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Social value in public services – what's legally
possible?
Mark Cook

No procurement is an island



Public Services (Social Value) Act 2012

Section 1 – Contracts of relevant authorities

The Act:

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



We could spend all day talking about the Public Contracts Regulations 2015...

....but we'll just focus on what they say about:

- pre-market consultation;
- contract award criteria;
- reserved contracts
- disabled or disadvantaged workers;
- the new light touch regime for social care etc. services;
- reserved contracts for certain services.



Regulation 40, Public Contracts Regulations 2015

Preliminary market consultations

- 40.—(1) Before commencing a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.
- (2) For this purpose, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants.
- (3) Such advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.



Regulation 67, Public Contracts Regulations 2015

Contract award criteria

- 67.—(1) 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.
- (2) 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.
- (3) 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;



Regulation 67, Public Contracts Regulations 2015

- (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.
- (4) The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.
- (5) Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:
- (a) the specific process of production, provision or trading of those works, supplies or services; or



Regulation 67, Public Contracts Regulations 2015

- (b) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance.
- (6) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.
- (7) Award criteria shall ensure the possibility of effective competition and:
 - (a) shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria; and
 - (b) in case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.



Regulation 20, Public Contracts Regulations 2015

Reserved contracts

20.—(1) 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 the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

(2) In such cases, the call for competition shall make reference to Article 20 of the Public Contracts Directive.



Commission Regulation (EU) No 651/2014 of 17
June 2014 declaring certain categories of aid
compatible with the internal market in application of
Articles 107 and 108 of the Treaty

or the General Block Exemption Regulations



Disadvantaged worker

means any person who:

- (a) has not been in regular paid employment for the previous 6 months; or
- (b) is between 15 and 24 years of age; or
- (c) has not attained an upper secondary educational or vocational qualification (International Standard Classification of Education 3) or is within two years after completing full-time education and who has not previously obtained his or her first regular paid employment; or
- (d) is over the age of 50 years; or
- (e) lives as a single adult with one or more dependents; or
- (f) works in a sector or profession in a Member State where the gender imbalance is at least 25 % higher than the average gender imbalance across all economic sectors in that Member State, and belongs to that underrepresented gender group; or
- (g) is a member of an ethnic minority within a Member State and who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment;



Severely disadvantaged worker

means any person who:

- (a) has not been in regular paid employment for at least 24 months; or
- (b) has not been in regular paid employment for at least 12 months and belongs to one of the categories (b) to (g) mentioned under the definition of 'disadvantaged worker'.



Sheltered employment

means employment in an undertaking where at least 30 % of workers are workers with disabilities;



Regulations 74 to 76, Public Contracts Regulations 2015

Award of contracts for social and other specific services

74. Public contracts for social and other specific services listed in Schedule 3 shall be awarded in accordance with this Section.



Schedule 3, Public Contracts Regulations 2015

(CPV Code)	Description
Supply services of domestic help personnel, supply services of nursing personnel and supply services of medical personnel. Private households with employed persons and manpower services for households, agency staff services for households, clerical staff services for households, temporary staff for households, home-help services and domestic services.	Health, social and related services
Administrative, defence and social security services; educational and training services, exhibition, fair and congress organisational services, seminar organisation services, event services, cultural event organisation services, festival organisation services, party organisation services, fashion shows organisation services and fair and exhibition organisation services.	Administrative social, educational, healthcare and cultural services
	Compulsory social security services
	Benefit services
	Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
	Religious services
Catering services for private households, meals-on-wheels services, meal delivery service, catering services, catering services for transport enterprises, catering services for other enterprises or other institutions, school catering services, canteen services, canteen and other restricted-clientele cafeteria services, canteen management services and school-meal services	Hotel and restaurant services

Schedule 3, Public Contracts Regulations 2015

(CPV Code)	Description
	Legal services, to the extent not excluded by Regulation 10 (1)(d)
	Other administrative services and government services
	Provision of services to the community
	Prison related services, public security and rescue services to the extent not excluded by regulation 10(1)(h)
Investigation and security services, security services, alarm-monitoring services, guard services, surveillance services, tracing system services, absconder-tracing services, patrol services, identification badge release services, investigation services and detective agency services, graphology services and waste analysis services.	Investigation and security services
Services provided by extra-territorial organisations and bodies and Services specific to international organisations and bodies	International services
Postal and telecommunications services, post and courier services, postal services, postal services related to newspapers and periodicals, postal services related to letters, postal services related to parcels, post office counter services, mailbox rental, post-restante services, Internal office mail and messenger services.	Postal services
	Miscellaneous services



Regulations 74 to 76, Public Contracts Regulations 2015

Publication of notices

75.—(1) Contracting authorities intending to award a public contract for the services referred to in regulation 74 shall make known their intention by any of the following means:—

- (a) by means of a contract notice, which shall contain the information referred to in part H of Annex V to the Public Contracts Directive; or
- (b) by means of a prior information notice, which shall—
 - (i) be published continuously,
 - (ii) contain the information set out in part I of Annex V to the Public Contracts Directive,
 - (iii) refer specifically to the types of services that will be the subject-matter of the contracts to be awarded, and
 - (iv) indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.



Regulations 74 to 76, Public Contracts Regulations 2015

Publication of notices

- (2) Paragraph (1) shall not apply where a negotiated procedure without prior publication could have been used, in accordance with regulation 32, for the award of a public service contract.
- (3) Contracting authorities that have awarded a public contract for the services referred to in regulation 74 shall make known the results of the procurement procedure by means of a contract award notice, which shall contain the information referred to in part J of Annex V to the Public Contracts Directive.
- (4) Contracting authorities may group contract award notices on a quarterly basis, in which case they shall comply with paragraph (5) by sending the grouped notices within 30 days of the end of each quarter.
- (5) Contracting authorities shall send the notices referred to in this regulation for publication in accordance with regulation 51.



Regulations 74 to 76, Public Contracts Regulations 2015

Principles of awarding contracts

- 76.**—(1) Contracting authorities shall determine the procedures that are to be applied in connection with the award of contracts subject to this Section, and may take into account the specificities of the services in question.
- (2) Those procedures shall be at least sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators.
- (3) In particular, where, in accordance with regulation 75, a contract notice or prior information notice has been published in relation to a given procurement, the contracting authority shall, except in the circumstances mentioned in paragraph (4), conduct the procurement, and award any resulting contract, in conformity with the information contained in the notice about—
- (a) conditions for participation,
 - (b) time limits for contacting the contracting authority, and
 - (c) the award procedure to be applied.



Regulations 74 to 76, Public Contracts Regulations 2015

Principles of awarding contracts

- (4) The contracting authority may, however, conduct the procurement, and award any resulting contract, in a way which is not in conformity with that information, but only if all the following conditions are met:—
 - (a) the failure to conform does not, in the particular circumstances, amount to a breach of the principles of transparency and equal treatment of economic operators;
 - (b) the contracting authority has, before proceeding in reliance on sub-paragraph (a)—
 - (i) given due consideration to the matter,
 - (ii) concluded that sub-paragraph (a) is applicable,
 - (iii) documented that conclusion and the reasons for it in accordance with regulation 84(7) and (8), and
 - (iv) informed the participants of the respects in which the contracting authority intends to proceed in a way which is not in conformity with the information contained in the notice.



Regulations 74 to 76, Public Contracts Regulations 2015

Principles of awarding contracts

- (5) In paragraph (4)(b)(iv), “participants” means any economic operators which have responded to the notice and have not been informed by the contracting authority that they are no longer under consideration for the award of a contract within the scope of the procurement concerned.
- (6) All time limits imposed on economic operators for the purposes of this regulation, whether for responding to a contract notice or taking any other steps in the relevant procedure, shall be reasonable and proportionate.
- (7) Without prejudice to the generality of paragraph (1), and subject to the other requirements of this Chapter, contracting authorities may apply procedures for the purposes of this regulation which correspond (with or without variations) to procedures, techniques or other features provided for in Chapter 2, as well as procedures which do not.



Regulations 74 to 76, Public Contracts Regulations 2015

Principles of awarding contracts

- (8) In relation to the award of contracts subject to this Section, contracting authorities may take into account any relevant considerations, including —
 - (a) the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services;
 - (b) the specific needs of different categories of users, including disadvantaged and vulnerable groups;
 - (c) the involvement and empowerment of users; and
 - (d) innovation.



Regulation 77, Public Contracts Regulations 2015

Reserved contracts for certain services

77.—(1) Contracting authorities may reserve to qualifying organisations the right to participate in procedures for the award of reservable public contracts.

(2) For that purpose, a contract is a reservable public contract only if it is exclusively for one or more of the services which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, and 98133110-8.



Regulation 77, Public Contracts Regulations 2015

Reserved contracts for certain services

- (3) In this regulation, “qualifying organisation” means an organisation which fulfils all of the following conditions:—
- (a) its objective is the pursuit of a public service mission linked to the delivery of services referred to in paragraph (2);
 - (b) profits are reinvested with a view to achieving the organisation’s objective, and any distribution of profits is based on participatory considerations;
 - (c) the structures of management or ownership of the organisation are (or will be, if and when it performs the contract) —
 - (i) based on employee ownership or participatory principles, or
 - (ii) require the active participation of employees, users or stakeholders; and
 - (d) the organisation has not been awarded, pursuant to this regulation, a contract for the services concerned by the contracting authority concerned within the past 3 years.



Regulation 77, Public Contracts Regulations 2015

Reserved contracts for certain services

- (4) The maximum duration of a contract awarded under this regulation shall not be longer than 3 years.
- (5) Where a contracting authority exercises the power of reservation conferred by paragraph (1), the call for competition shall make reference to Article 77 of the Public Contracts Directive.
- (6) This regulation does not apply in relation to the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013.



Short term “spin outs” to “mutuals”

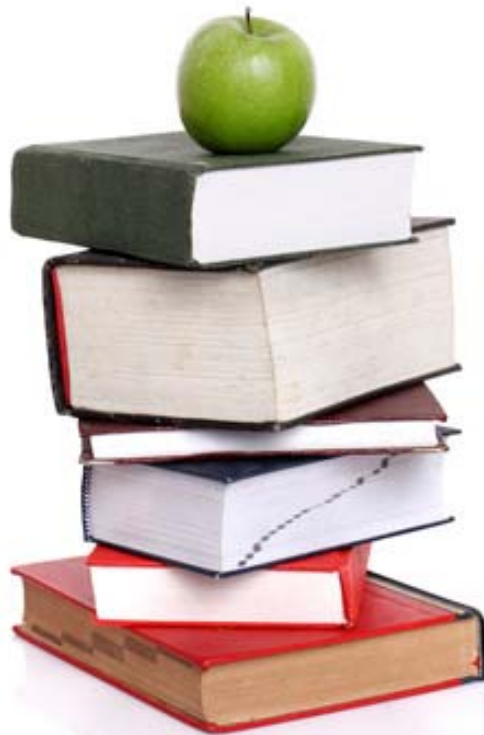
75121000-0	Administrative educational services
75122000-7	Administrative healthcare services
75123000-4	Administrative housing services
79622000-0	Supply services of domestic help personnel
79624000-4	Supply services of nursing personnel
79625000-1	Supply services of medical personnel
80110000-8	Pre-school education services
80300000-7	Higher education services
80420000-4	E-learning services
80430000-7	Adult-education services at university level
80511000-9	Staff training services
80520000-5	Training facilities
80590000-6	Tutorial services
85000000-9 – 85323000-9	85000000-9 – Health and social work services 85100000-0 – 85172000-5 – Health services 85200000-1 – 85210000-3 –Veterinary services 8530000-2 – 85323000-9 – Social work and related services
92500000-6	Library, archives, museums and other cultural services
92600000-7	Sporting services
98133000-4	Services furnished by social membership organisations
98133110-8	Services provided by youth associations



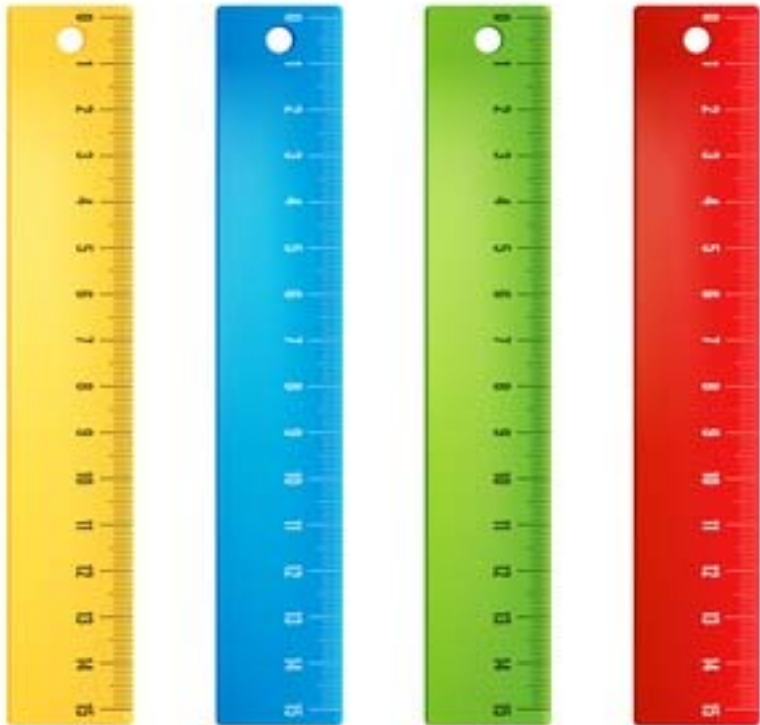
The central conundrum: what are you buying?



The subject matter of the contract



Verifiability



Pointers for supported employment

- **Commissioners:**
 - pre-procurement market consultation
 - flex social requirements in the specification;
 - reflect in selection and evaluation process;
 - enforce contractually;
 - consider other processes e.g. Regulation 20;
 - adopt the services and training = employment approach.
- **Employers/Providers:**
 - demonstrate/evidence satisfaction of Regulation 20;
 - articulate demonstration of public service mission organisation test;
 - think about your services and training = employment offer



QUESTIONS



Disclaimer: Whilst every effort has been made to ensure the accuracy of these materials, advice should be taken before action is implemented or refrained from in specific cases. No responsibility can be accepted for action taken or refrained from solely by reference to the contents of these materials.

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