

SOCIAL VALUE IN GOVERNMENT PROCUREMENT

OUR RESPONSE TO A CONSULTATION ON
HOW GOVERNMENT SHOULD TAKE ACCOUNT
OF SOCIAL VALUE IN THE AWARD OF
CENTRAL GOVERNMENT CONTRACTS

ANTHONY COLLINS SOLICITORS LLP

June 2019

Introduction and General Comments

At Anthony Collins Solicitors LLP, social value sits at the heart of our own purpose, which is to improve lives, communities and society. We have been engaged in the conversation around achieving social value and community benefits through public contracting for 25 years.

We have been at the forefront of bringing legal clarity into the social value arena since our pioneering work with Richard Macfarlane in the ground-breaking publication “Achieving Community Benefits Through Contracts” (JRF 2002), which triggered interest across the UK in the delivery of wider social benefits through procurement.

We supported Chris White MP throughout the passage of the Public Services (Social Value) Act 2012. We have continually supported Social Enterprise UK in its constant campaigning to embed and widen good practice this arena – and we support the messages that it is giving the Government on this important subject.

Not only have we assisted our clients and the wider public sector in achieving social value through public spend, we have actively promoted this approach widely to encourage improved practice nationwide. We have made strong contributions to the relevant legislation in Scotland (the Procurement Reform (Scotland) Act 2014) and assisted with the publication of cutting edge practice in Wales (especially the “Can Do Toolkits”).

As a consequence, we welcome the ambition for maximising social value described in the government’s consultation paper, ‘Social Value in Government Procurement - A consultation on how government should take account of social value in the award of central government contracts’ (the “**Consultation**”) fundamentally agreeing with its conclusion that “*The public sector must maximise social value effectively and comprehensively through its procurement. It cannot afford not to; a missed opportunity to deliver social value is a cost that has to be absorbed elsewhere in public services.*” We would go further than this to say that a missed opportunity to deliver social value is a cost which must not only be absorbed across wider public services but actively multiplies (particularly where multiple and complex needs arise), the opportunity cost impacting upon the growth and health of the economy as a whole. The costs of a shrinking economy caused by climate change have, for example, long been recognised.¹

It is imperative first to articulate what we mean when we talk about “social value”. This is distinct from “corporate social responsibility” – a corporate approach taken to making a business socially responsible through self-regulation – and from “added value”, which can be described as what a business is willing to offer to its customers over and above its core offer,

¹ Stern Review on the Economics of Climate Change, October 2006.

free of charge (or free of obvious charge). Social value can best be defined by reference to the Public Services (Social Value) Act 2012, which refers to three pillars – the economic, social and environmental well-being of the relevant area. True social value is achieved through wellbeing-focussed procurement. This is reflected to some extent in the narrative of the Consultation (pages 3-8 in particular), but not necessarily in the actual proposals made within it.

While a concerted approach to measuring and evaluating the social value achieved at the level of central Government departments is welcomed, we do not think that the practical proposals described in the Consultation go far enough to achieve truly meaningful results. The measures risk promoting a “one-size-fits-all” approach that will, as a direct consequence of its generality, achieve only some of the potential social value in each contract procured. From our experience, the way to maximise the social value that can be delivered is to ensure that social value itself is at the core of what is being procured; to take a contract-by-contract approach considering how best to achieve that using all the tools available in procurement law and practice; and to make sure that no one stage of the commissioning cycle is considered in isolation.

Our recommendations are that the evaluation methodology:

- should focus on only those requirements that further the economic, social or environmental wellbeing of an area or community, to ensure consistency of message about what “social value” is, and to avoid dilution of that message by encompassing legal and regulatory requirements and other unrelated aspirations under the umbrella of “social value”;
- needs to be considered in the context of wider Government procurement policy and, we would suggest, that social value needs to be placed at the centre of a more holistic approach to procurement policy which replaces the piecemeal policy statements on a variety of different matters;
- should be placed as one of a series of steps that can be taken to achieve social value through public spending, recognising that tender evaluation is only one part of the commissioning cycle, and that in particular identifying the subject-matter of a contract in advance of the procurement process with a view to social value being core to the contract, not simply an add-on where it is felt to be appropriate, will achieve the greatest impact;
- should form part of a policy position which emphasises that achieving social value through procurement is simply good procurement policy – not a “nice to have” but an imperative that demonstrates best practice.

We describe how we think this can be achieved below in our responses to each of the four questions posed in the consultation paper.

As an overall comment, we suggest that the broad **aims** of promoting social justice, tackling poverty, removing inequalities and reversing climate change should lie at the heart of all Government procurement exercises, so that they shape the purpose of the commissioning process and are not just tacked on as desirable added benefits. Intriguingly we think that the Consultation's case study of "RAF Marham powered by green energy" goes a long way to being an exemplar of such aims, although we fear that this is a consequence of unwitting competence rather than deliberate policy-led procurement.

1. DO YOU AGREE WITH THE PROPOSED POLICY METRICS IN THE MODEL IN THE ATTACHED ANNEX? DO YOU HAVE EXAMPLES OF SUCH METRICS BEING SUCCESSFULLY USED IN PUBLIC PROCUREMENT?

Whilst we appreciate the need to be able to demonstrate examples of how social value can be evaluated through procurement exercises, the table of proposed policy metrics lacks ambition by supporting a "tick box exercise" rather than an approach which brings social value to the core of the contract. Consequently, the proposed approach sits on the margins of what can be achieved, focussing on limited and discrete areas of social value, rather than having the ambition to push for the wider opportunities that embracing social value in a more wholesale way presents, especially if the Government takes the purposeful aim-centred approach that we suggest.

The Consultation's message that public services should be delivered with "*values at their heart*" is to be applauded as a policy position. But a distinction needs to be made between the values of the organisation, and values-driven procurement. Particularly, this needs to be seen in the light of the European and domestic case law², and legislation, which govern how social and environmental considerations are taken into account in public procurement. Government will be aware, for example, that Recital 97 of Directive 2014/24³ confirms that contracting authorities should "*not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place*". The requirement for evaluation criteria to have a link to the subject-matter of the contract, which was established in the *Finnish Buses* case⁴, "*excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services*". Values-driven procurement needs to ensure that the key step of identifying how those values govern what is purchased (not what social value is

² See the 'Helsinki Bus' case (Case C-513/99 of 17 September 2002) and the 'Dutch Coffee' case (Case C-368/10 of 10 May 2012) which strongly influence the way that Public Contracts Regulations 2015 are framed.

³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

⁴ *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* (Case C-513/99) EU:C:2002:495

added onto an already defined purchase) is not missed. Once the purchasing decision is made, the primary opportunity to drive the contracting authorities values forward has passed.

The proposed policy metrics suggest that a generic approach can be taken to social value. Our key criticism is that this approach is less likely to result in significant social value, which is best achieved through bespoke consideration of the opportunities that each individual procurement offers. In our view, bringing values to the heart of how public services are delivered is all about bringing social value to the core of contracts. The proposed evaluation model only goes so far as to suggest that, once a contracting authority has decided what it is procuring, it should consider whether there is any social value metric which can be applied on the basis that it is relevant to the subject matter of the contract. We have considered some of the specific metrics from the evaluation model below, but also set out our views on how social value can best be achieved through procurement, by recognising that evaluation of tenders is only one discrete part of the procurement process at which social value should be considered, and which itself forms part of the much larger commissioning cycle.

REVIEW OF THE PROPOSED EVALUATION MODEL

Not all the proposed social value metrics are legitimate. It is a concern to us that items such as cyber security and modern slavery are included as indicative social value objectives. Under the Public Services (Social Value) Act 2012, a contract's social value would be how it would "improve the economic, social and environmental well-being of the relevant area". Cyber security cannot be said to fall within this definition. As for modern slavery, this is a legal compliance issue and, again, should not be confused with social value. Whilst both are legitimate concerns to be addressed through procurement, they sit outside of the social value regime and the danger of including them at policy level is that commissioners may mistakenly consider themselves as having achieved social value objectives merely by addressing these two unrelated issues. There must be no confusion at policy level as to what is or is not social value, or else we risk failing to deliver true social value because it has been misinterpreted as including standard due diligence exercises.

While we welcome some of the metrics proposed (subject to the comments made above concerning those that are not relevant to social value), and the themes identified are relevant, these metrics need to be seen in the context of the commissioning cycle and, as emphasised above, recognised as a small part of that wider cycle. With that in mind, we would only comment as follows:

- **Skills and employment:** there are tried and tested models for increased the targeted recruitment and training outcomes from public contracts which could be used under this theme. We would encourage the proposed model to take best advantage of these tried and tested models;

- **Diverse supply chains:** SMEs, VCSEs and social enterprises can form a vital and very effective part of a supply chain for larger contracts, and this theme is therefore welcome. We would stress, however, that placing this theme first in the evaluation model could have the effect of reducing SMEs, VCSEs and others to the role of subcontractors and suppliers and discouraging those same entities from identifying prime contractor opportunities that they could tender for in their own right. We would invite you to consider the approach taken in the CIH Wales Can Do Toolkit for SME friendly procurement as one example of an effective, and more detailed, approach to encouraging social value through supply chain use;⁵
- **Environmental Sustainability:** the policy outcome is stated as “environmental impacts are reduced”. We would strongly recommend that this is changed to “negative environmental impacts are reduced and positive environmental impacts are increased”. Given the clear messages received from the UN and elsewhere which demonstrate the need for urgent action on climate change, it is vital that Government procurement policy goes further than simply reducing negative environmental impact.

GENERAL COMMENTARY ABOUT THE APPROACH TO SOCIAL VALUE

Bringing social value into the core of the contract is more likely to be achieved where the focus throughout the commissioning cycle is to ask “What is the purpose of the procurement?”, taking into account the key policy and strategy goals of the contracting authority, and use this to drive social value considerations. For example, where a contracting authority operates in areas of deprivation, the policy and strategy goal behind a procurement might be to eliminate or alleviate poverty; the goods, services or works being procured are ancillary to this wider policy or strategy goal. How this approach differs to that in the proposed Evaluation Model is that it turns these issues on their head – rather than social value sitting alongside, or being applied to, the core focus of the contract, social value becomes the key goal. When you make social value the goal in its own right, the focus of the procurement changes so that social value is not seen as an ancillary output, but instead the subject matter of the contract itself.

To get the most out of the opportunities social value presents it is important to consider each contract individually and to openly, without assumptions, assess what is being purchased, so that where appropriate the core focus of the procurement shifts to embrace, rather than append, social value. For example, instead of a contract for construction works that has added to it a requirement for targeted recruitment and training requirements, we could have a contract to deliver employment and wellbeing outcomes that are achieved through a guaranteed stream of works.

⁵ http://www.cih.org/resources/PDF/i2i/SME_Friendly_Procurement-CDT_2-Resource_1-Eng.PDF

Furthermore, by focussing only on the contract award stage of a procurement process, the proposed Evaluation Model risks compounding a common issue in achieving social value through public procurement, which is to consider social value as a procurement concern only, failing to reflect the significance of those social value objectives in the wider commissioning cycle: first by taking into account social value at the point of deciding what to purchase, but also through robust contract drafting and effective contract management. Bidders' social value may score highly at contract award, but if this does not translate into actual results, both managed and evidenced through effective contract management, contractors may not feel under pressure to deliver that social value at contract delivery stage. What is needed are practical mechanisms and dedicated resources for monitoring delivery and holding contractors to account for their social value commitments.

Any policy put forward by the Government must be clear that it is as important to ensure that the focus on achieving social value must persist throughout the lifespan of the contract and the commissioning cycle as a whole. We suggest that the proposed Evaluation Model could sit as part of a wider suite of social value policy positions, taking into account:

- the decision over “**what to buy**” discussed above;
- **considering social value pre-procurement:** the scope to use the procurement rules to best effect needs to be thought through prior to entering the procurement stage of the cycle and this can include effective use of procurement rules and the opportunities they allow: for example the reserving of contracts to sheltered workshops or public service mutuals; the use of the discretionary exclusion criteria around breaches specified social and environmental laws; or simply ensuring that selection criteria don't unnecessarily exclude small businesses;
- **applying effective award criteria:** this is, in effect, the point in the commissioning cycle that the Consultation addresses;
- **suitable contract drafting:** this needs to emphasise the extent to which the client contracting authority intends to enforce the terms of the contract, and to ensure that social value outcomes (whatever proportion of the contract they make up) are achieved;
- **proactive contract management:** which harnesses the resources available to monitor and administrate the contract, and which allows for sufficient data gathering and presentation against KPIs, without unnecessary bureaucracy;
- **planning for exit:** wherever possible with a view to a clear social value legacy being achieved – especially if questions such as how social justice has been delivered and climate change been impacted can become commonplace to answer.

2. DO YOU AGREE THAT THE PROPOSED MINIMUM 10% WEIGHTING FOR EVALUATING SOCIAL VALUE IN THE BID IS APPROPRIATE?

We would reiterate that social value should be at the core of the procurement and, as such, the proposed minimum weighting of 10% is an arbitrary figure. Any arbitrary weighting risks marginalising social value to something that is added onto a contract, rather than forming a core and integral part of that contract.

In a scenario where social value is truly at the core of the contract, it may not even be necessary to individually measure “social value” through a discrete evaluation criteria and associated weighting. This would be on the basis that the contract, as designed, inherently delivers social value through all activities under it, and so social value would permeate all the evaluation criteria.

We would note also that, as the Consultation effectively proposes an approach to social value which leaves the contracting authority to decide what social value (from the matrix) is relevant to the subject matter of their contract, an arbitrary minimum weighting for evaluation criteria (whatever that minimum is set at) risks being meaningless in any case. The contracting authority still has the option not to include social value and, until this option is removed, there is still the very significant risk that contracting authorities will choose simply not to engage with the issue. A contracting authority may choose not to incorporate social value into a contract where it considers that the 10% minimum weighting is disproportionate, for example, missing the opportunity.

If a weighting is to be introduced, we support Social Enterprise UK’s contention that it should be increased to a minimum of 20%; but this is a second-best option to the pursuit of the core aims that we have recommended being adopted at the heart of Government procurement.

See above for our comments on themes in response to Question 1 which should also be considered under this Question.

3. DOES THE PROPOSED APPROACH RISK CREATING ANY BARRIERS TO PARTICULAR SIZES OR TYPES OF BIDDERS, INCLUDING SMES OR VCSES? HOW MIGHT THESE RISKS BE MITIGATED?

SMEs and VCSEs, alongside social enterprises and others in the “third” sector, are often in the best position to deliver real social value. Clearly, therefore, it is vital to consider whether any approach to social value inadvertently raises barriers which prevent the delivery of the very social, economic and environmental goals that the contracting authority is seeking to achieve. We consider very strongly that the greatest impact can be achieved through fundamentally rethinking what is being procured to bring social value truly front and centre of

a contract (and therefore the procurement process). We have set out our thoughts on this point in response to question 1 above. If social value were truly front and centre of a contract, and not on the periphery, then if anything SMEs, VCSEs and Social Enterprises are better positioned to deliver than mainstream commercial for-profit vehicles.

Our criticism of the Evaluation Model is that it lacks ambition. As is discussed above in our response to question 1, we advocate an approach which turns the issues set out in the Evaluation Model on their head, as social value can and should become the core focus of a procurement, rather than an ancillary “add-on”. We have considered the contents of the proposed Evaluation Model with a view to identifying where any specific aspects might have the effect of restricting competition or creating barriers to the marketplace.

4. HOW CAN WE ENSURE GOVERNMENT’S EXISTING PROCUREMENT POLICY MANDATES (FOR EXAMPLE ON LEVELLING THE PLAYING FIELD FOR SMES) TAKE PRECEDENCE IN DESIGNING THE PROCUREMENT?

The most significant thing that Government could do in this arena would be to take a holistic view of its procurement policy with its goal being to achieve the best possible outcome from every procurement process and public contract. This means consolidating existing procurement policy mandates into a coherent whole, which will both provide clarity and certainty. The adoption of **aims** such as delivering social justice, tackling poverty, removing inequalities and reversing climate change across all commissioning activity would instil confidence that the Government really does believe in “common good” being at the heart of its operations – a signal badly needed in a nation divided by Brexit and all its causes in these strange times. The Government’s existing policy mandates should be articulated to explain how they achieve these proposed aims.

If you have any queries or comments concerning this document, please contact:

Mark Cook

Partner

Tel: 0121 214 3636

Email: mark.cook@anthonycollins.com

Gayle Monk

Senior Associate

Tel: 0121 214 3630

Email: gayle.monk@anthonycollins.com

Beulah Allaway

Associate

Tel: 0121 214 3614

Email: beulah.allaway@anthonycollins.com

Martin Brown

Solicitor

Tel: 0121 212 7424

Email: martin.brown@anthonycollins.com