

USING PROCUREMENT LEGISLATION FOR DDPOs

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There is hope!

- The headline point is that DDPOs should feel empowered under the relevant legislation
- The other headline is that the legislation assists those who are proactive rather than reactive
- Once a case is actually “live”, it is more difficult to establish that a commissioner has acted in breach of the legislation (but not impossible!)

The legislative framework (1)

- Directive 2014/24/EU the title of which is on Public Procurement. Given effect by the **Public Contracts Regulations 2015 ('PCR')**
- Basic rules which govern public procurement competitions are the same.
- The key rules are:
 - (1) **Transparency** – procedures must be transparent and contracts publicised.
 - (2) **Equal treatment and non discrimination** – potential suppliers must be treated equally
 - (3) **Proportionality** – procedures and decisions must be proportionate.
 - (4) **Mutual recognition** – qualifications and standards from other EU states must be recognised as equal where appropriate

The legislative framework (2)

- Only procurements over a certain amount (“threshold amount”) are subject to the Regulations.
- Procurements below are subject to the basic requirements.
- The requirement for transparency means that in the majority of cases there will be a requirement to publicise a contract even if below threshold.
- Threshold for Services contracts is around £165k. Works is much greater.

The legislative framework (3)

- Regulation 18 PCR effectively replicates the basic duties, but it is further stated:
- The design of the procurement is not to exclude it from the scope of the PCR or of artificially narrowing competition.
- The competition will be considered artificially narrowed where its design is made with the intention of unduly favouring or disadvantaging certain economic operators.
- There are clear rules on contracts needing to be advertised (Reg. 26)

The legislative framework (4)

- The key point to take aware is that there is a requirement to hold a competitive selection before awarding public contracts above the threshold.
- Below the threshold there will need to be publicity and competition but PCR does not need to be followed.

The criteria for awarding a contract

- This is set out in **Regulation 67 PCR**.
- (1) Must award on basis of the most economically advantageous tender '**MEAT**'.
- (2) Can be assessed on the basis of price or cost.
- (3) This can include a price-quality analysis, which can be assessed on criteria such as qualitative, environmental/social aspects, linked to the subject matter of the contract.

Quality criteria in more detail

- The following may be used:
 - (1) Quality, including technical merit, aesthetic, design, social, environmental and innovative characteristics.
 - (2) Organisation factors: qualification and experience of staff
 - (3) After sales service.
- In the procurement documents, the commissioner has to explain the relative weighting for each criteria.

Public Sector Equality Duty

- **S. 149 Equality Act 2010** – applies to public authorities
- **Due regard** to the need to:
 - i. eliminate discrimination,
 - li. Advance equality of opportunity between persons who share a relevant protected characteristic (which includes a disability)
 - lii. Foster good relations between persons who share a protected characteristic and persons who do not share it.
- **S. 149(3)** due regard in particular to:
 - (i) Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic (connected to it);
 - (ii) Take steps to meet their needs which are different to those who do not have the characteristic;
 - (iii) Encourage those who share a characteristic to participate in public life or any activity in which participation is low

PSED (2)

- *R (Brown) v SSWP and another* [2008] EWHC 3158 (Admin). Guidance on how to give “due regard”
- Must be fulfilled before or at time policy will or might affect disabled people.
- Rigour, open mind – not ticking boxes
- Good practice to keep records – encourages transparency and discipline.
- *R (RB) v Devon CC* [2012] EWHC 3597 (Admin) – recognition that PSED applied. But on facts of that case relief not appropriate.

Consequences of PSED

- **Remove barriers to participation**
 - (1) Contracts in bundles
 - (2) Too short time frames
 - (3) Too large contracts;
 - (4) Over prescriptive contracts; and
 - (5) Poorly publicised contract opportunities

- **Systemic failures**, excluding certain organisations, like DPPOs.

- Duty extends to encouraging participation of disabled persons in providing services.

Reg. 20 PCR

- Contracting authorities may:
 - 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 employees of those are disabled or disadvantaged workers.

- Still need for competition
- Government's PPN Guidance

SOCIAL VALUE ACT 2012 (1)

- Public Services (Social Value) Act 2012
- S. 1 – authority must **consider**:
 - a. how **what is to be procured** might improve the economic, social and environmental well-being of the relevant area;
 - b. how, in **conducting the process of procurement**, it might act with a view to securing that improvement
- S. 1(3)(b) Proportionality in considering these matters
- S. 1(3) authority must consider whether to carry out a consultation.
- Urgency is “get out”

Social Value Act (2)

- Duty arises before start of the procurement process.
- Potentially more limited than s. 149 EA (timing and “consider” less than “due regard”).
- Only applies to contracts for **services**.
- Only above threshold amounts.
- No definition of “Social Value”
- PPN Guidance – should record consideration
- But supplier can try to promote utility of social value criteria

LGA 1999

- Local Government Act 1999
- S. 3 – “best value authority”, must make arrangements to secure continuous improvement – having regard to a combination of **economy, efficiency and effectiveness**.
- In order to do this – **MUST CONSULT**.
- Does not apply solely to contracts above threshold amounts. Does not apply just to services contracts.

LGA 1999

- Duty applies at all stages of commissioning cycle.
- *R (Nash) v Barnet LBC* [2013] EWCA Civ 1004 – less about specific terms of contract and more to do with questions of policy and approach.

Conclusions

- Use of FOIA
- Failure to carry out EIA
- Failure to considering social value criteria
- Failure to consult under s. 3

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