

UNISON Branch guidance on the Social Value Act 2012

Introduction

The Public Services (Social Value) Act 2012 came into force on the 31 January 2013. The Act means that a public contracting authority proposing to procure a service is now obliged to consider how what is being proposed might improve the economic, social and environmental well-being of an area; and how the process of procurement might secure that improvement.

The Governments broad definition of social value is: “a concept which seeks 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”.

To help public contracting authorities implement the Social Value Act the Cabinet Office issued a Procurement Policy Note on the Act (December 2012) which sets out guidance to commissioners and procurers. The Act and Guidance can be downloaded here:

The Public Services Social Value Act (2012) in full:

<http://www.legislation.gov.uk/ukpga/2012/3/enacted>

The Procurement Policy Note Guidance:

http://www.cabinetoffice.gov.uk/sites/default/files/resources/Public_Services_Social_Value_Act_2012_PPN.pdf

What does the Act apply to?

The legislation applies to public contracting authorities in England and Wales only. This includes

- Local authorities
- Government departments and agencies
- NHS Trusts
- Clinical Commissioning Groups
- Fire and rescue services
- Police
- Housing associations

Current EU procurement rules mean the new legislation will apply to central government and NHS contracts worth more than £113,057 and local authority contracts worth more than £173,934.

This guidance provides details of the

- 1- The Act- in brief**
- 2- The Act- in detail**
- 3- Guidance on how UNISON branches can use the Act**

The Act has the potential to improve commissioning processes by enabling more sustainable outcomes to improve local economic, social and environmental community well being .This includes using the Act to deliberately promote the case for social added value through

proposing better workplace practices, terms and conditions in public service procurement contracts.

1. The Public Services (Social Value) Act 2012 – in brief

The Act applies to public authorities. It requires a public authority to consider:

- a) how what is proposed to be procured might improve the **economic, social and environmental** well-being of an area; and
- b) how, in conducting the process of procurement, it might act with a view to securing that improvement.¹

Background to the Act

1. The Act attempts to add a social value dimension to the ethos that 'Value for money' is the over-riding factor that determines all public sector procurement decisions.
2. There recently has been a policy shift in how 'value for money' should be calculated, and growing support for the idea that it should also include social and environment requirements. The Public Services (Social Value) Act is the most significant development in this trend towards embedding social and environmental outcomes in procurement. Scotland is also currently debating a new Procurement Bill which will include consideration of added social and environment values in procurement processes.
3. At the European level the EU Public Procurement Directive is also being revised to include these elements in procurement rules. The final text of the new EU procurement rules (April 2013) will affect further how the Social Value Act and other procurement legislation will be interpreted and implemented in the future.

The European Parliament has stated:

“The criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of the most economically advantageous tender, in terms of economic, social and environmental benefits – taking into account the entire life-cycle costs of the relevant goods, services or works.”²

The potential benefits of the Act

1. There are many examples of providers delivering social value to illustrate “the additional benefit to the community from a commissioning/procurement process over and above the direct purchasing of goods, services and outcomes”. However the Public Services (Social Value) Act does not take a prescriptive approach to social value.
2. The benefits of this flexible approach is that social value can be delivered best by considering what is beneficial in the context of local needs, the workforce or the particular strategic objectives of a public body.
3. In doing this, the Act aims to give commissioners and procurement officials the freedom to determine what kind of additional social or environmental value would best serve the needs of the local community as well as giving providers the opportunity to innovate.
4. Social Value can drive up service quality whilst provide wider benefits for the community and workforce.
5. At a time of economic austerity and cuts to public services and jobs - alongside the drive for privatisation and 'Open Public Services'³ to mutual's and co-operatives - commissioners and procurement officials often feel under considerable pressure to buy services at the

¹ s1(3) Public Services (Social Value) Act 2012

²http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf

³<http://www.openpublicservices.cabinetoffice.gov.uk/publications/>

lowest possible cost increasing the contractual 'race to the bottom'. By embedding social value in commissioning and procurement practices the 'race to the bottom' practices can be challenged.

The limits of the ACT

1. The Act applies only to contracts for services that are subject to procurement and over the EU threshold. This currently stands at £113,057 for central government and the NHS and £173,934 for other public bodies.

2. The Act does not require contracts for public works or public supply (goods), or contracts for services under the EU threshold, to consider social value. Whilst this means it will not be compulsory under the terms of this Act to apply social value below the threshold, or to goods and works contracts, this does not mean that commissioners cannot apply social value in these contracts.

3. The Act has no part to play in the procurement process itself. Nothing in the Act changes procurement law. It applies only to the stage being defined as "pre-procurement"⁴.

4. The Act does apply to framework agreements; and also to mixed contracts- where both goods and services are being procured- providing the value of the service is higher than the value of the goods.

5. There are no requirements in the Act to state that a public authority need evidence its compliance with the Act. However case law on similar areas of law would suggest there must be some form of evidence, and it must be proper.

6. There is a requirement that the public authority considers consulting with those affected by a service being proposed for procurement. However the Government guidance anticipates that the consultation will be appropriate and "digital by default"⁵.

7. There are two clauses within the Act which curtail its applicability. First- there is no need for an authority to comply with the Act if an urgent need to procure makes compliance impractical⁶. This applies unless the urgency is created by undue delay on the part of the authority⁷. Second, in relation to how procurement may secure improvement, the authority must only consider matters to the extent it is proportionate, in all the circumstances, to do so. The authority remains bound by EU law, and cannot take into account considerations irrelevant to the procurement in question.

8. In part the Social Value Act is designed to help the Government roll out its Open Public Services agenda which aims to ensure that mutual's and social enterprises and co-operatives are more involved in delivering public services. To enable the growth of these sectors, the Government has rolled out initiatives such as the Right to Provide⁸ and the Community Right to Challenge⁹ to allow organisations to 'spin out' of the public sector. There is also a £10 million Mutual Support Programme that provides practical advice to these organisations, as well as a Mutuels Taskforce that is focussed on formulating policy recommendations to support the Open Public Services Agenda.

9. UNISON has already provided guidance to branches on the co-operatisation and mutualisation of public services^{10 11}.

10. Whilst the Social Value Act is being used to drive the mutualisation of public services it is not just for exclusive use by this sector enabling them to win public sector contracts. In-house bids can now also demonstrate the social value they provide as part of their contractual outcomes.

⁴ s1(2) Ibid

⁵ Procurement Policy Note- The Public Services (Social Value) Act 2012- advice for commissioners and procurers. Information Note 10/12 20 December 2012

⁶ s1(8) Public Services (Social Value) Act 2012

⁷ s1(()) Ibid

⁸ http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_125638.pdf

⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6072/1986977.pdf

¹⁰ <http://www.unison.org.uk/acrobat/19946.pdf>

¹¹ <http://www.unison.org.uk/acrobat/21205.pdf>

2. The Act – in detail

Background

The Act started life as the Public Services (Social Enterprise and Social Value) Bill, put forward as a Private Members' Bill by Conservative MP Chris White. The original draft of the Bill explains why the social enterprise sector has long supported the Act. The original draft included specific references to social enterprises, and requirements on authorities to create 'social enterprise strategies'. Through the Parliamentary process the Act was watered down as it gained Government support.

The wording of the Act with reference to 'economic, social, and environmental well-being' is not new. Section 2 of the Local Government Act 2000 first introduced the wording, then known as the 'powers of well-being'. The power has been superseded in England by the General Power of Competence under s1 of the Localism Act 2011, but still exists for Wales.

Under the Social Value Act all contracting authorities have now been given an active role to play in promoting and developing the economic, social and environmental wellbeing of local communities. The Act simply makes this consideration a requirement prior to procurement.

Considerations- economic, social and environmental

The Act requires public authorities to consider:

- a) how what is proposed to be procured might improve the economic, social and environmental well-being of an area; and
- b) how, in conducting the process of procurement, it might act with a view to securing that improvement.¹²

These two requirements are looked at in turn:

1. The first requirement of 'economic, social and environmental well-being' is essentially what is meant by 'social value', though social value is yet to be defined in law. The contracting authority must consider how what it proposes might improve social value. The Government explain this in the following example:

A local authority is considering the provision of a meals on wheels service for elderly people. During the pre procurement stage the contracting authority decides that as this is a service which will be provided directly to citizens it will consult potential users and potential suppliers along with other interested stakeholders.

The results of the consultation suggest that many potential service users suffer from loneliness and social isolation. Feedback from a community group suggests that a service where people are collected and taken to a local community centre for their meals would help combat problems of loneliness and isolation. Feedback from the local NHS trust suggests that many potential users would benefit from contact with health professionals for routine medical services who could spot other medical and mental health issues at an earlier stage. In addition feedback from local people suggests the development of a new community centre would provide a valuable new community resource.

The council takes this feedback into account when designing the outcomes it wishes to see from this new service as wider economic and social benefit would derive from

¹² s1(3) Public Services (Social Value) Act 2012

*improving community cohesion for users of the service, in addition to improving user's health and improving access to care facilities.*¹³

The example shows how a local authority has considered how improvements to social well-being could be made by the proposed procurement.

2. The second consideration is how in a procurement exercise the envisaged improvement (outcomes) to economic, social and environmental well-being may be achieved.

The Government has attempted to show how procurement may be used to secure the improvements to economic, social and environmental well-being. The example below continues from where it stopped above:

As well as informing the specification of a service, considerations under the Act may inform selection of economic operators. When considering a potential supplier's technical or professional ability a supplier's experience in delivering similar services may be relevant.

*The local authority decides to procure a meals on wheels service which is based on bringing people to a local community centre. When considering suppliers' technical ability to deliver this service experience in providing specialist transport services as well as catering is considered as well as experience of providing services to elderly people. The selection criteria that are established make it clear that suppliers can demonstrate their technical ability through sub-contractors taking on specialist roles in the delivery of the service, as part of a consortium as well as by a single supplier.*¹⁴

In essence, the Act is prompting commissioners to think carefully about how procurement selection criteria are drafted and how bids are assessed. But, once the procurement process begins, the Act is not applicable.

When it applies

Reference has been made to the Act only applying to the 'pre-procurement' stage. The Act defines pre-procurement as the time before any of the following first occur:

- (a) the Official Journal of the European Union (OJEU) notice is sent
- (b) an advert seeking offers of expressions of interest is published
- (c) the authority contacts someone in order to seek an offer or expression of interest
- (d) the authority contacts someone to respond to an unsolicited offer or expression of interest
- (e) the authority enters into a contract or concludes a framework agreement¹⁵

Therefore an authority must start to consider social value at an early stage.

Area covered

Organisations must consider the social value of the 'relevant area'. The relevant area is the area in which the authority primarily exercises its functions. A local authority must therefore consider its local authority area. Where more than one authority is joining together to procure the services, the wider area of all authorities concerned needs to be considered. This includes instances where a framework agreement is being used.

¹³ Procurement Policy Note- The Public Services (Social Value) Act 2012- advice for commissioners and procurers. Information Note 10/12 20 December 2012

¹⁴ Ibid

¹⁵ s1(2) Public Services (Social Value) Act 2012

Contracts the Act applies to

The Act applies to Part A and B service contracts. It does not apply to contracts for the supply of goods or works. The Act does however apply to a mixed contract- for instance, where goods and services are being procured- providing the value of the service is higher than the value of the goods.

The Act covers those contracts where the Public Contracts Regulations 2006 applies¹⁶. Therefore it is not mandatory for an authority to consider the social value of contracts falling outside the Regulations, such as those below the procurement threshold. However an authority can, and UNISON argues should, consider social value on all contracts. Framework agreements are covered by the Act where public services contracts constitute the greater part of the value of the contract¹⁷. However the Act does not apply to services contracts awarded by calling off from a framework.

Consultation

The Act requires that an authority must consider whether to undertake any consultation in relation to its consideration of social value¹⁸. This is not a requirement to consult. However Government guidance implies an expectation of some form of consultation where services are delivered directly to citizens¹⁹. Consultation is considered “less relevant” where back office functions are the subject of procurement.

The Act does not set out how any consultation is to take place. Therefore authorities are free to consult how they wish. But, the Government does have ‘Consultation Principles’²⁰ which some authorities take into account. Consultations are to be “digital by default”. Authorities are reminded by the Government to make sure the consultations are ‘appropriate’. The consultation does not form any part of the procurement exercise.

Non-compliance with the Act

It is important to highlight that the failure of an authority to consider social value does not affect the validity of the procurement exercise, or anything done to comply with the Public Contracts Regulations 2006.

The Act does not require authorities to evidence how they have complied with the Act. However there has been litigation on the Public Sector Equality Duty (part of the Equality Act 2010), which has a similar duty of ‘consideration. The judgments in these cases suggest that some evidence of compliance is preferred, and that it should be proper, even if not extensive. Therefore obligations on authorities are fairly limited.

3. Guidance on how UNISON branches can use the Act

UNISON’s Four Key uses of Social Value in Commissioning and procurement

- Continue to campaign for publicly owned and accountable public services which strengthens social value in service outcomes creating a dialogue

¹⁶ For further details on procurement see UNISON's procurement guidance

¹⁷ s1(1)(b) Public Services (Social Value) Act 2012

¹⁸ s1(7) Public Services (Social Value) Act 2012

¹⁹ Procurement Policy Note- The Public Services (Social Value) Act 2012- advice for commissioners and procurers. Information Note 10/12 20 December 2012

²⁰ <http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

between public service providers, users, communities, unions and other stakeholders

- Use the Social Value Bill to promote best practice public authority commissioning and procurement practices and contracts which demonstrate the added value of social value. Particularly in Voluntary and Community, NHS and local government where intense public spending cuts with pressure for increased outsourcing may hamper confidence in tendering for contracts requiring added social value outcomes
- Promote and work with progressive organisations such as the New Economics Foundation on best use of social value methodologies
- Use the social value Bill to make procurement work to deliver improved workforce outcomes: support living wages, investment in local employment, training and apprenticeship schemes and labour standards

The requirement to consider the economic, social, and environmental well-being of an area is not new. As mentioned earlier in this guidance, the wording first appeared in the Local Government Act 2000. It also appears in relation to the Community Right to Challenge²¹ where local authorities in England are obliged to consider how accepting an expression of interest (and the subsequent procurement exercise) will promote the, economic, social and environmental well-being of an area. Social value is also a consideration under the Best Value Duty²² and public sector Equalities duties²³.

It is important for UNISON branches to promote the understanding that local commissioning of the Social Value Act is not about opening public services to social enterprise or voluntary and charity providers but about ensuring that all procurement decisions – including opting for in-house service delivery - considers how social value can be added in delivery of the service to be procured.

The Act does not restrict or limit the ability of an authority to deliver in-house services.

Below is a checklist of useful questions for branches to go through to help familiarise themselves with the key issues. Also set out are some negotiation actions and tools that branches can use in securing Social Value procurement outputs with local public contracting authorities and employers.

Checklist for branches

1. Is there an agreement locally of a shared understanding of social value?

There is no law or universal agreement defining neither what Social Value is nor how it can be measured. Value is subjective and requires discussion between different stakeholders and agreement on what is to be valued in particular circumstances. Therefore authorities, providers, service users, the workforce and communities need to be consulted on to agree what social value means for them and a Social Value Policy can be adopted .

- What approach is your local public authority taking to Social Value?
- Who is taking the lead on Social Value in commissioning?
- What does social value mean to the contracting authority?

²¹ <http://www.unison.org.uk/acrobat/21206.pdf>

²² <http://www.unison.org.uk/acrobat/13612.pdf>

²³ <http://www.homeoffice.gov.uk/equalities/equality-act/equality-duty/>

- How is this being consulted with the community, workforce, providers and service users?
- How are social values to be prioritised in service delivery?
- Is social value linked to a sustainable commissioning strategy?
- How has the terms, conditions and well being of the local workforce been valued?

Examples of Social Value Policy commitments

- Promoting training and employment opportunities, often for under-represented groups, for example for youth employment, women's employment, the long-term unemployed and people with physical or learning disabilities
- Promoting compliance with social and labour law, including best practice examples of employment terms and conditions, pay and collective bargaining, NMW and Living wage campaigns, the abolishment of zero practice hours, TUPE
- Promoting the contribution of the community and voluntary sector and civil society organisations by making subcontracting opportunities more visible
- Stimulating socially conscious markets – corporate social responsibility (CSR)
- Demonstrating socially responsive governance
- Promoting fair and ethical trading
- Ensuring more effective and efficient public expenditure and promoting local multiplier effect of public spending and services
- Contributing to health improvement priorities
- Stimulating social integration, inclusion and cohesion
- Stimulating demand for environmentally-friendly goods, services and works
- Contributing to climate change mitigation targets and to energy, efficiency

2. Is there an agreement what methodologies should be used to measure social values created through the procurement and commissioning process?

'Social value' as a concept has additional implications beyond those of measuring the outcomes of a particular service or project. In theory, it is an attempt to measure what is 'valued', and therefore, prioritised by different stakeholders. It is also important to note that the word 'social' in the context of the Act includes environmental and economic added value and impacts.

- What methodologies have been agreed and recognised by the contracting authorities?
- Has guidance been provided as part of the commissioning process with examples of measurement tools and indicator models with service delivery case study examples?
- What will count as an acceptable minimum outcome for meeting the Act?
- What will count as really making the most of the Act?
- Is training and consultation being provided to local community groups, providers organisations, service users and the workforce?

Useful resources for planning and measuring added social value

Toolkits

New Economics Foundation - SROI tool

<http://www.neweconomics.org/publications/guide-social-return-investment>

New Economics Foundation – Public sector for public spending

<http://www.pluggingtheleaks.org/>

Charities Evaluation Services

<http://www.ces-vol.org.uk/about-performance-improvement/about-monitoring-evaluation/index>

Social audit network

<http://www.socialauditnetwork.org.uk/>

National Council for Voluntary Organisations (NCVO) Impact measurement tools:

<http://www.ncvo-vol.org.uk/strategy-impact/learn/tools-and-techniques/tools-for-demonstrating-impact>

Navca: Measuring social value, social impact and social outcomes.

<http://www.siaassociation.org/wp-content/uploads/2012/05/NAVCA-report-on-measuring-social-value-social-outcomes-and-impact.pdf>

Eurodiaconia – ‘measuring social value’, Stanford Social Innovation review, 2010

[http://eurodiaconia.org/files/Eurodiaconia_policy_papers_and_briefings/Briefing - Measuring Social Value.pdf](http://eurodiaconia.org/files/Eurodiaconia_policy_papers_and_briefings/Briefing_-_Measuring_Social_Value.pdf)

Measuring Outcomes

J.Ellis: The Case for an Outcomes Focus. Charities Evaluation Service 2009

<http://www.ces-vol.org.uk/index.cfm?format=509>

New Economics Foundation The value of work:

<http://neweconomics.org/programmes/valuing-what-matters>

Criminal justice and the arts

<http://www.thinknpc.org/publications/unlocking-value/>

NEETS

<http://www.thinknpc.org/publications/impact-measurement-in-the-neets-sector-2/>

Youth justice

<http://www.thinknpc.org/publications/measuring-together/>

Prisoners families

<http://www.thinknpc.org/publications/measuring-together-2/>

Theory of change

<http://www.thinknpc.org/publications/theory-of-change/> ;

Social Value forums

Social Return On Investment Network

<http://www.thesroinetwork.org/>

North West Social Value Foundation

<http://www.nwsocialvaluefoundation.org/>

Sustainable Procurement Cupboard

<http://www.procurementcupboard.org/>

The Social value Hub

<http://www.socialvaluelab.org.uk/>

The South West Forum

<http://southwestforum.org.uk/all-about-proving-our-value>

3. Is there an agreement how and where Social Value will be inserted in the pre-procurement process, its role in the overall commissioning process and the monitoring of added value to services? ²⁴

The recent consolidation of the EU procurement framework makes it clear that social requirements can be fully embraced in procurement practices providing certain criteria are met:

- Social requirements reflect the policy adopted by the public body
- Social requirements are capable of being measured in terms of performance
- Social requirements drafted in the specification become part of the contract
- Social requirements are defined in ways that do not discriminate against any bidders

The Social Value Act obliges contracting authorities to consider social value at the pre-procurement stage. UNISON has provided detailed guidance for branches on commissioning processes and the procurement stages ²⁵. Whilst UNISON believes that inserting consideration of social value in the pre-procurement stage is good practice – the best results will be achieved when a contracting authority considers how Social value can and should be built into the whole commissioning cycle.

- Has the pre-procurement period as part of the commissioning process been identified and agreed?
- Is a pre-procurement market-testing exercise needed in which potential stakeholders can advise what sort of social, economic or environmental requirements could be specified in the eventual procurement exercise?
- Is a cost benefits analysis assessment needed of how much added social value will benefit and cost the contracting authority?
- Will social, economic or environmental requirements (even if only in broad terms) be mentioned in the advertisement for any competitive procurement exercise that is undertaken?
- Are social value priorities going to be made into verifiable requirements within the core of a tender specification?
- What weighting will be developed and applied to the social value criteria in each specification and what criteria will be developed to judge the most advantageous tender?
- How will monitoring and performance management based on social value be set up or included in the commissioning and procurement process?

4. Negotiating with contracting commissioning authorities and employers

The Social Value Act does not explicitly promote the privatisation or the mutualisation of public services and it's important that branches use the Act to engage with employers and commissioners.

- Have you arranged a meeting with the commissioning and procurement team?
- Have you presented to local commissioning authorities questions from the above checklist?
- How will the commissioning authorities engage UNISON in developing local social value policies in the commissioning process? In particular how will they carry out appropriate consultation with relevant staff with regard to social value in the workplace?

²⁴ See UNISON comprehensive procurement guide <http://www.unison.org.uk/activists/procurement/>

²⁵ <http://www.unison.org.uk/acrobat/17808.pdf>

- What evidence of compliance with social value considerations will the authority use for scrutiny purposes? If the evidence seems weak, what challenge mechanisms are in place for the authority to enact?