

## Public Services (Social Value) Act 2012

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### Summary

- The Public Value (Social Value) Act 2012 requires certain public authorities, including local authorities, to consider how, in procuring services, they might improve the economic, social and environmental well-being of their areas.
- While the potential impact of the legislation particularly on the social enterprise sector has been somewhat exaggerated, seeking to achieve corporate and community objectives through the procurement of mainstream services can, alongside other options, realise greater value for money.
- This briefing will be of interest to all executive members and cabinet portfolio members and officers who are involved or have oversight of commissioning and procurement functions.

### Overview

[Public Services \(Social Value\) Act 2012](#), which received Royal Assent on 8 March 2012, places a duty on certain public authorities, including local authorities, at the 'pre-procurement' phase of procuring services to consider how what is being procured might improve the economic, social and environmental well-being of their areas; and how they might secure that improvement in the procurement process itself as long as such action is relevant to what is being procured, and is considered to be proportionate.

The Act extends to England and Wales. Its application in Wales is limited and does not extend to Scotland or Northern Ireland nor does it apply to contracts principally for works or for the supply of goods. It is understood that the Government's intention is to bring the legislation into effect in January 2013. It is anticipated that the Cabinet Office will publish 'light touch' guidance on the Act in August 2012.

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## Briefing in full

Whilst every effort has been made to ensure the accuracy of the information provided in this briefing paper, local authorities must, of course, take their own legal advice before taking any action.

## Background and Passage of legislation

[The Public Services \(Social Value\) Act 2012](#) (“the Act”) was introduced by Chris White, Conservative MP for Warwick and Leamington, as a Private Members Bill - Public Services (Social Enterprises and Social Value) Bill - on 30<sup>th</sup> June 2010. The aim of the Bill’s promoters was to help the social enterprise sector to win public service contracts by attempting to level the playing field by making public sector commissioners take account of the ‘social value’ delivered by the social enterprises which is seen as their strength.

The Bill, as was originally drafted, included provisions requiring the Government to publish a “national social enterprise strategy” and requiring local authorities to include in their sustainable community strategies proposals for promoting engagement with social enterprise in their area. These clauses were not supported by the Government, with a number of Conservative backbench MPs “sceptical” about the need for both. MPs saw these measures as discriminating against the private sector, notably small and medium size enterprises whom they believe also receive a ‘raw deal’ from public procurement and, feared that as a consequence of the Bill, as was drafted, that small businesses might be “squeezed out” in the competition for public sector contracts.

While others supported the Bill’s intentions on promoting the achievement of social value, they queried the definition of social enterprise in the Bill as introduced. Some saw that it could apply equally to private companies that paid dividends to shareholders; while many others saw that ‘social value’ could be generated by supporting local small and medium size enterprises. Even known supporters of the civil and social enterprise sector such as Hazel Blears considered the definition of social enterprise to be insufficient in not embracing the wider voluntary and community sectors.

Consequently, a number of Government amendments were made to the Bill during the Committee stage, with specific references to social enterprise and the requirement to produce national and local authority strategies removed as a condition of government support, without which it had no chance of becoming law. The short title of the Bill was amended to reflect this. The other key changes insisted upon by the Government were to restrict the duty’s application to services (and not

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goods or works) contracts and to only apply it to the ‘pre-procurement’ phase and therefore removing an on-going obligation to consider the conclusions drawn at the planning stage throughout the process.

### What is social value?

There is no consensus around a single definition of social value; however, in terms of the Act social value is determined by reference to improving *“the economic, social and environmental well-being”* of an area. The best value statutory guidance defines social value as *“about seeking to maximise the additional benefit that can be created by procuring or commissioning goods and services, above and beyond the benefit of merely the goods and services themselves”*. The Act consistent with the EU Procurement rules narrows this down further by restricting this to matters which are relevant to what is proposed to be procured.

### Legislative provisions

#### To whom does the Act apply?

The Act applies to public authorities that are contracting authorities as defined by regulation 3 of [Public Contracts Regulations 2006 \(S.I. 2006/5\)](#) (“the 2006 Regulations”), which implements the European Commission Procurement Rules into domestic law. This includes therefore: Central Government departments, non-departmental bodies and agencies, both Houses of Parliament, local authorities, fire and police authorities, NHS bodies, National Park Authorities, housing associations, Greater London Authority and the criminal justice system.

Welsh Ministers (including the First Minister for Wales), Counsel General to the Welsh Assembly Government; the National Assembly for Wales Commission and, any Welsh public authority *“whose functions are wholly or mainly Welsh devolved functions”* are explicitly excluded making the Act’s application in Wales very limited particularly in local government. The Act does not extend to Scotland or Northern Ireland.

#### To what does the Act apply?

The Act applies to all public service contracts and framework service agreements to which the 2006 Regulations apply i.e. those contracts above the EU threshold (currently £173,934 over the life of the contract) but not call-offs under those frameworks. This includes [Part B \(of Schedule 3 to the Regulations\)](#) service contracts since these are covered by the 2006 Regulations albeit with less onerous requirements; notably, Part B covers health and social services, education and vocational health and recreation, cultural and sporting services.

While the Act does not cover contracts solely for goods or works, as the definition of a public services contract under the Act has the same meaning as in the 2006 Regulations, it does therefore apply to “*contracts where the greater part by value is for services*” and therefore lessor by goods or works.

### What are the Act’s requirements?

The ‘relevant authority’ must consider:

- how what is proposed to be procured might improve the economic, social and environmental well-being of the “relevant area” covered by the contract or agreement in question (though not outside the United Kingdom);
- in doing so they must consider only matters that are relevant to what is proposed to be procured and must consider the extent to which it is proportionate in all the circumstances to take those matters into account;
- then if relevant, how, in conducting the process of procurement it might act with a view to securing that improvement;
- for all the above requirements, the authority must consider whether to undertake any consultation.

In practice this means that public authorities will have to explain (to themselves) why they are specifying particular matters of social value or why they are not specifying any at all.

An authority can disregard the requirements to the extent that it is not practical if there is an urgent need to arrange the procurement, but not if the urgency has been caused by the authority’s own undue delays after the legislation is in force. Timescales are not defined for what could be considered ‘urgent’. Failure to comply with any of the requirement does not affect the validity of anything done in order to comply with the 2006 regulations.

### When would the Act’s requirements apply?

The start of the procurement process and the point, before which the obligations in the Act are to be carried out, is whichever is the earliest of these following steps:

- an OJEU notice to the Official Journal
- publishing an advertisement seeking offers or expressions of interest
- contacting a person in order to seek an offer or expression of interest

- contacting a person in order to respond to an unsolicited offer or expression of interest
- entering into the contract or framework agreement.

The Act validates steps taken in anticipation of commencement of the legislation thereby making the initial operation of the new duty easier for public authorities to manage.

## How does this affect other legislation?

The new duty will operate within boundaries of the existing and wider legal framework, notably the European Union Public Procurement rules and for local authorities their duty to secure best value. It should not be misconstrued as permitting authorities a broader scope than before in setting environmental social and environmental policy requirements; save relaxing the restrictions on ‘non-commercial’ considerations in local government procurement (see below). This means, for example, that the current legal position on the promotion of local suppliers or classes of providers such as voluntary and community groups, social enterprises or small and medium size enterprises remains unchanged. The next section of this brief explores the relationship between the provisions of the new Act and that wider framework.

### EU Procurement Rules

The European Commission have long been seen as blocking the ability of commissioning and procurement officials to take ‘social’ and ‘non-commercial’ matters into account in public procurement. The European Commission 2010 report [\*“Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement”\*](#) sought to address this perception by making clear that the EU procurement regime has long allowed public contracting authorities to stipulate related social considerations.

The 2004 Procurement directives, implemented in the 2006 domestic regulations, specifically mention ways of incorporating social considerations into technical specifications, selection criteria, award criteria and contract performance clauses.

The following social considerations have been identified by the aforementioned EU guidance as could be ‘relevant for procurement’: promoting employment opportunities; decent working conditions, compliance with labour standards and decent pay; supporting social inclusion; promoting service accessibility and ‘design for all’; taking into account of sustainability and ‘ethical trade’ and seeking to achieve wider voluntary commitment to corporate social responsibility.

The proviso is that such consideration must be linked to the actual supplies, services and works to be purchased, are proportionate to its requirements, capable of being measured in terms of performance and defined in a way that does not discriminate, and promotes equality of treatment between potential suppliers. So you cannot specify the geographical location of the tendering organisation nor are you permitted to prefer specific classes of tenderers (save 'sheltered employment' schemes).

However, the EU law does permit 'positive action' to increase access to public procurement by, for example, promoting opportunities, removing barriers and building capacity in the supply chain. This can include as set out in the ["European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts"](#) unbundling large procurement requirements into smaller contract lots as a way of opening access to smaller organisations and increasing competition. EU guidance also makes clear that public authorities should take into account the potential burdens on small and medium size enterprises (including voluntary and community organisations) when deciding how and whether to incorporate social considerations into their procurement.

## Best Value

Local authorities and a range of other local government bodies are under a general Duty of Best Value to *"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"*.

The current [statutory guidance on best value](#) published last September which local authorities must have regard to (though, not necessarily follow) states that in securing the duty *"authorities should consider overall value, including economic, environmental and social value, when reviewing service provision"*. It defined social value as: *"seeking to maximise the additional benefit that can be created by procuring or commissioning goods and services, above and beyond the benefit of merely the goods and services themselves."* Essentially, all the guidance does is to 'join up' with the provisions of the new Act around ensuring that local authorities consider social value.

This does not mean that securing social value will always represent best value (i.e. meet the duty of Best Value). This is something which will need to be determined according to the individual circumstances which will vary from area to area and over time. It does mean that local authorities will need to consider pursuing social value in accordance with the new Act and then to determine whether it represents best value to do so through public procurement, or whether another means (e.g. voluntary agreements, grant funding) and/or source (e.g. local community groups and businesses) might represent better value or whether it represents best value to pursue social value for a particular objective at all. This is regardless of whether or



not there is a price or cost in doing so, as there will be at least an opportunity cost in pursuing any course of action.

The best value duty and guidance is not confined to public procurement, covering all local authority functions regardless of whether they result in the procurement and/or delivery through of other means for goods, services or works (or any other form of requirement). However, the best value guidance in advising local authorities that they should consider 'overall value' does explicitly refer to "when reviewing service provision" in line with the Act.

The Act is confined to the pre-procurement phase (i.e. commissioning); the Best Value guidance makes no distinction as to when social value might be considered in the commissioning and procurement cycles.

Given that the Act does not explicitly prohibit considering (and pursuing) the social value in goods and works procurement and below threshold service contracts, considering (and pursuing) these matters beyond the procurement phase (e.g. for existing contracts); and through other means than procurement; then, local authorities, should they wish, can go further than the Act and the wording of the best value guidance if they believe it represents best value for them to do so, and within the EU Procurement rules. Where necessary, they can rely upon their general power of competence.

### Non-commercial matters in Local Government Procurement

[Section 17 of the Local Government Act 1988](#) prevents local authorities from introducing political or other irrelevant considerations into the procurement process by defining certain matters as 'non-commercial' and prohibiting authorities from having regard to these matters in the contractual process. Section 2 of the new Act dis-applies this legislation "*to the extent that [the] local authority considers it necessary or expedient to do so to enable or facilitate compliance*" with the requirements of the new Act.

However, given that since 2001 local authorities have been given similar legislative discretion over workforce issues (to facilitate the achievement of best value and TUPE transfers) and subsequently in complying with their Equality duties, it is unlikely that the remaining restrictions listed in section 17 of the 1988 Act would impinge on the pursuit of social value. But where it does, local authorities have been given discretion to take appropriate action.

### Equality Laws

The [Equality Act 2010](#) introduced a general equality duty which requires public bodies to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations, as regards disability and various

other grounds including race and gender; this general duty is supported by a number of specific duties.

The application of the duty is explicit in covering public procurement functions regardless of the value; though the value of the contract may, however, impact upon the relevance and proportionality of equality considerations. The duty also extends to external contractors which carry out public functions. By virtue of an amendment to the section 17 of the 1998 Act, local authorities are explicitly permitted to take non-commercial matters into account during the procurement process, when they consider it 'necessary' or 'expedient' to do so to fulfil their equality duties.

Therefore public authorities are already required to consider and act on how their public procurement might help in the field of equalities, so it is unlikely that the new (Social Value) Act will add anything new here. However, in considering and then seeking to secure (or not) 'social value' in other ways public authorities will need to be mindful of their Equality duties both in terms of corporate policies and for individual decisions to secure 'social value'; this includes undertaking equality impact assessments.

## Misinterpretations of the new Act

An extensive review of the literature published since the legislation received Royal Assent reveals a series of misinterpretations of the Act, claiming that under the new legislation that:

<b><i>What is claimed</i></b>	<b><i>What the legislation and the wider legal framework says</i></b>
If a potential provider offers community benefit beyond the contract specification then this should be taken into consideration when the contract is awarded	The legislation does not require public bodies to procure for social value. It merely requires public bodies to <u>consider</u> how procurement might promote social value and how it might go about this. But it does not compel them to act upon that consideration.
Will enable procurement bids which factors social value above those that don't	The existing EU Procurement regulations already allow public authorities to take account of social considerations (where they are specified) alongside other factors, in the award of contracts. The new Act neither changes nor enhances this.
Public bodies must consider how the procurement process might secure	While the first part of this statement is correct, the second part is simplistic and

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an improvement in the economic, social and environmental well-being rather focus solely on the price of the contract	<p>misleading. The new Act does not rule out price-based contract awards, nor does it affect in any way the current legal framework for how public procurement is discharged.</p> <p>It also misunderstands the how the EU Procurement rules and procurement in general operate in practice. Any social considerations will need to part of the procurement specification to which suppliers will respond in their bids including on price. While price might dominate it is very rare and, for some services impossible, for contract awards to be solely based on price. It is usually a (scored and weighted) balance between factors such as quality, price, technical merit and functional characteristics and where specified social consideration. In such circumstances, you might see the lowest price contract award but which delivers social value as specified.</p>
Commissioners and policy makers are going to have to show they have 'considered' and then 'demonstrate' that some degree of social value has been sought and achieved.	While the Act requires public bodies to consider 'social value', it does not require them to report on that consideration nor on the achievement of social value where it is sought.
Now all services commissioned by public authorities must demonstrate social value; so social value has to be incorporated into the design of the service.	The legislation does not require public bodies to commission/procure for social value. It merely requires public bodies to <u>consider</u> how procurement might promote social value and how it might go about this. It does not compel them to act upon that consideration.
Voluntary organisations can use the new legislation to hold commissioners to account if social value has not been considered.	<p>This may well be the case; though the legislation does not provide for any specific penalties and makes explicit that failure to comply with the new legislation does not affect the validity of actions taken to comply with the EU Procurement rules.</p> <p>In practice, as we have seen elsewhere, the courts are unlikely to seek to second guess local judgements on when to consider or</p>

	pursue social value but rather focus on whether due process has been observed such as on consultation; though even here the new Act gives discretion to public authorities when to consult or not.
Places a duty on Central Government to publish a national social enterprise strategy and requires local authorities to include in their sustainable community strategies proposals for promoting engagement with the social enterprise in their area.	While such provisions were contained in the original Bill as introduced to Parliament they were omitted by Government amendment in the final Bill. The Government has also announced its intention to repeal the requirement for local authorities to prepare sustainable community strategies.

## Comments

The passage of this legislation has been keenly followed by the national leadership for the civil society and social enterprise sectors; and its Royal Assent has been greeted by euphoria within the sector and accompanied by some unrealistic expectations and misinterpretation of the new legislation and what it means in practice.

The new Act provides a large amount of discretion at the local level, because the legislation imposes a duty on commissioners only to consider economic, social and environmental improvements, where they consider it to be relevant and proportionate. It does not compel them to act upon that consideration nor does it change in any way the current legal framework, notably the EU Procurement rules in how public procurement is discharged. However it does provide a legal stimulus to get commissioning and procurement officers to think about social value within the existing EU Procurement rules.

There is a sense, from what has been written about the new legislation and more generally about social value, that some regard this agenda as almost the sole domain of the civil society and social enterprise sectors when in fact many private sector suppliers have shown willingness to support the community, social and corporate objectives of public contracting bodies not only because of the commercial advantage they may gain over competitors but also it can make longer-term economic sense for them to do so. What we know is that public service providers from the private sector are very adaptable on things which will win them new business.

Indeed, there are signs that this is another Whitehall agenda supposedly created for the benefit of social enterprise and voluntary organisations that might not again meet their expectations.

### Weaknesses in the legislation

It is not often that a private member's bill makes it onto the statute book; but to do so does require Government support and compromise. However this legislation contains one compromise too many in restricting its application to service contracts, omitting those for works and supplies. The Government claims that service contracts are *"the types of contract with the greatest direct impact on individuals and communities, and consequently where wider value is likely to be most relevant"*.

This is a false premise which simply ignores the history of social considerations in public procurement, current practice and future potential. On this basis, for example, local authorities and housing associations should not be seeking social value through their investment in new housing and housing refurbishment projects; though they have been for a number of years.

What was the real reason for the Government confining this legislation to service contracts: have they been successfully lobbied? Do they really understand this agenda? Or are they so focused on the civil society and enterprise sectors, whose interests are almost solely tied to service contracts, that they have lost sight of the real point of social value in securing additional value from public expenditure?

Whatever the reason, this is a significant missed opportunity; a central rationale for the Government's £250 billion Infrastructure Investment plan was economic growth. Consequentially, there will be no guarantee that the Government will consider seeking social, economic and environmental benefits over and above the infrastructure itself, from projects such as High Speed 2, the £1 billion being spent on upgrading the national road network or £1.4 billion investment in railway infrastructure or £100 million on creating 'super connected' broadband cities. While not all these projects will be directly procured by Government they can still use their influence to secure social value. As a consequence, how many potential apprenticeships, trainee placements and work experience places will be lost? How many millions of pounds of sub-contracting opportunities will find their way to overseas companies?

The new Act's relationship with best value and, in particular the best value statutory guidance which was published last year is another area where the Government should have taken greater care and attention. Much was made at the time that the guidance explicitly (rather than implicitly before) recognises social value but again, like the new Act ties this to service provision. It also falls short of providing a definitive policy statement on the subject which matches the breadth of the best value duty it seeks to describe.

### Will social value eradicate lowest cost procurement?

It is argued that public sector commissioning tends to favour the provider that can offer the cheapest price, an outcome that may have become even more pronounced since the onset of the recent deep spending cuts. There has been a great deal of misguided expectation that the new Act will change that, when it does not rule out price-based contract awards, nor does it affect in any way the current legal framework for how public procurement is discharged. It also simply ignores how the EU procurement regulations work in practice where social considerations are required to be specified so will be priced by bidders. So procurement officials may still prefer the lowest price bids in the knowledge that this includes social value considerations where this has been specified.

While it has always been perfectly legitimate for commissioners to choose service providers based on social consideration, as well as price and service quality there is often a mistaken belief that the creation of social value should be both financially supported and represents best value in all cases. That best value can now be determined by comparing SROI ratios, or that social value equates to best value, ignoring the legal framework and putting aside the core factors around the cost effectiveness and quality of the public services being commissioned to one side.

Equally, some commissioners and in particular local politicians have often been persuaded by seemingly free offers of apprenticeships for young people or support for community projects from large private sector service providers; when in fact nothing is really free, whether contract profit margins are maintained or reduced as a result. This approach may represent best value; though whether this is the case will depend on the individual circumstances, the financial value and social impact of the added value being leverage, whether it is aligned with community and corporate priorities and whether or not better value might be realised through an alternative option to securing those same social considerations.

### Differing perspectives to its meaning?

At the heart of these differing perspectives is how differently social value is defined by those who have championed the social value agenda and how social considerations in public procurement are defined in the EU Procurement rules. Those in the civil society and social enterprise sectors primarily define social value by reference to the measurement of non-monetary factors; whereas the EU Procurement rules refers to social considerations which are specific, defined and measurable and relate to what is being procured.

One explanation for this is that the development of social accounting and social value measurement and the public procurement legal framework have been on parallel but separate paths and have only recently crossed as social enterprise and voluntary organisations increased their income from public sector commissioning. And, while there have been moves to adapt existing methodologies and frameworks

there are legitimate questions about whether they really reflect the realities of public procurement practice and its legal framework.

So far tools such as social return on investment (SROI), which converts social value into monetary terms, have had a limited uptake and impact. Not many civil society organisations can currently report in accurate and robust manner on their social value. There is a cost and capacity requirement which are likely to be out of reach of smaller organisations, so whilst many are doing good things for their local community, not many are able to prove it.

There is also a tendency for providers to over-claim social value by for example wrongly claiming that their efforts have directly led to a particular outcome, manipulation of what is measured and how the results are presented.

Claudia Wood at Demos believes that this could prove a continuing challenge for smaller organisations and prove the undoing of this new legislation. Because, if commissioners want to give evidence about social value weight in awarding contracts then only larger charities and, somewhat ironically, private companies who have the resources and capacity to deploy SROI type analysis will be able provide it. As a consequence, she concludes that we may see a situation where contracts are not awarded to organisations which have the greatest social value, but the ones who are best at quantifying and articulating this to commissioners.

What is required is a form of measurement that is relevant and proportionate to the size and activities of the organisation and the nature of what is being commissioned. While too much 'financialising' of results may not be helpful in this context there needs to be a process for commissioners and providers to make the case for incorporating economic, social and environmental well-being considerations.

Equally, commissioners need to know what constitutes a good investment; that means building up knowledge about what may or may not be achievable informed by expert evidence. Where these are used by providers, commissioners need the ability to distinguish between good and weak SROI (or indeed other forms of cost-benefit analysis) by getting under the bonnet to understand in detail how things have been measured and how the final numbers have been generated, taking only the relevant evidence rather than being distracted by the overall financial ratio and headline results.

Given this, social enterprise and voluntary organisations (and indeed, private SMEs) would benefit if they concentrate on identifying and promoting their 'concrete' deliverables (e.g. the number of apprenticeships offered) as opposed to intangibles (e.g. raising awareness) and focusing on impact (e.g. number of people taken out of out of work benefits) rather than inputs (e.g. number of volunteering hours) however worthy they may seem (they are still inputs). In this way they will be in a better position to respond to social considerations which are specified by commissioners as well as making it easier to predict, measure and account for.



### Culture change and capacity

This new legislation, like any other, will not solve anything without a culture change that comes from both commissioners and providers. There is no substitute for a strong relationship between the two where a real effort is made to understand each other and develop mutual respect. Commissioners need a clearer understanding and appreciation of the commercial, financial and value drivers of potential bidders. Service providers need to be in tune with commissioning organisations' corporate and community objectives to make the right connections between the services to be procured and these wider objectives.

A recent survey for a LGIU report on partnership working (["Future Service Partnerships: How the Private and Community Sector can generate social value together"](#), *Local Government Information Unit, 2012*) found that while eighty-seven per cent of local authority respondents said that partnerships with the voluntary and community sector organisations would be important in the future, eighty-three per cent highlighted lack of capacity in the community and voluntary sector as a problem. Consequently, local authorities will have to help up-skill their local and small providers to ensure that they are not put at a disadvantage.

There are also capacity challenges for commissioning organisations notably that some procurement professionals are risk averse and view the risk of buying in a socially responsible way, is too high. Some believe the EU procurement rules to be more restrictive than they are in reality and many don't see social outcomes to be their responsibility. The Act in applying the requirement to consider social value in the pre-procurement phases has in effect put commissioners and policy/service managers in charge; though they need to work to develop a mutual understanding on the agenda across the professional groups involved in the commissioning of public services.

### Will social value increase the costs of contracting?

One of the key barriers to the promotion of social value through public procurement is the perception and indeed the reality that this could push up contract prices. According to a [BDO and Municipal Journal](#) survey forty-eight per cent of local authorities are reluctant to encourage the delivery of social value in this way as they believe that controlling costs are more important. As the BDO report observes coming at a time when local authorities (and indeed other public bodies) are under pressure more than ever to secure contracts at the lowest possible price, they might be wary of adding social considerations onto their procurement requirements.

The problem is perhaps that commissioning and procurement professionals are looking at the cost issue from the wrong perspective. While those who advocate social value seem to deny there are cost implications at all when more likely than not there will be additional costs involved.



The perspective that should be taken by commissioners and procurement professionals is that securing social value via public procurement can potentially be an economic, efficient and effective means, alongside other complementary and alternative options, for achieving some of their organisation's community and corporate objectives, such as tackling disadvantage, climate change and economic growth; rather than adopting a starting point of seeing social considerations in public procurement as additional criteria to be squeezed into procurement specifications or a means to making it easier for councillors to sign large contracts with unknown opportunity costs. The focus is therefore to establish the best value means for achieving these goals.

Therefore in approaching these additional costs commissioners should compare the right things and make the best value judgement on the social value being leverage not on the totality of the contract price (i.e. the service plus the social value requirements), but whether the additional cost represents value for money for what it buys in social value terms judged against other options for securing those same social requirements through other means.

This is likely to succeed when local authorities act corporately with different commissioning frameworks cross-fertilising so that the social objectives (e.g. employment opportunities for hard to reach groups) required by one commissioning framework (e.g. troubled families) may be secured, alongside other delivery chains, through another commissioning framework for its mainstream services, works and supplies (e.g. waste management, in this case in providing work experience and employment opportunities). Here, the '*win win*' being sought is that the service being procured represents value for money on its own terms with the social value being sought, on its own terms also representing value for money and that both can be delivered together without introducing unmanageable risks.

In some cases it can be possible to deliver both efficiency savings and social value; for example, creating employment opportunities for adults with learning difficulties to provide a needed workforce for older people with personal care needs. And social requirements can also help reduce the 'whole life costs' of services (and assets) by for example, reducing operating costs through the reduction in the carbon footprint of what is being procured.

There are the potential opportunity costs of not seeking certain social value objectives for example such as increasing welfare benefits and crime and disorder; though the challenge here, as with pooled community budgets, is that the savings do not always accrue to the commissioning body generating the savings.

### Commissioning for social value

It is of course for individual local authorities to determine whether to follow the new legislation, and the best value statutory guidance, to the letter or instead work

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towards a more optimum approach to leveraging in social value by going beyond the minimum requirements.

In the case of the former then, the legislation does provide a large amount of discretion at the local level, because it only requires commissioners to consider economic, social and environmental improvements, where they consider it to be relevant and proportionate. In a typical unitary council this consideration would probably need to take place for two to three 'above threshold' service contracts a year (assuming that they are deemed to be relevant and proportionate to do so).

In the case of the latter this could mean taking a more strategic and proactive approach which potentially embraces all supply chains across goods, works as well as services and working beyond public procurement to search out for the best value options to lever in social value. This would imply:

- Acting **strategically and corporately** by identifying across their organisations a small number of six to eight social value objectives which they want to achieve through their commissioning and procurement, over and above individual services objectives.
- Securing the **leadership and commitment of elected members and senior officers** to those priorities and the processes to secure those and for identifying other social value opportunities on a case by case basis.
- Take a **whole systems approach** in this way a greater range of options will present themselves for securing social value and in adopting measures which will reinforce those already being taken elsewhere in the organisation or within area partnerships.
- Encouraging **joint working across different commissioning and policy teams** and potentially across area partnerships, to search out for 'win wins' where, different commissioning frameworks and policy objectives can work together to deliver community goals.
- By recognising that **public procurement isn't some silver bullet** and should not certainly be seen as an end in itself but rather a means to an end for which there are a number of alternative and complimentary options such as voluntary charters and agreements, grant funding and profit sharing arrangements, which can be used with specialist service providers.
- Focusing upon the end should also mean **seeking out the best value source for, and option to, lever in social value** prioritising where the biggest wins can be made guided by corporate and community strategy priorities, working beyond just specialist service providers and also through local partners in the local business, social enterprise and community sectors.

- It also means ‘keeping the eye on the prize’ **going further than your own supply and delivery chains where, you might influence as a significant buyer as part of a wider market** e.g. care homes, leisure, waste management.
- **Adopting supply chain management techniques** to identify how the existing supply chain can contribute to social value objectives rather than wait until contracts come up for renewal.
- Fully **integrate the consideration of social value within the commissioning of mainstream services** which will not only ensure that EC rules are adhered to but also help design service and social value objectives which can reinforce each other thereby maximising overall value that is sustainable.
- Start **considering the role of social value as early as possible**; it is too late to wait until just before publication of the OJEC notice (or other advertisement) as these are issues which need to be considered in formulating the commissioning strategy, even prior to the assessment of need.
- **Use the whole of the commissioning cycle to identify, explore, refine and embed social value**, for instance; if social value considerations are not built into on-going contract management opportunities to deepen social value achievement can be lost.
- Following this through to each of the key stages of procurement, **being clear within the context of the EU Procurement rules, when and how social consideration can be factored in** and taken into account in technical specifications, award criteria and contract performance clauses etc.

## Conclusion

It is quite clear that the arguments in favour of taking account of social value in commissioning, procurement and funding decisions is compelling. This new legislation is a welcome step in the right direction with a recent LGIU report finding that while *“there has been considerable progress in local authorities leveraging more value through procurement and service delivery contracts in the past ten years, there is potential for this to be taken even further”*.

However, both the new Act and the new statutory guidance on Best Value if followed to the letter, provides for a sub-optimal approach to commissioning for social value which fails to match the best practices that already exist in local government and the nature and scope of the best value duty.

Either way it doesn't automatically mean more contracts for social enterprise and voluntary organisations – they should be under the same obligation as any other to explain and demonstrate how they can deliver social value. It doesn't guarantee that contracts will not go to big contractors or the cheapest tender. It will be the cheapest that also delivers the social value specified; with large private sector companies and charities likely to be more able to resource and demonstrate in their procurement bids social value and play the corporate social responsibility card. Consequently, local authorities need to take care in leveraging in social value that they do not as a consequence close off opportunities for smaller suppliers.

In part this is because the Government has not resolved the irrevocable tension between their communitarian aspirations, which had been characterised by the Big Society, with the Conservative neo-liberal drive to reduce the cost and extent of Government. This is evidenced by a clear gap between the Government's rhetoric and the reality of their own procurement policies where you can see the missed opportunities over the last two years: the Work Programme, the NHS reforms, and the Open Public Services White Paper in which social value is only referred to once (merely stating that it should not be ignored). On the health reforms Andrew Lansley pledged to create "the largest social enterprise sector in the world" but as it turns out this just meant that he wanted more health services to be provided from outside Government; a motivation shared with the Cabinet Office's drive on mutualisation.

Work and Pensions Secretary Iain Duncan Smith through the Work Programme quite deliberately chose to prioritise saving money in the short term rather than social change with increasing life chances thereby circumventing the communities where both the problems and solutions lie. Even with the legislation in place the same bidders would have probably won the prime contracts.

Going forward, excluding contracts for works from the legislation is at least sending out mixed messages when the Government is meant to be encouraging the development of apprenticeships and using infrastructure spend to boost the economy and at worst, providing a pipeline of significant missed opportunities which cannot be afforded.

This should worry the promoters of this new legislation as while it might provide additional encouragement to locally based commissioning organisations, the big gains will come from Central Government departments that are not always closely connected to social issues.

## External Links

[Public Services \(Social Value\) Act 2012](#)

[Public Services \(Social Value\) Act 2012 – Explanatory Notes](#)

*“Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement”, European Commission, October 2010*

*“Buying into Communities – Jobs, skills training and business opportunities from council contracts”, Local Government Association and Local Partnerships, November 2011*

*“European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts”, European Commission, 2008*

*“Future Service Partnerships: How the Private and Community Sector can generate social value together”, Local Government Information Unit, 2012*

*“Measuring Social Value: the gap between policy and practice”, Demos, 2010*

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