



## **Procurement: The Public Services (Social Value) Bill**

**by Julia Rudin, Partner**

### **Introduction**

It is not often that a private member's bill of significant and direct importance to local authorities and other public bodies makes it onto the statute book. Of over 200 private member's bills introduced since the general election, only 4 have made it onto the statute book and no more than 4 are likely to do so before the end of the current session.

The Public Services (Social Value) Bill is one of those likely to make it. The Bill started out as the Public Services (Social Enterprise and Social Value) Bill when it was introduced in June 2010 by Chris White, the Conservative MP for Warwick and Leamington. The Bill has been filleted somewhat during its parliamentary progress, but the two substantive clauses that remain will be of importance for English local authorities and those tendering for public contracts, assuming the Bill makes it through.

In summary, the Bill would, if enacted, require certain public 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 an area and how the authority might secure that improvement in the procurement process itself. There is also a requirement that authorities consult on those matters. It has been promoted as a "big society" Bill, intended to ensure that the local community's needs are taken into consideration in the context of the procurement of services.

This note is based on the Bill as it stands, having completed its passage through the Commons but before going through the Lords. The Bill could be amended or lost in the meantime.



## **Clause 1: Contracts of relevant authorities**

Clause 1 sets out a number of requirements that would have to be complied with by a relevant authority before starting the process of procurement, when proposing certain procurement exercises. “Relevant authority” is defined as a person or body that is a contracting authority for the purposes of the Public Contracts Regulations 2006, so will include local authorities and other public bodies.

### **When would the clause 1 requirements apply?**

Subsection (1) explains when the requirements would need to be complied with by a relevant authority. The requirements would have to be complied with if an authority proposes to procure or make arrangements for procuring:

- the provision of services, or
- the provision of services together with the purchase or hire of goods, or
- the carrying out of works,

AND

the proposal is to procure or arrange to procure by:

- entering into a public services contract (within the meaning of the 2006 Regulations) that is not a contract based on a framework agreement (again within the meaning of the 2006 regulations), or
- concluding a framework agreement as regards which public services contracts are likely to constitute the greater part by value of the contracts based on the agreement.

Subsection (2) of clause 1 sets out the circumstances in which a relevant authority would be treated as having started the process of procurement (ie the time before which it would have to have complied with the requirements). It is as soon as it takes whichever is the earliest of these steps:



- sending 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.

### **What are the clause 1 requirements?**

The requirements are set out in subsections (3), (6) and (7) of clause 1.

The subsection (3) requirement is that 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, and
- how, in conducting the process of procurement, it might act with a view to securing that improvement.

“Relevant area” is defined as the area consisting of the area or areas of the one or more relevant authorities on whose behalf a public services contract is, or contracts based on a framework agreement are, intended to be made, and there is further detail about what the area of a relevant authority is.

The subsection (6) requirement is that the authority must consider, in respect of the second part of the subsection (3) requirement, only matters that are relevant to what is proposed to be procured and, in doing so, must consider the extent to which it is proportionate in all the circumstances to take those matters into account.

The subsection (7) requirement is that the authority must consider whether to undertake any consultation as to the matters that fall to be considered under subsection (3).



An authority can disregard the requirements to the extent that it is not practical to comply with them 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.

Failure to comply with any of the requirements does not affect the validity of anything done in order to comply with the 2006 regulations.

### **Clause 2: Local authority contracts**

The second change that the Bill would make is consequential on clause 1. It would be to make an amendment to section 17 of the Local Government Act 1988. Section 17 sets out the duty on certain public authorities, in exercising any functions regulated by section 17, to exercise those functions without reference to matters which are non-commercial matters. The duty applies to local authorities, the GLA, urban development corporations, police authorities, fire and rescue authorities and others.

The functions regulated by section 17 are all related to public supply or works contracts and include:

- the inclusion in or exclusion of persons from approved lists
- the accepting or not accepting the submission of tenders
- selecting persons with whom to enter into the contract.

The amendment proposed by clause 2 would provide that section 17 does not prevent a public authority from exercising a function regulated by section 17 with reference to a non-commercial matter, to the extent that the authority considers it necessary or expedient to do so to enable or facilitate compliance with any of the duties imposed by clause 1.

### **Commencement**

Clauses 1 and 2 do not come into effect until a Minister has made a commencement order by way of statutory instrument.



## Comment

Local and other public authorities are likely, in many cases, to be complying with the legislation already, and may not need to make many adjustments if the Bill became law and came into effect. As the Explanatory Notes to the Bill point out, guidance on taking into account social and environmental issues in the context of procurement is already available (see *Social issues in purchasing* (February 2006), *Joint note on environmental issues in purchasing* (October 2003) and *Best Value Statutory Guidance* (September 2011)). The greatest impact is likely to be in the area of selection and evaluation criteria, as it is difficult to see how the economic, social and environmental improvement can be secured if it does not form part of the selection and evaluation process. A shift to “social value” commissioning should therefore present opportunities for organisations such as charities, voluntary organisations and social enterprises, who should be well placed to demonstrate added value in these areas.

This note does not provide specified legal advice and should not be acted or relied upon as doing so. If you would like further information or specific advice, please contact Julia Rudin (0207 405 4600 or [jrudin@sharpepritchard.co.uk](mailto:jrudin@sharpepritchard.co.uk))