

# Social Value and Public Procurement

A Legal Guide

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**Anthony Collins Solicitors** is a medium-sized law firm providing legal advice to organisations in the public, private and third sectors. It is a firm with clear values and purpose, committed to excellence in a national market in areas including housing, local government, health and social care, social enterprise. The firm advises on public procurement, including a particular specialism in procuring for social value. The work on this report has been carried out by Mark Cook, Sarah Lines, Gayle Monk and Beulah Allaway.

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## Glossary

<b>BMEs</b>	Black and minority ethnic enterprises
<b>Consolidated Directive, the</b>	Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts
<b>Draft Directive, the</b>	Proposal for a Directive of the European Parliament and of the Council on public procurement (Classical Directive) (First reading), Approval of the final compromise text, Council of the European Union 12 July 2013, 2011/0438 (COD)
<b>ECJ</b>	European Court of Justice
<b>Equality Act, the</b>	Equality Act 2010
<b>EU</b>	European Union
<b>EU Treaty</b>	Treaty on the Function of the European Union (Consolidated version 2012)
<b>MEAT</b>	Most economically advantageous tender
<b>Procurement Policy Note</b>	Cabinet Office Efficiency and Reform Group, 'Procurement policy note: Public Services (Social Value) Act 2012
<b>Regulations, the</b>	Public Contracts Regulations 2006 SI 2006/05
<b>SMEs</b>	Small and medium enterprises
<b>Social Value Act, the</b>	Public Services (Social Value) Act 2012

## I. Introduction

The Social Value Act<sup>1</sup> came into force in January 2013, cementing the importance of contracting authorities providing social value through their procurement processes.

Whilst social value is a concept that significantly pre-dates the Social Value Act, it does provide a useful statutory understanding of what the phrase means, that being an improvement to “*economic, social and environmental well-being of the relevant area*”<sup>2</sup>. This guide demonstrates how the EU and domestic legal frameworks enable and require social value through public procurement, whether or not the public contracts in question strictly fall within that newest piece of legislation.

For at least a decade prior to the enactment of the Social Value Act, seeking out social value has been common practice for many contracting authorities. Much changed in that decade, of course, not least the economic climate both in the UK and across Europe, which shifted from growth and optimism to austerity and budget cuts. A report for the Joseph Rowntree Foundation sets out a clear case that even in times of austerity (perhaps, particularly in times of austerity) public procurement can be used to drive forward improvements in economic, social and environmental well-being.<sup>3</sup> Austere times cannot be a reason to shy away from ensuring social value is obtained. In fact, referring to this issue directly in its guidance on the Social Value Act, the Cabinet Office stated its understanding as follows:

*“In these tight economic times it is particularly important that maximum value in public spending is achieved. However currently some commissioners miss opportunities to secure both the best price and meet the wider social, economic and environmental needs of the community. Commissioners and procurers should be taking a value for money approach – not lowest cost – to assessing contracts and the Act complements that approach.”*<sup>4</sup>

Many public sector procurers are still uncertain of exactly *how* and *in what instances* the legal framework allows them to require social value. This guide tackles those uncertainties, demonstrating to what extent past, current and likely future legal

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<sup>1</sup> Public Services (Social Value) Act 2012 (“the Social Value Act”)

<sup>2</sup> Section 1(3)(a), the Social Value Act

<sup>3</sup> Richard Macfarlane, ‘Tackling Poverty through Public Procurement: law, policy and practice in delivering community benefits and social value’, a report for the Joseph Rowntree Foundation, 2014

<sup>4</sup> Cabinet Office Efficiency and Reform Group, ‘Procurement policy note: Public Services (Social Value) Act 2012’, first published 20 December 2012 and updated 7 January 2013 (“the Procurement Policy Note”)

frameworks enable or may enable contracting authorities to award contracts that deliver social value.

This guide predominantly reviews legal frameworks from an English law perspective. Section 5 briefly describes to what extent the law in other areas of the United Kingdom is the same or differs.

The primary legal sources governing this area have been the Consolidated Directive<sup>5</sup>, the Regulations<sup>6</sup> and European case law. More recently introduced, the Social Value Act has reinforced the legitimacy and importance of providing social value through public procurement.

In terms of future developments, the EU is looking to legislate further in this direction in order to achieve “*a better integration of social and environmental considerations*”<sup>7</sup>. This guide explores in what respects the forthcoming adoption of the New Directive will modernise this area of law yet further.

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<sup>5</sup> Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (“the Consolidated Directive”)

<sup>6</sup> Public Contracts Regulations 2006 SI 2006/05 (“the Regulations”)

<sup>7</sup> Recital 97, Proposal for a Directive of the European Parliament and of the Council on public procurement (Classical Directive) (First reading), Approval of the final compromise text, Council of the European Union 12 July 2013, 2011/0438 (COD) (“the New Directive”)

## 2. The Existing EU Legal Framework for Social Value in Procurement

### EU STRATEGY

The EU's ten-year growth strategy, 'Europe 2020', identifies the following key targets:

1. **Employment:** 75% of 20-64 year olds to be employed.
2. **R&D:** 3% of the EU's GDP to be invested in R&D.
3. **Climate change and energy sustainability:** greenhouse gas emissions 20% lower than 1990; 20% of energy from renewables and 20% increase in energy efficiency.
4. **Education:** Reducing the rates of early school leaving below 10%; at least 40% of 30-34 year olds completing 3<sup>rd</sup> level education.
5. **Fighting poverty and social exclusion:** at least 20 million fewer people in or at risk of poverty and social exclusion.

### EU GUIDANCE

European Commission 2010 guidance, "Buying Social: A guide to Taking Account of Social Considerations in Public Procurement", covers the promotion of employment opportunities, social and labour rights, social inclusion, ethical trade issues, corporate social responsibility and promoting SMEs.

In a news release put out by the Commission to coincide with the publication, it was said that the Commission intended that the guidance should "*highlight the contribution public procurement can make to stimulate greater social inclusion*".

European Commission guidance and strategy highlight the importance the Commission places on public spending that achieves social, economic or environmental goals. Whilst these show a clear desire at Commission level to deliver social value through public procurement, it is important to understand the legislative sources enabling contracting authorities to do so in order to properly understand how this may be achieved free from the fear of challenge.

### Social value in EU legislation

The EU legislative framework leaves us in no doubt that there are instances in which it is valid for a contracting authority to consider social and environmental characteristics when deciding whether to award a contract.

Firstly, this is made clear by the Consolidated Directive, which allows for contracting authorities to set down “*special conditions relating to the performance of a contract*” which “*may, in particular, concern social and environmental considerations.*”<sup>8</sup>

This is reiterated for English, Welsh and Northern Irish contracting authorities by the Regulations, incorporating EU procurement law into domestic law. These allow for the consideration of environmental characteristics when determining the most economically advantageous tender (“MEAT”)<sup>9</sup>, whilst Recital 46 to the Consolidated Directive sets out that social characteristics can similarly be considered.<sup>10</sup> Social as well as environmental contract performance conditions can be placed on contractors<sup>11</sup>.

Following both pieces of legislation, award criteria relating to social value may only be used if they:

- a) are being used to assess MEAT in achieving value for money;<sup>12</sup>
- b) are linked to the subject matter of the contract;<sup>13</sup>
- c) do not confer an unrestricted freedom of choice on a contracting authority;<sup>14</sup>
- d) comply with EU Treaty obligations, and specifically are not directly or indirectly discriminatory;<sup>15</sup>
- e) are compatible, generally, with EU law;<sup>16</sup>
- f) can be compared and / or assessed objectively;<sup>17</sup> and
- g) are properly advertised in the contract notice and / or contract documents.<sup>18</sup>

## Social value in case law

The Consolidated Directive was introduced with the aim of consolidating a great deal of preceding case law from the European Court of Justice (“the ECJ”).<sup>19</sup> There have similarly been some significant pieces of case law in the domestic courts. A summary of some of

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<sup>8</sup> Article 26, the Consolidated Directive

<sup>9</sup> Regulation 30(2), the Regulations

<sup>10</sup> Recital 46, the Consolidated Directive

<sup>11</sup> Regulation 39, the Regulations

<sup>12</sup> Regulation 30(2), the Regulations

<sup>13</sup> Recital 1, the Consolidated Directive; Regulation 30(2), the Regulations

<sup>14</sup> Recital 1, the Consolidated Directive

<sup>15</sup> Recitals 1 and 33, the Consolidated Directive

<sup>16</sup> Article 26, the Consolidated Directive; Regulation 39(1), the Regulations

<sup>17</sup> Recital 46, the Consolidated Directive

<sup>18</sup> Recital 33 and Article 26, the Consolidated Directive; Regulation 39, the Regulations

<sup>19</sup> Recital 1, the Consolidated Directive

the most significant cases from both before and after the Consolidated Directive can be found at Appendix I to this guide.

These cases can sometimes be difficult to reconcile, but collectively they have established important principles, both forming the basis of what is now set out in the Consolidated Directive and the Regulations and helping us to flesh out and properly understand those principles:

- it is possible to include social and environmental requirements in public procurement provided that neither the procurement documents nor process disadvantage non-local bidders, for example by requiring them to have local labour market knowledge, or a local base, or use local materials (see *Laboratori Bruneau*<sup>20</sup>);
- environmental and (by implication) social requirements that address a policy objective of the purchaser are permissible: they do not need to provide an economic benefit to the purchaser (see *Finnish Buses*<sup>21</sup>);
- all requirements must be capable of measurement and verification (see *EVN*<sup>22</sup>); and
- where there is a requirement for a contractor to use environmentally friendly sourced or fair trade produce the contracting authority can ask for this but not require specific labels or brands (see the *Dutch Coffee Case*<sup>23</sup>).

## Ensuring the award criteria adequately relate to the subject matter of the contract

Contracting authorities that ensure social value requirements relate to the subject matter of the contract will benefit from being able to assess those requirements as part of the tender evaluation.

Examples of where social value can be directly connected to the subject matter include:

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<sup>20</sup> *Laboratori Bruneau Srl v Unità Sanitaria Locale RM/24 De Monterotondo* [1994] I CMLR 707 (“*Laboratori Bruneau*”)

<sup>21</sup> *Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v (1) Helsingin Kaupunki (2) HKL-Bussiliikenne* (C513/99) [2003] 3 CMLR 20 (“*Finnish Buses*”)

<sup>22</sup> *EVN AG and Another v Austria (Stadtwerke Klagenfurt AG and Another, intervening)* (C448/01) [2004] I CMLR 22 (“*EVN*”)

<sup>23</sup> *European Commission v Netherlands* C-368/1 [2013] All ER (EC) 804 (“*the Dutch Coffee Case*”)

- a contract to build houses that includes the ability to target recruitment and training for construction related skills;
- a catering contract which requires eco-friendly ingredients are used;
- the provision for refuse collection specifying that items for recycling are separated out (which is also, incidentally, a legal requirement on local authorities);
- a grounds maintenance contract requiring the use of indigenous plants only.

**TOP TIP** To evidence that the criteria is a core requirement of the contract, ensure it is properly supported by the contracting authority's own strategies and policies. What is core to a contracting authority's policy is core to what it purchases.

In these examples, the requirements would have to be reflected in the contract notice, the Pre-Qualification Questionnaire, other procurement documentation (depending on the procurement route adopted) and contract documents to ensure it meets EU Treaty obligations of transparency.<sup>24</sup>

There are limits on what types of requirement may be considered to have a close enough relationship to the contract's subject matter in order to be valid part of the evaluation criteria. This is particularly the case for supplies contracts. For example, a contracting authority wishing to contract out for the supply of stationery will struggle to argue that training or employment award criteria have anything to do with the contract's subject matter.

When the social value is not a core requirement (ie. relevant to the subject matter of the contract) it can still be included within the contractual terms of the contract. However it would not form part of the evaluation award criteria.

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<sup>24</sup> See the *Finnish Buses* case

## Issues around enforcing a Living Wage

### Tender award criteria

It would be difficult for a contracting authority to argue that a requirement for a contractor to pay the Living Wage (or, indeed, that it adopt any pure employment terms beyond those required by law) would sufficiently relate to a contract's subject matter for it to validly be evaluated through award criteria at tender stage.

### Contractual terms

Even an approach that includes the payment of staff of the Living Wage by way of a term of the contract is likely to be problematic, however, because:

- contractors cannot be required to pay *all* their staff a Living Wage, only those working under the contract. Problems for contractors will arise where members of staff are employed to work on a mixture of contracts, not all of which require the Living Wage to be paid, or where some staff are paid at different rates to others;
- contracting authorities will not easily be able to monitor adherence to the contractual term or enforce it; and
- EU case law to date has not been in favour of contractual terms that require minimum wage terms that are specific to that contract and not otherwise a national legal requirement (see the *Rüffert Case* which is discussed further in Appendix I)

### 3. The New Directive: Modernising Public Procurement Law

Through the New Directive, some modernisation is afoot for EU public procurement. Whilst many contracting authorities may already be up to speed on some of the widely publicised changes (such as those to Part A and Part B services) many may not yet be aware of the extent of its impact on their ability to deliver social value in contracting. As the legislation will be implemented in 2014 it is pertinent to be aware of the draft now.

#### An overarching commitment to social value in EU procurement

The EU seeks “a better integration of social and environmental consideration in the procurement procedures”, meaning procurers “should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services, in all aspects and at any stage of their life cycle, even where such factors do not form part of their material substance”

Recital 97, the New Directive

The draft makes numerous general references and suggests amendments to current legislation that together clarify how integral social value should be to public procurement. These include:

- The list of characteristics that can be considered as award criteria when making a MEAT assessment is extended to include social characteristics (environmental characteristics are included on the existing list and repeated in the New Directive<sup>25</sup>).
- With an aim to foster the involvement of SMEs in public procurement, contracting authorities are encouraged to divide large contracts into lots.<sup>26</sup>

<sup>25</sup> Articles 67(2) and 70, the New Directive. Note that both environmental and social contract conditions can already be included by virtue of Regulation 39, the Regulations (see Section 2 above)

<sup>26</sup> Recital 78, the New Directive

**BUYER'S CHOICE** Award criteria are intended to assess the value of the tender from the point of view of the contracting authority, which emphasises that it is the procurer who is to choose what it identifies as being of value.

See Recital 63(2), the New Directive

## Some specific changes of note

Some more specific changes set out in the New Directive are:

- *Compliance with social and environmental laws:* contracting authorities may not award a contract to the otherwise “best” tender where that tender does not comply with certain social and environmental laws (eg. International Labour Organization conventions that the UK signs up to)<sup>27</sup>;
- *Product labelling:* the New Directive codifies the *Dutch Coffee Case* summarised in Appendix I. Contracting authorities should not require a tenderer to hold a particular label, but should define the technical specifications for the contract that they require. This can be done by reference to all or part of a label, and a label can be accepted as evidence that those technical specifications are met (along with equivalent labels or evidence that fulfil the same requirement). When labels are referred to, any requirements must be based on objectively verifiable criteria, and the label must be accessible and available to all interested parties that meet the required standards<sup>28</sup>;
- *The seller's policies:* corporate social and / or environmental policy is not linked with the subject matter of the contract and, as such, contracting authorities may not require tenderers to have such policies in place.<sup>29</sup> This may, at first, surprise some contracting authorities, but the New Directive follows existing case law<sup>30</sup> by clarifying the fact that an organisation's corporate policy will relate to *all that it does* and is not as a consequence something that relates solely to the subject matter of the contract the purchasing body wishes to award.

<sup>27</sup> Article 56(1), the New Directive

<sup>28</sup> Recital 75 and Article 43, the New Directive

<sup>29</sup> Recitals 97 and 104, the New Directive

<sup>30</sup> The *Dutch Coffee Case*

## 4. UK Government Legislation and Guidance Relevant to English Contracting Authorities

Domestic legislation, guidance and policy have contributed towards the momentum generated by EU law towards enabling and encouraging contracting authorities to consider social value in the award of contracts. The Social Value Act hits this topic head on. Other legislation and guidance on, for example, equality, sustainability and Best Value, contain significant cross-overs with the social value agenda. We explore below the most relevant areas of cross-over and how they can be applied to contracting authorities, whilst providing a list of further policy and guidance that may be of interest in our Recommended Further Reading section in Appendix 2.

### The Social Value Act

The Social Value Act provides a real impetus by imposing on relevant contracting authorities an active duty to consider the economic, environmental and social benefits that can be achieved through commissioning. It does so by requiring consideration of:

- a) how to improve through procurement the social, economic and environmental well-being of the area served by that contracting authority; and
- b) how to undertake a procurement process with a view to securing that improvement.<sup>31</sup>

This duty relates to service contracts above the relevant monetary thresholds in the Regulations, whether they fall under Part A or B of those Regulations.<sup>32</sup> It also applies to contracts with a works / supplies element that is so incidental that the contract would ordinarily be considered a services contract under the Regulations (as well as to frameworks for such contracts).

The Social Value Act also applies to the pre-procurement stage<sup>33</sup> and authorities are required to consider whether consultation on social value matters is needed<sup>34</sup>.

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<sup>31</sup> Section 1(3), the Social Value Act

<sup>32</sup> The Procurement Policy Note

<sup>33</sup> Section 1(1), Social Value Act

<sup>34</sup> Section 1(7), Social Value Act

The duty does not apply to call-offs under framework agreements that existed at the date the Social Value Act came into force and nor does it apply where such consideration would be impractical in a genuinely urgent situation<sup>35</sup>.

Some have argued that the Act lacks clout, in that it encourages good practice without penalising poor practice. However, it has been entirely designed to avoid social value becoming a tick-box exercise. This is particularly evident from the fact that contracting authorities are required to give genuine consideration to social value and make an active decision as to what they procure *before they procure it*. This duty means that bidders should find contracting authorities asking questions that are relevant, pertinent and of genuine policy importance. Where this is not the case, contracting authorities' decisions may be challengeable (subject to time limits on any challenge – time limits on judicial review, for example, are very tight).

As a consequence of its implementation, social value has been placed firmly at centre stage, with the Social Value Act placing a social value duty on those that may have previously been nervous of incorporating it into their buying processes. The Act presents a real opportunity to radically shift the mind-set of contracting authorities towards the achievement of social value.

## The public sector equality duty: the Equality Act

Procurement processes are a “public function” of public bodies under the Equality Act<sup>36</sup>, and thus those public bodies must adhere to their duty under it when carrying out procurement and commissioning exercises. The duty is to have due regard to the:

- Elimination of discrimination, harassment, victimisation and other analogous conduct;
- advancement equality of opportunity between those who share protected characteristics and those who do not; and
- fostering of good relationships between those who share protected characteristics and those who do not.<sup>37</sup>

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<sup>35</sup> Section 1(8), Social Value Act

<sup>36</sup> Equality Act 2010 (“the Equality Act”)

<sup>37</sup> Section 149, the Equality Act

The “*protected characteristics*” covered by the duty are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.<sup>38</sup>

By adhering to this duty during a procurement process, contracting authorities may simultaneously be providing social value. This is can be the case where:

- procurement recognises and responds to the diverse needs of communities;
- through procurement a contracting authority promotes equal treatment;
- socio-economic requirements in contracts make them more accessible to groups with protected characteristics, which can help advance the equality of opportunity for that group ;
- opportunities are opened up to BMEs/SMEs, social enterprises and social firms (such as sheltered workshops); and
- procurement encourages supply chain partners to advance equality and diversity.

**TOP TIPS** How to build the social value and equality duties into a procurement process:

- develop a sustainable commissioning strategy – reflect priorities, local needs and the need to comply with the public sector equality duty;
- undertake soft market testing and community consultation;
- undertake supply chain mapping;
- develop policy for social value commissioning in procurement;
- show a clear audit trail on equalities issues.

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<sup>38</sup> Section 4, the Equality Act

# Sustainable procurement delivering social value

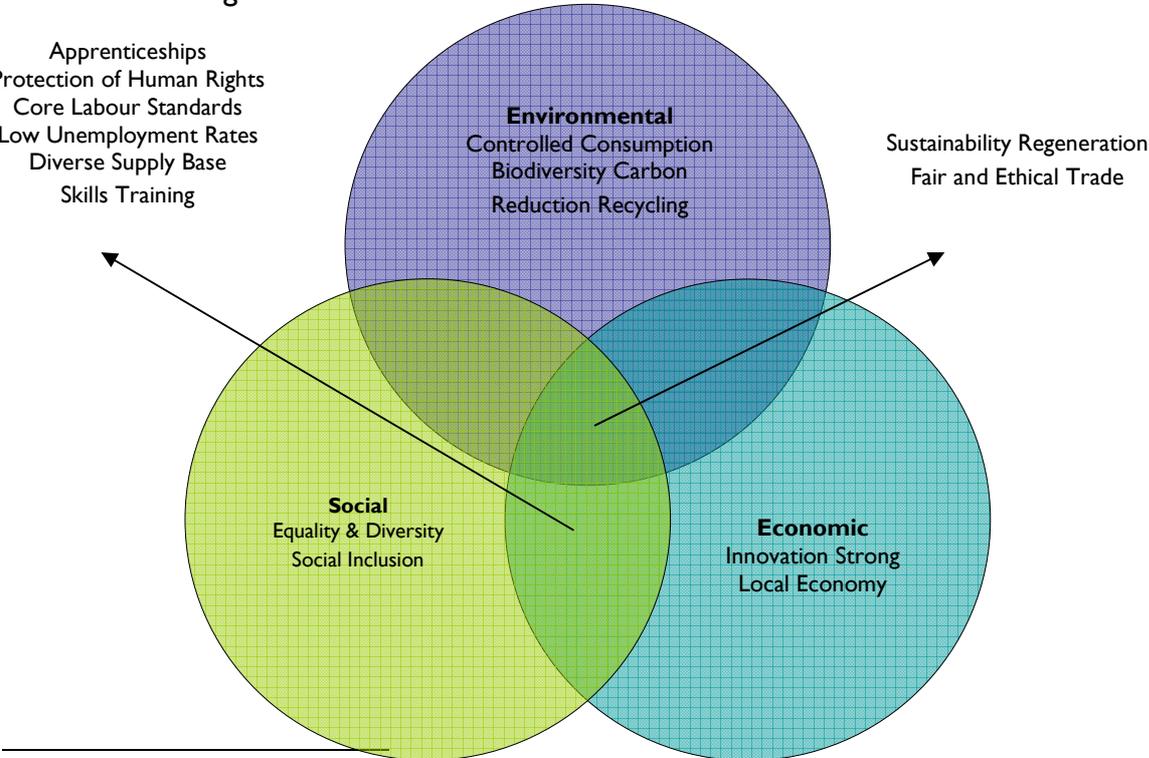
The Government set up the Sustainable Procurement Task Force to consider and provide guidance on how best contracting authorities could achieve sustainability in development.

For the Task Force, sustainable procurement is defined as:

*“a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits to society and the economy, whilst minimising damage to the environment”.*<sup>39</sup>

The “three pillars of sustainability” – society, the economy and the environment – are the same areas of consideration when determining social value. So, whether the terminology used refers to “sustainable procurement” or “social value in procurement” the aims, objectives and responsibilities are the same. As a consequence, where contracting authorities are already choosing a “sustainable” route through procurement they will also be providing social value to their area.

Examples of social value outcomes that fall under these “three pillars of sustainability” are set out in the diagram below.



<sup>39</sup> Sustainable Procurement Task Force, ‘Procuring the Future. Sustainable Procurement National Action Plan: Recommendations from the Sustainable Procurement Task Force’, Department for Environment, Food and Rural Affairs, 28 March 2011

It is worth noting that the quote from the Sustainable Procurement Task Force above suggests consideration of sustainability on a “*whole life basis*”, so that contracting authorities should not just consider the value to society, the environment and the economy at the point of purchase, but build into the procurement process a way of evaluating whether the value of these criteria is achieved in the long term.

## When social value can mean Best Value for local authorities

It is a misconception that achieving social value is unaffordable or does not offer value for money, and therefore cannot be reconciled with the local authority duty to provide Best Value.<sup>40</sup> The Government has made it clear in its revised Statutory Guidance on Best Value that compliance with the Best Value duty is only achievable by considering social value. It sets out:

*“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.”*<sup>41</sup>

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<sup>40</sup> Section 3(1) Local Government Act 1999

<sup>41</sup> Paragraph 2, Department for Communities and Local Government, ‘Best Value Statutory Guidance’, 2 September 2011

## 5. Wales, Scotland and Northern Ireland

### The current position

As signatories to the EU Treaty, contracting authorities in Wales, Scotland and Northern Ireland are bound to ensure they undertake public procurement exercises that adhere to the fundamental principles of the Treaty: free movement, non-discrimination, fairness, transparency and proportionality. Similarly, other EU legislation will apply, including the requirements of the Consolidated Directive explored in Section 2 of this guide. Likewise, the New Directive will apply to all EU member states.

As for domestic legislation, the Regulations apply in Wales and Northern Ireland as they do in England. Scotland has its own, equivalent Regulations.<sup>42</sup> The Equality Act sets the legal agenda for Wales, Scotland and Northern Ireland, as well as England, whilst the Best Value obligations of the Local Government Act 1999 only apply to Wales and England.

The Social Value Act does not apply in Scotland or Northern Ireland. This does not mean that contracting authorities in Scotland and Northern Ireland cannot seek to achieve community benefit in their procurement of services (or good and/or works). In fact many contracting authorities in Scotland and Northern Ireland do already.

In Wales, the Social Value Act applies to Welsh bodies that are not solely or mainly under the jurisdiction of the Welsh Assembly Government but does not apply to those authorities whose functions are wholly or mainly Welsh devolved functions.<sup>43</sup>

#### Welsh bodies affected by the Social Value Act

On 16 February 2012, the Welsh Assembly Government (WAG) distributed a note setting out its understanding of the applicability of the social value duty to Welsh authorities. Whilst the note states that the Act's applicability is ultimately to be decided by the courts, its understanding of applicability is as follows:

##### Bodies excluded from the Act

Local authorities; fire and rescue authorities; National Park authorities; governing bodies of community, foundation or voluntary schools; governing bodies of institutions in the further and higher education sectors; and bodies such as the Auditor General for Wales, the Countryside Council for Wales and various Commissioners

##### Bodies included within the Act

The Environment Agency (including the Environment Agency Wales); the UK Commission for Education and Skills; and the Food Standards Agency (including the Food Standards Agency Wales)

<sup>42</sup> Public Contracts (Scotland) Regulations 2012, Scottish SI 2012/88

<sup>43</sup> Section 1(11)(e), Social Value Act

## Reforming Procurement in Scotland

The Procurement Reform (Scotland) Bill was introduced to the Scottish Parliament on 3 October 2013. Should the Bill be adopted, its provisions would place general and specific duties on regulated authorities, including:

1. a general duty on regulated authorities to consider the sustainability of their procurement processes before carrying out regulated procurement;<sup>44</sup>
2. a specific duty on those authorities anticipating “*significant procurement expenditure*” in any coming financial year to draw up a procurement strategy that includes a statement of that authority’s policy on the use of community benefit requirements in its contracts;<sup>45</sup> and
3. a specific duty that such authorities will have to consider whether to include such community benefit requirements as part of the procurement for any contract of a value equal to or greater than £4,000,000.<sup>46</sup>

The Bill goes further in casting social value at the heart of public procurement more than any other piece of legislation adopted in the United Kingdom to date. The aspirations of those drafting it reflect the European-wide agenda highlighted in this guide towards *ensuring* social value through public procurement. We endorse the approach of the Bill and recommend such duties are adopted throughout the United Kingdom.

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<sup>44</sup> Paragraph 9, Part 2, Procurement Reform (Scotland) Bill

<sup>45</sup> Paragraph 11, Part 2, Procurement Reform (Scotland) Bill, and see also Paragraph 19, Part 3 for a definition of “community benefit requirement”

<sup>46</sup> Paragraph 20, Part 3, Procurement Reform (Scotland) Bill

## Appendix I: Brief Guide to Relevant Procurement Case Law

### Relevant EU case law

Case Reference	Key Points to Remember
<i>Gebroeders Beentjes B.V. v The State (Netherlands)</i> (C31/87) [1990] I CMLR 287	A contract condition that the contractor must employ long-term unemployed persons can be <i>compatible with</i> the rules if it has no direct or indirect discriminatory effect on tenderers from other Member States as long as procedural rules are adhered to, specifically that it must be mentioned in the contract notice.
<i>Commission of the European Communities v French Republic</i> (C225/98) [2000] ECR I-07445	<p>Rejecting an earlier assessment by the Commission, the ECJ ruled that an award criterion “linked to the campaign against unemployment” can be applied as an “additional” criterion where the MEAT assessment of bids on a purely economic basis has revealed “two or more economically equivalent tenders”. Any such criterion must still be consistent with the fundamental principles of community law.</p> <p>NB: This case should be treated with caution, not least because the ECJ did not consider whether the local labour was consistent with EU fundamental principles, particularly whether it could be said to discriminate against contractors from other member states.</p>
<i>Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v (1) Helsingin Kaupunki (2) HKL-Bussiliikenne</i> (C513/99) [2003] 3 CMLR 20 (known as “Finnish Buses”	<p>In response to a question relating to an environmental award criterion as part of a MEAT assessment, the ECJ set out a number of important considerations in its ruling as follows:</p> <ol style="list-style-type: none"> <li>I. The contracting authority was entitled to include an environmental consideration in its award criteria.</li> </ol>

in this guide)

2. Award criteria need not be purely economic in nature [and so by implication could include social criteria as well as environmental].
3. BUT the award criterion *does need to*:
  - I. be linked to the subject matter of the contract;
  - II. not confer an unrestricted freedom of choice on the authority;
  - III. be expressly mentioned in the contract documents or tender notice; and
  - IV. comply with all the fundamental principles of community law, in particular the principle of non-discrimination.

*EVN AG and Another v Austria (Stadtwerke Klagenfurt AG and Another, intervening)* (C448/01) [2004] I CMLR 22 (known as “EVN” in this guide)

The ECJ agreed with the judgment in the *Finnish Buses* case in that contracting authorities are entitled to use award criteria that are not purely economic in nature. In addition, the court confirmed contracting authorities are similarly entitled to determine the weighting of such criteria. In this case, the court found a weighting of 45% in favour of meeting environmental criteria acceptable.

The court found the award criterion in question breached EU law because:

- i. it did not relate to the subject matter of the contract (it related to the amount of renewable energy supplied to consumers outside of the contract *and only* to consumption it was not expected the contracting authority would ever require; and
- ii. it unjustly discriminated against smaller suppliers tendering who were able to meet the subject matter of the contract.

<i>Contse SA v Insalud (Now Ingesa) (2005) (C-234/03)</i>	A pre-qualification requirement for a contractor to have premises within a particular geographical area was held to be discriminatory and unjustified.
<i>Du Pont de Nemours Italiana SpA v Unità Sanitaria Locale No. 2 Di Carrara C-21/88 [1991] 3 CMLR 25</i>  <i>Laboratori Bruneau Srl v Unità Sanitaria Locale RM/24 De Monterotondo [1994] 1 CMLR 707 (known as “Laboratori Bruneau” in this guide)</i>	It was discriminatory to require bidders to obtain a set portion of their supplies from a specified region.
<i>EC Commission v Italy [1991] 2 CMLR 115</i>	It was discriminatory to require contractors be chosen from only companies in which all or a majority share of share capital was in public ownership.
<i>Frigerio Luige &amp; C. Snc v Comune di Triuggio; Azienda Servizi Multisetoriali Lombarda ASML SpA (intervening party) (2007) (C-357/06)</i>	National provisions cannot permit contracting authorities to preclude bidders solely on the ground that they do not have a specified legal form (such as a company limited by shares).
<i>European Commission v Netherlands C-368/10 [2013] All ER (EC) 804 (known as “the Dutch Coffee Case” in this guide)</i>	<p>The ECJ provided clarification and guidance on the extent to which a contracting authority can require a supplier to provide products bearing specific labels relating to those products’ environmental and / or fair trade credentials. The ECJ held that:</p> <ul style="list-style-type: none"> <li>• environmental characteristics can be used in specifications, but must be set out in full</li> <li>• fair trade cannot be included in technical specifications but can be in a contract condition</li> <li>• evaluation criteria can reflect fair trade or eco-requirements, provided they are linked to the</li> </ul>

	<p>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</p> <ul style="list-style-type: none"> <li>• general requirements on bidders to demonstrate sustainable purchasing/socially responsible business cannot be used as pre-qualification factors</li> <li>• equal treatment, non-discrimination and transparency require clarity and precision.</li> </ul>
<p><i>Commission of the European Communities v Denmark (also known as Storebaelt) C-243/89 [1993] ECR I-3353</i></p>	<p>A requirement that, to the greatest possible extent, Danish materials, consumer goods, labour and equipment were used by contractors in the construction of a bridge fell foul of the fundamental Treaty principle of equal treatment.</p>
<p><i>Commission of the European Communities v Federal Republic of Germany C-20/01 and C-28/01</i></p>	<p>It is not impossible that a technical reason relating to the environment may be taken into account in an assessment of whether the contract at issue may be awarded to a given supplier.</p> <p>However, insufficient evidence was put to the court to establish that the choice of thermal waste treatment could be regarded as a technical reason substantiating the German government's claim that the contract could only be awarded to one supplier. Furthermore, there was insufficient evidence to suggest that the proximity of the plant was such a sufficient technical reason.</p>
<p><i>Rüffert v Land Niedersachsen C-346/06 [2008] 2 CMLR 39</i></p>	<p>The ECJ reviewed Directive 96/71 (particularly Article 3) in relation to a requirement as part of a Framework Agreement that contractors pay their employees a certain minimum wage.</p> <p>The court found the minimum-wage requirement in question was in breach of EU law and that Article 3 of Directive 96/71 did not apply because the wage requirement was not universally applicable (the requirement was site-specific and related to public contracts only).</p>



## Relevant UK case law

The cases in the following table (many of which come from Northern Ireland), make some relevant points which should be kept in mind.

<b>Case Reference</b>	<b>Key Points to Remember</b>
<i>Federal Security Services Limited (plaintiff) v Northern Ireland Court Service (defendant) &amp; Resource (NI) Limited (intervening party)</i> [2009] NIQB 15	Tendering instructions and award criteria should be certain and unambiguous.
<i>Henry Brothers (Magherafelt) Limited &amp; Ors v Department of Education for Northern Ireland</i> [2008] NIQB 105	At least at the primary consideration stage, it is not possible to omit criteria relating to price. Unless the cost of the relevant goods or services was fixed, it would be very difficult to reach any objective determination of what was the “most economically advantageous tender”, without an indication of price in relation to which non-price elements can be taken into account.
<i>McLaughlin &amp; Harvey Limited v Department of Finance and Personnel</i> [2008] NIQB 91	Where sub-criteria are used as part of the assessment of tenders, these must be disclosed to bidders.
<i>Letting International Limited v Newham London Borough Council</i> [2008] EWHC 1583 (QB)	The duty on a contracting authority to act in a transparent way include the need to sufficiently disclose contract award criteria and weightings in advance, including setting out detailed criteria and sub-criteria where these are used.
<i>Traffic Signs, Equipment Limited v Department for Regional Development, Department of Finance and Personnel</i> [2010] NIQB 138	It may not be sufficient to meet the requirements for transparency and objectivity in procurement to simply list the weighting criteria. Whilst determining weighting criteria was a decision for the contracting authority, should that decision go beyond usual practice it may

require justification and explanation in order to be transparent and objective.

## **Appendix 2: REFERENCES AND RECOMMENDED FURTHER READING**

### **REFERENCES IN THIS GUIDE**

#### **Report for the Joseph Rowntree Foundation**

Richard Macfarlane, 'Tackling Poverty through Public Procurement: law, policy and practice in delivering community benefits and social value', a report for the Joseph Rowntree Foundation, 2014.

#### **EU legislation**

Treaty on the Functioning of the European Union ("the EU Treaty").

Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts ("the Consolidated Directive").

Proposal for a Directive of the European Parliament and of the Council on public procurement (Classical Directive) (First reading), Approval of the final compromise text, Council of the European Union 12 July 2013, 2011/0438 (COD) ("the New Directive").

#### **Domestic legislation**

Public Services (Social Value) Act 2012 ("the Social Value Act").

Public Contracts Regulations 2006 SI 2006/05 ("the Regulations").

Localism Act 2011.

Local Government Act 1999.

Equality Act 2010 ("the Equality Act").

### **EU guidance / policy**

'Buying Social: A guide to Taking Account of Social Considerations in Public Procurement', European Commission publication, 2010.

### **Domestic guidance / policy**

Cabinet Office Efficiency and Reform Group, 'Procurement policy note: Public Services (Social Value) Act 2012', first published 20 December 2012 and updated 7 January 2013 ("the Procurement Policy Note").

Sustainable Procurement Task Force, 'Procuring the Future. Sustainable Procurement National Action Plan: Recommendations from the Sustainable Procurement Task Force', Department for Environment, Food and Rural Affairs, 28 March 2011.

Department for Communities and Local Government, 'Best Value Statutory Guidance', 2 September 2011.

## **RECOMMENDED FURTHER READING**

### **EU guidance / policy**

Interpretative Communication of the Commission on the Community law applicable to the public procurement and the possibilities for integrating social considerations into public procurement COM (2001) 566, 15 October 2001.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681, 25 October 2011.

European Commission, 'Buying Green! A handbook on green public procurement', 2<sup>nd</sup> edition, October 2011.

### **Domestic guidance / policy**

Office of Government Commerce, Department for Environment, Food and Rural Affairs, 'Joint Note on Environmental Issues in Purchasing', October 2003.

Office of Government Commerce, 'Social Issues in Purchasing', February 2006.

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**Anthony Collins**  
solicitors

If you have any queries or comments in regards to this document please contact

**Mark Cook or Gayle Monk**  
on **0121 212 7472** or  
**mark.cook@anthonycollins.com**  
**gayle.monk@anthonycollins.com**

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)