
White Paper Procurement Conferences

Awarding Public Contracts Skilfully and
Lawfully within the Procurement Rules

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How do you build social value into your tenders?

- How do you score them and enforce them, such as living wage, carbon reduction, regeneration, long term unemployed?

Coverage

- Legislative background
- Specifying social value
- Selection
- Tender evaluation
- Contracts
- Specific cases
- Future trends

Legislative background

- EU Treaty and Directives
- Public Contracts Regulations 2015
- Case Law
- Public Services (Social Value) Act 2012
- Section 17 Local Government Act 1988
- Other legislation (e.g. Equality Act, Climate Change Act)

Where does the EU stand on the issue?

- Directive 2014/24/EU
 - Recital 2 - facilitation of participation of SMEs and better use of societal goals
 - Recital 37 - apply local level laws in fields of environmental, social and labour law (provided there is compliance with EU law and preservation of principle of equal treatment)
- European Commission Handbook on Green Public Procurement (2016)
- “Buying Social” - European Commission Guide to Taking Account of Social considerations in Public Procurement (2010)

Public Services (Social Value) Act 2012

- Applies to all contracting authorities in England
 - in Wales see Well-being of Future Generations Act (Wales) Act 2015
 - in Scotland see Procurement Reform (Scotland) Act 2014
- Applies only to services contracts (and frameworks for the same, but not call-offs)
- Doesn't apply to supplies or works contracts
- Doesn't apply below threshold or to mixed contracts (where services value exceeded by value of goods or works)

Social Value Act - the duties

- Pre-procurement - how will what is proposed to be procured improve the economic, social and environmental well-being of the relevant area?
- In conducting the procurement - how might the authority secure that improvement?
- Application - the “relevant area”
- Qualifications to the duties - relevance and proportionality
- Consider whether to undertake consultation
- Failure does not affect the validity of the procurement
- Enforcement
- How do you demonstrate compliance?

Section 17 Local Government Act 1988 - exclusion of non-commercial matters

- Non-commercial matters include:
 - the terms and conditions of employment or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces;
 - any involvement of the business activities or interests of contractors with irrelevant fields of Government policy;
 - the conduct of contractors or workers in industrial disputes between them or any involvement of the business activities of contractors in industrial disputes between other persons;
 - the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors;
 - any political, industrial or sectarian affiliations or interests of contractors or their directors, partners or employees;
 - financial support or lack of financial support by contractors for any institution to or from which the authority gives or withholds support
- Carve out for Equality Act and Social Value Act

Specifying Social Value

- Regulation 42 - Technical Specifications shall define the characteristics required, which may include levels of environmental and climate performance
- Possible to specify processes or methods of production or provision even if they do not form part of the characteristics material substance provided linked to the subject matter and proportionate in value

Social Value in Selection

- Discretionary exclusion for breach of applicable obligations referred to in Regulation 56(2)
- Grave professional misconduct?
- Environmental management standards in technical assessment

Social Value in Tender Evaluation

- Best price-quality ratio, assessed on basis of criteria such as environmental and/or social aspects
- Must be linked to the subject matter of the contract
- Life cycle costing - including costs imputed to environmental externalities linked to the contract, provided monetary value can be determined or verified e.g. greenhouse gases, other pollutant emissions and other climate change mitigation costs
- Exclusion of MEAT under Regulation 56(2) where tender does not comply with relevant environmental, social and labour law
- Abnormally low tenders - authority may seek explanation relating to compliance with obligations in Regulation 56(2)

Incorporating Social Value in the Contract

- Contracting authorities may lay down special conditions relating to the performance of a contract provided linked to the subject matter of the contract and may include economic, environmental, social or employment related conditions - Regulation 70
- Should have been set out in the tender documents

Squaring the circle

- Remains a tension between fundamental treaty principles and social value objectives
 - Note specific qualifications to the inclusion of social value provisions in the Regulations e.g. “linked to the subject matter of the contract” “proportionate to its value”
- Local labour and “buy local” will always be tricky
- What does case law teach us?

What does Case Law teach us?

- Set out your requirements in full in the contract documents with clarity and precision
- Requirements must be linked to the subject matter of the contract
- Selection rights limited - cannot require demonstration of social responsibility
- Be careful of discriminating against smaller suppliers or those not locally based

Further Reading

- Concordia Buses (C-513/99)
- EVN (C-448/01)
- Dutch Coffee case - (C-368/10)
- Gebroeders v Netherlands (Case 31/87) (Beentjes)

Cabinet Office Consultation

- Central Government only
- To extend to all contracts, not just high value infrastructure
- Aimed at achieving policy outcomes related to diversity and environment
- Possibly will standardise award and evaluation around such issues

Practicalities

- Have very clear social value policies (which are not in themselves discriminatory)
- Use pre-market consultation and understand the supply chain
- Make sure application is relevant and proportionate and don't apply a one size fits all approach
- Use rules which support SMEs
- Use the rules creatively to achieve your goals
- Be transparent
- More easily applied in contract than selection or evaluation

Thank you



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