Working with the Public Sector - Busting the Myths

A guide for social enterprise and contracting public bodies

This guide (second edition, January 2013) is aimed at social enterprises who wish to enter public sector markets but face challenges navigating the procurement process and contracting bodies who want to work with social enterprises and commission for social value.

As more and more social enterprises move into public sector markets it is essential that they do it with a sound understanding of procurement rules, practices and processes. At the same time there is increased interest among public sector bodies to work more closely with social enterprises and to maximise the social value of their contracts, and it is useful to them to understand how the rules allow, rather than disallow, working with social enterprises.

The rules on public procurement may seem complex and difficult to navigate, a perception which has perpetuated a number of myths that can make it hard for social enterprises to start fulfilling their potential in public services. Contracting bodies and social enterprises alike should be prepared to constantly challenge these myths which often, sadly, form the basis of procurement decisions.

This is a guide to the most commonly-held - but mistaken - beliefs about procurement, market engagement, social value and localism. It is an update to the previous edition, taking into account the Localism Act 2011 and the Public Services (Social Value) Act 2012, and looking to the future of procurement in the proposed new EU Directive, which is expected soon.
The Myths

#1: The procurement rules apply to everything

#2: When establishing a social enterprise, a public body must go through an open tendering process

#3: Strong financial track records are the best way to minimise risk

#4: Engaging with social enterprises prior to procurement is anti-competitive

#5: Competition is the only way to get the best price

#6: The Community Right to Challenge will open up many public services

#7: Including social value in procurement just isn't legal

#8: Including social value in the procurement process is too hard and too expensive

#9: The Public Services (Social Value) Act 2012 is just another hoop for bidders to jump through

#10: The Public Services (Social Value) Act 2012 is too weak and will not achieve what it could

#11: Including social value in the procurement process is anti-competitive

Myth #1: The procurement rules apply to everything

Often the temptation is to apply the EU procurement rules without considering whether or not this is necessary. But this won’t provide value for money if the contracting body is doggedly following a process without thought. There are a number of exceptions to the EU procurement rules, including:

- “below threshold” contracts¹;
- contracts for “Part B” services; and
- purely land transactions.

“Part B” services include some often provided by social enterprises, charities and community-led organisations, such as educational services, health & social services, recreational, and cultural and sporting services. They can often be provided more effectively by organisations that know their communities and can deliver against local need. The same is often true of lower value contracts. Following a full EU procurement for these types of contract is unnecessary and off-putting to the inexperienced bidder. The result is that it undermines instead of encourages competition.

The proposed new EU Directive looks set to change the landscape of the procurement rules, with most of the current “Part B” being subsumed into “Part A”. The new “Part B” will be much more limited in scope, and there will be a simplified procurement regime for any of these services where the contract is valued above €750,000. This commits contracting authorities to adhering to the fundamental principles of transparency and equal treatment.

**Myth #2: When establishing a social enterprise, a public body must go through an open tendering process**

The setting up of a new organisation is not a matter for procurement, as the EU procurement rules apply to contracts alone. But it is likely that a public body setting up a new organisation will be doing so either to:

- enter into contracts with that organisation (for example, for the social enterprise to provide services back to the public body); or
- create a trading entity that will interact with the wider world.

If the public body wants the organisation it creates to interact only or mainly with itself, then it is possible that the “Teckal” exemption for in-house contracts can be applied. Where the public body exercises over the organisation a level of control similar to that it exercises over internal departments and, at the same time, that organisation carries out the essential part of its activities with the public body, then the EU procurement rules will not apply. This can also be the case if an organisation is set up by a group of public bodies that each plays a role in that enterprise’s managing bodies (such as the board of Directors) and the organisation carries out its activities for those public bodies (altogether). The exemption falls away if there is any private sector capital in the vehicle (such as shares in a share company).

The new Directive suggests that, for this test to be satisfied, 80 or 85% of the subsidiary’s activities should be “carried out in the performance of tasks entrusted to it” by its parent or parents.

This “Teckal” exemption will generally not apply when the organisation is trading with a wider marketplace. For a start, it will not be doing the “essential part of its activities” with its parent body or bodies. And the nature of a trading company means that it is unlikely that the public body will exercise the necessary degree of control – it will want to be free to make its own decisions about what contracts it bids for and enters into. So for a genuine social enterprise which is a commercial, trading entity, the parent public body or bodies would need to follow the EU procurement rules if it wanted to award a contract to the social enterprise.

At this point, the public body should consider what following the EU procurement rules means – remembering that not all contracts must be tendered under the Regulations, and that it may well have in mind contracts for Part B services or below threshold contracts.
A new rule is set to be introduced under the proposed new Directive, that will allow a contracting authority to reserve a contract for tender only by employee-led public service organisations that integrate former public sector employees. Contracting authorities may wish to consider reserving a contract for public service mutuals under this new rule.

**Myth #3: Strong financial track records are the best way to minimise risk**

Knowing that a bidder has a strong financial track record is certainly one of the best ways to minimise risk. But past performance is no guarantee of future results.

An organisation’s financial history is not a promise of its financial future; meanwhile many organisations cannot demonstrate a long, strong financial track record but are in good health and have a bright future. When a public body decides who to invite to tender, it can accept alternative sources of information from a bidder that is unable (for a valid reason) to provide the financial information as requested. Public bodies should be encouraged to do this as a way of opening up competition without taking on substantial extra risk.

A procuring body should also think about what information is actually relevant to the contract being put to tender. Bidders should be expected to have the necessary – but not a disproportionate – financial strength.

**Myth #4: Engaging with social enterprises prior to procurement is anti-competitive**

The earlier a contracting body starts considering what it wants from a service the more transparent and fair it can be, and the more likely it is to achieve the right results. Procurers can discuss their needs with both potential bidders and service users before beginning a procurement process. This can help them select what to buy and how best to buy it. In doing so contracting bodies may find they learn a great deal about the capabilities and willingness of the marketplace.

Before formally starting procurement, the public body can consult with the marketplace quite freely, being careful not to prejudice the fairness and transparency of the procurement. Public bodies must be careful not to discriminate when engaging (so could not, for example, choose only to engage with social enterprises). But consulting the whole marketplace will not generally be discriminatory if that consultation is genuinely open to all. Contracting bodies should be encouraged to flag the opportunities for engagement to those groups who might otherwise not find out about them – including social enterprises, the rest of the civil society sector, and small businesses.
Myth #5: Competition is the only way to get the best price

Public bodies should always make informed decisions about how they purchase services, given the range of options they have in addition to formal competitive tendering – from in-house delivery to grant funding, joint ventures, and “Teckal” companies (see Myth #2). If proper market and user engagement has happened (see Myth #4) then the purchasing public body may have formed a view on what the market can offer, which can inform its decision about how it commissions its services – for example by highlighting that there are numerous organisations to which it could offer grant funding and achieve excellent results.

The important point about competition is that it ought to be appropriate and proportionate. Disproportionately complicated tendering processes (for example, following the EU procurement rules even when they don’t apply) will not achieve value for money – if only because the tendering process itself has been needlessly expensive and time consuming.

Myth #6: The Community Right to Challenge will open up many public services

This doesn’t appear to be what’s happening. Under the Community Right to Challenge a council must consider an expression of interest (EOI) to provide a service on its behalf.

That EOI could be made by: a voluntary or community body; a charity; a parish council; two or more employees of the local council; or any other group specified by the secretary of state. The council must consider the EOI, taking into account whether accepting it would promote or improve the social, economic or environmental well-being of the area. If the council accepts the EOI, it must then carry out a procurement exercise taking into account the same well-being factors.

There are a number of blocks in place that mean that the opportunities are limited, including:

- councils are entitled under the Localism Act to specify periods of time during which they will accept the submission of any EOIs, and can refuse to consider an EOI submitted outside of any window they’ve specified;
- councils are not obliged to undertake a procurement exercise – an EOI can be rejected, at which stage the council does not need to take any further action; and
- councils must specify the time period they intend between the acceptance of an EOI and the start of the procurement process. However, there is no limit to the length of this time period.

The organisation or person making the EOI needs to be prepared for the fact that the council is under no obligation to give it a contract for services and that, if the council decides to undertake a procurement exercise, that organisation or person may not be awarded the contract at the end.
Myth #7: Including social value in procurement just isn’t legal

Not so. There is much good (and lawful) practice demonstrating how to incorporate social value into procurement. And now the Public Services (Social Value) Act 2012 provides a mandate for contracting authorities to consider the social value they can achieve in all their services procurement (and see Myths #9 and #10). Toolkits and evidence of expertise are being developed, now further prompted by the Act.

Of course many people have made mistakes in the past, and it’s the mistakes that get remembered. Including social value in procurement can be entirely legal, so long as you bear in mind:

- EU law supports social and environmental requirements explicitly – balancing the open market with social policy;
- The direction of case law on social issues is clear:
  - don’t specify “local” as this will almost always be discriminatory;
  - having or forming a policy basis can legitimise a purchasing requirement;
  - requirements should be verifiable – a requirement that cannot be verified means bidders cannot be compared and the success of the contract cannot be monitored;
  - contracting authorities should not require bidders to hold a particular label (such as an ecolabel) as part of their specification, or their contract award criteria. Instead, bidders should be asked to demonstrate their ability to comply with a detailed specification. Holding a particular label can, of course, be evidence of that ability.
- This case law is being codified in the new EU Directive, which will help to confirm and to clarify the rules on social value.
- Equal treatment and transparency are paramount – focus on levelling the playing field and building capacity.
- Social requirements that are relevant to the subject matter of the contract can be taken into account during the tendering process. Otherwise they can be contract conditions, but bidders cannot be evaluated as part of their tenders.
- “Added value” is hard to measure – the more specific social requirements are, the more likely it is a social enterprise (or any bidder) can deliver.
**Myth #8: Including social value in the procurement process is too hard and too expensive**

Anything done for the first time will present some challenges. But there is action contracting bodies can take that will make it easier to include social value in procurement and to embed the philosophy:

- identify and map key people who can contribute to scoping social requirements – this means establishing good lines of communication between departments (operational, legal and procurement teams amongst others), and between key personnel;
- identify your sustainable procurement champions – champions at all levels of an organisation help to drive the agenda forward, ensuring that social issues are not incorporated into just a single procurement but are more widely progressed;
- choose social requirements you can monitor – and don’t bite off more than you can chew. There’s nothing wrong with starting small and growing experience and expertise over time;
- look to the market for guidance – constant dialogue between the public sector and its partners (actual or potential) helps to create real social value by identifying what the community needs and what the marketplace can deliver.

As for the cost of social value, it is a case of balancing affordability with value for money, “the optimum combination of whole life costs and quality to meet the service user requirement”. Value for money is about getting more from your money, which is more important than ever when affordability is a concern. Just remember social value is part of the value for money equation and social value saves costs to all kinds of public services in the long run. There is a need for more joined up thinking and working between different parts of the public sector, to help those organisations to account for the social value they can generate, regardless of which organisation feels the financial benefit.

For more details on how to embed social value in the commissioning process, see the Social Value Guide produced by Social Enterprise UK with Anthony Collins Solicitors:

http://www.socialenterprise.org.uk/advice-support/resources/the-social-value-guide

**Myth #9: The Public Services (Social Value) Act 2012 is just another hoop for bidders to jump through**

Not at all. The Act requires contracting authorities to consider – before they procure – the social, environmental and/or economic wellbeing of the communities they serve, and how this wellbeing can be improved through their procurement. So it is entirely designed to avoid social value being a tick box exercise, to which the public sector will only pay lip service. Instead the contracting body must give genuine consideration to social value, and make an active decision about what to procure. Bidders should be confident, therefore, that the contracting authority is asking questions that are relevant, pertinent and, most importantly, of genuine policy importance to that contracting authority.
Myth #10: The Public Services (Social Value) Act 2012 is too weak and will not achieve what it could

The core purpose behind the Act is to place social value firmly at centre stage. The Act represents a real opportunity for those public bodies that have been nervous of incorporating social value to start adopting the good practice that is already demonstrated. But the Act is certainly a “carrot” rather than a “stick” – encouraging good practice rather than penalising poor practice.

Myth #11: Including social value in the procurement process is anti-competitive

Not if you make a contract open to everybody. In reality, competition can be strong. Many different types of organisation are geared up to providing social value: from large contractors that often expect social requirements and are ready and waiting to comply - to small businesses, social enterprises and other civil society organisations that often know their audiences well and can offer tailored solutions that really work.

So long as there are sufficient organisations that could deliver a social requirement, then competition will not be at risk.

There are also many opportunities for social enterprises to undertake subcontracts working with a lead contractor. Increasingly there also opportunities for consortia and collaborative working between social enterprises, other third sector organisations, and the private sector too. These are all ways of ensuring that social value can be achieved through procurement while ensuring healthy competition.

Further information

If you’d like to know more about the relationship between social enterprise and the public sector, please contact:

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Social Enterprise UK

We are the national body for social enterprise. We are a membership organisation. We offer business support, do research, develop policy, campaign, build networks, share knowledge and understanding, and raise awareness of social enterprise and what it can achieve. Our members come from across the social enterprise movement – from local grass-roots organisations to multi-million pound businesses, as well as the private and public sectors.

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