

How do you enforce social value obligations?

What are the sanctions and contract implications
when something isn't done or targets not quite met?

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Whitepaper

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- Evolving basis in law for applying social value to procurements
- Enforceability of social value guidance
- Who can sue and what remedies are available
- Contractual effects
- 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
 - increase supply chain resilience and capacity eg start-ups
- **Fighting climate change**
 - eg working towards net zero
- **Equal Opportunity**
 - reduce disability gap, tackle workforce inequality
- **Wellbeing**

- **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 evaluation questions
 - Model response guidance for tenderers
 - Model award criteria and sub-criteria
 - 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?
 - 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?
 - 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
- Or damages to unsuccessful tenderer

- Declaration of ineffectiveness?
 - if authority said they would apply social value criteria but did not and standstill letter wrong?
- Contract implications ‘when something isn't done or targets not quite met’
 - scope for contractual dispute over application of social value requirements eg if deliverables, reporting requirements or metrics are unclear or unenforced
 - similar to other KPI disputes – need to ensure they are clear, measurable and monitored

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