

Public Contracts Regulations 2015: A Guide to the Implications and Opportunities for Social Enterprises

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Anthony Collins Solicitors provides legal advice to organisations in the public, private and third sectors. It is a firm with clear values and purpose, committed to excellence in a national market in areas including housing, local government, health and social care, social enterprise. The firm advises on public procurement, including a particular specialism in procuring for social value. The work on this report has been carried out by Mark Cook, Beulah Allaway and Martin Brown.

Birmingham & Solihull Social Economy Consortium (BSSEC) is a practitioner-led network of agencies and enterprises that supports social enterprise in Birmingham and Solihull.

Introduction

On the 26th February 2015 new laws came into force – the Public Contracts Regulations 2015 (“PCR 2015”) – intended to streamline public procurement and make it more open to small and medium enterprises, social enterprises and third sector providers.

This guidance note, commissioned by Birmingham & Solihull Social Economy Consortium (BSSEC) and produced by Anthony Collins Solicitors LLP, is intended for social enterprises that want to better understand PCR 2015, and in particular want to know how this legislation, along with the Public Services (Social Value) Act 2012 (“the Social Value Act”), increases the public contracting opportunities open to the sector.

1. Public Procurement and social enterprises

As social enterprises are increasingly competing for public sector contracts and looking to deliver public sector services it is becoming increasingly necessary that they tackle complex tendering processes under an EU procurement regime affecting public contracts.

PCR 2015 determine how public procurement exercises are to be carried out. This means that they can impact on social enterprises when:

- 1) they are bidding for public contracts; or
- 2) must themselves run procurement process in line with PCR 2015, for example under the terms of a funding agreement.

These processes have long been considered daunting and heavy in bureaucracy meaning that organisations with limited resources and experience can struggle to compete with large, established suppliers. This, of course, can have a direct impact on the accessibility of public contracts to social enterprises: while able to provide exceptional value for money and innovative solutions, they are often perceived as lacking the capability and capacity of “mainstream” providers.

However, PCR 2015 reforms and clarifies the EU procurement regime and open up competition for public contracts with a view to supporting small and medium sized enterprises (“SMEs”) and delivering greater social value. Twinned with duties on contracting authorities in England and Wales under the Public Services (Social Value) Act 2012 (“the Social Value Act”), there is now much greater and clearer scope for social enterprises to procure contracts that they are best-placed to deliver.

Social enterprises that have a firm grasp of this legal framework will be better placed to make the most of these opportunities and more able to demonstrate how they can deliver the services that contracting authorities need.

2. Public procurement under PCR 2015

2.1. When and how will PCR 2015 apply?

Contracting authorities (being either the State or a regional or local authority) must comply with PCR 2015 when procuring works, services and supplies contracts. These EU regulations are built upon the following underlying EU Treaty Principles:

- transparency;
- equal treatment; and
- proportionality.

For contracts with a value below the thresholds set out in PCR 2015, contracting authorities must ensure that the procurement process it uses to let that contract to a supplier meet those principles. Otherwise, the contracting authority has relative flexibility to decide how that is achieved.

These thresholds are currently the following figures, exclusive of VAT and subject to change on 1 January 2016:

- supply and services contracts - £172,514;
- works contracts - £4,322,012; and
- the light touch regime for social and other specific services - £625,050.

More complex rules apply to contracts with a value above those thresholds. For example, for contracts for works, supplies and services (other than those falling under the light touch regime) the following parts of the procurement process will be affected by PCR 2015:

- **choice of procedure:** contracting authorities must use one of the procurement procedures set out in PCR 2015: open procedure, restricted procedure, competitive procedure with negotiation, competitive dialogue and innovation partnerships;
- **advertising opportunities:** these must be advertised on the Official Journal for the European Union (“OJEU”) by way of a Prior Information Notice or Contract Notice detailing contract and procurement process information (e.g. estimated value and award criteria to be used) as specified in PCR 2015. In addition, contracting authorities in England must also advertise opportunities on a Government website, Contracts Finder;
- **availability of procurement documents:** all procurement documents, which will at least include whichever is relevant of the Contract Notice, PQQ, invitation to tender and full contract documents, must be made freely available to bidders from the date that the OJEU notice is sent. A link to the website from which these documents can be downloaded must be included within the OJEU notice;
- **selection of bidders:** contracting authorities must follow the rules which determine how bidders are to be selected, which include regulations on mandatory and discretionary reasons for excluding bidders that contracting authorities must and may, respectively, apply as well as limitations on what types of additional questions can be asked and how bids can be evaluated. Often, this process will involve bidders completing a pre-qualification questionnaire (“PQQ”). Under PCR 2015 contracting authorities can only use the questions in the Cabinet Office’s standard PQQ (or alternatively PAS91 if a works contract) and can only ask additional questions (“project specific” questions) that fall in line with both PCR 2015 and the statutory guidance that accompanies the Standard PQQ;
- **the tender process:** the relevant process for the procedure chosen must be strictly followed. This will determine minimum timescales allowed from invitation to tender to tender submission as well as how contracting authorities must communicate with bidders and deal with clarification questions. For more complex procedures, such as competitive dialogue and the competitive procedure with negotiation, contracting authorities must also follow rules on how they undertake negotiation/dialogue with bidders as well as when and how they can reject a bidder during the process;
- **contract award:** contracting authorities can only award the contract to the tenderer that submitted the most economically advantageous tender (commonly referred to as “MEAT”). This means that they can either award it to the tenderer who offered the best price or to the tenderer who offered the best results based on a price-to-quality ratio. In the interests of transparency and fairness, the price-to-quality ratio, and the award criteria and evaluation methodology used to determine it, must be the same as that advertised at the outset of the procurement process in the

OJEU notice and procurement documents. Once the successful tenderer has been selected, the contracting authority cannot enter into a binding contract with the tenderer until a “standstill” period has passed. Contracting authorities must send “standstill” letters to all bidders setting out specific information, such as their tender score, the reason for selecting the winning tenderer and the end-date of the standstill period (which will be 10 days from the date such letters are sent by email, or 15 days if by post);

- **reporting and recording:** contracting authorities must document the progress of the procurement process, which will include sufficient documentation to justify the decisions it has taken in that process. These documents must be kept for at least 3 years after from the award of the contract. In addition, contracting authorities must draw up a written report setting out specific information, such as details of the successful tenderer and the names of candidates not invited to tender with reasons.

The “Light Touch Regime” under the Regulations is a different procurement regime that applies to specific services including health, social, education and other services (see Schedule 3 of the Regulations for a comprehensive list of services to which the regime applies).

The regime is referred to as “light touch” because, in relation to contracts subject to the light touch regime, contracting authorities are free to choose which procurement process they follow for above threshold contracts (either one set out in the Regulations or an in-house process) provided:

- the process complies with the general EU Treaty Principles so that there must be no favouritism or bias;
- the opportunity is advertised on OJEU (and therefore also on Contracts Finder);
- the conditions for participating, time limits that apply and a brief description of the main features of the award procedure are set out in the OJEU notice;
- time limits set must be proportionate;
- the procurement process undertaken must follow the process set out in the advertisements; and
- when awarding contracts, they may take account of:
 - the need to ensure quality, continuity, accessibility, affordability and comprehensiveness of the services;
 - the specific needs of different categories of users, including disadvantaged and vulnerable groups;
 - the involvement and empowerment of users; and
 - innovation.

This more flexible procedure can be used for many services that social enterprises provide, highlighting their role in helping the disadvantaged and vulnerable and in empowering users.

Of particular importance to social enterprises, PCR 2015 makes procurements more accessible for social enterprises and SMEs by:

- introducing bidders' self-certification at selection stage (e.g. PQQ) so that only the successful tenderer need provide the evidence that they meet the criteria used to select tenderers;
- encouraging contracting authorities to consider including social value within the bid requirements especially in the specification of services to be provided;
- encouraging contracting authorities to consider procuring the public contract as a “reserved contract” (see more below);
- extending the list of characteristics that can be considered as award criteria at tender evaluation to include social characteristics; and
- requiring contracting authorities to consider dividing contracts into smaller lots which are potentially more accessible to SMEs.

3. Achieving Social Value in Public Procurement

3.1. The Social Value Act

The Social Value Act provides a real impetus for social value by imposing an active duty on relevant contracting authorities to consider achieving social value through procurement. This means contracting authorities must consider the following before the procurement process is started:

- a) how to improve the social, economic and environmental well-being of the area served by that contracting authority through procurement; and
- b) how to undertake a procurement process with a view to securing that improvement.

Whilst the duty only relates to services contracts, it is considered best practice to follow this process for all contracts. The duty means that contracting authorities should now be planning how best to deliver social value before the procurement process has even started. Such delivery may include asking bidders to agree to voluntary commitments related to social value and/or requiring them to deliver social value in specific ways under the contract.

3.2. Delivering social value – the role social enterprises can play

The increased need to achieve social value in public procurement can open up opportunities to social enterprises, which are often naturally well suited to achieving social value. Understanding how social value can be delivered in public contracts will help social enterprises exploit these opportunities. Social enterprises are often undertaking activities and operating in a way which could count towards social value in a procurement bid. Highlighting this can be a cost effective way of making a bid stand out. Social enterprises can get their message across in a number of ways before and during the procurement process.

Pre-market engagement

Social enterprises can take a proactive approach by engaging with contracting authorities they want to work with either in pre-market engagement set up by the contracting authority or by approaching them directly with a particular solution that they think the contracting authority would benefit from. This gives social enterprises a good opportunity to demonstrate what the contracting authority can achieve before it designs its procurement process and contract. Such pre-market engagement is permitted under PCR 2015 as long as it does not distort competition in any subsequent procurement process and the Regulations set out how that can be achieved.

Delivering social value

There are a number of ways that social value can be delivered during the life of a contract. By understanding the scope of what is possible and what contracting authorities may be looking for, social enterprises will be well-placed to demonstrate how they can deliver this in their tender returns. Some examples of how social enterprises can deliver social value are:

(a) Payment of a Living Wage and fair working practices:

A bidder can make commitments to the Living Wage and other fair working practices. Such fair working practices will be particularly relevant to social enterprises providing services where the quality and continuity of staff are very important (e.g. personal care services).

(b) Targeted recruitment and training / tackling worklessness

Social enterprises can consider to what extent they can undertake targeted recruitment and training to tackle worklessness. For example, if operating in a sector with a gender imbalance, or where an ethnic minority is under-represented, consider adopting a targeted recruitment policy to counter the imbalance. Alternatively, a social enterprise could assess their current training programmes and evaluate whether there is scope for expansion to offer more training opportunities to improve the skills and experience of new recruits.

(c) Impact on the local economy

Social enterprises can demonstrate how they would support the local economy through the delivery of the contract, including highlighting locally sourced products and/or suppliers who can be engaged through “meet the buyer” events.

(d) Social value impact through the supply chain

Social enterprises can demonstrate a commitment to achieving social value down their own supply chains. This can include opening up opportunities to SMEs, third sector organisations and other social enterprises as well as including fair payment terms in subcontracts. Alternatively, this could involve purchasing only materials and goods which are sustainably sourced or carry a lower environmental impact.

(e) Environmental sustainability

Bidders of any size can demonstrate how they will ensure contract delivery is environmentally sustainable by setting out method statements of sourcing materials, energy usage, waste and recycling. Depending on the type of the contract, bidders may be asked to develop a Sustainability Action Plan for contract delivery and/or implement an Environmental Management System that meets the requirements of ISO 14001. For some social enterprises, it will be worth pre-empting such requirements by exploring how to implement such plans and management systems in its service delivery.

(f) Reserved contracts opportunities

PCR 2015 includes two instances in which competition for certain contracts can be “ring-fenced” so that only a certain type of bidder can apply. This will be significant for many social enterprises that fall within the defined type of bidder that can apply for such opportunities.

Contracts can be reserved as follows:

- **Regulation 20:** for bidders that are a sheltered workshop; a sheltered employment programme and/or an organisation with the main aim of the professional integration of disabled or disadvantaged persons. At least 30% of this organisation’s employees must be disabled or disadvantaged; and
- **Regulation 77:** for bidders falling into the following categories:
 - administrative educational, healthcare and housing services;

- services for the supply of domestic help, nursing, and medical personnel;
- pre-school education services;
- higher education services;
- e-learning services;
- adult education services at university level;
- staff training services;
- training facilities;
- tutorial services;
- health and social work services (including a wide range of discrete medical, health, social, rehab and counselling services);
- library, archives, museums and other cultural services;
- sporting services;
- services furnished by social membership organisations;
- services provided by youth associations.

Even if a bidder falls into one of the categories listed above, to be eligible to apply for a Regulation 77 reserved contract that bidder:

- must have as its objective the pursuit of a public service mission that is linked to the delivery of the relevant service;
- must reinvest profit with a view to achieving that objective;
- must distribute profit based on participatory considerations;
- must have structures of management or ownership that:
 - are based on employee ownership or participatory principles; or
 - require the active participation of employees, users or shareholders; and
- must not have been awarded a contract for those services with that contracting authority using this rule within the previous three years.

Many social enterprises will be eligible to bid under either Regulation 20 or Regulation 77 processes, by satisfying the eligibility criteria. Any social enterprise should take steps to prepare a statement about how they meet these eligibility criteria, to use as part of their pre-procurement business development activity.

4. Challenges

4.1. The process or the outcome under PCR 2015

If a contracting authority has failed to award a contract in compliance with legislation or its regulatory framework, social enterprises that bid for that opportunity may have grounds to challenge.

Some may feel, however, that the potential benefit of challenging a contracting authority is outweighed by the negative impact this could have on the social enterprise's relationship with that contracting authority. Nonetheless, where delivery of a public contract is critical to a social enterprise and it loses that opportunity, a challenge may be appropriate.

Challenge for breach of PCR 2015

Challenges under PCR 2015 may arise when:

- 1) a procurement process does not comply with PCR 2015, for example a failure to give sufficient timescales for tender returns; or
- 2) a contracting authority applied the award criteria incorrectly so that the wrong bidder was awarded the contract.

Social enterprises looking to challenge must do so within 30 days of the date from which it knew or ought to have known of the breach.

If successful, bidders may be awarded damages.

Declaration of ineffectiveness: Special time limits and grounds exist for seeking a declaration of ineffectiveness, which is a court power to declare a public contract is no longer effective. In this event, the contracting authority will have to terminate the contract (potentially breaching it in the process) and undertake a new procurement process to fulfil that need.

For example, this remedy can be sought where there has been a total failure to advertise a contract opportunity on OJEU that should have been tendered under the PCR 2015 rules for above threshold procurements. In this instance, the time limits for bringing a claim are 6 months from the date the contract was awarded.

Mystery Shopper

The Mystery Shopper Scheme is a Government initiative that accepts feedback from bidders wishing to raise concerns about the conduct of a procurement process they have been part of. The scheme provides an alternative to a court challenge and involves significantly less time and expense. Contracting authorities must co-operate with the Mystery Shopper Scheme's investigations, though there is no obligation to comply with its recommendations. Nonetheless, this course of action could be of benefit to social enterprises as a means of encouraging contracting authorities to be mindful of their social value obligations where in the past they have not been.

Judicial review and the Social Value Act 2012

A social enterprise may wish to challenge if it considers that a contracting authority has failed to address its duty under the Social Value Act. Whilst there is no route for challenge under the Act itself, a decision made by the contracting authority in relation to that duty may be challenged by judicial review if:

- it "is so unreasonable that no reasonable authority could ever have come to it" (Wednesbury unreasonableness);
- the decision-maker in reaching its decision took into account irrelevant matters and/or failed to consider relevant matters; or
- the decision-maker made a mistake of fact (this cause of action is least likely to succeed in practice).

Social enterprises looking to challenge, must do so within 30 days of the date from which it knew or ought to have known of the grounds for judicial review.

Of the remedies available for a successful challenge by way of judicial review it is likely that a court would award damages as the most appropriate remedy. However, the reputational damage to the contracting authority for such a challenge being brought against them could be great.

Alternatives to challenging

Alternatives to a court challenge include making a complaint to the European Commission or notifying the relevant regulator.

Conclusion

Social enterprises should start to feel the positive impact of the new legislation affecting procurement as set out in this guide, being more opportunities open to social enterprises and easier, less

burdensome access to them. By applying the principles set out in this guide and fully understanding how social value can be achieved through procurement, social enterprises will be better able to maximise these opportunities by effectively demonstrating when, how and in what ways they offer contracting authorities the best solutions in procurement.

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