

Client Alert.

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UK Public Procurement Law Digest: Social Value in Procurement

By Alistair Maughan

For many years, the trend in UK public procurement has been towards greater certainty. Clear financial thresholds apply; cases have tightly defined time limits for notification of award decisions; and weightings and evaluation criteria must be published. So the rather vague requirements of the Public Services (Social Value) Act 2012 come as something of a surprise.

How much value must a contracting authority now attach to the effect of a procurement on the economic, social and environmental well-being of the local area? Seemingly, either quite a lot or not very much, depending on the authority's discretion.

PUBLIC SERVICES (SOCIAL VALUE) ACT 2012

On 8 March 2012, the Public Services (Social Value) Act 2012 (the "Act") received Royal Assent. The Act requires public authorities to consider the economic, social and environmental well-being of their area when undertaking public procurements for works, supplies or services.

The Act imposes various requirements on a contracting authority in any regulated procurement process. These include a consideration of factors such as:

- how the procurement might improve the economic, social and environmental well-being of the relevant area;
- how the procurement process might secure that improvement; and
- whether to undertake any consultation with the public as to the economic, social and environmental well-being and how that might be improved.

"Relevant area" means the part of the United Kingdom in which a public services contract, or contracts based on a framework agreement, are intended to be made.

The Act only applies to contracts and framework agreements for services that are subject to the Public Contracts Regulations 2006. It does not apply to call-off contracts made under an already-awarded framework agreement.

The Act has been amended several times since its first draft and a number of requirements were removed - for example, the suggested requirement that the public authorities would have to take steps to promote engagement with social enterprises.

IMPACT

The difficulty with the Act is its wooliness. It is far from clear what "economic, social and environmental well-being" actually means (unhelpfully, it is not defined) and how detailed a consultation may be.

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The Act only requires that the authority considers these factors. There is no obligation actually to do anything. This means that there is a seemingly wide discretion given to authorities either to make a fairly cursory assessment of these factors and then press ahead regardless as it would have done anyway, or to stop in its tracks and consider a broader consultation exercise.

There is a fear in some quarters that the Act is a licence to discriminate in favour of locally based service providers.

Also, it is far from clear how this requirement will affect central government departments: on a national procurement, how does a central government body interpret the “relevant area” in respect of which it is supposed to be considering the well-being? The meaning and possible effect is much clearer for local government procuring entities or locally based NHS trusts, for example.

Overall, unless an authority wants to justify a certain policy approach on the basis of local effects, compliance with the requirements of the Act ought not to be unduly onerous despite the fuzziness around some of the concepts such as “well-being” and “relevant area”. But the flip side is that the incentive to improve the economic, social and environmental well-being of a particular relevant area could be used to mask a set of local buying requirements that cuts across the basic principles of transparency and non-discrimination under the Public Contracts Regulations 2006.

The Act requires a statutory instrument to bring it into full force and effect. It can only be hoped that, when the statutory instrument to do so is actually published, it will contain some clarification as to how the Act ought to be applied.

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