

UK Transposition of new EU Procurement Directives Public Contracts Regulations 2015

Consultation response from Social Enterprise UK

About Social Enterprise UK

Social Enterprise UK was established in 2002 as the national body for social enterprise in the UK. We are a membership organisation. We conduct research; develop policy; campaign; build networks; support individual social enterprises; share knowledge and understanding; support private business to become more socially enterprising; and raise awareness of social enterprise and what it can achieve.

Social enterprises are businesses driven by social or environmental objectives whose surpluses are reinvested for that purpose in the business or in the community. They operate across a wide range of industries and sectors from health and social care, to renewable energy, recycling and fair trade and at all scales, from small businesses to large international companies. They take a range of organisational forms from co-operatives and mutuals, to employee owned structures and charitable models.

Our members come from across the social enterprise movement, from local grassroots organisations to multi-million pound businesses that operate across the UK. The UK social enterprise movement is recognised as a world leader and our members are united in their commitment to changing the world through business. The current climate presents the social enterprise movement with a unique opportunity. We know it can solve some of the UK's most pressing problems, promote social justice and help to bring about the more diverse, bottom-up economic growth that we urgently need. In particular, social enterprises are well placed to deliver on the Government's three priorities for civil society: empowering communities, opening up public services and promoting social action.

Please see our response to the consultation questions on behalf of our members below.

In summary, we support the swift transposition of the new EU laws into domestic legislation. However, we believe there is an opportunity missed here to ensure that public spending is less wasteful, through:

- ensuring that wider, long-term social value is maximised through the use of taxpayer's money;

Social Enterprise UK The Fire Station, 139 Tooley Street, London, SE1 2HZ
T: 020 3589 4950 **E:** info@socialenterprise.org.uk **www.socialenterprise.org.uk**

Company number 4426564. The Social Enterprise Coalition is a company limited by guarantee registered in England and Wales.



the voice for social enterprise

- greater transparency;
- giving more powers to service users, citizens and communities;
- the breaking up of oligopolies; and
- taking past performance in to consideration in procurement decisions.

With regard to the draft regulations themselves, we would like to see:

- further clarity around a number of definitions;
- greater emphasis on the principle of subsidiarity
- better resourced training and more powerful guidance;
- greater transparency with regard to sub-contracting; and
- wider use of the new rules which reserve contracts to organisations with a public service mission; who reinvest profits and which have a significant degree of staff or user ownership and control.

Despite the Cabinet Office's laudable ambitions, we are still seeing an increasing trend towards the dangerous aggregation of contracts, which requires a stronger and more consistent cross government effort to address.

Question 1 - We seek general comments on the drafting of the draft Regulations.

Social Enterprise UK welcomes the draft regulations and the Government's ambition to swiftly transpose EU law into domestic legislation. However, there is an opportunity missed here to ensure better value for money in public service commissioning and procurement. The draft regulations should be amended to include further measures which ensure:

- public bodies are obliged to account for how social value is generated in commissioning and procurement; the Social Value Act should be extended to apply to the purchasing of goods and works and the management of assets, including investments and disposals of capital, land and other assets; the Act should be supported with Statutory Guidance; and the Act should be given greater 'teeth' to ensure its implementation.
- public bodies publish their social value priorities and ensure contracts are weighted toward them. They should also include in tender evaluations whether a bidder is transparent about its tax arrangements, meets Fair Tax Mark standards, pays the Living Wage and meets appropriate targets on apprenticeships. Public bodies would enforce minimum standards, doing business only with firms that pay living wages and fair taxes.
- for citizens and communities - a Right to Recall over a provider in the case of a significant breach of trust, the ability to trigger investigations,

Social Enterprise UK The Fire Station, 139 Tooley Street, London, SE1 2HZ
T: 020 3589 4950 E: info@socialenterprise.org.uk www.socialenterprise.org.uk

Company number 4426564. The Social Enterprise Coalition is a company limited by guarantee registered in England and Wales.



user-led ratings systems, the right to choose their own provider in certain circumstances, and the Right to Observe the Board of the public service provider.

- that no single supplier should be allowed to take up more than 20% of a public body's budget, or have more than a 20% share of an important public service market. This would include services delivered in supply chains.
- FOI powers should be extended to companies delivering public services (taking into account proportionality and appropriate timeframes)
- performance under previous contracts can be explicitly weighed up as part of the decision-making process in procurement decisions. This now needs to become de rigueur when public authorities evaluate tenders.
- open book accounting should be rolled out for all public- sector contracts worth more than £250,000.
- MEAT is mandated. We are disappointed that the Government has failed to take advantage of the option to prohibit contracting authorities from using cost or price only as the sole award criterion, or to restrict their use to certain types of contracts. We believe value for money can only be achieved through full consideration of social value and quality alongside cost. We challenge the Government to provide us with an example of a service where quality is immaterial and look forward to a response. We hope the Social Value Act review currently underway will present another opportunity to address these concerns.

Beyond these wider concerns, we have some specific suggestions with regard to the draft regulations as they stand, which fall outside the scope of the questions below.

- The definition of “VCSE” in the draft regulations as a “non-governmental organisation that is value-driven and which principally reinvests its surpluses to further social, environmental or cultural objectives” is highly ambiguous and could be misunderstood. HM Treasury, for example, once described UKFI as a “value-driven” organisation, referring to its aim of maximising *financial value* from its investments. We suggest instead that the text reads “non-governmental organisation with a clear social and/or environmental mission set out in their governing documents, which is majority controlled in the interests of this mission, and which principally reinvests its surpluses to further social, environmental or cultural objectives.”
- This regulation should also say “SME and/or VCSE” to provide further clarity that information is required on both.
- We support the Government's decision to mandate that all public procurement opportunities and award notices for public contracts over

Social Enterprise UK The Fire Station, 139 Tooley Street, London, SE1 2HZ
T: 020 3589 4950 E: info@socialenterprise.org.uk www.socialenterprise.org.uk

Company number 4426564. The Social Enterprise Coalition is a company limited by guarantee registered in England and Wales.



£25,000 be accessible from Contracts Finder, but believe that much more must be done to make this outlet user-friendly for social enterprises and SMEs.

- We welcome the introduction of the new 'innovation partnership' procedure which allows contracting authorities to engage with suppliers to procure innovative services that are not already available on the market place. Given its untried and untested status, extra effort will be required to raise awareness of this new flexibility and the parameters of what is, or is not, permissible under the new procedure. Government should also facilitate the sharing of best practice as the procedure is developed and used.

Question 3 - Sheltered Workshops

We question the argument that defining 'disabled persons', 'disadvantaged persons', 'sheltered workshop', and 'sheltered employment programme' in the regulations would mean departing from the Government's policy on copy-out as there are a number of other definitions added to the draft regulations, such as VCSE, for instance. We suggest that in providing guidance on these terms, that meaningful engagement takes place with social enterprises and social firms, and their representatives.

Question 8 - Division of contracts into lots / SME access

We agree with the Government that division of contracts can encourage SME access and that the decision on whether or not to divide into lots, and if so the number and types of lots, should be left to the discretion of each contracting authority or entity case-by-case. But there should be greater emphasis here placed on the principle of subsidiarity and ensuring that the default principle should be that public services are designed, commissioned and procured at a level as close to the citizens as possible, unless there is a case otherwise. So while we welcome the Government's decision to allow contracting authorities discretion over whether to split large contracts into smaller lots, and where applicable explain their reasons for not doing so, we believe this approach is rather upside down. Instead, contracting authorities should have discretion over whether to combine smaller contracts into larger lots and where applicable explain their reasons for doing so.

Social Enterprise UK The Fire Station, 139 Tooley Street, London, SE1 2HZ
T: 020 3589 4950 **E:** info@socialenterprise.org.uk **www.socialenterprise.org.uk**

Company number 4426564. The Social Enterprise Coalition is a company limited by guarantee registered in England and Wales.



We also support the Government's decision to allow contracting authorities to award contracts combining several or all lots, where this offers better value for money or added social value. However, this will not always be the case so we disagree with the suggestion in the consultation this this "will help to achieve the best value for money." In combining lots professionals should be required to consider the impact on the long-term health and competitiveness of the supplier market.

Question 9 - Division of contracts into lots / SME access

We want to see a properly resourced training and guidance programme for contracting authorities that includes a specific focus on encouraging small organisations to realise their potential as shapers and providers of public services. This should highlight the advantages of dividing contracts into smaller lots, and encourage procurers to provide support for consortia formation. We also want the Government to monitor and evaluate the size of the contracts being awarded with a view to ensuring future markets include a sufficiently diverse range of providers. Encouraging a diverse range of providers is essential for the health of future markets in public service provision. Contracting authorities should also be reminded of the longstanding principle of subsidiarity - fundamental to the functioning of the European Union - which holds that social problems should be dealt with at the most immediate or local level compatible with the intervention, unless there is a strong case to the contrary.

Question 13 - Sub-contracting

Social Enterprise UK is disappointed that the Government has not taken advantage of the option to make it compulsory for contracting authorities to ask bidders to indicate in their proposals any share of the contract they may intend to subcontract to third parties and any proposed subcontractors. This should be a basic requirement of transparency and openness in public services.

Question 14 – Sub-contracting

We want training and guidance to include a requirement for bidders to ask bidders to indicate what share of the contract they intend to subcontract, indicate the composition of their supply chain and which organisations will

Social Enterprise UK The Fire Station, 139 Tooley Street, London, SE1 2HZ
T: 020 3589 4950 E: info@socialenterprise.org.uk www.socialenterprise.org.uk

Company number 4426564. The Social Enterprise Coalition is a company limited by guarantee registered in England and Wales.



deliver the various components of the service. We recognise that it is not always feasible to predict precisely the value of work that will go to subcontractors (for instance under spot purchase or specialist intervention arrangements) but a percentage share expressed as a range between two figures is achievable. Prime contractors should be required to publish timely data on referral volumes and work flows throughout their supply chain and subcontractors should provide comparable performance data. When submitting a bid for a public service contract it is essential that a prime contractor clearly indicates the composition of their supply chain and which organisations will deliver the various components of the service. For a prime contractor to be held to account for any commitment made, there needs to be full transparency throughout the supply chain. The government should also make it compulsory that contracting authorities ensure their prime contractors publish timely data on referral volumes and work flows in £ value throughout their supply chain.

Question 16 - Light Touch Regime

We welcome the replacement of the existing 'Part B' services category with a new 'light touch' regime for health, social and other services. The new Directive allows for certain services in the fields of health, social and cultural services to be reserved for organisations that have as their objective the pursuit of a public service mission; who reinvest any profits with a view to achieving the organisation's objective; and whose structure is based on employee ownership or participatory principles. Elsewhere, we have put our name to NCVO's response to this consultation, which we broadly support. Our position on the mutuals reservation is slightly different, however, and set out below. We also support the submission made to this consultation by Scott Darraugh on behalf of the *Northern Based Health and Social Care Public Service Mutuals and Social Enterprises*.

We are concerned that the government has suggested that existing health legislation (the Health Act and the NHS Procurement, Patient Choice and Competition Regulations) prevents the mutual reservation from applying to healthcare commissioning in England, when it is not clear this is indeed the case. There are a range of factors that health commissioners can consider when commissioning services and it not clear that the new EU law is incompatible with the Health Act or related regulations. We understand the Cabinet Office believes that the mutuals reservation may be incompatible with the NHS Patient Choice and

Social Enterprise UK The Fire Station, 139 Tooley Street, London, SE1 2HZ
T: 020 3589 4950 E: info@socialenterprise.org.uk www.socialenterprise.org.uk

Company number 4426564. The Social Enterprise Coalition is a company limited by guarantee registered in England and Wales.



Competition Regulations (PCCR), which prohibit commissioners favouring one provider, or type of provider, over another. However, this ignores the fact that health commissioners can already restrict the awarding of a contract to a public body, for example, without competition, while it may feel unable to do so with regard to a mutual or private provider. Legal analysis suggests that the PCCR in fact, contrary to the Cabinet Office's suggestion, would thus favour the transposition of the mutuals reservation in a clinical health context, as this would enable the extension of a privilege already granted to one type of provider to another. Not adopting this Directive would rather be incompatible with the PCCR as it would represent continuing to favour one type of provider over another when the new EU rules allow for a fairer playing field to be established. (That other private providers may not be granted this privilege represents a potential conflict between wider EU procurement law and the PCCR which goes beyond the scope of this consultation.)

Further, arbitrarily excluding healthcare commissioning from the flexibility afforded by the mutual provision and applying the new provision to some public service markets, while neglecting others, appears to be an inappropriate transposition of EU law, as it is not clear that the new Directive affords member states this flexibility.

Finally, we are concerned that this application of EU law afford less freedom and flexibility to local commissioners, which is against the principles of localism and subsidiarity supported by this government. It is also likely to work against the potential for integration, with local authority and health commissioners operating under different procurement rules. We therefore urge government to include healthcare commissioning within the scope of the new provision, to enable local commissioners the flexibility to make decisions in the best interests of patients, value for money and the taxpayer.

Question 17 - training aids, policy instructions or guidance and supporting materials

There is a strong culture of risk-averseness and inflexibility in public contracting authorities when applying EU procurement rules even when these allow for flexibility and the use of discretion. For example, the existing 'Part B' services category that the 'light touch' regime will replace also has few rules to follow, yet procurement professionals often follow 'full' procedures when not required to do so.

We believe the proposed reforms only address one aspect of the reforms needed as the most significant barriers are more structural and cultural, and addressing procurement processes and rules alone will be wholly insufficient

Social Enterprise UK The Fire Station, 139 Tooley Street, London, SE1 2HZ
T: 020 3589 4950 E: info@socialenterprise.org.uk www.socialenterprise.org.uk

Company number 4426564. The Social Enterprise Coalition is a company limited by guarantee registered in England and Wales.



in terms of ensuring a plural, diverse and sustainable market of providers. There are also issues around the professional procurement capabilities of public officials.

A comprehensive training package is also recommended through the existing Commissioning Academy. While we welcome the Government's intention to expand the size of the programme to target 1,500 participants by 2016, this target still represents a modest intake given the size of the procurement community nationally (thought to be circa 6000). Furthermore, feedback from participants of the Academy suggests the initiative has not yet done enough to address the disconnect between procurement teams and commissioning teams which often serves as a significant barrier to creative procurement and value for money interventions. We therefore recommend that government extend the academy to a larger number of commissioners than at present, as well as extending the offer to procurement, legal and financial staff.

To combat poor practice, commissioners and procurement officials need to feel secure that they will not be challenged for certain decisions. It is therefore essential that the Government provides clear, practical and comprehensive guidance to accompany the implementation of the new regime. It is therefore vital that government provides guidance which is endorsed by the maximum possible range of stakeholders, including HM Treasury, Cabinet Office, the Department for Business, Innovation and Skills, the Local Government Association and the Society of Procurement Officers, for example. Guidance badged only by Cabinet Office will be perceived to be less powerful. A comprehensive training programme should run alongside the new Regulations.

Question 19 - New measures to increase SME participation in public procurement

Our response¹ to the Government's 2013 consultation 'Making public sector procurement more accessible to SMEs' sets out our views with regard to the new measures to increase SME participation in public procurement.

In many public service areas we are still seeing the increasing trend towards the aggregation of contracts, which is precluding more and more SMEs and VCSEs from bidding. Indeed, there are some very contradictory messages between the Government's commitment to localism and SME participation and recent policy from the Ministry of Justice and the Department of Health, for example. This contradiction between policy and

1

http://www.socialenterprise.org.uk/uploads/editor/files/SME_procurement_consultation_S_EUK_and_Locality_1.pdf

Social Enterprise UK The Fire Station, 139 Tooley Street, London, SE1 2HZ
T: 020 3589 4950 E: info@socialenterprise.org.uk www.socialenterprise.org.uk

Company number 4426564. The Social Enterprise Coalition is a company limited by guarantee registered in England and Wales.



the voice for social enterprise

practice confuses SMEs and VCSE organisations, makes Cabinet Office look weak and compromises the credibility of any constructive policy ambitions in this area.

Social Enterprise UK The Fire Station, 139 Tooley Street, London, SE1 2HZ
T: 020 3589 4950 **E:** info@socialenterprise.org.uk **www.socialenterprise.org.uk**

Company number 4426564. The Social Enterprise Coalition is a company limited by guarantee registered in England and Wales.

