

Social Value and public procurement

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Introduction



- Social Value Act 2012
- Public Contract Regulations 2015
- Underlying EU directive
- Case law
- Cabinet Office consultation

Why is social value important?



- Government has recently identified that it wants social and environmental values built in to the tenders that it designs and in the contracts which are let.
- It signalled last year that it was going to make the evaluation of social value compulsory in central government contracts by changing the Social Value Act and ask for large government bidders to address social and environmental issues.
- Current consultation (closes June 2019) gives ideas on how this can be done.
- Restatement of previous views that value for money includes social and environmental factors.
- In times of austerity, even more important to focus upon this (see Joseph Rowntree Foundation paper from 2014).

Why is social value important?



How is social value defined?

- Defined in the Social Value Act 2012 as
- “Improvement to economic, social and environmental well being of the relevant area”

Obligations set out in the EU Directive 2014



- Recitals to the directive expressly identify that there needs to be social and environmental considerations in procurement processes.
- Also identify that should be able to use criteria relating to these in the award and the contract at all aspects even when not the subject matter of the procurement.
- Expressly says that MEAT obligations are extended to include social and environmental characteristics.
- Expressly also encourages SME's to participate in large scale contracts.

Obligations in the EU Directive



- The directive identifies that contractors must not award a contract to a tenderer where it does not comply with social and environmental laws (relevant laws set out in Annex X to the Public Contracts Directive and Reg 56(2) of the PCR 2015).
- Not allowed to require particular label (EG Fairtrade/MSC) but define the technical specifications for the contract that they require – can be done by reference to a label or the specifications set out therein – the label can be accepted as evidence that technical specifications are met.
- The requirements to be met for labelling must be objectively verifiable and the label must be accessible and available to all parties .

Social Value Act 2012



- Pre dated the Directive
- Meant to put a real impetus for public bodies to consider social value in services contracts.
- Requires specific consideration of:
 - (a) How to improve through procurement the social, economical and environmental wellbeing of the area served by the contracting authority and
 - (b) How to undertake a procurement process with a view to securing that improvement.
- © Consideration of need to consider if consultation on social values matters is needed before procuring the contract.

Social Value Act 2012



- Designed to give genuine consideration to social value
- Designed to make an active decision as to what they procure taking this into account before they procure it.
- Questions should be asked which are relevant, pertinent and of genuine policy importance.
- Was meant to provide a radical mind set of contracting authorities towards the achievement of social value.

Equality Act 2010-the PSED



- Procurement processes are a “public function” of public bodies under the Equality Act 2010.
- Public bodies must therefore ensure that they do not discriminate in the manner in which they carry out their functions as identified in s29 of the EA 2010
- But also required to have due regard to s149 of the EA 2010 – the public sector equality duty.

PSED – what does it say

- Due regard to :
- Elimination of harassment, victimisation and other analogous contract.
- Advancement of equality of opportunity between those who share protected characteristics and those who do not: and
- Fostering of good relationships between those who share protected characteristics and those who do not
- Protected characteristics, include age, disability, gender reassignment, pregnancy/maternity, race, religion or belief, sex, sexual orientation.

PSED – how does it help social value?

- By using the PSED process, you are simultaneously providing social value. This is particular so if
- (a) The procurement recognises and responds to the needs of diverse communities
- (b) The procurement promotes equal treatment.
- © Socio-economic requirements in contracts make them more accessible for groups with protected characteristics, which can help advance equality of opportunity
- (d) Opportunities are opened to MBE's/SME's/social enterprises
- (e) Procurement encourages supply chain partners to advance equality

The PCR 2015



- Expressly allows contracting authorities to incorporate social and environmental factors into:
- Specifications for a contract
- Award criteria
- Contract conditions.
- (see Reg 67 (2) and (3)).

Must however be:

- (a) Linked to the subject matter of the contract.
- (b) Proportionate to what is being procured.
- (c) Does not result in unequal treatment of bidders (i.e. because only one bidder could meet the criteria)
- (d) Be free from discrimination (i.e. favouring one country over another)
- (e) Be subject to the EU principle of transparency – i.e. the conditions are clear and set out in the award criteria.

- Reg 70 also allows that special conditions relating to the performance of a contract can be made as long as :
- (a) They are linked to the subject matter of the contract
- (b) This was expressly set out in the tender documents or in the call for competition
- These include economic, innovation related, environmental, social or employment related considerations.

- Can also reserve participation for education, health and housing (Reg 77(2)) to organisations which (must meet all these conditions):
- Have a public service mission linked to the delivery of those services.
- Profits are reinvested to achieve the objective
- Is based on employee ownership/participatory principles or require the active participation of employees/users/stakeholders and
- Not had a contract for the services within the past 3 years.
- Not apply to NHS services

PCR – Sheltered workshops

- Reservation of right to participate in processes to sheltered workshops or
- Suppliers whose main aim is employment of the disabled or otherwise disadvantaged.
- 30% of the employees must be disabled or otherwise disadvantaged.

Relevant EU /UK case law

- *Gebroeders v Netherlands* [1990] 1 CMLR 208 – Contract including the employment of the long term unemployed can be compatible with EU rules provided that it is set out in the contract notice.
- *Finnish buses* [2003] 3 CMLR 20 - Can have an environmental consideration in an award criteria and criteria need not be purely economic but must meet the rules set out in the PCR (above).
- *EVN* [2004] 1 CMLR 22. Whilst environmental criteria are lawful in procurements, in this case there was a breach of Eu law as the criteria did not relate to the subject matter of the contract and is unjustly discriminated against smaller suppliers.

Relevant EU/UK case law (2)

- *Dutch Coffee Case* [2013] All ER (ECCC) 804. ECJ case clarifying extent to which a supplier can be required to provide products bearing specific labels relating to their fair trade/environmental credentials. Found:
 - (a) If using environmental specifications, must be set out in full in the spec
 - (b) Fair trade is not a technical specification and so cannot be included but can be in a contract condition
 - © Evaluation criteria can reflect fair trade or eco-requirements, but they must be linked to the subject matter of the contract and observe the principles of equality, non discrimination and transparency

Relevant Eu/Uk case law (3)



- *Dutch Coffee Case (2)*
- General requirements on bidders to demonstrate socially responsible business cannot be used as pre – qualification factors.
- Equal treatment means that factors have to be identified with clarity and precision.
- *Republic v Germany C-20/01*-It was not impossible that a technical reason relating to the environment may be taken into account, but there was not enough evidence to substantiate this claim .

Current Procurement consultation

- Cabinet Office consultation proposes a “Social Value Delivery Model” for central government for all contracts – at present there is a model for contracts over £10 million only in infrastructure.
- There are a series of policy outcomes related to diversity in the workforce, diversity of the supply chain, improving the environment and reducing risk, for example of modern slavery.

Current Procurement consultation

- Each policy outcome will have a set of standard award criteria and evaluation questions, and also a set of performance standards against which the contract can be managed.
- Mandated for all contracts issued by central government, executive agencies etc subject to the PCR 2015 save infrastructure and construction contracts over £10 million.

Tips on building social value

- Have a sustainable commissioning strategy which reflects the needs of the community and the PSED.
- Use consultation and soft market testing
- Undertake supply chain mapping
- Have an audit trail on issues of social value and equality
- Provide and ensure that award criteria are transparent
- Ensure that any social/environmental technical specifications are set out in full.