



# Anthony Collins solicitors

THE PUBLIC SERVICES (SOCIAL VALUE) ACT 2012 –  
HEALTH AND SOCIAL VALUE PROGRAMME

Mark Cook  
4<sup>th</sup> December 2013

In force...

31<sup>st</sup> January 2013

Cabinet Office Procurement Policy Note

The Public Services (Social Value Act) 2012 – advice  
for commissioners and procurers

Information Note 10/12 20<sup>th</sup> December 2012



# Public Services (Social Value) Act 2012

## Section 1 - Contracts of relevant authorities

### The Act:

- covers public service contracts (including service contracts with a works or goods element) and frameworks for such contracts
- applies itself to the pre-procurement stage of the commissioning process
- requires that contracting authorities should:
  - consider how to improve the economic, social and environmental well-being of the area served by them through procurement;
  - how to undertake the process of procurement with a view to securing that improvement;
  - consider whether to undertake any consultation as to these matters
- provides that genuinely urgent situations do not require this exercise



## Section 1 also says.....

When it considers how to secure the procurement in well-being the contracting authority must consider only matters that are relevant to what is proposed to be procured and, in doing so, must consider the extent to which it is proportionate in all the circumstances to take those matters into account.



# Public Services (Social Value) Act

## Section 2 – Local authority contracts

“In section 17 of the Local Government Act 1988 (exclusion of non-commercial considerations in the case of local and other public authority contracts), after subsection (10) insert-

“(11) This section does not prevent a public authority to which it applies from exercising any function regulated by this section with reference to a non-commercial matter to the extent that the authority considers it necessary or expedient to do so to enable or facilitate compliance with duty imposed on it by section 1 of the Public Services (Social Value) Act 2011.”

Local authorities are not usually permitted to take non-commercial considerations into account in their contracts, but can do so if needed to comply with the Social Value duty



## Non-commercial considerations

- employment terms and conditions, training and opportunities for workforces
- whether sub-contractor terms are for self-employed persons only
- involvement in industrial disputes
- country of origin of supplies/location of business
- political, industrial or secretarian affiliations
- financial support for an organisation the authority withholds support from
- Building Regulations approvals



This is not new stuff...



Including social and economic requirements in procurement is nothing new, but had a renaissance at the beginning of the century when new clarity developed around the ambit of the EU procurement rules, and the relaxation of local government rules on non-commercial considerations.



# Public Bill Committee

Wednesday 19 October 2011

"By focusing on services, the legislation rightly focuses on the types of contract with the greatest direct impact on individuals and communities, and consequently where wider value is likely to be most relevant. I stress that it is not the Government's intention to suggest that there would not be benefits in considering wider value in other forms of contract, but we do not believe that they warrant legislation at this time. " (Nick Hurd MP)



# Definitions



# Best Value Statutory Guidance 2011

- 56 pages replaced with 1 page
- Confirms the Best Value duty
- “Under the Duty of Best Value, therefore, authorities should consider overall value, including economic, environmental and social value, when reviewing service provision. As a concept, social value is about seeking to maximise the additional benefit that can be created by procuring or commissioning goods and services above and beyond the benefit of merely the goods and services themselves.”
- Duty to consult – including local voluntary and community organisations and small businesses. “This should apply at all stages of the commissioning cycle, including when considering the decommissioning of services. In the interests of economy and efficiency, it is not necessary for authorities to undertake lifestyle or diversity questionnaires of suppliers or residents”
- Don’t pass on too many cuts!



The central conundrum: what are you buying?



# Procurement: good practice

## Core specification

- Check the authority's powers – especially for large or broad contracts
- Identify a policy basis for action (short term)
- Adopt an explicit policy (longer term)
- Include in Business Case
- Include in the core requirements – ensure non-discriminatory
- Include reference in Contract Notices to ensure you are upfront. If it's not in the Contract Notice, it's not in the procurement!
- Include in PQQ and specification
- Use in the award process
- Deliver through a 'partnering approach'. Don't just leave your contractors to it.



# The significance of policy

- The “Finnish Buses” case
- Contracting authorities are entitled to include environmental (and, by implication, social) considerations in their award criteria. These need not be purely economic in nature. They need to:
  - be linked to the subject matter of the contract;
  - not confer an unrestricted freedom of choice on the authority;
  - be expressly mentioned in the contract documents or tender notice; and
  - comply with all the fundamental principles of community law, in particular the principle of non-discrimination.

Case C-513/99

Concordia Bus  
Finland Oy Ab  
(formerly  
Stagecoach  
Finland Oy Ab)

v

(1) Helsingin  
Kaupunki (2)  
HKL–  
Bussiliikenne

(2002)

If it's policy, it's core



**But:  
exercise  
common sense!**



# Verifiability

The accuracy of the information sought from tenderers in relation to environmental (and, by implication, social) requirements must be capable of being verified. Award criteria that are not linked to the subject matter of the contract are not permissible.

Case C-448/01

(1) EVN AG (2)  
Wienstrom GMBH

v

Republic of  
Austria

(2003)



## Evaluation criteria

Increasing amounts of case law on the complete disclosure of evaluation criteria

Three recent cases:

- Traffic Signs and Equipment Limited -v- Department for Regional Growth and Department for Finance and Personnel [2011 NIQB 25 (4 February 2011)
- Mears Ltd -v- Leeds City Council (No 2) [2011] EWHC 1031 (TCC) (19 April 2011)
- Commission -v- Netherlands (Case C-368/10) (10 May 2012)



## Commission -v- Netherlands (10<sup>th</sup> May 2012)

- Environmental characteristics can be used in specifications but must be set out in full
- Fair trade cannot be included in technical specifications but can be in a contract condition
- Evaluation criteria can reflect fair trade or eco-requirements, provided they are linked to the subject matter of the contract and observe the principles of equality, non-discrimination and transparency such that well-informed bidders can know their exact scope
- General requirements on bidders to demonstrate sustainable purchasing/socially responsible business cannot be used as pre-qualification factors
- Equal treatment, non-discrimination and transparency requires clarity and precision



## Key points

- Policy is critical to social value being embedded in procurement
- Early scoping so the subject matter of the contract is clear greatly reduces bases for challenge
- The use of sustainability criteria that go beyond quality accreditation must be explained in the tender documentation
- Provided that all evaluation criteria are properly disclosed to bidders, the use of economic, social and environmental requirements is entirely acceptable
- Don't use specified labels - technical specifications used should instead describe the underlying requirements
- “There is therefore nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of fair trade origin” (Netherlands).



# Contract Notices

*“Under the Public Services (Social Value) Act 2012 the contracting authority must consider—*

*(a) how what is proposed to be procured might improve the economic, social and environmental well-being of the area where it exercises its functions, and*

*(b) how, in conducting the process of procurement, it might act with a view to securing that improvement.*

*Accordingly the subject matter of the contract has been scoped to take into account the priorities of the contracting authority relating to economic, social and environmental well-being. These priorities are described in the invitation to tender/negotiate/participate in dialogue and are reflected in environmental and social characteristics in the evaluation criteria for the award of the contract.”*

**Wording to be inserted under the heading “Other information” in an OJEU Contract Notice**



If you have any queries or comments about the Act or sustainable procurement please contact Mark Cook of Anthony Collins Solicitors LLP on 0121 212 7472 or [mark.cook@anthonycollins.com](mailto:mark.cook@anthonycollins.com)

**Anthony Collins**  
solicitors

Anthony Collins Solicitors LLP  
134 Edmund Street  
Birmingham B3 2ES  
MDX 13055 Birmingham 1  
Tel: 0121 200 3242  
[www.anthonycollins.com](http://www.anthonycollins.com)

