

Working with the Public Sector

Busting the Myths



Anthony Collins
solicitors

Working with the Public Sector: Busting the Myths

This guide is aimed both at social enterprises who wish to enter the public sector market but face challenges navigating the procurement process, and contracting bodies who want to work with social enterprises and commission for social value.

As more and more social enterprises move into public sector markets it is essential that they do it with a sound understanding of procurement rules, practices and processes.

At the same time there is increased interest among public sector bodies to work more closely with social enterprises, and is useful to them to understand how the rules allow, rather than disallow working with social enterprises.

The rules surrounding public sector procurement are often complex and difficult to navigate, and this environment has perpetuated a number of myths that make it hard for social enterprises to start fulfilling their potential in public services. Contracting bodies and social enterprises alike should be prepared to constantly challenge these myths which often, sadly, form the basis of procurement decisions.

This is a guide to the most commonly-held but mistaken beliefs about procurement, market engagement and localism.

Myth #1

The procurement rules apply to everything

Often the temptation can be to adhere to the EU procurement rules without considering whether or not this is necessary. But this won't provide value for money if the contracting body is doggedly following a process without thought. There are a number of exceptions to the EU procurement rules, including:

- “below threshold” contracts;
- contracts for “Part B” services; and
- purely land transactions.

“Part B” services include some often provided by social enterprises and the rest of “Civil Society”, such as educational services, health & social services, and recreational, cultural & sporting services. They can often be provided more effectively by organisations that know their communities and can deliver against local need. Following a full EU procurement for this type of contract is unnecessary and off-putting to the inexperienced bidder – this undermines instead of encourages competition.

Myth #2

When establishing a social enterprise, a public body must go through an open tendering process

The setting up of a new social enterprise is not a matter for procurement. However, any contracts entered into by a public body may be governed by the EU procurement rules, and it is likely that a public body setting up a new organisation will be doing so to either:

- enter into contracts with that organisation (for example, for the social enterprise to provide services back to the public body); or
- create a trading entity that will interact with the wider world.

If the public body wants the social enterprise to interact only or mainly with itself, then it is possible that the “*Teckal*” exemption for in-house contracts can be applied. Where the public body exercises over the social enterprise control similar to that it exercises over internal departments and, at the same time, that social enterprise carries out the essential part of its activities with the public body, then the EU procurement rules will not apply. This can also be the case if a social enterprise is set up by a group of public bodies.

It is difficult to argue that this is the case when the social enterprise is trading with a wider marketplace. For a start, it will not be doing the “essential part of its activities” with its parent public body or bodies. And the nature of a trading company means that it is unlikely that the public body will exercise the necessary degree of control – it will want to be free to make its own decisions about what contracts it bids for and enters into. However, it can be possible for a social enterprise to move from being “*Teckal*” exempt to begin with, and later being “set free” to become a trading entity by its parent.

Myth #3

Strong financial track records are the best way to minimise risk

Knowing that a bidder has a strong financial track record is certainly one of the best ways to minimise risk. But past performance is no guarantee of future results”

An organisation’s financial history is not a guarantee of its financial future, and many organisations cannot demonstrate a long, strong financial track record while being in good health and having a bright future. When a public body decides who to invite to tender, it can accept alternative sources of information from a bidder that is unable (for a valid reason) to provide the financial information as requested. Public bodies should be encouraged to do this as a way of opening up competition without taking on substantial extra risk.

Myth #4

Engaging with social enterprises prior to procurement is anti-competitive

The earlier a contracting body starts considering what it wants from a service the more transparent and fair it can be, and the more likely it is to achieve the right results. Procurers can discuss their needs with both potential bidders and service users before beginning a procurement process. This can help them select what to buy and how best to buy it. Contracting bodies may find they learn a great deal about the capabilities and willingness of the marketplace.

Before formally starting procurement, the procurer can consult with the marketplace quite freely, being careful not to prejudice the fairness and transparency of the procurement. Procurers must be careful not to discriminate when engaging (so could not, for example, choose only to engage with social enterprises). But consulting the whole marketplace will not generally be discriminatory if consultation is genuinely open to all. And contracting bodies are to be encouraged to flag the opportunities for engagement to those groups who might otherwise not find out about them – including social enterprises, the rest of the Civil Society sector, and small businesses.

Myth #5

Competition is the only way to get the best price

The important point about competition is that it ought to be appropriate and proportionate. Disproportionately complicated tendering processes (such as, for example, following the EU procurement rules even when they don't apply) will not achieve value for money – if only because the tendering process itself has been needlessly expensive and time consuming.

Myth #6

The Community Right to Challenge will create an automatic right to provide services

It won't. Under the right to challenge a council will have to consider an expression of interest (EOI) to provide a service on its behalf.

That EOI must be made by: a voluntary or community body; a charity; a parish council; two or more employees of that council (or any other group specified by the secretary of state). The council must consider the EOI, taking into account whether acceptance would promote or improve the social, economic or environmental well-being of the area. If the council accepts the EOI, it **must then carry out a procurement exercise** taking into account the same well-being factors.

Councils may be concerned that receiving an EOI and then procuring a service will lead to accusations that the procurement is biased in favour of the organisation making the EOI. Where contracts are subject to full EU procurement (and remembering that many services that receive EOIs will be Part B services, or low value, and that the rules may not apply), the council should:

- have an audit trail showing it actively considered what it wanted to procure and how to procure it, and has not just responded to the EOI;
- scope the market beyond the EOI – e.g. by soft market testing;
- disclose in its tender documents all information disclosed when responding to the EOI;
- allow longer than the minimum timescales, given that the body making the EOI will have had advance information about the procurement.

Myth #7

Including social requirements in procurement just isn't legal

It's entirely possible to incorporate social issues into procurement lawfully – it's just that many people have made mistakes in the past, and it's the mistakes that get remembered. There are a few key things to remember:

- EU law supports social and environmental requirements explicitly – balancing the open market with social policy is built into the Consolidated Directive which forms the basis of EU procurement law;
- the direction of case law on social issues is clear:
 - don't specify "local" as this will almost always be discriminatory;
 - having or forming a policy basis can legitimise a purchasing requirement;
 - requirements should be verifiable. A requirement that cannot be verified means bidders cannot be compared and the success of the contract cannot be monitored.
- equal treatment and transparency are paramount – social requirements should not restrict opportunities to local bidders or people, but instead focus on levelling the playing field and building capacity.
- if social requirements are relevant to the subject matter of the contract they can be taken into account during the tendering process. Otherwise they become contract conditions that can be enforced, but bidders cannot be assessed on their ability to deliver.
- "added value" is hard to measure – the more specific social requirements are, the more likely it is a social enterprise (or any bidder) can deliver.

Myth #8

Including social value in the procurement process is too hard, and too expensive

Anything done for the first time will present some challenges. But there is some action to take that will make it easier to include social value in procurement and to embed the philosophy:

- identify and map key people who can contribute to scoping social requirements – this means establishing good lines of communication between departments (thinking of operational, legal and procurement teams amongst others), and between key personnel;
- identify your sustainable procurement champions – champions at all levels of an organisation help to drive the agenda forward, ensuring that social issues are not incorporated into just a single procurement but are more widely advanced;
- choose social requirements you can monitor – and don't bite off more than you can chew. There's nothing wrong with starting small – perhaps by piloting a particular approach – and growing experience and expertise over time;
- look to the market for guidance – knowing what your market can deliver can help to identify and plan the social requirements imposed. Constant dialogue between the public sector and its partners (actual or potential) helps to create real social value by identifying what is needed by the community and what can be delivered by the marketplace.

As for the cost of social value, it is a case of balancing affordability (clearly a matter of major concern, especially at the moment) with value for money, *“the optimum combination of whole life costs and quality to meet the service user requirement”*. Value for money is about getting more from your money, which is more important than ever when affordability is a concern. Just remember social value is part of the value for money equation and social value saves costs to all kinds of public services in the long run.

Myth #9

Including social value in the procurement process is anti-competitive

Not if you make a contract open to everybody (as mentioned under Myth #6, specifying “local” is not a good idea, but you can level the playing field for local people and businesses).

In reality, competition can be strong – many different types of organisation are geared up to providing social value:

- large contractors often expect social requirements and are ready and waiting to comply;
- small businesses, social enterprises and other Civil Society organisations often know their audiences well and can offer tailored solutions that really work.

So long as there are sufficient organisations that could deliver a social requirement, then competition will not be at risk.

Myth #10

The General Power of Competence will be a panacea for local government

Not necessarily. Under the proposed general power of competence, a council will have the power to do anything that an individual with “full capacity” generally may do. But there are boundaries and conditions attached to the use of the power:

- it doesn't mean councils can do things they are prohibited from doing by other legislation;
- where a council wishes to charge for a service it can only do so where it has a discretion (not a duty) to provide that service, and it can't make a profit from doing so;
- where it wishes to do things for a commercial purpose it must do them through a company or friendly society – this provision seems to overlap with recent legislation about councils trading but it is not clear how they fit together.

So, for the moment, far from simplifying matters for local authorities, lawyers will still have to trawl through the mountain of existing legislation just to check that the exercise of the general competence power is not constrained in any particular instance!

Further information

If you'd like to know more about the relationship between social enterprise and the public sector, please contact:

- Gayle Monk at Anthony Collins Solicitors at gayle.monk@anthonycollins.com or
- Ceri Jones at the Social Enterprise Coalition at ceri.jones@socialenterprise.org.uk.

Acknowledgements

The Social Enterprise Coalition would like to thank Anthony Collins Solicitors for their significant role and valued expertise in the production of this guide.

Social Enterprise Coalition

The Social Enterprise Coalition is the UK's national body for social enterprise. The Social Enterprise Coalition represents a wide range of social enterprises, regional and national support networks and other related organisations. As well as showcasing the benefits of social enterprise, and sharing best practice we work closely with our members to inform national policy.

CAN Mezzanine, 49–51 East Road, Old Street, London, N1 6AH

info@socialenterprise.org.uk

+44 (0)20 7793 2323

Copyright © 2011

Social Enterprise Coalition

Published by the Social Enterprise Coalition

May 2011

www.socialenterprise.org.uk

