

# 11KBW

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## Evaluating social value

Nigel Giffin QC

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# Social value: from patchwork of provisions to general obligation?

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## The status quo (in England):

- **Public Services (Social Value) Act 2012**
- **Public sector equality duty (Equality Act 2010 section 149)**
- **Modern Slavery Act 2015 section 54**
- **Climate Change Act 2008**
- **Government policy – PPN 06/20**

# Brave new dawn?

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- **National Procurement Policy Statement (NPPS) published June 2021; explained in PPN 05/21; against background of December 2020 *Transforming Public Procurement* Green Paper**
- **Currently, “information and guidance” – but intention to legislate – authorities to “have regard” to NPPS in undertaking procurements**
- **Authorities supposed now to be considering their policies, processes and capacity - staged requirement for publication of pipelines and benchmarking of procurement capability – guidance starting to appear e.g. November 2021 LGA “Sustainable Procurement” toolkit**

# NPPS and other obligations

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- **Says that no conflict intended with existing procurement obligations**
- **NPPS will be statutory guidance – cannot itself change legislation (although forthcoming Bill can of course do so)**
- **Green Paper foreword: “We will respect our commitments to not discriminate against parties in [the GPA] and other bilateral international agreements on public procurement.” – see also PPN 02/21**

# Scope of the NPPS

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- **Applies to “contracting authorities” within Small Business Enterprise and Employment Act 2015**
- **“Exercise of functions relating to procurement” – includes preparation for entering contracts, and contract management**
- **Intended for current Parliament (but no “expiry date”); Minister for Cabinet Office can review**

# Content of the NPPS

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**Authorities to “have regard” to specified “national priorities” under three headings:**

- **Social value**
- **Commercial and procurement delivery – policies and processes – “pipeline” publication (at least 18 months; “ideally” 3-5 years); independent project review; delivery model assessments and “should cost” estimation**
- **Skills and capability for procurement – building and benchmarking capability**

# Social value and the NPPS

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- **“Public procurement should be leveraged to support priority national and local outcomes for the public benefit”**
- **Still aimed at value for money, but broad view to be taken of what VfM means**
- **Cross-references to HMT Green Book, PPN 06/20**
- **Three national “outcomes” to be considered, alongside “any additional local priorities”, where relevant and proportionate to do so – “a balance with delivery of the core purpose of the contract”**

# The 3 national outcomes – (1)

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- **Creating new businesses, jobs and skills**
  - **Helping new/small businesses to grow**
  - **Employment opportunities for disadvantaged people and areas (cf. DWP’s “Life Chances through Procurement” contractor guidance)**
  - **Training, especially for shortage skills and high growth sectors**

# The 3 national outcomes – (2)

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- **Tackling climate change and reducing waste**
  - **Net zero emissions by 2050**
  - **Reduced waste**
  - **Environmental benefits from contract delivery**

# The 3 national outcomes – (3)

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- **Improving supplier diversity, innovation and resilience**
  - **Supply chain diversity: start-ups; SMEs; voluntary, community and social enterprise organisations**
  - **Encourage innovation**
  - **“Scalable and future-proofed new methods”**

# But . . .

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- **“. . . do not `gold-plate' contracts with additional requirements which could be met more easily and for better value outside of the contract compliance process . . .”**
- **Do not impose obligations where “legislation has already determined that such provisions do not apply”, e.g. not to impose PSED equivalent on private sector**

# Legal nature of the “have regard” duty

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- **Familiar public law concept – e.g. *R (Khatun) v Newham LBC* [2005] QB 37; *R (London Oratory) v Schools Adjudicator* [2015] ELR 335 - should consider NPPS specifically when designing procurements**
- **“Have regard to” does not mean “comply with” – but departure must be recognised, and reasoned**
- **Unlikely in this context to be any need to meet a “good” or “cogent” threshold beyond ordinary rationality – though mere disagreement with NPPS may not suffice – wide margin of discretion (cf. *Greenwich Community Law Centre* [2011] EWHC 3463 (Admin))**

# Enforcing the duty

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- **Depends on precise terms of legislation, but presumably a matter for judicial review**
- **Might Ministers be given powers of direction?**
- **Green Paper proposes new oversight unit to replace Public Procurement Review Service, with powers to review, monitor and “issue improvement notices with recommendations to drive up standards”**

# Wider (and unintended?) consequences

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- **Might legislation on NPPS create the necessary “statutory underpinning” to allow public law requirements, and judicial review, to apply in procurement more generally?**
- **Present restrictive approach e.g. *Menai Collect Ltd* [2006] EWHC 724 (Admin); *Newlyn plc v Waltham Forest LBC* [2016] EWHC 771 (TCC)**
- **But cf. “underpinning” in *R (A) v B Council* [2007] LGR 813**

# Potential JR issues

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- **Standing likely to be wider than in *R (Good Law Project) v SoS for Health* [2021] PTSR 1251 – third party challenges even to contract management?**
- **Alternative remedies? – the oversight unit?**
- **Time limits?**
  - **“Relates to a decision governed by the PCR” (CPR r.54.5(6) – i.e. 30 days from knowledge)? or “promptly and in any event within 3 months”?**
  - **Time likely to run from early in process: cf. *R (Nash) v Barnet LBC* [2013] PTSR 1457**

# Having regard to social value: techniques and (legal) barriers

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- **Stages at which social value might be relevant (within context of proposed new “competitive flexible procedure”):**
  - **Procurement design**
  - **Bidder selection**
  - **Award criteria**
  - **Specifications and performance conditions**
  - **Contract management**
- **Proper planning of procurements more important than ever**

# Possible legal problems – (1) “level playing field” issues

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- **Obligations of:**
  - **Transparency**
  - **Equality and non-discrimination (PCR reg 18(1) - also required by GPA)**
  - **PCR reg 18(3) – procurement not to be designed “with the intention of unduly favouring or disadvantaging certain economic operators”**

# Potential “level playing field” questions

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- **Can an authority consciously set out to favour e.g. SMEs?**
- **Can e.g. “local employment” obligations be reconciled with non-discrimination requirements?**
- **May not be insuperable obstacles, but authorities need to tread carefully**

# Possible legal problems – (2) other PCR issues

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- **Green Paper proposes “most advantageous tender” test for contract award – not intended to be legally different from PCR r 67(1) MEAT**
- **Sufficient connection with subject-matter of contract – PCR rr 67(2), (5)**
- **Objectivity, clarity and RWIND test – PCR r 67(6)**
- **Verification – PCR rr 56, 67(7)(b), 67(8); cf. *Willmott Dixon v Hammersmith & Fulham LBC* [2014] EWHC 3191 (TCC)**

# Possible legal problems – (3) other domestic legislation

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- **Subsidy control**
- **Local Government Act 1999 section 3**
- **Local Government Act 1988 section 17**
- **Best consideration and similar obligations on land disposals – Local Government Act 1972 s 123 (*London Jewish Girls High Ltd* [2013] PTSR 1357); cf. more flexible TCPA 1990 s 233**

# What might a bad attempt to factor in social value look like?

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- **10% for social value “chucked in” to award criteria without clarity as to what authority wants to achieve and why**
- **Evaluation criteria which reward “box ticking” and process over substantive outcomes**
- **Vague or unverifiable criteria**

# What might a good attempt to factor in social value look like?

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- **Authority considers at outset what this contract can and should sensibly be used to achieve, and has regard to NPPS (also e.g. to PPN 09/16 and “balanced scorecard”)**
- **Authority decides what it will require through contract conditions, and what is “added value” to be assessed through award criteria**
- **Criteria are clear, verifiable and weighted appropriately**
- **Contract managed to ensure contractor delivery**