

**Leisure and Culture Trusts and Progressive Public Sector Commissioning:
a Paper Commissioned by Community Leisure UK**

1. The Commissioning Environment for Leisure and Culture Trusts

- 1.1 In recent decades, the commissioning environment for public services, in the UK, has been distorted, undermined and in extreme cases rendered dysfunctional, by generalised misinterpretations and misapplications of the public law governing public procurement and public sector subsidy.
- 1.2 The proper determining factor in commissioning decisions is the public benefit, social, or public, value, derived from public expenditure on public services (*"Public Value"*).
- 1.3 Leisure and Culture Trusts are core, or "anchor", local and regional public benefit community institutions, broadly providing: leisure and culture facilities, education and training in sport, physical activity, cultural interest and promoting: health, well-being and social inclusion; and operating as hubs supporting and integrating local communities.
- 1.4 Leisure and Culture Trusts exist to and inherently provide Public Value, of a unique and essential kind (provided they promote their purposes efficiently).
- 1.5 Putting formal procedure to one side, it is manifest that the public benefit facilitating purposes of Public Authorities and the public benefit purposes of Leisure and Cultural Trusts are aligned.
- 1.6 Commissioning process should serve purpose and significant distortions have been caused by the processes of public procurement and state aid/subsidy control becoming detached from Public Value purpose and treated as if they are free-standing rules to be complied with, rather than purposeful rules to be applied to facilitate Public Value.
- 1.7 This has led to avoidance of risk becoming a dominant consideration in public procurement and subsidy control. Risk is perceived to be avoided by strict compliance with rules in following standard, clearly established processes. Such an approach tends to limit positive, creative, imaginative and innovative interpretation and need-focussed, reasonable professional judgement.
- 1.8 Procurement and subsidy control rules highlight politico-economic presumptions that *"Best Value"*, or *"Value for Money"*, for public sector expenditure, is best realised through market competition and that public sector expenditure decisions are necessarily made within competitive markets.
- 1.9 Such presumptions are inconsistent with and/or too simplistic in relation to, the unique and essential community functions, public benefit purposes and Public Value of Leisure and Culture Trusts.
- 1.10 Such process and market-based presumptions need to be corrected, so that Public Authority approaches to and engagements with Leisure and Culture Trusts are properly focussed on the public sector/public benefit sector purpose alignment and the best means

of realising Public Value, particularly through public sector support and facilitation of Leisure and Culture Trusts.

1.11 This was true before the 2020-22 Covid pandemic, but the importance of such Public Value focus has been further highlighted by the consequent threat to the sustainability Leisure and Culture Trusts.

2. **Correctives to prevailing assumptions about the Commissioning Environment for Leisure and Culture Trusts**

2.1 ***Financial versus Real Value***

2.1.1 Best Value and Value for Money” are public sector determinants for proper expenditure.

2.1.2 Simplistically they are too often equated directly with financial, or monetary value. For example, procurement decisions have too often been made on the basis of “lowest price”, not attributing appropriate value to quality and social value factors. And when wider factors are considered there is too often a narrow assumption that to count in an assessment such wider factors need to be monetised, or measured by some direct proxy for financial value.

2.1.3 The legal reality is that the applicable definitions of Best Value/Value for Money actually refer to the optimum balance between: “*economy (cost); efficiency (output); effectiveness (realisation); and equity (fairness in those receiving benefit)*”.

2.1.4 The specific equivalent in formal procurement is: “*Most Economically Advantageous Tender*”, or “*MEAT*”. Selection by lowest price alone has not been legitimate since 2015 and arguably was never legitimate in relation to services, as opposed to undifferentiated goods. The MEAT test translates as the optimum balance of price, quality and social value and the rules are explicit about long-term (or contract “life-cycle”) benefits and impacts being relevant to the assessment.

2.1.5 Public Value is used in this paper in the sense defined by Mariana Mazzucato, Professor in the Economics of Innovation & Public Value at University College London, in “*The Value of Everything*” [Allen Lane 2018; Penguin 2019]. In that publication it is, in presented, as the proper, primary, complex focus of macro-economic policy and is contrasted with current orthodox over-simplifying financial proxy, for real value, of Gross Domestic Product. GDP does not measure whether the climate change, or social care, or post-Covid crises are being effectively addressed. GDP calculation places no formal value on universal free state education, while recording its financial cost.

2.1.6 “*Social Value*”, given its full essential meaning, may be seen as micro-economic Public Value. The proper, primary focus of Public Authority public interest decision making. However, Social Value has come to be used, to a large extent, as an incidental, added value concept.

2.1.7 For this reason, Public Value is the term used in this paper to emphasise the proper essential, inherent, integral, definitional importance of Public/Social Value, to Best Value/Value for Money in public services.

2.1.8 Leisure and Culture Trusts deliver Public Value.

2.2 ***Economic market versus social community***

- 2.2.1 The UK has generally and imprecisely taken the European Union (“EU”) Competition Law regimes of Public Procurement (regulating public sector contracts) and State Aid (regulating public sector subsidies), as Best Value regimes for public services. The actual primary purpose of these regimes, in EU Law, was the maintenance of fair competition within the EU Single Market.
- 2.2.2 The equation of fair competitive markets with Best Value public services is understandable and reasonable to a point, but is ideological, rather than objective, without qualification and flexibility.
- 2.2.3 The UK generally and imprecisely failed to take account of the extent to which the 2014-5 reforms to EU Public Procurement legislation and the EU State Aid rules were reformed explicitly to allow them to be used as and to clarify that they could and should be used as Social Policy instruments, within the Competition Law frame. The reforms were part of the EU’s “Social Business Initiative”, which was hardly mentioned in the UK.
- 2.2.4 In practice this means, in the UK, that the Public Procurement legislation and the State Aid rules have, in relation to public services, generally been applied too rigidly, without appropriate purposive interpretation, flexibility, proportionality and Public Value facilitation.
- 2.2.5 By extension, it means the post-Brexit UK proposed legislation replacing the UK provisions (in the case of State Aid renamed as “Subsidy Control”), has not been drafted with a focus on Public Value social policy purpose, but has carried forward the ideological equation between Competition Law and Best Value.
- 2.2.6 The point is that in public services, including Leisure and Culture Services, assuming the natural efficiency of competitive markets is certainly not the only and may well not be the best approach to securing optimum Public Value.
- 2.2.7 There is an obvious reason for this. Market theory proclaims that systemic, optimal efficiency comes from the impersonality of the market dynamics of demand and supply and the universal pursuit of self-interest and private profit. But “demand” in public services is a constant, needing to be paid from strained public resources, to secure adequate quality, full and equitable coverage, consistency, affordability, long-term stability and sustainability and desirably, progressive development and improvement.
- 2.2.8 That means the commissioning public authority has some level of responsibility for facilitating, shaping, developing and cultivating the socio-economic environment for public services, which is to say some level of responsibility for community capacity development and market intervention, by reference to actual Public Value requirements. Otherwise, there are no buses on uneconomic routes; care services are delivered on a minimum-cost basis; poorer citizens will be unable to afford health services, or leisure facilities; and cultural services will be marginal.
- 2.2.9 Public Value, in public services, derives significantly from inherent Social Value elements, such as: social purpose-driven operation; knowledge of and engagement with the local community; an active interest in discovering and meeting actual community need; commitment to maximising quality, full and equitable coverage, consistency, affordability, long-term stability and sustainability and progressive development and improvement; and the recruitment and development of personnel exhibiting such commitment and dedication.

2.2.10 Leisure and Culture Trusts, as charitable and/or public benefit companies, dedicated to such inherent Social Value, are purpose-aligned with commissioning public authorities and may, on that basis, in reality, be properly recognised as distinct from commercial market suppliers.

2.3 ***Competition versus Collaboration***

2.3.1 Such purpose-alignment and such distinctiveness allows Public Authorities to consider Leisure and Culture Trusts, relationally, as collaborative community partners, as an alternative to considering them only to be, non-distinctively, competitive, commercial market suppliers.

2.3.2 Collaboration between Public Authorities and local/regional Leisure and Culture Trusts, as public benefit, community anchor institutions, reflects a natural and desirable reality and opens the way to mutual investment and the long-term development and improvement in public utility infrastructure and operational public services.

2.3.3 A principal obstacle to this is a widespread narrow understanding and limited interpretation of Public Procurement and Subsidy Control regulation.

2.3.4 EU Public Procurement law and State Aid law are, in design, Competition Law regimes, with the original objectives of ensuring the EU Single Market is not unfairly distorted, (respectively), by public sector contracts being issued, or public sector subsidy being granted, preferentially, rather than objectively.

2.3.5 This Competition Law objectivity principle, within the frame of market ideology, became automatically equated with Best Value public service procurement.

2.3.6 This remained true despite the 2014-15 reforms applying the EU Social Business Initiative and the express purpose of Public Procurement and State Aid Law being used actively to promote social policy objectives.

2.3.7 It remains a dominant force in the post-Brexit UK approach to procurement and subsidy control reform.

2.3.8 However, public law may be applied by reference to collaboration principles, as well as competition law principles.

2.4 ***Procurement versus Commissioning***

2.4.1 As noted in 2.2.8 the responsibility of Public Authorities, in relation to public services, is not limited to purchasing services, through transactional short-term competitively procured contracts. Commissioning public services is a deeper responsibility, with a wider range of available policy implementation powers, actions and activities.

2.4.2 Commissioning involves professional application to: investigating, consulting on and analysing community need and developing strategy for the best way of meeting such need.

2.4.3 Strategic implementation may involve, one, or combinations of: subsidy, investment, leveraging third-party resources; co-ordinating with other public authorities; community engagement, support and facilitation; asset-transfer; relational, collaborative partnerships; and also, market-based purchasing.

- 2.4.4 Public Authorities may engage with Leisure and Culture Trusts, collaboratively, as core, anchor, public benefit institutions and community assets and as purpose-aligned strategic partners, rather than as one potential supplier within a competitive market of commercial suppliers.
- 2.4.5 That is especially true where a Leisure and Culture Trust owns and/or has leasehold rights in leisure and culture facilities, which are physical community assets, but may also apply through the community integration of a management company Leisure and Culture Trusts, with deep community engagement, where the public benefit organisation is itself a core community asset.
- 2.4.6 Public authorities may develop, support, facilitate and strategically collaborate with Leisure and Culture Trusts as core community assets.

2.5 ***Private Sector versus Public Benefit Sector***

- 2.5.1 Leisure and Culture Trusts are public benefit sector organisations: charitable social enterprises; community interest companies; or other genuinely purpose-driven, community-engaged businesses.
- 2.5.2 In crude procurement terms they are potential suppliers in a competitive commercial market of suppliers and public benefit legal status, non-profit distributing status and being locally-based are not material to their commercial delivery potential.
- 2.5.3 In crude economic terms, being private sector, profit-driven and of national, or international, scale may be believed to represent orthodox potential efficiencies and competitive advantages.
- 2.5.4 However, the essential objective and practical realities of Public Value add further and alternative material considerations. An organisation: dedicated to maximisation of public benefit, within available resources; with deep community integration, knowledge and engagement; promoting community employment; and concerned with service sustainability and development, rather than, exclusively, shareholder investment returns, offers potentially greater interest and focus on and long-term commitment to community benefit, development and wealth-building.
- 2.5.5 Objectivity principles do dictate that one type of organisation cannot be regarded, by its legal status, or structure, as being better qualified than another type of organisation. But, some factors, in relation to service provision, are more associated with the private sector (investment resources) and some are more associated with the public benefit sector (purpose and care).
- 2.5.6 A private sector company may deliver public benefit; a public benefit sector company may fail to, but the prevailing system, to a notable extent, generally assumes the primacy of commercial evaluation factors and to that extent public benefit Leisure and Culture Trusts can tend to be wrongly undervalued.

3. **Practical and legal commissioning issues in relation Leisure and Culture Trusts**

3.1 ***The Art of the Possible in public law***

- 3.1.1 Before addressing public law considerations, Leisure and Culture Trusts provide a unique contribution to local social economies, as anchor institutions, with Public Value purposes aligned to those of Public Authorities, as commissioning authorities.
- 3.1.2 This must mean that Public Authorities have some level of interest in supporting them and it cannot be that Public Value promoting arrangements are unlawful. The question is how are public law considerations properly addressed in the provision of such support.
- 3.1.3 In past decades that question has been confused by misunderstandings and misinterpretations of Public Procurement and State Aid Law, suggesting local support for local anchor institutions offends against a higher legal obligation to the law protecting fair competition within the EU Single Market. A general, legalistic, procedure-dominated approach has, in public services, led to supposed public law requirements superseding and distorting a focus on Public Value purpose.
- 3.1.4 This has been specifically addressed by Stone King LLP acting in collaboration with E3M (see <https://e3m.org.uk/>). E3M has, for 10 years, worked with groups of: i) pioneering chief executives of mature social enterprises (including Stuart Lockwood and Phil Rumbelow, the previous and current chairs of Community Leisure UK); ii) progressive, senior public authority commissioners; and iii) public policy-engaged social finance institution officers.
- 3.1.5 In 2016 E3M published “*The Art of Possible in Public Procurement*”, co-authored by Julian Blake of Stone King, which highlighted the true purposive, permissive, flexible and facilitating nature of the EU Public Procurement regime and how the 2014-15 reforms were specifically focussed on procurement being used actively to promote social policy objectives. This publication has had widespread influence in changing perceptions of public service procurement. For example, it is cited in Local Government Association guidance and the Government’s 2018 Civil Society Strategy.
- 3.1.6 The EU reforms included the introduction of the “*Innovation Partnership*” as a new potential procedure, where the public authority seeks the collaborative co-design and co-development of services, rather than simply to purchase services in the market. E3M supported the two first Innovation Partnerships, in Leicestershire Children’s Services and Oldham Social Prescribing.
- 3.1.7 E3M’s work has progressed to the “*Procurement to Partnership Toolkit*”, freely available on its website, which includes commentary and case studies.
- 3.1.8 E3M’s critique of public law misunderstandings and misinterpretations applies also to the EU State Aid regime, which, contrary to entrenched approaches, is also consistent with Public Value purpose in public services. Many subsidies to public services were outside the scope of regulation. Many others, while within scope, were permissible, precisely as “*Services of General Economic Interest*”, or within more specific categories legitimately promoting local socio-economic capacity development and investment.
- 3.1.9 Proposed post-Brexit UK Public Procurement and Subsidy Control law emphasises flexibility and public authority reasonable discretion, so will retain the full opportunities under EU law, potentially clarifying their extent (provided narrowing, process-driven practice, such as obscured the purposiveness of EU, is not allowed to continue under the new UK law).

3.1.10 All of this means Public Authority commissioners have the legal powers and discretions to act upon the reality of the unique local socio-economic importance of Leisure and Culture Trusts in collaborative and creative ways.

3.2 **Public Value Strategy**

3.2.1 In summary, problems for Leisure and Cultural Trusts in being recognised, supported and facilitated by Public Authorities, as community asset, anchor institutions and consequent existential insecurity derive largely from standard, routine, unimaginative and risk averse assumptions that Leisure and Cultural Trusts may only be seen as competitive suppliers in a market and may only be engaged with through the purchasing of service contracts, via full competitive public procurement processes, typically repeated every 3-5 years.

3.2.2 In summary, an alternative, where Leisure and Cultural Trusts are properly recognised, supported and facilitated by Public Authorities, as community asset, anchor institutions, promoting sustainability, could derive from professional, considered, imaginative and purpose-driven public policy, based on active, appreciative enquiry into local need and the use of commissioning to establish, cultivate, develop, enhance and integrate local Public Value leisure and cultural facilities and services, serving the local community and social economy.

3.2.3 Leisure and Culture Trusts seeking to promote such recognition, support and facilitation need to engage, communicate with and offer persuasive ideas and propositions to Public Authorities, in relation to public service strategy development.

3.2.4 To the extent Public Authorities are not already aware of and acting upon the breadth of their commissioning opportunities, powers, discretions and discretions, these may be influentially promoted.

3.2.5 Effective engagement may then lead to the full consultation of Leisure and Culture Trusts in local strategic planning and an appropriate focus on their core roles as local anchor institutions within that local strategic planning.

3.2.6 Ideally, Leisure and Culture Trusts would be recognised as and engaged with as local strategic partners in relation to such local strategic planning.

3.2.7 Inevitably, given the current varied and difficult commissioning environment, in practice, the aspiration of such effective engagement requires a continuous commitment and effort and will meet with frustrations.

3.2.8 However, the principles outlined in this paper offer a legitimate basis for a Leisure and Culture Trust reaching a position of being better heard and better understood.

3.3 **Strategic Specification of Leisure and Culture facilities and services**

3.3.1 A full strategic specification for local leisure and culture facilities and services ("*Strategic Specification*") would (including on the basis of community and local institution consultation):

- (a) Enquire into, consider and determine what is needed and desirable;

- (b) identify resources available to establish, cultivate, develop, enhance and integrate such needed and desirable provision, particularly including resources of and additionally accessible to, or through, local anchor institutions; and
 - (c) develop, implement and continuously improve a local leisure and culture strategic plan, for the optimal application of such resources to such needed and desirable provision, over the long-term, particularly including the role of local anchor institutions.
- 3.3.2 A fundamental corrective, allowing Public Authorities to move from a limited service procurement concept, to a creative, Public Value commissioning concept, is to challenge the assumption that Leisure and Culture Trusts are merely suppliers in optimally efficient, pure competitive markets, from which Best Value services may be commercially purchased.
- 3.3.3 A public service demand is, in essence, different to a pure market demand, suggesting public service demand may not best be met by pure market supply.
- 3.3.4 The public service demand, in leisure and culture services, for example will, or may, include: reasonable quality; a comprehensive offer of affordable accessibility; institutional commitment to good and responsive service; dedicated personnel realising that commitment; investment in maintaining and improving standards; strategic co-ordination and integration with other community services, for example in well-being; welfare; care; health; education; training; promotion of social inclusion; and promotion of employment opportunities.
- 3.3.5 A fundamental first level question is whether, or how far, any notional “market” offers a range of providers with such a full-set of Public Value imperatives and whether, or how far, such Public Value imperatives are distinctive to a core, purpose-driven, public benefit, local anchor, Leisure and Culture Trust.
- 3.3.6 A following fundamental commissioning question is whether, or how far, a committed long-term, collaborative engagement with a local anchor, Leisure and Culture Trust would be a more beneficial Public Value proposition than the repeated short-term market purchasing of the type of services such a Leisure and Culture Trust provides.

4. **Commissioning methods and options in relation to Leisure and Culture Trusts**

4.1 ***Commissioning is broader than procurement***

- 4.1.1 Procurement is only one method of Commissioning, based on the premise that Best Value will be secured by competitive market purchasing.
- 4.1.2 That premise is less applicable to securing Best Value public services, with their complex requirements and inter-relationships, than it may be for the purchase of commercial goods and services, such as equipment and information technology.
- 4.1.3 Commissioning methods and options may include one, or, with more refinement, a co-ordinated combination of the those outlined in 4.2 to 4.13.

4.2 ***“Pre-market” engagement***

- 4.2.1 A Public Authority may reasonably assess market options do not offer services meeting Strategic Specification requirements and actively promote and support the development of new local service infrastructure, capacity and innovation, on the research and development principle.
- 4.2.2 This may be in response to strategic and innovative initiations and propositions from Leisure and Culture Trusts.
- 4.3 ***Investment, co-investment and leveraged investment***
- 4.3.1 Public Authorities have investment powers, which may support the development of local infrastructure and capacity.
- 4.3.2 On public value and impact investing principles, these may be applied to core, local anchor institutions and the community facilities and services available through Leisure and Culture Trusts.
- 4.3.3 On the partnership principle, Public Authority direct investment may be planned in association with institutional co-investment and third-party investment, leveraged through Public Authority commitment.
- 4.4 ***Grant and preferential loan subsidy***
- 4.4.1 The facilities and operations of core public benefit anchor institutions, such as Leisure and Culture Trusts may be supported by Public Authority subsidy, including grants and preferential loans.
- 4.4.2 Subsidy decisions are now regulated by UK Subsidy Control legislation, replacing the pre-Brexit EU State Aid regime. In both cases the regulation is to ensure fair market competition, so a subsidy may be justified: firstly, where there is no competition in respect of the Strategic Specification being properly supported; and secondly, under specific provisions allowing for subsidy to be provided to Public Value services (“*Services of General Economic Value*” under the EU regime).
- 4.4.3 The UK legislative approach emphasises that reasonable consideration and discretion is the basic test for a legitimate subsidy.
- 4.5 ***Community Wealth-building support, facilitation and engagement***
- 4.5.1 Public Authorities may be proactive in their commissioning by promoting Leisure and Culture Trusts in a range of ways not involving direct finance, through focussed community engagement.
- 4.5.2 Activities may be promoted and Public Authority support may leverage support from third-parties, including public benefit funders and committed local business.
- 4.5.3 Public Authorities are encouraged by Community Wealth-building initiatives and by the rhetoric of the Government’s Levelling-up policies, to become more systematic about acting as a community partner institution in this way.
- 4.6 ***Community Asset-transfer***

- 4.6.1 Public Authorities have specific powers to transfer buildings and property representing “*community assets*”, or with potential to be used as community assets to core, local anchor institutions, such as Leisure and Culture Trusts.
- 4.6.2 A Public Authority and public benefit organisations may collaborate to bring such assets into productive community use.
- 4.7 ***Service Contract with unique or particular provider and market-testing***
- 4.7.1 With a Strategic Specification, including Public Value imperatives, a core local anchor institution may, on reasonable analysis and interpretation, be uniquely placed to provide what is required.
- 4.7.2 If that is the position, a Public Authority may enter into a direct service contract with that institution, on the principle that there are, in reality, no market competitors for the fully defined Strategic Specification. The formal procurement requirement is the “*Negotiated Procedure*”, meaning agreeing a contract which is objectively fair and reasonable from the public sector perspective.
- 4.7.3 Public Authorities may, understandably, be concerned about a judgement of such uniqueness being exposed to challenge and in such a case streamlined market-testing procurement procedures may provide desirable security.
- 4.7.4 A simple public notice (in formal language a “*Voluntary Ex-Parte Transparency*”, or “*VEAT Notice*”) may be issued stating an intention to let a contract, for the Strategic Specification, to a provider the Public Authority believes to be uniquely capable of meeting the requirements. If there is no response from an organisation claiming to be a potential competitor, for the full Strategic Specification, within 15 days, the proposed contract may proceed.
- 4.7.5 The same effect may be achieved by dividing a conventional tender procedure into a first stage, inviting expressions of interest, in relation to the Strategic Specification and a second competitive tender stage. If only one expression of interest is received, at the first stage, for example from a local Leisure and Culture Trust and it is satisfactory, then there is no need to proceed to the second stage.
- 4.8 ***Innovation Partnership, Community Partnership, and Alliance Contracts***
- 4.8.1 In decades prior to 2015, progressive public benefit organisations, such as Leisure and Culture Trusts, would take the initiative to make developmental and innovative propositions to Public Authorities and would experience Public Procurement and State Aid being cited as barriers to such ideas progressing, at least without the Public Authority asserting a need to go to market and treat the proposing organisation as if it were an equal market competitor, despite its initiation of the idea. This was highly problematic for various reasons, including: artificiality; delay; cost, non-respect for the proposing organisation’s intellectual property and prior development work; and the loss of opportunity for focussed collaboration.
- 4.8.2 In 2015, the new procurement regulations introduced the “*Innovation Partnership*” procedure, which directly addressed some of the main problematic issues, essentially by: providing a procedure for partnership-style collaboration between Public Authorities and innovative providers and opening the pathway for the initiation of ideas by innovative providers to lead to co-design, co-development and delivery by the innovative provider.

- 4.8.3 This is a procedure especially suitable for collaborative, long-term relationships between core anchor institutions, such as Leisure and Culture Trusts and Public Authorities.
- 4.8.4 Similar approaches, recognising the value of community partnership collaboration may be applied using other under-utilised purposive, permissive, flexible principles and procedures, within the regulatory provisions. For example, “Alliance Contracts” create multi-party, service integration within local social economies.
- 4.9 ***Reserved Contracts for Public Benefit Providers***
- 4.9.1 Developing the concept of the Strategic Specification may properly place a high, or even a determining value, on purpose-driven, locally-committed and non-profit distributing approaches to service delivery and participative approaches to engaged personnel, such that public benefit legal status and/or structure becomes a qualifying requirement for providers.
- 4.9.2 The procurement rules include a traditional provision allowing organisations with workforces made-up substantially of disadvantaged individuals to be particularly promoted, in this way, on the basis that the social policy of supporting the employment of such individuals is a legitimate priority.
- 4.9.3 There is also specific provision in the rules allowing invitations to tender to be limited to organisations which: have a social purpose; are non-profit distributing; and have significant employee participation.
- 4.9.4 In that specific provision conditions are attached, based on an assumption that this is allowing such organisations to develop capacity, before taking their place in a competitive market. However, in the areas of leisure and culture the same principles may be applied, non-prescriptively, through the “Light Touch Regime” (see 4.11).
- 4.10 ***Full Strategic Specification, Public Value Imperatives, Open Book and mainstream procurement***
- 4.10.1 Throughout this paper emphasis has been placed on Public Authorities adopting a professional, analytical, deeply considered approach to actual community needs in relation to leisure and culture facilities and services, focussing especially on the multiple and inter-connected Public Value benefits to be derived from Leisure and Culture Trusts.
- 4.10.2 This may lead to Strategic Specifications, which are especially focussed on “*Public Value Imperatives*”, which may be specified as essential requirements for any community public service provider and therefore pre-requisite qualifications for being engaged, by the Public Authority, as such.
- 4.10.3 Public Value Imperatives may include: being demonstrably purpose-driven; demonstrably community engaged; and demonstrably serving social needs, for example, in relation to well-being, health, education, social inclusion etc (as outlined in 2.2.9).
- 4.10.4 This concept may be further developed and enhanced by a demand for a collaborative approach to Value for Money provision. A purpose-driven provider may be recognised as one that is prepared to operate on the “*Open Book*” principle, so that all resources and costs relating to service provision are transparent within the public service contractual

relationship, allowing public benefit collaboration in relation to resource allocation and service pricing.

4.10.5 This may extend to public interest alignment and contractual agreement on reasonable surplus, or profit, as a service cost, necessary for provider sustainability and long-term service development and improvement, thereby maximising the retention of benefit for the community and also serving as a safeguard against extractive over-pricing and profit and counter-productive under-pricing.

4.10.6 Such refined commissioning approaches may, therefore, legitimately narrow the field of potential providers, even to a single qualified provider, such as a local Leisure and Culture Trust, on the basis that it is objectively, uniquely, placed to provide services to the full Strategic Specification and to develop an optimal long-term collaboration with the Public Authority, for the local public benefit.

4.10.7 Any mainstream procurement procedure could, in principle, apply the principles of a Strategic Specification, pre-requisite Public Value Imperatives and Open Book arrangements.

4.11 ***Light Touch Regime flexibility and mainstream procurement***

4.11.1 Additionally, in relation to formal procurement, there is a “*Light Touch Regime*”, which disapplies prescriptive procedures and requires only reasonable public advertisement and compliance with general principles of: equal treatment; non-discrimination; transparency; and proportionality.

4.11.2 The Light Touch Regime may be applied to: health, social, education, training, cultural, community and related services: allowing significant flexibility in relation to the procurement of services provided by Leisure and Culture Trusts.

4.12 ***Social Value***

4.12.1 Public Authorities now have Social Value policies, reflecting the obligation to consider Social Value in procurement under the 2012 Social Value Act and more extensively, for the more progressive Public Authorities, the pre-existing powers to consider Social Value as an element within UK Best Value and MEAT Tender assessments under procurement law.

4.12.2 UK procurement standard practice has, as least notionally, become to allocate, broadly, 5-10% of a tender assessment to Social Value.

4.12.3 This has given rise to a current standard approach which generally equates Social Value with “*Added Value*” commitments and benefits, provided alongside the principal service specification and Public Authorities are using standard lists of monetised Added Value items that may be offered by suppliers.

4.12.4 While it is progressive for Social Value to have become a standard feature of procurement, a purpose-driven, public benefit organisation, such as a Leisure and Culture Trust is dedicated 100% to Social Value, when it is appropriately interpreted to mean direct socially-beneficial outcomes.

4.12.5 It is desirable for Public Authorities to recognise this and appreciate that such inherent, intrinsic, integrated Social Value, or “Public Value”, is a more important aspect of Social Value than “Added Value”.

4.13 ***A Public Service Contract as a Collaborative Working Agreement***

4.13.1 Public service contract documents typically follow transactional commercial models, with the drafting focus, of each party, being the best deal and most protective terms and conditions from its own perspective.

4.13.2 However, in purpose-aligned, collaborative public service contracts, the drafting focus may be the: mutual public benefit purpose; the clear and appropriately flexible specification, allowing adaption to changes in need; and practical communication arrangements, all facilitating a productive relationship between Public Authority and provider, designed to achieve intended public benefit outcomes.

5. **UK Public Procurement and Subsidy Control legislation 2022-2023**

5.1 At the time of writing (May 2022), the UK Government is intending to introduce new post-Brexit, UK Public Procurement and Subsidy Control statutes, planned for late 2022, or early 2023.

5.2 The current indications are that they will broadly follow the same principles as the EU-based rules they are replacing, with a more particular emphasis of flexibility in the case of Procurement and Public Authority reasonable discretion, in the case of Subsidy Control.

5.3 This should mean all the principles outlined in this paper will still have application, although there is a concern that, as was the case with the EU-based regulation, interpretation and implementation will, in practice, be unduly narrow in focus, interpretation and implementation and in particular that purpose-based collaboration in public service commissioning will continue to be under-valued and under-utilised.

5.4 It would be desirable for the continuing purposive, permissive, facilitating and flexible nature of the applicable regulations to be emphasised, for example in guidance promoting these characteristics

Julian Blake
Stone King LLP
JulianBlake@stoneking.co.uk

May 2022