

# 11KBW

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How do you create a golden opportunity to introduce social value into your contracts?

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# Introducing social value

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**How can it  
be done?**

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graph LR; A[How can it be done?] --- B[1) Circumstances where contracts can be reserved for 'social enterprises']; A --- C[2) Contract conditions or specification]; A --- D[3) Award Criteria];
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1) Circumstances where contracts can be reserved for 'social enterprises'

2) Contract conditions or specification

3) Award Criteria

# Reserving contracts: Recital (36)

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*“Employment...contribute[s] to integration in society and...guaranteeing equal opportunities...sheltered workshops can play a significant role. The same is true for other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons...[M/S] should be able to reserve the right to participate in award procedures...to such workshops or businesses...” (emphasis added)*

# Reserving contracts: Art. 20

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*“[M/S] may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30 % of the employees...are disabled or disadvantaged workers.” (emphasis added)*

# Reserving contracts: Who is a ‘disabled’ or ‘disadvantaged’ worker?

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- Reg. 2: “*disabled*”, in relation to a person, means a disabled person within the meaning of the Equality Act 2010(c) and, in relation to a worker, means a disabled person who is a worker;
- “disadvantaged” is undefined by the PCR 2015. However, see Recital (36): persons “*such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups*”

# Reserving contracts: Reg. 77

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For contracts < 3 years, CAs can limit competition to 'mutuals' satisfying all of following conditions:

- (a) 'a public service mission';
- (b) profits are reinvested/any distribution based on 'participatory considerations';
- (c) management or ownership:
  - (i) based on employee ownership or participatory principles, or
  - (ii) active participation of employees, users or stakeholders; and
- (d) No other award by CA within the past 3 years

# Contract Conditions: Art. 70

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*“Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3)... Those conditions may include...environmental, social or employment-related considerations.” (emphasis added)*

# What is permitted? (Recital (97))

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*“...[CAs] should be allowed to use...conditions relating to the [goods etc.] to be provided under the public contract in any respect and at **any stage** of their life cycles from extraction of raw materials for the product to the stage of disposal...including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance...” (emphasis added)*

# What is permitted? (Recital (97))

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*“[F]or example that the manufacturing of the purchased products did not involve toxic chemicals, or that the purchased services are provided using energy-efficient machines...[T]his also includes ...conditions relating to the supply or utilisation of fair trade products in the course of the performance of the contract to be awarded. Criteria and conditions relating to trading and its conditions can for instance refer to the fact that the product concerned is of fair trade origin, including the requirement to pay a minimum price and price premium to producers...”*

# What is permitted? (Recital (99))

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*“...the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded. In technical specifications contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users.”*

- See also Recital (98) for further examples...

# What are the limits? (Recital (97))

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*“However, the condition of a link with the subject-matter of the contract excludes...conditions relating to **general** corporate policy, which cannot be considered as a factor characterising the specific process of production or provision...[CAs] should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place...” (emphasis added)*

# What are the limits? (Recital (98))

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- Must relate to the [works etc.] to be provided under the contract.
- Must not discriminate, e.g. minimum pay must remain at level set by national legislation or collective agreements.

# Direct and Indirect discrimination is prohibited

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**C-31/87 Gebroeders Beentjes BV v Netherlands:**

*“The obligation to employ long-term unemployed persons could inter alia infringe the prohibition of discrimination on grounds of nationality... if it became apparent that such a condition could be satisfied only by tenderers from the State concerned or indeed that tenderers from other Member States would have difficulty in complying with it...” (emphasis added)*

# Contract Award Criteria: Art. 67(2)

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*“[CA] shall specify, in the procurement documents, the relative weighting which it gives shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question...may comprise, for instance:...social, environmental and innovative characteristics and trading and its conditions”*  
(emphasis added)

# Contract Award Criteria: Art. 67(3)

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*“...criteria shall be considered to be linked to the subject-matter...where they relate to the [works etc.] to be provided in any respect and at any stage of their life cycle, including factors involved in: (a) production, provision or trading...; or (b) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance.” (emphasis added)*

# Contract Award Criteria – Limits?

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- See Recitals (97)-(99). In short, same principles as apply to contract conditions, i.e. the position in respect of conditions and award criteria is now symmetrical cf. PCR 2006
- Cannot confer unrestricted choice

# Award Criteria: examples

Award Criteria	Permitted?
Award Criteria	Permitted/Not Permitted
Bidder's corporate responsibility initiatives in relation to combatting unemployment	Not permitted – not related to subject matter (see Recital (97))
Percentage of bidder's workforce that comprises persons recruited from local unemployment register	Discriminatory – likely to favour local contractors
Number of interns comprising persons out of work for at least 6 months that will be employed on this contract	Permitted
Percentage of bidder's workforce that comprises persons recruited from <u>an</u> unemployment register	Permitted
11kbw.com Criteria	Permitted/Not Permitted

# Final thoughts...

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- Limitation rules can make challenges difficult to mount
- If public contract is below threshold + no cross-border interest = greater scope

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