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Best Value Statutory Guidance – Department of Communities and Local Government

1. The Department of Communities and Local Government, after an expedited period of consultation, has published guidance on 2 September 2011 for local authorities making decisions regarding the funding of charities, voluntary organisations, social enterprises and small business.
2. The Best Value Statutory Guidance (the “Guidance”) has statutory force and must therefore be taken into account in the exercise of funding decisions. It is issued under section 3(4) Local Government Act 1999 which states that, in deciding how to fulfil its Best Value duty (section 3(1) LGA 1999), local authorities have to take into account guidance issued by the Secretary of State which may cover the form, content and timing of consultations.
3. The Guidance applies directly to “Best Value” authorities (Best Value authorities are defined in section 1 LGA 1999 and include local authorities, National Park authorities, Broads Authority, police and fire authorities, Waste Disposal Authority). The Ministerial Foreword, from Eric Pickles MP, states that non Best Value agencies of central government departments are also signed up to the “fair standards” set out in the Guidance.
4. The Guidance reflects many of the requirements of the Compact. Indeed, the Ministerial Foreword to the Guidance makes reference to the Government’s commitment to the Compact.
5. The Guidance can be downloaded from the Department of Communities and Local Government:

<http://www.communities.gov.uk/publications/localgovernment/bestvaluestatguidance>

Duty to consider Social Value

6. Section 3(1) LGA 1999 requires a local authority to have regard to a combination of economy (costs), efficiency (throughputs) and effectiveness (outcomes) when exercising the Best Value duty. Best Value decision-making takes into consideration a combination of these three factors and, social value can be a key consideration in reaching a decision. The Guidance reminds local authorities that “social value” should be considered when taking Best Value decisions.

7. In response to the consultation, although not defining social value, the Guidance states “*as a concept, social value is about seeking to maximise the additional benefit that can be created by procuring or commissioning goods and services, above and beyond the benefit of merely the goods and services themselves*”. As the Ministerial Foreword suggests, this “*plays to the long-term strengths of voluntary and community groups and small businesses*”.
8. Organisations seeking to avert a funding cut will want therefore to emphasise the “social value” that community engagement with service provision brings over and above just the goods and services themselves (ie: strengthening communities, providing local job opportunities etc.).

Consultation requirements

9. Next, the guidance addresses what is expected by way of consultation. Under section 3(2) LGA 1999, Best Value authorities are already under a duty to consult which will operate prior to making a funding decision. Most of what follows may also be a requirement in public law and where not complied with, an organisation should consult lawyers as quickly as possible (given the effective three month time limit on judicial review High Court proceedings!).
10. The Guidance states that a Best Value authority must consult local people on the funding decision, including council tax payers, users of the service under consideration and those who appear to the authority to have an interest “*in any area within which the authority carries out functions*”.
11. A Best Value authority should:
 - a. consult local voluntary and community organisations and small businesses;
 - b. consult at all stages of the commissioning cycle, including when deciding to decommission a service; and
 - c. be responsive to the needs of those organisations that will be affected by funding decisions.

The Fair Standards

12. The Best Value authority should comply with the so-called “Fair Standards”, that is, it should seek to avoid passing on disproportionate reductions in funding. The Guidance is clear that the reductions should reflect the reductions in funding the authorities are taking on themselves. In particular, Best Value authorities should:
 - a. give at least 3 months notice of an actual reduction to the organisation involved, and those affected, when reducing or ending funding;
 - b. actively engage the organisation and those affected as early as possible prior to making a decision that: effects the future of a service, will have consequential effects upon assets used to provide the service and will have a wider impact on the local community; and

- c. make provision for the local community, organisation and service users to put forward options on how to reshape the service or project. The authority should assist this by making available all appropriate information in line with the government's "transparency agenda".
13. The Guidance states that funding means both grant funding and funding received by way of fixed term contracts as well as "other support".

Comment

14. The Guidance will have statutory force so that if it is not taken into account and acted upon by a local authority, unless there is a good public interest reason not to, this will give grounds for challenge in judicial review (High Court proceedings). Much of what it provides is already the case under basic public law principles, but it will undoubtedly strengthen the arm of an organisation facing a cut where the local authority has not meaningfully consulted or engaged with them at all stages of the commissioning cycle (including decommissioning) and where the impact is disproportionate.
15. This will particularly be the case in relation to cuts which have equalities implications. As many readers will be aware, the most successful challenges to funding cuts in recent years have centred round the public authorities compliance with the equalities duties and in particular whether a proper equalities assessment was carried out. The Government response to the consultation made it clear it was not considered necessary to make further reference to the statutory duties of local authorities under the Equalities Act 2010 in the Guidance. Nevertheless, whilst an equalities based challenge is unlikely, on its own, in the long term to avoid the cuts and/or secure future funding, it could, together with other arguments, particularly in relation to the Compact, force a local authority to the negotiating table with the aim of mitigating the cuts. This can pressurise the local authority into reversing its decision or buy time which can sometimes assist in finding sources of alternative funding.
16. If properly followed, the Guidance should be a positive development. Of most interest is the exhortation that funders should 'actively engage' with the body facing the cut. A failure to do this, without good reason, will compromise the power of the local authority to proceed as it intends. Equally, there may be scope for taking a new line of public law challenge - that the cuts proposed are 'disproportionate' given the impact this will have on the service in question. This will, arguably, be an easier hurdle to cross than having to show that the decision taken was wholly unreasonable/irrational.
17. It will be important to scrutinise whether the local authority has properly considered the Guidance and recorded its reasons for departing from its provisions. If the Guidance has not been properly taken into account, this may well give grounds for judicial review.

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