

BWB

Bates Wells Braithwaite

The art of the possible in public procurement

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E3M


hctgroup

About the authors

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Introduction

An end to pushing on a piece of string



After a half-decade and more of austerity, the basic efficiencies available through tendered competition have already been secured. That particular well is empty. If essential public services are to be maintained or improved, we're going to have to look at doing things another way. This is the message we hear every day when we speak with the Commissioners of public services.

For all of this desire amongst Commissioners to think afresh, there can be a countervailing force – a barrier to change. That barrier is often perceived to be procurement – with regulations and iron-bound processes acting to stifle reform, hamper innovation and maintain the status quo. Change often seems like pushing on a piece of string.

'If essential public services are to be maintained or improved, we're going to have to look at doing things another way'

We strongly believe that this is a matter of custom and practice and need not be the case. The Public Contracts Regulations 2015 provide Commissioners with a great deal of flexibility to achieve the outcomes they seek for their communities. The purpose of this publication is to highlight some of those flexibilities, how to unlock them and some of the practical things that can be achieved within the scope of the law – the art of the possible in public procurement.

This publication is aimed at Commissioners and other change-makers in public authorities in England and Wales. It is not intended to be one more guide to procurement regulation (of which there are already plenty) and we assume that this landscape will be at least broadly familiar – with the basic vocabulary of procurement known to you. It is intended to be a part of a Commissioner's toolkit, providing supporting argument as you seek to drive change in your organisations.

Our focus is on commissioning things innovatively, rather than on commissioning innovative things. We believe that innovation in procurement practice is the most likely path to innovation in service delivery. Even without seeking novel approaches, good commissioning that makes use of the range of flexibilities in the procurement rules would go a long way to resolving most issues.

Our focus is not the pure cost-saving imperative – most authorities are pretty good at that sort of thing anyway. Rather, this publication focuses on the role of commissioning in addressing complex social issues – and on how we can achieve both genuine best value and broader social benefits for our communities. This is all possible when procurement is applied as a constructive tool in the service of that commissioning, rather than a means of undermining it.

'We believe that innovation in procurement practice is the most likely path to innovation in service delivery'

The publication is in two parts. The first discusses some of the implications of the new Regulations and the options they provide for Commissioners. The second is a set of scenarios that seek to demonstrate the scope of what the Regulations allow you to do.

This booklet does not claim to be a definitive guide to the Regulations, or to commissioning, or claim expertise in the different conditions in which Commissioners work. Rather its aim is to challenge – to provoke debate, discussion and new thinking from its audience about the relationship between commissioning and procurement. If the reader can find one new idea out of those presented that will help them achieve their goals, then it will have succeeded in its objective.

Part 1

Issues in procurement



The 'what' and the 'how'

Too many procurement guides and textbooks will tell you that the first step in the procurement process is the OJEU Notice. This is wildly unhelpful. The first step in the procurement process is to take any such guide or textbook out into the car park and set it on fire.

Whilst such an incendiary reaction may seem over the top,¹ the message itself could not be clearer. Most of the opportunities to ensure innovation and change are only available at the commissioning stage beforehand – the stage where you make strategic choices around what you are trying to achieve, the outcomes you are trying to secure. It is vital that the commissioning process has begun a long time before the advertisement and that commissioning has also directly informed the procurement process itself.

This will come as no surprise to many Commissioners – it is hardly a new idea. Yet Commissioners have told us that procurement has, through excessive caution and lack of imagination, too often become the tail wagging the commissioning dog – often in an unholy alliance with equally cautious legal advice. Process has taken over purpose. We believe that the primary focus on purpose needs to be restored to commissioning.

¹

Particularly as it is, technically speaking, true that the OJEU Notice starts the *procurement* process.

The Public Contracts Regulations 2015 can help with this restoration. They enable Commissioners to shape a procurement process that can actually deliver on strategy – reconnecting the procurement task with commissioning. The new Regulations:

- explicitly allow for market consultation with suppliers, service users and other stakeholders prior to tender – not just on the specification but on the process as well
- provide a much wider choice of process so procurement can deliver on strategy – and in the case of Light Touch procurement, the development of entirely bespoke processes (subject to general Treaty Principles²) so that Commissioners can be confident of procuring something which really meets communities' needs
- enable commissioning in situations where the answer is not yet known using the new Innovation Partnership
- engage with the social sector through Reserved Contracts
- go beyond the Social Value Act to invite social value considerations in all relevant procurements
- encourage the use of social impact measurement methods.

²

Or just slightly tweaked versions of existing processes if that's what's appropriate. The Light Touch Regime's flexibility is a feature in line with the underemphasised general Treaty Principle of 'proportionality' giving Commissioners the ability to design a process that is proportionate.

As a consequence, it has never been more important to articulate what you are trying to achieve – the ‘what’. This then leads naturally to designing a procurement process for its delivery using the new flexibilities – the ‘how’. Each should be a complement to the other – and both are worth spending time on to achieve the outcomes needed for our communities.

A change in intent

We’re often asked whether the flexibilities in the Regulations are mere loopholes – and whether Commissioners would be better off sticking with tried and tested ways rather than risk being ‘a bit cute’. This is profoundly not the case. Instead, what we have seen over time is a genuine and deliberate change in intent with the Regulations.

The first EU procurement Regulations were mostly about ensuring equal treatment of suppliers within the single market, achieved by establishing a mandatory level of objectivity through clear procedure. By addressing loose procedure and a lack of rigour they could improve the level of competition and stamp out subjective and improper arrangements.

Justifiably, the principle of transparency (contract procedures must be transparent and contract opportunities should generally be publicised) and the principles of equal treatment/non-discrimination (potential suppliers must be treated equally) are always likely to be at the heart of regulation, but the regulators feel that everybody gets this now to a greater or lesser degree. As a consequence, the areas of interest have changed and broadened over time – explicitly focussing on the wider social benefits of procurement.³

The 2015 Regulations reflect this significant change in intent. There is a definite recognition that public authorities are major economic actors who have a big impact through their spending – and by consciously directing that spending differently they can drive positive social change and social innovation.

3

This change in intent is in fact formal policy: the preamble to the draft EU Directive published on 2 October 2012 stated that, having largely achieved the Commission’s aim of creating a EU marketplace within which rigorous pro-competitive principles applied, the Commission considered it appropriate to turn its attention to other objectives, including making ‘better use of public procurement in support of common societal goals’.

As a consequence, we see changes to:

- the application of the Most Economically Advantageous Tender criteria⁴ to reflect this
- a clarifying of the limited requirements applicable in the commissioning of social, health and education services with a view to fostering social innovation (the Light Touch Regime)
- the introduction of Innovation Partnerships to allow Commissioners to develop solutions with the market where they do not yet exist.

Put simply, the intent of the new regulation is to make your freedoms clear, promoting good commissioning and encouraging innovation. The regulators want you to use these freedoms – you are in no way being ‘a bit cute’.

4

Described more fully on page 22.

A light touch

The most startling freedoms in the new Regulations are in the areas that arguably have the greatest potential for social change and innovation – social, health and education services.⁵ These are governed by the new Light Touch Regime.

‘Regime’ is probably a poor choice of words to describe these arrangements. As long as the principles of transparency and equal treatment are adhered to, you can design pretty much any procurement process you like.

If you think elements of competitive dialogue will give you a better outcome – include them. If you want a pre-qualification stage with a bespoke selection process and criteria – go right ahead. If you want bits of the competitive procedure with negotiation – it’s up to you. If you want tender presentations in the medium of interpretive dance – well, maybe not,⁶ but you get the idea. There are vanishingly few restrictions.⁷

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Plus a variety of other sectors – see *The Public Contracts Regulations 2015, Guidance on the New Light Touch Regime for Health, Social, Education and Certain Other Service Contracts*, Crown Commercial Service, for a full list presented at Annex A.

6

As it happens, in the wildly unlikely scenario where this is actually relevant to the subject matter of the contract, arguably it could be used, in part at least.

7

Perhaps obviously, other legislation still applies – for example, you still have to respect suppliers’ intellectual property in dialogue-based processes.

The point isn't to be inventive for inventiveness' sake – at its heart, the Light Touch Regime is an exercise in the Treaty Principle of proportionality, allowing you to take out the bits of established, well understood procedures that are, in context, procedure for procedure's sake.

We have been surprised that more authorities have not taken advantage of these new flexibilities.⁸ Perhaps after many years of limited freedom, the idea of designing a process to meet needs rather than having one dictated to Commissioners by regulation is just taking a bit of getting used to.

We suspect that the language used to describe the Light Touch Regime in guidance possibly doesn't help – focussing as it does on the threshold level of €750,000 as a significant feature. The thresholds are something of a red herring, as all the flexibility is maintained when over them.

When the value of a contract is over the threshold, all you have to do in addition is:

- publish a Contract Notice (CN) or a Prior Information Notice (PIN) – and a contract award notice when you award
- follow the process that you set out in your CN/PIN
- be reasonable and proportionate in the timeframes set.

As you might have wanted to do these anyway – they are helpful for ensuring transparency and equal treatment⁹ – they are no hardship and should not prevent anyone from getting the most of the Light Touch Regime.

As more Commissioners become comfortable with the Light Touch Regime, we anticipate that we will see more and more novel commissioning approaches and, as a consequence, more innovative service delivery.

8

Although to be fair, similar levels of flexibility were available under the old Part B services. Many authorities, rather than create their own procedures for Part B services often treated them as Part A, because it was simpler and, they felt, safer than being creative. The 2015 Regulations arguably create a similar regime but express it differently – perhaps as an encouragement to Commissioners to change their approach to these services.

9

The reason they are required over the threshold is because over those levels it is more likely that there could realistically be suppliers in other member states.

Navigating the paradox of choice

The Regulations provide a wide range of options, each with significant flexibilities. Some Commissioners we talk to are concerned that with flexibility and so much choice comes the risk of error – and that it would be better to stick with the tried and tested. We believe that the freedoms provided have such a potential to drive positive change that it would be remiss not to use them. So how can we navigate through this concern and protect against mistakes? We believe that the Treaty Principles themselves provide both map and compass.

Equal treatment

This principle requires that people – or in the case of procurement, qualified suppliers – must be treated equally. Everyone has the same access to the same opportunities, procedures, information and is assessed under the same criteria. Making sure that this is the case in any process is an essential prerequisite.

Non-discrimination

Closely associated with equal treatment, this principle aims to ensure that there is nothing about your procurement which would exclude someone from taking part in the process because of their characteristics.

Transparency

This principle covers the treatment of information – advertising opportunities so suppliers can take part, being clear about criteria so everyone knows what success looks like, publishing decisions so that they are accountable – as such, it is an essential component of the first two as well as a necessity in its own right.

Proportionality

How you chose to run your procurement: qualifications requirements, time limits for response – even the extent of the process – need to be necessary and appropriate for what you are trying to do. This principle is particularly helpful. It can act as your guide to making overly procedure-driven approaches more rational.

If your use of the new Regulations reflects the Treaty Principles in both fact and spirit, it is likely you will be on the right track. They also help to make your procurement fair, which suits your values.

The role of the social sector

A feature of the new Regulations – and the Social Value Act – is an increased focus on enabling commissioning for social value and wider social impact. The Regulations are neutral¹⁰ on organisation type, in line with the principles of equal treatment and non-discrimination. However, the role of broader social criteria does bring into focus the role of the social sector – social enterprises, mutuals, the third sector and those things that they are typically good at.

So, why the fuss? A lot has been written about the capacity of the social sector to innovate, to share a public benefit purpose with Commissioners, to deliver step changes in service delivery – and these are a very good reason to engage. However, many Commissioners that we speak to are less sanguine. For every social enterprise with a profoundly new way of looking at things and the ability to create change, there is another still shaking off the shackles of grant dependency that just wants to be told what to do. Strategic commissioning involves creating processes which allow the good social sector organisations to demonstrate what they can offer in competition; not to commit Commissioners to using organisations who aren't equipped to deliver.

In our view, the most significant reason to be excited about the social sector is the opportunity to build a supply chain that actually shares your essential purpose and values. The social sector wants the same things you do: it exists to deliver public benefit. This makes it possible, in the words of one Commissioner 'to procure for the abstract nouns that matter: trust, partnerships, shared journeys'. This means that over time, Commissioners can create a network of partners to support them as they tackle challenging social issues in new ways – ways that are developed together.

The second reason that commissioning from the social sector is now much easier is the ability to take economic externalities into account, something at which many of these organisations excel – employing hard-to-reach or disadvantaged groups, profit reinvestment back into communities, community-led service design and so on. The Social Value Act and changes to the definitions around Most Economically Advantageous Tender (MEAT) place ever more emphasis on achieving these externalities – and engaging the social sector is an established and effective means of doing this.

Finally, social sector organisations may be well-placed to show what they can do under the new Regulations, but that's where it ends. The good Commissioner should demand high quality standards and the good social enterprise will demonstrate them, in particular through being purpose driven. If the Commissioner demands such standards, all suppliers must deliver them to be competitive. The market would then work to make all suppliers more purpose focussed. Arguably, this makes including social criteria even more powerful as they can move the whole market towards creating positive change.

Bring it on

Many commissioning authorities are concerned by the prospect of using the new Regulations to their fullest, feeling that they increase the risk of challenges to tender awards. If Commissioners do their groundwork, we do not think this is likely to be the case. There will only be grounds for a legitimate challenge if the procurement falls outside the very wide boundaries set by the Regulations, or rules and processes are not followed.

The best way to manage the risk of challenge using the new Regulations is to focus first on the purpose and then implement a process to deliver that purpose, documenting your reasoning at each stage:

- articulate clearly what you are trying to achieve, establishing the objectives of the commissioning exercise
- select (or in the case of the Light Touch Regime, design) a process to deliver specifically on that objective
- check that there is consistency between the specification, the tender requirements, the evaluation criteria and the contract
- check that your whole process complies in spirit and in fact with the Treaty Principles – have I ensured transparency? Have I ensured equal treatment? and so on
- ensure any social value elements are objectively relevant to the subject matter of the contract.

¹⁰

With the exception of Reserved Contracts, which can be commissioned exclusively from social sector organisations for contracts with a maximum three-year term.

With these steps in place, you just need to run your process as designed and you'll be fine. The prospect of challenge should be viewed as a secondary matter to do with accountability for acting properly.

There is one further thing to say about challenges. In many public bodies, any challenge to a tender decision is met with a natural defensiveness. This should not always be the case – the balance should be reset. In our experience, there are two types of challenge:

Type one: legitimate challenges

These normally arise from a failure to do what you said you would do. These can be rectified and you can (and should) take the learning to improve your processes.

Type two: speculative challenges

In any tender process, there will be winners and losers. This is kind of the point. Suppliers can mount speculative challenges if they feel that their economic interest is threatened – they are, in effect, just chancing their arm.

We do anticipate that over next few years there will be an increase in the number of 'type two' challenges. As commissioning authorities seek to radically re-imagine services and apply new freedoms, suppliers who have done quite nicely out of the status quo will lose out to suppliers capable of disruptive innovation – and those original suppliers may object in defence of their profit margins. This is an entirely logical step for an out-competed supplier, but it is an abuse of process.

No-one wants the cost in time, money or disruption from a challenge, but for 'type two' challenges, Commissioners may feel more bullish if they have stuck to the principles above. Facing down such challenges robustly will, most likely and more quickly, lead to them drying up – as providers recognise they are throwing money (and reputation) away pursuing such claims.

Brexit-schmexit

Publishing a guide to EU procurement regulation just after we've voted to leave Europe might seem a bit eccentric. Nothing could be further from the truth. At the time of writing (September 2016), there is as yet no indication of when Article 50 might be triggered, so it looks like the Regulations will be in force until the end of 2018 at a minimum. In the meantime, the business of Government goes on. Procurement Regulations are not retrospective, which means that until they change, using the ones in force correctly will always be the right answer.

We suspect that the life of the current Regulations may well continue for a long time after Brexit. The reasons for this suspicion are entirely practical. Although repeal of The European Communities Act 1972 – one of the central legal consequences of Brexit – will in turn mean repeal of The Public Contracts Regulations 2015, there seems to be a widespread desire to preserve access to the single market. This, almost certainly, will require compliance with the Regulations or very similar rules – as will participation in other major structures of world trade.

The final reason is more prosaic still. At Brexit, you get the feeling that any lawyer the government can get their hands on will be a bit busy working on trade at the time, so the temptation to roll the Regulations over into UK law will be almost overwhelming – at least until things settle down.

There has never been a better time to explore what the new Regulations can help Commissioners achieve and these factors suggest Brexit is unlikely to alter that any time soon.

Part 2

Applying the new rules



Can I talk to the market about my tender specification?

Yes

The Regulations here are absolutely explicit. You can talk to the market about your tender specification¹¹ – and even the tender process itself.¹²

Not only can you do this, you should. Your service users, stakeholders and supply chain have a real contribution to make in creating the perfect specification. You can discover new ways of achieving the outcomes you're after, with new methods and ways of working. You can identify any risks to either process or service so that they can be managed or eliminated. Feedback on your process ensures you can remove needless barriers to participation for your supply chain, improving the eventual competitive process. It is a genuine opportunity to improve services.

11

It's there in black and white – Regulation 40 (1): 'Before commencing a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.'

12

Regulation 40 (3): 'Such advice may be used in the planning and conduct of the procurement procedure...'

Things to remember

The first thing to remember about pre-tender consultation is that it's pre-tender. The second thing to remember about pre-tender consultation is *that it's pre-tender*.¹³ The consultation and the bidding are separate, distinct processes – with consultation coming first before the Notice – and should be organised as such.

The consultation also needs to be handled with some care. Whilst supplier feedback and ideas should inform the tender, the Regulations state that no supplier should gain a preferential advantage for their eventual bid as consequence of the consultation.¹⁴ In practical terms, you can't change the specification in such a way that it suits a particular future bidder or bidders – even if they came up with something really neat.

13

This bears repeating, as trying to manage vital feedback from suppliers once a tender is already published is a common source of process failure.

14

Expressly prohibited in Regulation 41 (1).

The Regulations go as far as suggesting two ways of handling the risk of giving consultation participants an advantage. The first is to make any information that has shaped the eventual ITT available to all bidders.¹⁵ Some of your suppliers might not want to share their ideas with their competitors – and you will need to respect their intellectual property. This is best managed by being abundantly clear with participants what you will do with the information and, in the interests of both parties, provide an opportunity for them to assert their IP rights before you make any such information public. The second method is to make sure adequate time is given for the receipt of tenders when the process begins – allowing suppliers to understand and adapt to new information.¹⁶

¹⁵

Set out in Regulation 41 (2) (a).

¹⁶

Set out in Regulation 41 (2) (b).

The art of the possible

Sometimes consultations can raise as many questions as they answer, showing you multiple possible means of reaching your objectives. Alternatively, they can start to shed real light on intractable issues that you'd like to take further. If either of these is the case when the consultation is concluded, you have the option to pursue a more dialogue-based method when it comes to the actual tender – a competitive dialogue process or Innovation Partnership.

Can I involve service users in the award decision?

Yes

It is an uncomfortable truth that, usually, public services are done to people, not with them. Actively involving service users in your award decisions can bring people into the heart of service design, dramatically improving accountability. It can also have practical benefits – service users are more likely to focus on the difficult-to-measure soft outcomes that citizens prize and they are also blithely unconcerned with the internal 'sacred cows' in commissioning organisations, helping you to drive change.

The main body of the Regulations are quiet on involving service users in decisions – meaning that it's up to you. If you want to, you can. Where the Regulations do speak of this, it is in the context of the Light Touch Regime – and this is where it gets really interesting. Under the Light Touch Regime, Commissioners are explicitly permitted to consider the involvement and empowerment of users.¹⁷

¹⁷

Regulation 76 (8): '...contracting authorities may take into account any relevant considerations, including ... the specific needs of different categories of users; [and] the involvement and empowerment of users.'

Cabinet Office guidance goes even further, suggesting that this type of involvement for service users 'is not only allowed but actively encouraged under EU law'.¹⁸ The guidance then goes on to say that inclusion of service users on award panels is also an effective means of addressing user choice in even more complex situations such as pseudo framework agreements or pseudo dynamic purchasing systems.

Things to remember

Care does need to be taken to ensure that including service users in award decisions does not compromise the general requirements around transparency and treating suppliers equally. This can usually be achieved by communicating the award method clearly, including:

- that service users will be involved
- their specific role in the process
- how that feeds into the scoring

and by ensuring that the service users involved are representative and not likely to be inclined to favour certain types of bidder.

¹⁸

The Public Contracts Regulations 2015, Guidance on the New Light Touch Regime for Health, Social, Education and Certain Other Service Contracts, October 2015, Crown Commercial Service.

Involved all the way: service user co-production at NHS Guildford and Waverley CCG

When six CCGs and the local authority in Surrey decided to jointly procure Child and Adolescent Mental Health Services (CAMHS) in Surrey they involved service users and parents at every stage of the process. This participation secured a prime provider who holds positive user experience as paramount, delivering significant improvements in access to advice and intervention.

The lead commissioner, NHS Guildford and Waverley CCG, started this process by inviting CAMHS Youth Advisors (a network of young people who have used CAMHS) and a parents' organisation to help them understand gaps, challenges and opportunities for change ahead of procurement. They included service users in persuading commissioners of change and investment needed, co-production of service specifications, performance indicators and bidder evaluation questions. They supported the market engagement phase, providing potential suppliers with direct intelligence about what was needed, informing the market of the role of service users and signalling just how important their voice would be in awarding the contract. This directly stimulated the market and bids were innovative and user focused.

This has led to a direct improvement in service quality and access – for example, through the introduction of a 'no wrong door' policy, changes in opening hours and cutting waiting times at no extra cost.

It also had a profound impact on service design, identifying and eliminating gaps. For example, a gap was identified at the boundary between services for learning difficulty and services for other mental health. Research indicated that 40% of young people with attention deficit hyperactivity disorders have anxiety or depression, yet CAMHS was only triggered when these issues manifested as serious disruptive behaviour or self-harm. Commissioners were persuaded to address this gap and a cohort of 5000 young people in Surrey will now receive earlier intervention, effective differential diagnosis and the right support, leading to markedly improved outcomes and significant lifetime costs savings.

As service users were also involved in the award decision, the CCG managed potential conflicts of interest with care and those involved in supporting bidders were not involved in the evaluation of submitted bids.

The CCG ensured the youth advisors received sufficient coaching and support to play an active role and have their voices heard in this process.

The relationship continues and service users continue to let commissioners know whether the benefits wanted are being achieved and what else could improve. The young people themselves cited personal benefits of increased confidence with some life changing outcomes as a result. But the most benefit is for future service users.

Can I include wider social impact in my specification or award criteria?

Yes

It's not so much a question of 'can I' include wider social value. Unless you're buying paper clips, you pretty much have to now. As suggested in the preceding discussion, the inclusion of social value has been a part of the regulatory direction of travel for some time,¹⁹ with the Commission turning its attention to 'better use of public procurement in support of common societal goals'.

This focus on social value is a good thing. Commissioners have enormous economic agency – enough to shape marketplaces and change communities. When commissioning authorities include social value, they can target local unemployment, opportunities for the hardest to reach, the environment, working practices and so on – and all as a part of what they would be buying anyway.²⁰ Why would a socially responsible organisation not want this? And now, the Regulations act in direct support of this endeavour.²¹

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The 2015 Regulations apply the current EU Directive on public procurement (2014/24/EU) ('the EU Directive'), which, as part of the European Commission's Social Business Initiative 2010–14, was drafted, in significant part, with an express intention of emphasising the importance of social value.

20

Even paper clips, if you want to.

Two flavours

Regulatory support comes in two flavours. The first is the Social Value Act (2012). The Act provides the positive duty to consider 'how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area' in the procurement specification and process.

The second is a change to the definition of MEAT for award criteria – which now explicitly references the 'environmental and social aspects' of the price/quality ratio.²² In fact, price alone is no longer a proper basis at all for setting award criteria – you'll need to seek the best balance between price, quality and social value impact.

21

Interestingly, there has never actually been a regulatory barrier to the inclusion of social value in tendering – either at specification or award. All regulation has done is become ever more explicit that Commissioners should pursue this, as it is rarely well or consistently applied. Regulation cannot easily convey exasperation, but if it could, it would be here.

22

See Regulation 67 – particularly clauses (1), (2) and (3).

Things to remember

It's not a total free-for-all.²³ Both the Social Value Act and the changes to MEAT are clear that the social value included must relate to the subject matter²⁴ of the contract and be proportionate. It will certainly reward Commissioners to have a clear idea of the social value they wish to achieve and how it relates to what they wish to procure – as this will help them set out a clear process and award criteria to achieve it.

23

Regulation 67 (6) makes that abundantly clear: 'Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.'

24

This is critical – but even paper clips have issues relating to treatment of staff, sourcing of raw materials and costs of externalities which may be relevant. You just need to think about these issues in advance of the process, communicate your expectations and then score for them appropriately.

Creating social value in Halton

Halton Borough Council's participation in the Department of Health's Health and Social Value Programme shows what an Authority can achieve by putting social value at the heart of what they do. Their approach allows them to enhance the quality of life of local communities and support improved social, economic and environmental wellbeing using the commissioning and procurement process.

Halton's methods are intensely practical, with two, mutually supporting approaches. The first involves working closely with stakeholders. They identified and brought together key officers at senior level across the Authority, Clinical Commissioning Group, VCSE sector and wider partners with a commitment to doing things differently – all with the aim of developing a joint approach to implement the Social Value Act (SVA).

The second is to place everything they do within the context of Halton's Sustainable Community Strategy²⁵ and the Marmot Review priorities.²⁶ This meant that their commissioning and procurement for social value could take place within a clear strategic framework – output indicators and desired outcomes are now linked to these strategies.

25

www3.halton.gov.uk/Pages/councildemocracy/pdfs/Sustainable_Comunity_Strategy.pdf

26

Fair Society, Healthy Lives, the Marmot Review: Strategic Review of Health Inequalities in England Post-2010, 2010

This drive for clarity was supported by a social value policy, a procurement framework and a charter. This meant that Halton's commissioning for social value could be truly purposeful – rather than a simple act of compliance with the SVA.

For each procurement opportunity above £1000, for all supplies, services and works, Halton undertake a social value 'opportunity assessment'. This is to identify output indicators and outcomes appropriate for inclusion in the procurement process, with bidders asked to address these in their proposals.

The approach to social value is bespoke for each procurement opportunity, but the outcomes must be relevant, transparent and proportionate. If it is appropriate, they will seek provider innovation instead of or specific outputs and outcomes. Social value outcomes also form part of the award criteria, with a weighting proportionate to what is being procured.

This level of rigour also allows Halton to go further. Social value outcomes and outputs are built into contracts and monitored. They have also started to apply and explore further financial measurement of the positive social impact created as the consequence of their procurement decisions.

We are committed to supporting social sector suppliers and/or local suppliers where possible. Can we achieve this through our procurement practices?

Yes, but...

It's probably not the social sector or local suppliers you're after – it's the extra outcomes that they are in a position to deliver. You'll need to keep this at the front of your mind, being clear and objective about the role of these organisations in delivering those outcomes. This is the best way to avoid a process that might be discriminatory.

This mind-set is at the heart of the Social Value Act and the use of social factors in MEAT criteria. They were never intended to be a lock-in for any particular type of supplier. Creating a clear specification that values, for example, evidence of strong local knowledge and connections; or wider commitments beyond the contract to the community is one that is technically open to any potential supplier.

What social value does allow you to create is a procurement process and award criteria that allow social sector and local organisations to play to their strengths, showcasing the wider impacts that they create in the context of a specific contract. This ability to create social value is deservedly a source of competitive advantage in a market for your custom and the Regulations permit this. As with all commissioning, you'll need to ensure that you've structured the processes so that they are compliant with the Treaty Principles.

The new world of Reserved Contracts

There does come a point where working with a social sector supplier is so obviously more beneficial than the alternatives that there is no point pretending otherwise – it would be a waste of everyone's time. The Regulations recognise this, enabling Commissioners to pursue a Reserved Contract²⁷ – exclusively for social sector organisations²⁸ – as long as the contract is for a specific type of service.²⁹ Commissioners can use these, but it is essential that there is a clear and articulated rationale as to why a social sector organisation is objectively the best type of service provider.

Cabinet Office guidance³⁰ tells us that Reserved Contracts are, essentially, a subset of the Light Touch Regime. This means explicitly that the Commissioners letting Reserved Contracts should operate under the Light Touch Regime – with all the process options that this gives them.

Reading between the lines of the Cabinet Office guidance, it's pretty clear that Reserved Contracts were originally designed as an early-stage 'competition shield' for public sector spin outs and mutuals.³¹ As a consequence, there is a three year maximum contract length for a Reserved Contract – and the winning organisation cannot win the same contract again if it is let using the same process. There is nothing to stop the organisation re-winning the tender if a regular, open competition process is run.

27

See Regulation 77 on Reserved Contracts.

28

The Regulations have a very specific definition of this, set out in Regulation 77 (3). It would cover most social enterprises and third sector organisations with missions relevant to the area of the contract's work.

29

The Regulations present a list of relevant Common Procurement Vocabulary (CPV) codes of which services can use Reserved Contracts (77 (2)).

30

See page 15 para 1 of *The Public Contracts Regulations 2015, Guidance on the New Light Touch Regime for Health, Social, Education and Certain Other Service Contracts*, October 2015, Crown Commercial Service.

31

Whilst this appears to be the motivation for its inclusion, the Regulations make no such context-based restrictions.

Commissioning for social value in action: Liverpool

Liverpool City Council has a clear aim – to make Liverpool a strong city built on fairness. This combines the triple objectives of making the city’s businesses purpose-driven, eliminating poverty and focussing on fairness.

These overarching principles, that build upon the successful use of social value, have been embedded into procurement and commissioning processes using a straightforward framework – the Fair City Outcomes Framework. The framework sets out the city’s priorities along social, economic and environmental lines.

As Liverpool recognises the contribution that can be made to their priorities by both the local third sector and local SMEs, there has been a widespread programme of market engagement and development. This has involved supplier days and debriefs – and outreach to key networks including the Chamber of Commerce, the Federation of Small Businesses, Liverpool Vision and Professional Liverpool. Each step has been with the aim of enabling local organisations to play to their strengths in the city’s procurement processes.

To ensure all potential suppliers have an understanding of the type of purpose-driven business that can help Liverpool achieve its aims, they have articulated exactly what they mean by a purpose-driven business. Their definition covers five key principles that cover: how customers and suppliers are treated, how employees are treated, corporate citizenship, environmental sustainability – and what a guiding purpose of an organisation could look like. These principles have been crafted with care to ensure they are achievable by any type of organisation – voluntary sector, social enterprise or traditional business.

The final piece of the jigsaw is measurement. The Council generates regular management reports on their social value statistics and have developed a social value KPI portal. They are currently extending this to include measures relating to their purpose-driven business principles.

Measurement also enables Liverpool to track its progress – particularly on where their money is going. The council currently spends £449m across its supply chain and its analysis reveals that 51% is spent directly within Liverpool City and Liverpool City Region – directly supporting the city’s priorities.

Many of our potential social sector suppliers receive grants from us. Can we still contract with them?

Yes

This is a very common question, based on the fear of contracts that trip over rules about State Aid, rules which most normal people find breathtakingly hard to get their heads around. But it’s based on a misunderstanding. The important thing to remember about grants and contracts is that they are both governed by different rules and regulated in different ways. They are separate and distinct from one another.

If you are letting a contract, then that’s what it is – a contract. The only thing you need to worry about is following the Public Procurement rules that exist to prevent the unfair, anti-competitive issuing of public sector contracts. State Aid is not relevant as it relates to grants – which prevent unfair, anti-competitive public sector subsidy.

State Aid, if it was an issue, would have come into play when the grant was given in the first place – and anyone issuing grants should be following those separate rules that relate to State Aid. If those rules were followed, there is no State Aid or prohibited State Aid.

So if someone were to suggest that a grant gave a ‘cost advantage’ to a supplier – but that grant had already been assessed properly for State Aid as part of the grant-giving process, then any perceived advantage is immaterial. If it turns out retrospectively that a grant has given a massive cost advantage with obvious linkage to a contract, then the issue here is not with the letting of the contract. It is with how the grants were assessed for State Aid at that stage.

Put simply, if your colleagues responsible for grants³² are on their game, the issue never arises.

32

One interesting point about grants comes from a change in direction in how many grants are given. As the drive for accountability in public funding has grown, more and more things that were once ‘true grants’ given under Trust Law are now actually contracts – containing contractually binding terms, enforceable deliverables and the suchlike, governed under both Contract Law and Public Procurement Regulations. So they are not actually grants at all. They’re just called ‘grants’ from custom and practice and to prevent smaller voluntary sector organisations from panicking and freaking out. So if they are contracts, properly let under the Regulations, State Aid can never apply ... though, conversely, Commissioners need to ensure that if what they label ‘grants’ are in effect contracts, that they comply with the procurement regulations to the extent relevant.

I've been approached by a supplier with a brilliant new proposal. Can I just commission them?

Not exactly, but...

Even if a proactive proposal from a supplier is brilliant and obviously unique, you can't just pop over to finance and raise the purchase order. You've got a number of options here under the Regulations, but there are processes to be followed and you'll need to consider your procurement with care to make sure your approach is appropriate.

The Regulations³³ permit you to use a negotiated procedure to let a contract if you think there can be no other suppliers for either technical reasons,³⁴ or because the proposal relates to proprietary intellectual property. However, you will need to be absolutely certain that 'no reasonable alternative or substitute exists and [that] the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement'.

33

See Regulation 32 (2) (b).

34

Such as capability, availability.

If you're absolutely certain

If you have clear reasons to believe that no other potential supplier exists, you can publish a Voluntary Ex Ante Notice that states your intent to let a contract and then observe a standstill period. This informs the market of your intent to award without going down the OJEU route. The notice itself will require a solid justification of your decision, so you'll need to be sure. If no one challenges your notice during the standstill period, you can move onto a negotiated procedure.

For an example of a Commissioner using a Voluntary Ex Ante Notice in this way please see page 45.

If you are pretty certain, but not 100%

If you think there are no likely alternative suppliers, but are not comfortable making a bold claim about that, you can issue a PIN, seeking interest from the market. If no-one in the market bites other than the original supplier, a different part of the same regulation applies³⁵ – you are permitted to enter into negotiated procedure. Again, you will have to be sure that the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.

35

See Regulation 32 (2) (a).

If there is no real way of knowing

If the proposal you've heard is great, but probably not beyond the wit of other suppliers in the market – or if there really is no way of knowing what's out there, then we are into the territory of a regular procurement approach.

You would then consider the proactive proposal made by the supplier to be pre-procurement consultation information,³⁶ giving you an idea of the service you would like to procure. You'll need to ensure that you consult and that any relevant information is shared with all players to create fair competition – balanced with the need to respect the intellectual property of the supplier. This could potentially be achieved by using an open specification, whose parameters are set by the options your consultation has uncovered. The procurement process may then provide the scope to refine what is being procured with the bidders.

36

And remember, Regulation 40 explicitly permits you to do this before starting a procurement procedure.

The art of the possible

Brilliant proactive proposals often need work before they can be useful – they may well be somewhere between a great idea and a finished service specification. It is here that the new Innovation Partnership procedure could come into its own. It would allow an innovative supplier to assist with the design of a service and then openly deliver the service under a single procurement.

I only really get savings if I team up with another authority/NHS Trust. Can we jointly commission a service?

Yes

It's a common issue. There's a saving to be had, but only if you team up with someone else. These kinds of economies can be ones of scale: the unit cost of something drops when more of it is bought – the logic behind many shared services approaches. They can also be based on removing structural barriers – for example, commissioning statutory special educational needs transport on the same contract as an NHS patient transport service so you can use the same vehicle all day, rather than commissioning two under-utilised fleets.³⁷

The Regulations explicitly permit you to do joint commissioning³⁸ – either together, or with one Commissioner managing the process for the others. You can even include elements that are just for one party, not the others. The challenge here, as we are finding again and again, is less a legal impediment and more a cultural one.

37

We are not aware of anyone that has actually done this, which is daft when you consider that both parties would likely cut their contract costs by about a third.

38

Regulation 38 (1): 'Two or more contracting authorities may agree to perform certain specific procurements jointly.'

Coming together: joint commissioning of a mental health and employment Social Impact Bond

The positive link between getting a job and individual health and wellbeing is well understood – and it is particularly true for those people with mental health issues. Yet currently, only 37% of people with a mental health issue are in work, dropping to 7% for people with severe mental health issues. This is not only a tragic waste of human potential, it is also a serious drain on the taxpayer.

There are interventions that really work to support people with mental health issues into employment, improving lives and saving money. One of the leading methods is Individual Placement and Support (IPS). Service users are referred directly by their clinician, with eligibility restricted only by the user's desire to work, rather than their health condition. Specialists support users to conduct a rapid job search, tailored to their individual aspirations and skills. Once in work, IPS specialists continue to support both employee and employer as appropriate for an indefinite period.

The challenge with a model like IPS is funding – it is one of those areas where the people who could commission the service are in a different part of Government to where the savings are made. One answer is joint commissioning and a Social Impact Bond.

Haringey Council and CCG, Tower Hamlets CCG and Staffordshire County Council and CCGs have come together with Mental Health and Employment Partnership (MHEP), a new social purpose company to co-commission an IPS employment service. The local commissioner pays for about 70% of the service cost in their area, with MHEP paying the rest – drawn from a pool of socially motivated investment to finance service provision up front. The social investment is then repaid on a payment-by-results basis through Cabinet Office and Big Lottery Fund funding once sustainable job outcomes are achieved.

The Social Impact Bond will work with around 2500 people who are unemployed and in contact with secondary mental health services. It is expected that the project will lead to 500–850 job outcomes over three years. This is just the beginning. It is estimated that there are up to 24,000 people currently out of work with severe mental illness who might benefit from this type of support, enabling them to accelerate their recovery and lead more fulfilling lives.

There are lots of different ways of approaching a particular social problem. Can I commission for that?

Yes

Many Commissioners are seeking to address complex social issues where there is no single right answer. This is why all the best commissioning focusses on achieving outcomes, not inputs and outputs. The Regulations recognise this, providing a veritable armoury of increasingly flexible methods and approaches.

Variation, variation, variation

If you know that there is likely to be more than one way of addressing a particular need, the Regulations provide explicit permission to accept variant bids.³⁹ There are, however, some rules to follow:

- you have to say whether they are allowed or required⁴⁰ (or even if a compliant bid is necessary⁴¹) in the procurement documents
- you have to specify any specific requirements for variants including their presentation⁴² – which makes sense as you'll need to be able to compare these variants with compliant bids using your published award criteria (also insisted upon in regulation⁴³).

It's worth stressing that you'll need to work out the role of variants in advance – because unless you've given permission, you can't consider them, no matter how interesting.

Negotiation, negotiation, negotiation

If managing a range of different potential approaches is likely to be at the heart of your commissioning, then established, familiar processes such as competitive negotiation or dialogue⁴⁴ could be very effective. As discussed previously, if the Light Touch Regime applies, you can adapt these processes to make them more proportionate and easier to use.

39

Regulation 45 (1): 'Contracting authorities may authorise or require tenderers to submit variants.'

40

Regulation 45 (2).

41

Regulation 45 (4).

42

Regulation 45 (4).

43

Regulation 45 (5).

44

Governed by Regulations 29 and 30.

Innovation, innovation, innovation

The most exciting opportunity for commissioning in a complex environment is the new Innovation Partnership. Sometimes, the solution just doesn't exist yet, or doesn't exist yet in an appropriate form, leaving the specification in need of supplier input – and previously uncommissionable as a consequence. Innovation Partnerships change all that, providing a process that will lead to previously unavailable products, services or works.⁴⁵

As you cannot know the final specification before you begin, what you are procuring is, in essence, the process that leads to the specification and its subsequent delivery – and the partner or partners you'll want to go on that journey with. The Regulations require you to set out a clear structure of phases as steps in the research and innovation process.⁴⁶ The Regulations are also clear that eventual delivery can be included – this is helpful because it permits a blurred line between design and delivery, the 'learning by doing' that is at the heart of real world innovation.

45

The full process is governed by Regulation 31.

46

See Regulation 31 (10).

The art of the possible

Taken together, these three methods provide Commissioners with a wide degree of latitude to address complex social issues through unlocking the innovation of their supply chain – particularly when combined with the freedoms to consult with the market pre-tender. The burden of finding the right answer is now shared.

Innovation Partnership – the BWB perspective: great works in progress

Innovation Partnerships have been available to Commissioners since 2015, but have been slow to find uptake – through caution, through fear of novelty or through simple inertia.

Yet this is changing. We are now seeing a diverse range of projects underway where it looks like an Innovation Partnership is going to be the right answer to deliver genuine public benefit.

At BWB, we are very excited about the opportunities that the Innovation Partnership provides for our partners. Time and again, we have seen that long familiar situation where a public authority wishes to work with a supplier to develop new ways of delivering of public services, but then has to procure separately for service provision – building an active disincentive for innovation.

In the past, this has meant that projects just didn't happen, were squeezed into a procurement procedure that was not designed for the purpose, or required complex formal joint venture/co-investment structures. Now there is a process designed with this exact situation in mind.

As we've worked on the planning for a number of these forthcoming projects, there have been some important elements to focus on with Commissioners:

- effective pre-procurement consultation and engagement are vital parts of the process, allowing Commissioners to create the conditions for success
- significant care needs to be taken with suppliers' wishes to protect their intellectual property, particularly when moving from the pre-procurement phase to formal procurement
- the provision of all information relevant to the procurement process on an equal basis to all bidders requires active management
- most importantly, we are really starting to see substantial public benefit value in being able to procure design and subsequent service delivery through one process.

It's still too early to say much about the most advanced project we're currently involved in. What we can say is that it involves the creation of a new service to be delivered across a number of public authorities who have come together to commission under a collaboration arrangement. The Innovation Partnership will cover the service design phase and the subsequent delivery of the service, which will be delivered through a framework. Encouragingly, lawyers acting on behalf of the public authorities have recognised that the Innovation Partnership is the appropriate procedure in this case. So watch this space...

The Innovation Partnership method looks useful, how innovative do things really need to be to use it?

Don't panic

We believe that the Innovation Partnership method is useful. The term itself can unintentionally mislead. It brings to mind science labs full of bright young things with difficult hair, all writing the code for self-driving cars – rather than a way of rethinking waste collection in Stoke.

Nothing could be further from the truth. Innovation Partnerships are simply about creating innovative products, service or works that aren't currently available to you in the market.

The formal definition of innovation here is helpfully and appropriately broad⁴⁷ – anything from changes to business processes to new construction methods – even new marketing methods get a look in. The definition of innovation is even more helpful for the day-to-day work of many Commissioners as it specifically includes 'helping to solve societal challenges'. So don't panic, Innovation Partnerships are there to be used.

47

According to the Regulations (definitions section), innovation 'means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations, including with the purpose of helping to solve societal challenges or to support the Europe 2012 strategy for smart, sustainable and inclusive growth'.

I've heard that an Innovation Partnership can only be for three years – not long enough for me to address a big issue. What can I do?

It's not true

As we speak to Commissioners about Innovation Partnerships, we keep hearing that they can only be for a maximum of three years. This is simply not the case. It's a canard. A tentacled rumour. An urban legend.⁴⁸

The Regulations on Innovation Partnerships give no specific timeframes – and nor does Cabinet Office guidance. What the Regulations do say is that Innovation Partnerships (and the individual phases within them) should be as long as they need to be. Long enough to deliver on their goals – and no longer.⁴⁹

Things to remember

There are some things to think about when it comes to timeframes and Innovation Partnerships. If they include elements from other parts of the regulatory framework – any time limits in those would apply. So if an Innovation Partnership was also a Reserved Contract, the three year limit would apply;⁵⁰ if an Innovation Partnership used a framework agreement for strands of work, the limitation of four years (with some flexibility) would apply.⁵¹ However, these are time limits that you as Commissioner would be introducing to the process yourself, voluntarily, not ones imposed by the Innovation Partnership approach.

48

Procurement has urban legends now ... who knew?

49

Or more fully, Regulation 31 (25): 'The contracting authority shall ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market.'

50

As set by Regulation 77.

51

As set by Regulation 33.

I like the idea of competitive dialogue, but the formal process is long and clumsy – any way around that?

Probably

Competitive dialogue is great for when you want to be able to assess a range of different potential approaches to your commissioning question. However, the process, enshrined as it is in regulation, can be burdensome – and not just for you, for your supply chain also. Fortunately, there are indeed a few ways around this in certain circumstances – helping you secure the benefits without all of the grind.

Thinking about ways to make dialogue less burdensome is also a reasonable thing to do. 'Proportionality' is one of the general Treaty Principles that underlie public procurement, so seeking out the flexibility within the process is expressly permitted.

Regime? Change.

As we have already seen on page 9, the Light Touch Regime⁵² – where it applies – gives you a great deal of flexibility to tailor a dialogue process that is going to meet your needs. In fact, as long as you ensure both non-discrimination and transparency,⁵³ you can cherry pick the bits that you like to create a bespoke dialogue-based process.

Not a heavy hand

There are also ways to reduce the burden outside of Light Touch Regime. It is still possible to structure a procurement so that the dialogue is limited to certain elements of the tender only, rather than applying the whole thing. In this case, the Commissioner specifies that certain aspects of the specification and/or contract are not up for discussion, the bidders have to confirm that they accept these elements. Other elements may be discussed with bidders as per a standard competitive dialogue, allowing the Commissioner to select the best value bid for their overall purpose.

52

Set out in Regulation 76.

53

And as ever, you follow other applicable Regulations, the Treaty Principles and relevant law (such as respecting supplier intellectual property rights).

I want to commission a partner, not just a supplier. Can I commission for shared values?

Yes

Imagine a world where it was natural to solve problems with your suppliers, rather than deal with problems caused by them. A world where relationships were governed by trust rather than the protocols of contract management. This is all possible and it pulls together some of the themes we have been looking at. There are a number of ways you can do this; some relate to the Regulations, some relate to your commissioning practice.

Engage early, engage often

The first step always involves early engagement with the market before any commissioning takes place. This allows you to understand what is possible.⁵⁴ That can inform the specification to be adopted, the procurement process to be used, the evaluation criteria to be applied and the contractual terms to be agreed. It will also help you work out what incentives might align your interests with those of your supply chain. In our experience, shared incentives are a good place to start in building shared values.

Be clear what success looks like

There is nothing in the Regulations or Treaty Principles that prevent you from articulating the shared values that you want. An effective way to do this is to include social value in your specification and social factors in your setting of MEAT criteria.⁵⁵ If these factors are actively linked to your authority's vision, any supplier that can address these is likely to be on your side. This is one of the noted advantages of commissioning from the social sector.

54

As governed by Regulation 40.

55

As per Regulations 67 (2), (3) (a).

Shared values, shared data

One method of binding Commissioner and supplier together is not a procurement regulation question – but a contractual one – the use of open data and open book. This means that the Commissioner sees the same information as the supplier at the same time, enabling joint problem solving, reducing management reporting and building trust.

The clue is in the name

The Regulations recognise the power of working in partnership to tackle the challenges Commissioners face. The new Innovation Partnership is a specific process for procuring a 'partner' for commissioning combined design and delivery. However, this arguably makes the need to seek shared values even more important. Thinking about how to procure for those is likely to be a major success factor in Innovation Partnerships long after the dust of procurement has settled.

Incentives for partnership: The States of Jersey bus contract

When the States of Jersey⁵⁶ commissioned a new public transport network in 2013, they were not looking to procure a supplier, but rather a partner that could work with them to grow ridership, reduce subsidy and create a bus network that the island could be proud of for both resident and visitor. Each step they took in the procurement process was with creating such a partnership in mind.

The commissioning team at the States used extensive pre-tender consultation with a range of stakeholders and market participants. This was not only to gain an insight into what might be possible, but also to ‘set out their stall’ – signalling to the market the sort of working relationship that they were looking for.

Having selected a range of potential bidders via a PQQ, the tendering process and eventual contract applied a huge array of measures that would contribute to a successful partnership. These included a profit-share scheme where operator profits over a certain point are shared with the States for reinvestment in transport infrastructure. This then leads to greater operator profits, leading to a greater profit share for the States and round it goes – a virtuous circle in which operator and commissioner are incentivised to want the same things.

56

Whilst Jersey does not fall under the Regulations, each step taken by the States would be permissible in England and Wales under the Light Touch Regime.

They also included milestone contract extensions based on achieving performance – incentivising the operator to maintain their focus throughout the life of the contract; a clearly profiled risk-share between the parties; transparent accounts and budgets for both operator and commissioner; empowering the operator to design the network and timetables as circumstances change and the use of States facilities and equipment – each element binding operator and commissioner in closer partnership.

To ensure both partners are on the same page, the contract specifies open data as well as open book. The States have a login to the operator’s ticket machine and Real Time Bus Information software, seeing the same data as the operator in real time. This means there are not two parties demanding reports from one another, but a team working on the same data to improve services and increase revenue.

The results have been impressive – an increase in ridership of 29% since 2013, growing returns both to the operator (HCT Group⁵⁷), and the States and public pride in their bus service.

57

HCT Group have published a full account of the procurement process used at www.hctgroup.org/downloads

Can I set financial thresholds and manage risk without unintentionally barring large sections of my potential supply chain?

Yes

The financial thresholds and financial tests applied in procurement are arguably some of the most stable features of the tender process. In most commissioning authorities, these features roll on, year after year with the purpose of managing financial risk. However, this tells you that they are amongst the least actively managed dimensions of the whole commissioning process.

Outside of the commissioning world, commentary on this issue is moving from concern to alarm. Cabinet Office guidance urges change on arbitrary barriers to participation,⁵⁸ think tanks are publishing reports showing the damage that high, arbitrary thresholds may have on participation in the Work and Health Programme,⁵⁹ questions are being asked in the Commons about the impact of thoughtlessly applied gearing ratios on organisations who have received social investment.⁶⁰ For the innovative Commissioner, it’s time to look at this issue anew.

58

Procurement Policy Note 01/12: *Use of Pre-qualification Questionnaires*, Cabinet Office.

59

Hitchcock, A et al (2016) *The Work and Health Programme: Levelling the Playing Field*, Reform.

60

See Hansard: <https://hansard.parliament.uk/commons/2016-06-15/debates/16061547000002/SocialInvestment>

The balancing act

The Regulations specifically permit (rather than insist on) the use of tests for economic and financial standing⁶¹ as a risk management measure – ‘ensuring that economic operators possess the necessary economic and financial capacity to perform the contract’. However, the Regulations also show concern with these being over-rigorous, setting a maximum proportion of turnover that will apply in all but special circumstances.⁶²

The concern with going too far comes through very strongly in Cabinet Office guidance, which explicitly discusses keeping turnover thresholds at reasonable levels with the direct objective of expanding the supplier base: ‘Contracting Authorities should not impose arbitrary minimum requirements which may have the unintended effect of barring new business from bidding’ and ‘the supplier evaluation process should not rule out a potential provider unless there is clear evidence that the supplier’s financial position places public money or services at unacceptable risk.’⁶³

61

Regulation 58 (7).

62

Regulation 58 (9).

63

Procurement Policy Note 01/12: *Use of Pre-qualification Questionnaires*, Cabinet Office.

Clearly, there is a balancing act to perform here. On the one hand, there is the need to appropriately protect the interests of the commissioning authority. On the other, there is danger of creating arbitrary barriers to competition out of all proportion to the actual risks facing the authority through sheer custom and practice.

The art of the possible

The best way to address this issue is to take a proactive approach, based on a realistic assessment of risk. The level of financial protection needed to provide the Commissioner with reassurance should take into account:

- the specifics of what is being commissioned
- the sorts of losses that might arise
- the protections that may exist (eg through insurance)
- the impact on the Commissioner of potentially restricting themselves to a limited number of bidders that have similar characteristics (both in this procurement and the future)
- whether suppliers will just pass back the costs of unnecessary demands – performance bonds, third-party guarantees and prescriptive insurance requirements onto the Commissioner.

The crucial point about thresholds is that they should be based on the Treaty Principle of proportionality. The balance is between reasonable precautions that seek reassurance about the viability/capacity of suppliers and the risk of imposing inappropriate and unfair barriers to smaller, particularly social sector, best value suppliers. A threshold should be set at the point which some kind of protection becomes necessary to ensure that the Commissioner can deliver on their purpose effectively – and absolutely no higher.

When it doesn't work: guarantees and Transforming Rehabilitation

Transforming Rehabilitation (TR) is the Ministry of Justice's (MoJ) programme to outsource probation services for low- and medium-risk offenders in England and Wales with annual contract value of £490m.

When preferred bidders were announced, 20 of the 21 lots name charities, social enterprises or mutual organisations in the delivering consortium. On the face of it, this looked like good news for the social sector. Furthermore, around 75% of the subcontracts were for voluntary sector or mutual organisations and some individual organisations, such as 3SC, look to have done very well.

However, if you delve a bit deeper, the picture becomes markedly less rosy. Only one out of the 21 lots was won by a socially led consortium. This is the ARCC consortium in Durham Tees, which is a relatively small lot accounting for less than 3% of the total TR programme value.

There was a deep, structural issue with TR that was challenging, if not impossible, for charities and social enterprises to overcome – and that was the bias towards large organisational size. Most problematic was the MoJ's insistence on a large (100% of annual contract value) and broadly defined Parent Company Guarantee.

Companies with large balance sheets and who directly oversee delivery can, to an extent, stomach this. But bidders with small balance sheets had to either 'bet the ranch' or look to a third-party guarantor. It goes without saying that third parties cannot be parent companies by definition, and they lack the information, control or expertise over service delivery that a parent company has. The insurance market does not currently exist for products of this type. As a consequence, these guarantees effectively barred the social sector from leading a consortia.

It's telling that all but one prime contractor has at least one multinational member with assets in the hundreds of millions, if not billions. There are practically no organisations in the social sector that have assets anywhere near the size of the winning TR bidders, unless they have evolved out of the social housing sector, or are a grant-making endowment charity. Sure enough, many extremely credible social sector service delivery organisations, such as CGL, were competing in the late stages of TR bidding, and were conspicuous by their absence as prime contractors.

It remains to be seen yet whether TR is successful, or not. But surely plurality and diversity in UK public service markets means greater scope for innovation and ultimately better outcomes for society.

Can I stipulate that there will be a profit share/share of savings earned element in the specification?

Yes

Motivated suppliers can be more effective suppliers. There are many scenarios where your supply chain can find ways of saving money or increasing revenue (depending on the type of contract) but won't if there is nothing in it for them. Profit shares and savings shares that divide up surpluses can create incentives to generate real change – and can also help you to place a value on wider benefits such as social value.

At one level, this isn't really a matter for procurement as the Regulations are quiet on this. It's entirely a matter for your specification. However, there is some helpful pre-work you can do on this to make this type of contract a practical possibility.

Build it in from the start

The first step is to consider this during a proper pre-procurement consultation. Is it a potential option? How could it work in practice to motivate for change? What is the best balance of risk and reward? This could then lead to the ITT specification allowing for it, or even requesting it.

Care is needed to ensure that any such specification is drafted in an accommodating and specific way. It is important to be clear with all bidders what is intended and how it will be evaluated. Otherwise, it's going to be hard to differentiate fairly between different ways of implementing this type of arrangement – other bidders could reasonably challenge an award which gave credit for a part of an offer that was not invited and which they were silent on as a result.

It is also likely to mean detailed contractual provisions on adopting an open book approach and defining what are profits or savings. How, for example, might you evaluate a bid from a social enterprise that will generate smaller surpluses, but can evidence this is because it is committing surpluses from the contract to supporting other authority priorities?

The art of the possible

These kinds of arrangement are practical and can be very beneficial. So the best practice approach is: that Commissioners should consult; suppliers should indicate possibilities; Commissioners should draft accommodating specifications; and suppliers should present their propositions within the scope of such specifications.

Ways to Wellness: enriching peoples' lives and sharing the savings

Ways to Wellness is an unprecedented commissioning of large-scale social prescribing. It aims to improve the health and wellbeing of people in the west of Newcastle who have long-term health conditions.

The evidence base for social prescribing is clear – it can help people to better self-manage their long term health conditions, improve their quality of life and dramatically reduce both GP visits and secondary healthcare costs. The challenge is that the financial benefits take some time to accrue and can be difficult to measure. The stakeholders behind Ways to Wellness⁶⁴ realised that this was natural territory for a Social Impact Bond (SIB), combined with a payment-by-outcomes process.

As with many SIBs, there are quite a few moving parts.⁶⁵ Newcastle West CCG (now Newcastle Gateshead CCG) is the Commissioning Authority. They have received funding from both the Big Lottery Better Outcomes Fund and the Cabinet Office Social Outcomes Fund to pump-prime outcomes payments. They have commissioned Ways to Wellness as the social prime contractor – importantly, the approach was considered sufficiently unique to use a Voluntary Ex Ante Notice rather than a formal procurement exercise. Ways to Wellness has secured further social investment from Bridges Ventures to get the project started.

To deliver the services themselves, Ways to Wellness has commissioned four social sector delivery partners using a blend of up-front payment and payment by results.

There is further innovation in how payments are made, which uses two mechanisms to ensure that savings are measured and shared amongst the partners. The first is for improvements in wellbeing resulting from the service. Each patient's wellbeing is assessed before and after interventions across eight dimensions – the Wellbeing Star – with payments made for those patients making progress.

The second method is more long term. NHS data for the cohort in the project area is benchmarked against NHS data with a comparable cohort in an area without the service. This allows the CCG to explicitly identify savings generated by improvement in the self-management of long-term conditions on secondary care costs. These savings are shared in an agreed proportion between the CCG, Ways to Wellness, the social investor and the service providers. This means that all parties share an incentive to make the service work, and that there are resources freed to continue funding the programme sustainably.

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Voluntary Organisations' Network North East, supported by Newcastle West CCG and ACEVO (Charity Leaders Network).

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A detailed description can be found at www.biglotteryfund.org.uk/global-content/programmes/england/commissioning-better-outcomes-and-social-outcomes-fund/cboevaluation

This all sounds great, but we have no money so what are we supposed to do?

Go for it!

We strongly believe that it is vital for Commissioners to use the fullest range of options in pursuit of their objectives – and that embedding ideas of social value and social impact can help in meeting those. The reasons for that belief fall into two schools – one philosophical, the other deeply pragmatic.

At one level, it goes back to basics. The purpose of commissioning is to secure the best possible service in the public interest. Cost is one fundamental factor. Need is another. The Regulations provide a procedure for identifying the right answers and are much more facilitating and flexible than is often believed. They provide principles to be applied and interpreted, while complying with the overarching obligations to treat all bidders equally and fairly. They are effective tools to aid you in doing the best for your communities.

Social value and social impact can act as an accelerant to the creation of public value. Embracing these concepts – along with impact measurement for quantifying what has been achieved – can introduce factors beyond the simple price of the service and basic quality considerations. They lead to beneficial longer term effects, prized outcomes and an opportunity to create wider economic value. We support the consideration of these factors not simply because it is just, but because it works.

At a more down-to-earth level, with real pressure on budgets, you can't afford not to deploy the full range of tools at your disposal. It's the best way of re-thinking services from the ground up, designing out cost and improving quality.

If you don't do it this year, you will have to next, or the year after. Those who get their heads around how to commission strategically and use procurement as a tool to deliver meaningful change are going to have the edge. Doing what has always been done because that's how it has always been done is an approach parked at the bar of the Last Chance Saloon.

Whether you look at the issues through the lens of better outcomes for communities, or through the lens of day-to-day organisational realpolitik, the tools are all there for Commissioners to create change – the art of the possible.

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The Public Contracts Regulations 2015 provide Commissioners with a great deal of flexibility to achieve the outcomes they seek for their communities. The purpose of this publication is to highlight some of those flexibilities, how to unlock them and some of the practical things that can be achieved within the scope of the law – the art of the possible in public procurement.

About Bates Wells Braithwaite

BWB is a professional services consultancy, combining a top legal practice with impact, business and compliance advisory services. The firm works with businesses, social enterprises, charities and public interest organisations, large and small, established and new, across a wide range of sectors.

BWB has a particular specialisation in public service design and delivery by purpose-driven, innovative business, incorporating social enterprise, social investment, social value, social impact measurement and organisations transferring out of the public sector.

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About HCT Group

HCT Group is a social enterprise in the transport industry, safely providing over 20 million passenger trips on our buses every year. We deliver a range of transport services – from London red buses to social services transport, from school transport to whole transport networks, from community transport to education and training. We reinvest the profits from our commercial work into further transport services or projects in the communities we serve and always aim to be at the forefront of social innovation.

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About E3M

E3M promotes and supports innovation in the delivery of public services. It facilitates two specialist knowledge communities: the E3M Social Enterprise Leaders Business Club and the E3M Bold Commissioners Club. E3M shares knowledge and learning about the key issues for success in developing supplier led public benefit models for public services and new partnership approaches to public service design and delivery. E3M is catalyst for change, in particular developing thought leadership on key issues for social enterprise growth where there are gaps in current thinking.

www.e3m.org.uk