting out Government's strategic priorities in relation to procurement
- Green Paper: NPPS priorities may include
  - delivering social value, including environmental outcomes
  - commercial delivery – publishing pipelines
  - commercial capability – benchmarking performance

- NPPS will set out key outcomes that all authorities should have regard to where relevant to subject-matter and proportionate:
  - creating new businesses and jobs “in the UK”
  - improving supplier diversity, innovation
  - tackling climate change
- A contracting authority “must have regard to” the NPPS
  - NA to private utilities, framework or DPS call offs
  - separate Welsh procurement policy statement

- Will bring social value requirements back within scope of procurement regime
  - seems likely to replace PPN 06/20
  - less onerous – ‘have regard’ rather than 10% rule
  - may be less need for parallel JR claims
- Potential for litigation
  - ‘jobs in the UK’ and focus on local communities tension with non-discrimination rule (clause 11(2) Bill)
  - claims by ‘treaty’ non UK suppliers?
  - regional or English/Welsh discrimination?

- Drive to promote strategic benefits in procurement through social and environmental outcomes
- Policy guidance with a wide menu of options
- Enforceable if authority fails to consider and include
- Overriding objective remain achieving best commercial outcome
- Procurement Bill 'have regard to' NPPS a weakening
- Tension with non-discrimination duty
  - proportionality and contract related criteria