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A LEGAL PERSPECTIVE

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Social Value as an established, permissive concept in public service commissioning

There is a common misconception that social value was introduced into UK public service commissioning by the Public Services (Social Value) Act 2012. In fact, social value has long been a legitimate consideration, expressly and implicitly since 1999, although the Act did add a duty to consider social value as a supplement to the pre-existing power to utilise the concept.

- Social value was first expressed as a concept within the 'best value' regime, introduced under The Local Government Act 1999, with the aim of promoting continuous improvement in the exercise of public authority functions. Updated guidance, published on 27 March 2015 states that local authorities should consider overall value, including economic, environment and social value when reviewing service provision.
- The Public Contracts Regulations 2006 required selection of suppliers by price, or by most economically advantageous tender ("MEAT"). These rules were superseded by The Public Contracts Regulations 2015¹ that expressly incorporate a range of factors beyond price alone, to deliver the optimum balance between price, quality and other cost-effective value factors.
- The 2015 Regulations apply the current EU Directive on Public Procurement and the new Regulation 67 now provides MEAT² as the only basis of award, with price alone no longer considered a proper basis alone to award. In addition, the updated definition of MEAT includes express reference to '**environmental and social aspects**' of the price/quality ratio.

The European Commission's focus on social value was explicit in its publication in January 2011 of Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement ('Buying Social Guide) and more officially in the preamble to the draft EU Directive published on 2 October 2012 which stated that: having largely achieved the Commission's aim of creating a EU marketplace within which rigorous pro-competitive principles applied, the Commission considered it appropriate to turn its attention to other objectives, including making **"better use of public procurement in support of common societal goals"**.

The permissiveness of the new procurement regime is illustrated by examples and potential benefits arising from award contained within in the Buying Social Guide:

EXAMPLES FROM BUYING SOCIAL GUIDE

Distinctions Used	Potential Benefits
Employment opportunities	Assisting compliance with social and labour law
Decent work	Stimulating socially conscious markets
Compliance with social and labour rights	Demonstrating socially responsive governance
Social inclusion	Integration of market activities
Social economy organisations	Effective public expenditure
Accessibility and design for all	Overall sustainable economic growth
Ethical trade	Improving living and working conditions
Corporate social responsibility	
Human rights	
Use of SMEs or third Sector	

To this already permissive framework the Social Value Act added the positive duty to consider **“how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area and how, in conducting the process of procurement [the public authority] might act with a view to securing that improvement”**.

The Act was a stimulus to social value becoming a recognised subject in the UK context and makes it clear that:

- No specific legal authority is required for public authorities to fulfil their public interest commissioning functions
- Good public services may be characterised by generating real, tangible and measurable beneficial effects, impacts and cost-efficiencies/savings beyond the literal delivery of a defined service for a specified price and that these may properly be considered within a commissioning process.

As long as social value obligations are:

- Appropriately linked to the subject matter of the procurement
- Be proportionate to the requirements of the procurement
- Be consistent with value for money
- Be consistent with the EU principle of equal access for all EU suppliers.

The legal meaning of social value

The lack of any formal legal definition of social value can lead to a suggestion that it is too vague a concept to have practical meaning and a reluctance to move beyond clear and safe traditional service specifications and pricing.

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However, this lack of specificity also permits for creative and imaginative interpretation and innovation. This makes the concept of social value potentially a major aid to addressing how best-practice and best value public services could and should be structured, commissioned and delivered.

There are, helpful distinctions that can draw out the meaning and importance of social value, specifically, there is a distinction between the incorporation of social value into the commissioning of public services as a public authority function, where social value may be integrated into the commissioning and ‘social buying,’ where, in the purchasing of general goods and services, public authorities may act as influential socially responsible purchasers within the market.

Key issues to consider include:

- **Social buying:** in relation to public services, additional (social) deliverables, which are desirable in relation to, but not essential for the particular service delivery, **commissioners can require, or request such added-value elements and/or suppliers can offer them.**
- **Social business:** social value can also refer to the inherent characteristics of a service, or a supplier. For example, charities, social enterprises and other **socially-focussed businesses are bound to deliver more than profits for their stakeholders and this is a distinction that commissioners can use in their selection criteria as long as it is in the public interest and to which all suppliers can respond.**
- **Social Impact:** social value in relation to public services can mean applying a social impact-analysis to a service to identify qualitative effects, impacts and cost-efficiencies/savings beyond the immediate service delivery and over the medium to long term. Such a service may justify a higher price than a cheaper more routine intervention **and commissioners can require such social impact deliverables and/or suppliers can offer them.**

All these possibilities may be considered, in compliance with the Social Value Act and/or generally in exercising commissioning powers and supplier cohorts may be consulted in relation to policy formulation and again prior to particular procurements to identify such possibilities.

Practical issues relating to social value

Regulation 40 of the 2015 Regulations makes it explicit that potential suppliers may be included in pre-procurement market consultations, provided the pro-competitive principles of non-discrimination and transparency are not violated, in particular through ensuring information material to the subsequent procurement process is available on the equal-treatment principle.

All these considerations may be applied by commissioners within reasonable parameters. In principle, this leaves the only justifiable basis for a challenge to the social value elements within the procurement of a service, for instance, by a disgruntled supplier, to be a manifestly unreasonable approach by the public authority. Robustness remains the appropriate response to such unjustifiable challenges.

To minimise problems arising from the prospect of challenge in relation to social value, the same disciplines that are used generally in relation to procurement apply, including the obligations to ensure that:

- The objectives of the commissioning exercise are clearly established from the outset and any associated procurement specification is properly related to those objectives
- There is consistency between the specification, the tender requirements, the evaluation criteria and the contract

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- There is compliance with the EU General Treaty principles in market communications and in the internal processes of the public authority;
- Social value elements are objectively relevant to the subject matter of the contract.

Price and quality requirements, or offers, are typically straightforwardly specified. Social value and social impacts underlying social value are typically not straightforward, but they still represent a third aspect of any public benefit service development and merit applied and detailed consideration on that basis.

The more integrated social value is with the price and quality elements, the more it will become part of the currency of commissioning. For example, one integrative method is to base competition within a procurement process on what quality of service and social value may be delivered at a specified level of pricing.

At its most sophisticated, including social value elements may be closer to a concept of the combined commissioning of a service and associated benefits and cost efficiencies/savings would be assessed across all public service budgets.

An important caution is against developing social value provisions based on imprecisely identified supposedly desirable social impacts. For example, supporting local, or voluntary, organisations, or SMEs does not, per se, represent social value. A particular objective rationale is required as to why social value would be delivered. For example, desirable characteristics of a service may, objectively, include: local knowledge and accessibility; enhanced standards typical of the voluntary sector; or efficiencies/savings typical of SME operation.

There is a question, in each case, about how far the commissioners should seek to prescribe social value elements and how far reliance should be placed on the

articulation of social value offerings by suppliers. The former may tend to miss what might be available, while the latter raises problems about the clarity of the invitation to suppliers to tender and establishing an evaluation framework capable of fairly measuring different competitive offerings. However, securing best value services, the purpose of commissioning, inherently requires a whole range of interpretive, professional and reasonable judgements.

As with all service specification and quality requirements, social value provisions need to be incorporated into the service contract through appropriate translation of the tender offer into contractually defined outputs and performance monitoring and assessment mechanisms.

Post Brexit Notes

The best value regime, Social Value Act and 2015 Regulations are all established UK law and as such Brexit will have no direct impact on the Act.

The 2015 Regulations are derived directly from EU law. The consensus is that substantive compliance with EU competition law, of which the EU public procurement regime is part, will, almost certainly, be a condition of any post-Brexit continued access to the European Single Market.

Similar pro-competitive requirements otherwise also operate at the level of world trade.

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