

## **Response to the Consultation on Social Value in Government Procurement**

Bates Wells Braithwaite LLP is a full service law firm with a focus on supporting organisations and businesses driven by social purpose. We work with many clients commissioning and delivering social value.

We are delighted to see the increased focus on social value proposed by the government, building on the *Civil Society Strategy*. We very much hope this is one more interim step towards greater integration of social value in all aspects of how public authorities behave, and in their commissioning in particular. If this is seen as a final flourish in respect of the government's approach to social value, then it falls sadly short, and we assume this is not the case. It would be reassuring if this was made explicit.

### **1) Do you agree with the proposed policy metrics in the model in the attached annex? Do you have examples of such metrics being successfully used in public procurement?**

1.1.1 We do not have particular comments on the proposed metrics. We would though encourage the proposed training associated with use of them to extend out to begin with a bigger picture consideration of what the commissioner is seeking to deliver at a strategic level and how the particular procurement may feed into that. This would include thinking carefully about how the subject matter of the contract is defined so that it enables, as far as possible, and does not unnecessarily restrict, the scope to derive social value from the public spending being undertaken.

1.1.2 This is because we see commissioning as a fundamental strategic tool for public bodies in enabling them to deliver their core purpose. Public authorities exist to deliver the optimal social value for those they exist to serve over time. For this reason, we believe this statement made at the start of the consultation document is misconceived:

*The overarching objective for the government's commercial activities will remain achieving the best commercial outcome but it is right that government applies its commissioning to supporting key social outcomes.*

1.1.3 It is, in fact, back to front, and a more useful articulation would be:

*The overarching objective for the government is to support key social outcomes and it is right that it applies its commissioning to optimise its commercial position whilst achieving this.*

1.1.4 This change in emphasis potentially carries significant implications for commissioning practice.

1.2.1 We would also suggest the proposed training encourages a more granular approach to environmental considerations. There is only one item in the model dealing with environmental considerations. It does include a broad range of potential issues, but we believe this may encourage an approach where the commissioner decides at a high level that environmental concerns are not relevant to a procurement and does not consider whether particular elements of what is being procured have a potential environmental impact which could be taken into account.

1.2.2 By way of example, it is often cited that purchasing paperclips does not involve social value. Not only could it do so in terms of whether they are manufactured using a disadvantaged workforce, there may be environmental factors in how they are manufactured, from what materials, how packaged, transported to the commissioner, and the possibilities for reuse or recycling at the end of their useful life.

1.2.3 There is a strong argument that given the climate emergency in which we are immersed, and which has been acknowledged by large numbers of public bodies, they should use every opportunity to improve environmental performance, so this should be given greater prominence and not be relegated to an incidental part of a process. One approach may be to challenge bidders to indicate what impact their delivery of the contract will have on biodiversity and on carbon emissions, with the expectation the successful bidder will be required in the contract to implement the measures it proposes (or others if they are unsuccessful) to achieve these targets.

1.3.1 We believe it is also worth stressing the importance of providing bidders with the opportunity to demonstrate not only what they might offer to fit specific evaluation criteria (such as improved skills and employability, or improved gender pay balance) but what else they can offer in terms of social value as part of their contract delivery.

1.3.2 This not only avoids the prospect of bidders not offering social value which is not being counted, but allows bidders to demonstrate how social value may be part of their culture and how they may embed that into delivering the subject matter of the particular contract.

1.3.3 The hope would be that over time, if this became common practice, any business working extensively with the public sector would adjust their behaviours such that social value was much more integral to the way they engage with all their clients (and not just a tendering technique), thereby creating a positive feedback loop for social value between the commissioning and delivery of public services.

1.3.4 This would also address another issue which it would be worth highlighting in any training. This is to debunk the assumption, prevalent among some commissioners, that social value is inevitably a cost. Where it is integral to both the commissioner and the provider, not only is it unlikely to amount to, or be treated as, an additional cost, it is also likely to reduce and remove the hidden (or externalised) costs which are often missed in traditional procurement processes.

**2) Do you agree that the proposed minimum 10% weighting for evaluating social value in the bid is appropriate?**

2.1 We would argue that this is misconceived, albeit understandably given current practice.

2.2 Regulation 67 of the Public Contract Regulations 2015 provides considerable flexibility in the approach to evaluation. It provides that the most economically advantageous tender is to be assessed from the point of view of the contracting authority (67(1)), inviting the authority to consider what is most valuable to it in its circumstances. It provides this may include 'the best price-quality ratio, which shall be assessed on the basis of criteria such as qualitative, environmental and/or social aspects' (67(2)). It also permits competitions based on fixed price and quality only assessments (67(4)).

2.3 In particular, there is a misconception of the price-quality ratio, which the proposal here perpetuates. The price-quality ratio does not mean simply allocating x% to price and y % to quality. This can often lead to each being considered in isolation, losing any overall sense of what the authority is being offered for the proposed price and the wider implications of that offer. Better

commissioning practice would be to assess tenders holistically, conducting an analysis of the full value (combining social and qualitative) available for the price proposed (taking into account not only price, but life cycle costs and external costs arising from the solution proposed, which the authority and those it serves will bear).

2.4 To suggest allocating a minimum 10% weighting affirms the faulty current practice and feels like business as usual, where social value is perceived as some icing on the cake, rather than an ingredient without which there is no point baking a cake.

2.5 If it decided this is not the place to advocate for a change in this approach, it is often the case that proposing a minimum leads to that becoming established as the default level, rather than one end of a spectrum. We would suggest it may be preferable to suggest a higher minimum and to provide that if an authority wishes to allocate a lower amount to social value they explain their reasoning for doing so, as part of their Reg 84 report.

**3) *Does the proposed approach risk creating any barriers to particular sizes or types of bidders, including SMEs or VCSEs? How might these risks be mitigated?***

Yes, there are risks that the proposed approach may create barriers to certain bidders. These include:

3.1 a standardised approach will enable better resourced bidders to finesse their responses and quickly develop superficially good answers (which may or may not be substantively good also, but which may skew the evaluation). We would suggest this is mitigated by emphasising the value in also inviting bidders to submit evidence of their approach to social value more broadly, which they would be prepared to commit contractually to replicating if successful on this occasion. This may also encourage fairly standard responses, but may create the space for smaller providers to communicate more bespoke offers which fall outside the other categories (see 1.3 above)

3.2 restricting the policy to central government potentially means this only applies to public procurement exercises where small organisations with specialist and/or local expertise will have less opportunity to use what is most likely to differentiate in their favour. We would suggest this is mitigated by applying the policy across the public sector as a whole

3.3 there is the danger, following on from the above, that prime contractors bidding large central government contracts, may rely on supply chain partners to score well in the social value element of the evaluation and then underuse them in the subsequent contract delivery. We would suggest this is mitigated by ensuring that any commitments made in the bidding process are captured in the contract arrangements, both at head contract and sub-contract levels. We would further suggest that the commissioner has visibility of all the subcontract terms and how these have been entered into. These should be consistent with any policy of not only providing opportunities for SMEs and VCSEs, but that they are on terms which are fair and reasonable for such parties.

**4) *How can we ensure government's existing procurement policy mandates (for example on levelling the playing field for SMEs) take precedence in designing the procurement?***

By being explicit that social value has to be at the heart of commissioning, not a marginal element of procurement processes. If everything is built out from this, embedding the suggestions outlined above, it will reduce the prospect of inadvertently cutting across any mandates which are aimed at increasing diversity of the market place and levelling the playing field for SMEs and VCSEs.