
ADVICE ON THE USE OF PROCUREMENT LEGISLATION FOR THE BENEFIT OF DEAF AND DISABLED PEOPLE'S ORGANISATIONS

I. OVERVIEW

1. Inclusion London ("Inclusion") have asked for advice on how Deaf and Disabled People's Organisations ("DDPOs") can take advantage of procurement legislation to address the challenges they face in winning public contracts.

2. Specifically, I am asked to address the following questions:
 - i. What legal duties do local authorities and other public bodies have to comply with when commissioning or decommissioning user-led specialist services which are delivered by small voluntary organisations for Disabled people?
 - ii. How does the public sector equality duty ("PSED") apply to the commissioning and procurement process?
 - iii. Can local authorities and other public bodies avoid putting a contract out for tender to ensure they maintain a specialist user-led service? If so, in what circumstances would this be possible?

- iv. In respect of user-led services:
 - a. What mechanisms within the tender and procurement process could local authorities use to protect these?
 - b. Do the PSED and Public Services (Social Value) Act 2012 (“the Social Value Act”) require them to consider using those mechanisms?
 - v. In what circumstances can commissioning decisions be challenged in general and specifically using the PSED and the Social Value Act?
3. In answering these questions my advice adopts the following structure:
- i. Introduction
 - ii. General Legal Duties In The Procurement Process;
 - iii. The Public Sector Equality Duty In The Procurement Process;
 - iv. Using Regulation 20 of The Public Procurement Regulations 2015 To Maintain Specialist User-Led Services;
 - v. The Public Services (Social Value) Act 2012;
 - vi. The Local Government Act 1999; and
 - vii. Conclusion and Further Points

4. The question of challenges is dealt with under each piece of legislation individually, and summarised briefly in the Conclusion. I have not covered the question of general challenges for breaches of PCR 2015, due to the large scope of this, but suppliers should be aware of Chapter 6 PCR 2015, which provides the procedure to be used for challenging breaches of PCR 2015, and in particular the time limits in Regulations 92 and 93.

5. To summarise, while there is considerable scope for public bodies to take social value into account where carrying out public procurements, it is difficult to challenge failures to do so. The duties are deliberately broad in many cases, and it is only where there are particularly glaring failures to comply with basic duties that a challenge is likely to be possible. That said, the legislation is useful as a tool to remind and persuade public bodies of the value of social criteria, and this advice sets out a number of ways that this can be achieved.

II. GENERAL LEGAL DUTIES IN THE PROCUREMENT PROCESS

6. The award of public contracts for works and services is governed at an EU level by directives, particularly Directive 2014/24/EU (“the Directive”) implemented at a UK level by the Public Contracts Regulations 2015 (“PCR 2015”).

7. The basic rules that govern public procurements are largely the same regardless of from whom the public body in question is buying (with a few exceptions, as detailed below).

8. All procurements under EU law¹ are subject to the basic requirements of:
 - i. Transparency – procedures must be transparent and contracts publicised;
 - ii. Equal treatment and non-discrimination – potential suppliers must be treated equally;
 - iii. Proportionality – procedures and decisions must be proportionate;
 - iv. Mutual recognition – qualifications and standards from other EU states must be recognised as equal where appropriate.

¹ See Recital 1 to the Directive

9. Only procurements above the value of the threshold amounts are, however, subject to the provisions of the Directive and Part 2 of PCR 2015². Procurements below the threshold remain subject to the basic requirements above, and PCR 2015 requires that if these contracts³ are advertised⁴, they must be published on Contract Finder. There is also a requirement to post details on Contract Finder once the contract has been awarded.

10. Contracts above the threshold are, under Regulation 18 PCR 2015, subject to the following principles:

- i. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
- ii. The design of the procurement shall not be made with the intention of excluding it from the scope of the PCR or of artificially narrowing competition.
- iii. For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is

² The current threshold amounts can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/670666/PPN_0417_New_Thresholds_2018_1.pdf.

³ The PCR 2015 provisions detailed here apply only to contracts below the threshold and over £10,000, if a central government procurement, or over £25,000 if a sub-central contracting authority procurement.

⁴ The requirement for transparency means that in the majority of cases there will be a requirement to publicise a contract even if below the threshold.

made with the intention of unduly favouring or disadvantaging certain economic operators.

11. Regulation 26 PCR 2015 provides that above threshold contracts may be awarded only if a call for competition has been published in accordance with the PCR and the Public Contracts Directive, except where Regulation 32 permits contracting authorities to apply a negotiated procedure, between the contracting authority and the economic operator, without prior publication.

12. There is consequently a requirement to hold a competitive selection process before awarding public contracts above the threshold⁵. Below the threshold, the requirements of EU principles of transparency, equal treatment and proportionality are likely, in almost all cases, to equate to a requirement that contracts be publicised and some form of competitive procedure followed before any award (though this need not be according to the provisions of PCR 2015).

13. Regulation 67 PCR 2015 details, for the purposes of procurements above the threshold amounts, the rules that must be applied to

⁵ Except in the very limited cases in Regulation 32, which applies where no suitable tenders have been received or only one operator can in fact supply the works, supplies or services in question due to artistic or technical reasons, or the need to protect intellectual property rights.

award criteria. The key points are as follows (emphasis in underlining added):

- i. Contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.
- ii. That tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.
- iii. Such criteria may comprise, for example –
 - a. quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
 - b. organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
 - c. after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

- iv. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.
- v. Award criteria shall ensure the possibility of effective competition;
- vi. The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.
- vii. Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

14. It is clear that even considering the PCR 2015, on its face, it allows for the use of social value criteria, provided it is made clear how these are to be weighted.

III. THE PUBLIC SECTOR EQUALITY DUTY IN THE PROCUREMENT PROCESS

15. The PSED derives from section 149 of the Equality Act 2010 (“the Equality Act”), which requires public bodies subject to the duty to have due regard to the need to:

- i. Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- ii. Advance equality of opportunity between persons who share a relevant protected characteristic⁶ and persons who do not share it;
- iii. Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

16. This includes, under s. 149(3) having due regard, in particular, to the need to:

- i. Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- ii. Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- iii. Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

⁶ The relevant protected characteristics are: age; disability, gender reassignment, pregnancy and maternity, race; religion or belief, sex, and sexual orientation.

17. This duty applies to public authorities⁷ and bodies carrying out public functions. As such, it applies both to public authorities when carrying out procurements, and to the contracting out of services or public functions to which PSED applies.

18. In the context of s. 49A of the Disability Discrimination Act 1995 (a predecessor to s. 149 Equality Act), in *R (Brown) v Secretary of State for Work and Pensions and another* [2008] EWHC 3158 (Admin) ("*Brown*") Aikens LJ set out the following six principles on the duty to give "due regard" (at paragraphs 90-96):

- i. *"First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have "due regard" to the identified goals.*
- ii. *Secondly, the "due regard" duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind.*
- iii. *Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of "ticking boxes".*

⁷ Those listed in Schedule 19 of the Equality Act.

- iv. *However, the fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have “due regard” to the needs set out in the section is not determinative of whether the duty under the statute has been performed... But it is good practice for the policy or decision maker to make reference to the provision and any code or other non-statutory guidance in all cases where section 49A(1) is in play.*
- v. *Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non-delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have “due regard” to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the “due regard” duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its “due regard” duty*
- vi. *Fifthly, (and obviously), the duty is a continuing one.*
- vii. *Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record-keeping encourages transparency and will discipline those carrying out the relevant function to*

undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1)."

19. Of particular importance are the requirements that the exercise carried out be more than mere 'box-ticking' and that the duty be fulfilled before and at the time that the decision in question is taken. This means that public bodies must consider, in a meaningful sense, the impact that its decisions will have before carrying out a procurement that will affect Disabled people.

20. While this duty is a potentially onerous one, it appears to exist in practice more for the benefit of those who are the recipients of services than the authority doing the procuring. Thus in *R (RB) v Devon CC* [2012] EWHC 3597 (Admin) ("*Devon*"), where the PSED was not properly discharged in the context of a procurement decision, the key consideration from the court's point of view, in deciding that the PSED was engaged, was that the services being contracted were care services for children, and thus the recipients of the service had relevant protected characteristics under the Equality Act s. 149⁸. The Government's Procurement Policy Note ("*PPN*") on

⁸ In *Devon*, the procurement decision was not quashed due to the pressing need to contract out the services in question and due to the fact that the defendant had subsequently carried

Public Procurement and the Public Sector Equality Duty⁹ states that “where it is clear from the start of the procurement, having conducted pre-procurement engagement and in identifying the need, that equality is not relevant to what is being procured, no further consideration or actions are needed” (paragraph 11).

21. However, as can be seen from s. 149(3) above, the PSED includes a duty to “remove or minimise disadvantages suffered by [Disabled people]” and to “encourage [Disabled people] to participate ... in any other activity in which participation by such persons is disproportionately low.” This could include removing barriers to participation by Disabled people in public procurements, including those already highlighted by Inclusion such as:

- i. Contracts in ‘bundles’ of different types of service;
- ii. Too short time frames to enable a partnership or consortia to be formed;
- iii. Too large contracts;
- iv. Over prescriptive contracts; and
- v. Poorly publicised contract opportunities.

out an Equality Impact Assessment, and the claimant was not able to demonstrate that the choice of supplier would lead to any detriment in practice.

⁹ Which can be found at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80185/PPN_Procurement_Equality_Jan-13_0.pdf

22. Particularly if such failures by a particular public body were systemic, it might be possible to challenge them on the grounds that they were in breach of the s. 149 duty given the provisions of s. 149(3). It might also be possible to demonstrate that DDPOs are better suited to providing services to Deaf and Disabled people themselves, and as such procurements that excluded these organisations, directly or indirectly, are in breach of s. 149.

23. There would be hurdles to overcome in making a challenge under either of the routes above. It may be difficult to demonstrate that, in practice, the barriers listed above did particularly exclude DDPOs, especially since these are likely to be issues faced by all small businesses¹⁰. If the public body in question can demonstrate that it has carried out a proper EIA and considered and justified the procurement processes it has adopted, a challenge on these grounds is likely to fail¹¹. And in the case of the second argument above, it would only be possible to run this once it was demonstrated that DDPOs were in fact excluded; there would then be the additional issue of proving that DDPOs provided a better service to Disabled

¹⁰ And, as emphasised by the Government's Guidance On Provisions That Support Market Access For Small Businesses, the majority of the ways that access has been improved for small businesses are at the discretion of the public body carrying out the procurement or involve the removal of central requirements that had an exclusionary effect:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560273/Guidance_on_on_Provisions_that_Support_Access_for_Small_Businesses_-_Oct_16.pdf

¹¹ It is, however, worth noting that this is quite a big 'if', as in many cases the impact on DDPOs of poor procurement practice is unlikely to have been considered.

people and that the public body in question had not properly considered and justified the practices that excluded them.

24. Neither of these arguments has been approved by the courts, and there is no guarantee that it would be possible to bring a successful challenge using either. Generally, the courts will not find a public body in breach of PSED where it has carried out an appropriate Equality Impact Assessment (EIA) and has thoroughly considered the impact of its proposals as required by s. 149. It follows, therefore, that - provided that the principles set down in *Brown* above have been adhered to (particularly the requirement for any assessment not simply to be a 'box-ticking' exercise) a challenge to a procurement decision on the grounds of a breach of s. 149 is unlikely to be successful.

25. Nonetheless, it is certainly worth highlighting to public bodies that they are required to comply with the s. 149 duty, and that that duty extends to removing barriers to and encouraging the participation of disabled people in providing services. This could either be done in the course of any consultation that the body in question ran pre-procurement, or as part of a broader campaign to raise awareness of the duties that public bodies face when carrying out procurements. It is clear from the case-law and the Government's own guidance

that such arguments are likely to have considerably more success when the subject matter of the procurement itself raises equality issues. As I understand the position this will, generally, be the case with public contracts that DDPOs have an interest in providing.

IV. USING REGULATION 20 OF THE PUBLIC CONTRACTS REGULATIONS 2015 TO MAINTAIN SPECIALIST USER-LED SERVICES

26. As noted above, under PCR 2015 a public body is not able to avoid running a tendering process where it wishes to enter into a contract, or re-contract with an existing supplier. Extensions of contracts are permissible provided they are allowed by the original contract; an extension not part of the original contract would almost certainly be considered a new contract for the purposes of PCR 2015, and so require a competitive procurement process. Likewise, while there are few explicit restrictions on the length of contracts under PCR 2015¹², the requirements under Regulation 18 to avoid anti-competitive restrictions and unduly favouring or disadvantaging certain operators would prevent any disproportionately (to the subject matter of the contract) long-running contracts.

¹² Though see the requirement under Regulation 33(3) PCR 2015 for framework agreements not to exceed four years except in exceptional cases.

27. While these rules do not explicitly apply to contracts below the threshold, the requirements under EU law of equal treatment and proportionality would be sufficient to catch any attempt to favour certain suppliers, including avoiding putting a contract out to tender.

28. However, Regulation 20 PCR 2015 states:

- i. Contracting authorities may (emphasis added) –
 - a. reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, or
 - b. provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

29. While it is still necessary to hold a competitive process that (otherwise) complies with PCR 2015 requirements, it is possible

under this provision to limit participation in that process to suppliers that meet the afore-mentioned criteria.

30. According to the Government's PPN Guidance on Social and Environmental Aspects for PCR 2015 ("the Social PPN")¹³, it is necessary both for the main aim of the supplier in question to be the social and professional integration of Disabled or disadvantaged people, and for at least 30% of their employees to be Disabled or disadvantaged workers:

"for a supplier to be eligible, its main aim must be the social and professional integration of disabled or disadvantaged persons. There is then a requirement that these suppliers, sheltered workshops or sheltered employment programmes, have at least 30% of their workforce comprising disabled or disadvantaged persons."

31. It is not obvious that this is the correct interpretation – it is possible to read Regulation 20 as allowing participation in the process to be restricted to suppliers whose main purpose is the integration of Disabled people *or* allowing for it to be a condition for the award of contracts that they be performed by sheltered employment

¹³ Which can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/558032/20160912social_environmentalguidancefinal.pdf.

programmes, where at least 30% of employees are Disabled or disadvantaged.

32. Nevertheless, even if the interpretation in the Social PPN is correct, it should be relatively easy for the majority of DPPOs to demonstrate that they fulfil these criteria. According to Inclusion London's own definition, an organisation is a DDPO if:

- i. Their Management Committee or Board has at least 75% representation from Deaf and Disabled people;
- ii. At least 50% of their paid staff team are Deaf or Disabled people with representation at all levels of the organisation and;
- iii. They provide services for or work on behalf of Deaf and Disabled people.

This would appear to meet the requirements of Regulation 20 – it is hard to see how an organisation that is composed of Deaf and Disabled people and that “provide[s] services for or work on behalf of Deaf and Disabled people” could not have as its main aim “the social and professional integration of disabled or disadvantaged people”. Moreover, it may be that the Government's interpretation works in DDPOs' favour – in a case submitted by Inclusion London

as evidence to the Public Accounts Committee, REAL, a local DDPO, was outbid by a national charity, POhWER¹⁴. Had this procurement been conducted under Regulation 20 as interpreted by the Social PPN, POhWER would have been excluded from participation.

33. Should a public body be interested, therefore, in maintaining user-led services for and provided by Disabled people, the correct approach would not to attempt to avoid putting the contract out to tender, but rather to make use of Regulation 20 to restrict participation in the process to DDPOs and similar organisations.

V. THE PUBLIC SERVICES (SOCIAL VALUE) ACT 2012

34. Section 1 of the Public Services (Social Value) Act 2012 (“the Social Value Act”) materially provides that:

- i. If a relevant authority proposes to procure or make arrangements for procuring the provision of services, or the provision of services together with the purchase or hire of goods or the carrying out of works, by –
 - a. entering into a public services contract that is not a contract based on a framework agreement, or

¹⁴ <http://www.disabilitynewsservice.com/council-thinks-again-over-pohwer-contract/>

- b. concluding a framework agreement as regards which public services contracts are likely to constitute the greater part by value of the contracts based on the agreement, it must comply with the requirements in subsections (3), (6) and (7) before starting the process of procurement.
 - ii. The authority must consider –
 - a. how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area, and
 - b. how, in conducting the process of procurement, it might act with a view to securing that improvement.
 - iii. The authority must consider under subsection (3)(b) 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.
 - iv. The authority must consider whether to undertake any consultation as to the matters that fall to be considered under subsection (3).
35. The above requires, in essence and so far as relevant for present purposes, a public body to consider how, when procuring services,

the services in question might improve the social well-being of the relevant area (which can be local or nationwide), depending on the body in question, and how it could conduct the procurement to secure that improvement. The public body must consider whether to consult on these matters. It is important to note that the requirement is only to *consider*, and not to actually act on these considerations; it also need only consider matters relevant to what is being procured, and must consider the extent to which it is proportionate to take these matters into account. There is also no need to fulfil these requirements where it is impractical to do so due to urgency (unless that urgency is caused by undue delay on the part of the body in question).

36. The duty arises *before* starting the process of procurement, which is defined by s. 1(2) as:

- a. *sending a notice to the Official Journal of the European Union for the purpose of inviting tenders, requests to be selected to tender or to negotiate or requests to participate in relation to a public services contract or framework agreement relating to what is proposed to be procured;*
- b. *publishing an advertisement seeking offers or expressions of interest in relation to such a contract or framework agreement;*

- c. *contacting a person in order to seek an offer or expression of interest in relation to such a contract or framework agreement;*
- d. *contacting a person in order to respond to an unsolicited offer or expression of interest in relation to such a contract or framework agreement;*
- e. *entering into such a contract or concluding such a framework agreement.*

37. In many ways, therefore, the duty is arguably more limited than that under s. 149 Equality Act. The Social Value Act applies only to contracts for services, and only those above the threshold amounts¹⁵. Provided proper consideration has been carried out at the pre-procurement stage, the provisions of the Social Value Act will have been complied with, and it is unlikely to be possible to challenge a failure to implement any prospective social benefits in the conduct of the procurement.

38. There is no definition in the Social Value Act itself of what it means to “consider” the relevant requirements. However, the

¹⁵ The Government’s PPN on the Social Value Act notes that although below-threshold contracts are not covered by the Act, “commissioners, as a matter of good practice, could consider economic, social and environmental well being in order to obtain maximum value for money” (page 5).

Government's PPN on the Social Value Act ("the Social Value Act PPN")¹⁶ states that (page 8):

"Although the Act does not prescribe that considerations made under it should be recorded, as a matter of good practice, contracting authorities may wish to keep a formal record to show that they have made the considerations required under the Act, as well as the rationale for any subsequent decisions. In the interests of transparency contracting authorities may also wish to indicate in any subsequent advertisements and tender documents that the requirements of the Act have been considered."

It is suggested that, beyond this, similar principles as were set out for the need to have "due regard" to PSED in *Brown* (see above) would be appropriate here, and if those had been complied with, notably the requirement for any consideration to be genuine, exercised rigorously and with an open mind before the procurement began, then the body in question would have complied with the conditions of the Act. The duty to "consider" is, it is suggested, less onerous than the duty to have "due regard" to¹⁷, and, as such, compliance with *Brown* is likely more than

¹⁶ Which can be found at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79273/Public_Services_Social_Value_Act_2012_PPN.pdf.

¹⁷ See note 17 below on the suggestion that 'consider' be replaced by 'have regard to', which was considered to make the duty more onerous.

sufficient to enable a public body to satisfy the requirements of the Social Value Act.

39. However, the Government's 2015 Review of the Social Value Act ("the Social Value Act Review")¹⁸ highlighted the importance of the non-prescriptive nature of the Act, and having considered the possibility of extending the scope of the Act in a number of ways¹⁹, decided that to do so would risk undermining the flexibility the Act provided, reduce the consideration of social value criteria to a 'box-ticking' exercise and reintroduce bureaucratic burdens that recent reforms had been intended to reduce. The essence of this report is that the Act is a tool to better allow public authorities to consider social value criteria, and that it is at its most effective when taken up "with enthusiasm and energy" (page 15). In practice, therefore, the usefulness of the Act is dependent more on the public body than the supplier, and there is a limited amount that can be done to force social value criteria to be included in procurements.

40. Nevertheless, it would in theory be possible to challenge a procurement process on the grounds of failure to comply with the

¹⁸ Which can be found at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_150212.pdf

¹⁹ Such as: replacing 'consider' with 'have regard to', 'account for', or 'implement'; requiring commissioners to consider social value at all stages of the procurement, and forcing them to include it in the tender documents; and extending the Act to goods or works contracts, or contracts below the threshold amounts (page 15).

requirements of the Social Value Act. If a public authority had entirely failed to consider social value as required by the Act, it might be possible to force them to go back to the pre-procurement stage, and carry out the proper assessment. This is likely to overlap, in the case of procurements that concern DDPOs and particularly Disabled recipients of contracted services, with PSED, and it is likely that in most cases, a failure to comply with one requirement would be found alongside a failure to comply with the other. In such cases, a challenge might well succeed, and be worth bringing, but such instances are likely to be comparatively rare.

41. The Social Value Act is more useful, it is suggested, as a means of encouraging public bodies to take into account social criteria when conducting procurement. The Social Value Act Review found that awareness of the Act was a “mixed picture” (page 19) and that “whilst most departments have amended their generic procurement guidelines to make reference to the Act, this awareness has not permeated through to the departments’ own procurement teams”. The Review also found that the pre-procurement focus of the Act had in many cases been forgotten, and that “fear of legal challenge and lack of clarity around what is legally permissible is preventing some commissioners from being able to implement social value” (page 24). There is, therefore, potential value in highlighting to

contracting public bodies the role of the Act and how it allows them to take social value into account when shaping procurements: guidance on good practice can be found at page 25 of the report.

42. The Social Value Act Review also notes the importance of suppliers making the case for social value criteria as a cost-saving method. In the Instructions to Counsel, it is noted that “[w]eighting in procurement processes does not sufficiently reflect the social value benefit whilst ‘value for money’ weighting trumps all other factors and means in reality cheapest bidder wins”. The Review stresses the importance of quantifying the social value that a supplier offers in financial terms, and using this to make a case for social value criteria as part of the procurement (see page 37-38, including case studies). This, when done at a pre-procurement stage, is likely to make the inclusion of social value criteria far more attractive to public bodies attempting to navigate spending constraints. For example, if the effective use of DDPOs were to increase employment among Disabled people, or reduce their reliance on generic public services, this benefit ought to be quantifiable in direct financial terms, and a case for using DDPOs to provide user-led services could subsequently be made on that basis.

VI. THE LOCAL GOVERNMENT ACT 1999

43. The Social Value Act also overlaps with the Local Government Act 1999 (“the Local Government Act”). Under s. 3 of the Local Government Act (emphasis added):

- i. *A best value authority²⁰ must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.*
- ii. *For the purpose of deciding how to fulfil the duty arising under subsection (1) an authority must consult –*
 - a. *representatives of persons liable to pay any tax, precept or levy to or in respect of the authority,*
 - b. *representatives of persons liable to pay non-domestic rates in respect of any area within which the authority carries out functions,*
 - c. *representatives of persons who use or are likely to use services provided by the authority, and*
 - d. *representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions.*

²⁰ ‘Best value authorities’ are defined in s. 1 of the Local Government Act, and include local authorities.

44. This duty, unlike that under the Social Value Act, does not apply solely to contracts above the threshold amounts. The Revised Best Value Statutory Guidance PPN²¹ (“the Best Value PPN”) notes that “[a]uthorities can ... apply the concept of social value more widely than [the requirements of the Social Value Act] and this Guidance recommends that authorities consider social value for other contracts (for example below the threshold or for good and works) where it is relevant to the subject matter of the contract and deemed to be beneficial to do so”. It highlights that “[u]nder the Duty of Best Value ... authorities should consider overall value, including economic, environmental and social value, when reviewing service provision” (‘Revised Best Value Statutory Guidance’, paragraph 2).
45. There is, perhaps more helpfully, a duty to consult – this provides an opportunity for DDPOs to make their case to for the inclusion of social value criteria. Consultation is mandatory, and the Best Value PPN states that this duty “should apply at all stages of the commissioning cycle, including when considering the decommissioning of services” (‘Revised Best Value Statutory Guidance’, paragraph 3). However, the Court of Appeal in *R (Nash)*

²¹ Which can be found at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418505/Revised_Best_Value_Statutory_Guidance_final.pdf

v Barnet London Borough Council [2013] EWCA Civ 1004 (“Nash”) held that²² (paragraphs 50-51 – emphasis added):

In my view that section [s. 3] is framed in notably broad terms. The duty is to “make arrangements” to secure continuous improvement in “the way” in which a relevant authority's functions are exercised: s.3(1). The obligation to consult, under s.3(2) then arises for the purposes of deciding “how” to fulfil that duty.

... The section is not designed to require consultation about the terms of particular contracts which an authority may be minded to make: indeed considerations of commercial confidentiality would in any event often make that an impossibility. Moreover it seems at first sight most surprising to align the duty to consult with the date of resolving to enter into a particular contract. Rather one might expect – given the width of s.3 – that the duty should be geared to consultation at a much earlier stage, well before the stage at which consideration is given as to whether the relevant officer is to be authorised to sign a particular contract. Those considerations justify the judge's finding (at paragraph 34 of his judgment) that the duty to consult is concerned with “questions of policy and approach”, not specific operational matters. That indeed accords with the wide language, and underlying purpose, of s.3 of the 1999 Act.

²² In *Nash*, the court noted that the guidance was “very broadly framed” and that “for the purposes of the issues before us, neither party in fact was disposed to place reliance on the Guidance”.

46. Therefore there is no requirement to consult on every procurement carried out by a public authority to whom this section applies, but to do so only where high-level policy decisions are taken by the body in question. This is important to bear in mind if considering whether to attempt a challenge under these provisions. In *Nash*, it was held that the challenge would have been successful, but was out of time, being in reality a challenge not to the specific award of the contract, but rather to the decision to outsource the services in question. It is consequently important, if seeking to challenge a change in procurement policy on these grounds, that it come at the appropriate time, i.e. when the high-level decision is being taken, rather than at the time the procurement itself takes place.

VII. CONCLUSION AND FURTHER POINTS

47. Under the Freedom of Information Act 2000 (“FOIA”), public authorities²³ are under a duty to provide information recorded in any form²⁴. Potential suppliers could use this provision to request information demonstrating that the authority in question has

²³ Defined in Schedule 1 FOIA: it is highly likely that any public body carrying out a procurement that is of interest to a DDPO will be covered by the Act.

²⁴ Per s. 84 FOIA: it therefore does not include unrecorded information.

complied with its duties under the Social Value Act or the Equality Act²⁵. While there is no explicit requirement for authorities to record their considerations, it is, as noted above, good practice to do so, and a failure to do so is likely to be a strong indication that no, or inadequate, consideration was given to the requirements of the Social Value Act.

48. The prospects of successfully challenging a procurement decision are, as noted above, limited under the legislation discussed. The potential routes identified are:

- i. A failure to carry out a proper EIA as required by the public body's PSED, or a general breach of the s. 149 PSED.
- ii. A failure to consider the social value criteria, or to consider consulting on them, as required by the Social Value Act.
- iii. A failure to consult as required by s. 3 of the Local Government Act.

Of these, the most promising is likely to be a challenge for breaches of PSED. The requirements on public bodies are most strenuous here, and there have been successful challenges on this basis before, including in a procurement context. As noted above, FOIA requests could be used to ensure that public authorities are carrying out

²⁵ There are exemptions, detailed at ss. 21-44 FOIA, which allow the information in question not to be disclosed, but these are unlikely to apply to information recorded for these purposes.

their duties properly, and challenges issued where the evidence suggests there have been serious breaches.

49. Even a successful challenge, however, is unlikely to prevent DDPOs being excluded, so long as the public body in question can properly justify the processes that excluded them (either directly or indirectly, though indirect exclusion is far more likely to justifiable). Rather what the legislative provisions discussed can achieve is DDPOs being excluded accidentally or without proper consideration.

50. This ties into the broader theme of this advice, which is that the true value of the legislation discussed is as a means of compelling public bodies to consider social value criteria. This prevents DDPOs being simply ignored (which could in many cases be a breach of the legislation) and enables them to make their case for favourable treatment.

51. For this to be successful, it is important that DDPOs give thought to the pressures that public bodies are under when making procurement decisions, and how the services offered by DDPOs can be made more attractive in light of those pressures. Often this will be mean quantifying the benefit that DDPOs provide in financial

terms, and this approach is likely to have the greatest success when attempting to engage with public bodies on these issues.

52. If public bodies can be persuaded of the value of social criteria in procurement, then there is considerable scope for them to take these into account and included them as part of the procurement process. As far as DDPOs are concerned, the most potent tool in this regard is likely to be Regulation 20 PCR 2015, which allows procurements to be restricted to organisations comprised of Disabled employees. However, both the Social Value Act and Regulation 67 PCR 2015 make it clear that the inclusion of social value criteria as requirements is entirely permissible. It is important that this be done at the start of the procurement process, and effective dialogue between public bodies and organisations such as Inclusion London could help shape procurement processes appropriately.

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