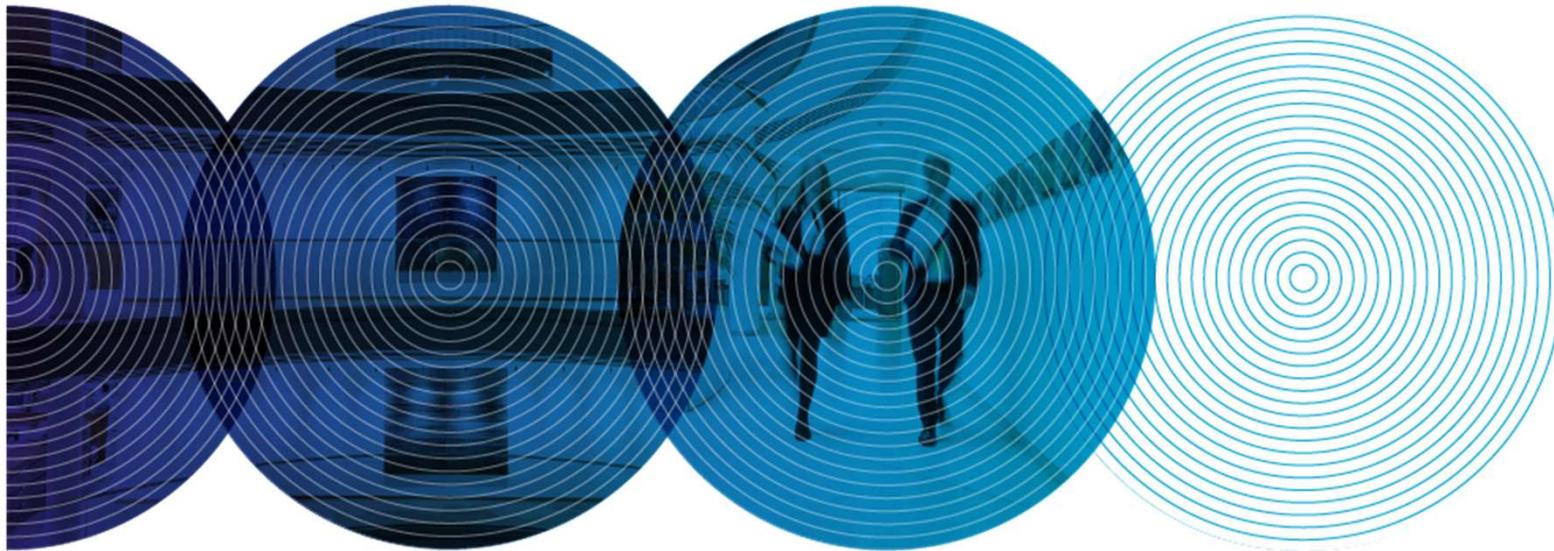


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# Non-tangible criteria

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## The question

- *How do you incorporate softer, non-tangible criteria into tenders such as social inclusion, diversity, biodiversity, accessibility and social and responsible business conduct, and how do you assess them?*
- What is required / encouraged by law and policy?
- How does this work at different stages in a procurement process?
- Examples
- Pitfalls

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## The Directives require...

- Article 18 – contracting authorities are obliged to ensure that contractors observe applicable social, environmental and labour laws in the performance of publicly procured contracts
- Article 69 – a contracting authority must reject a tender which is abnormally low by virtue of breach of applicable social, environmental or labour laws
- Article 42 – technical specifications must, in any procurement which is intended for use by natural persons, take account of accessibility requirements for disabled persons and universal design,

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## The Directives allow...

- Article 57 – contracting authorities may exclude a candidate/tenderer where the authority “can demonstrate by any appropriate means” a violation of social, environmental or labour laws
  - Subject to tenderer’s right to demonstrate self-cleaning measures
- Article 67 *“The most economically advantageous tender ...shall be identified on the basis of the price or cost... and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or **social aspects, linked to the subject-matter of the public contract in question.** Such criteria may comprise, for instance:*
  - *quality, including technical merit, aesthetic and functional characteristics, **accessibility, design for all users, social,** environmental and innovative characteristics and trading and its conditions...”*
- Article 70 – *“Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related consideration”*

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## The Directives encourage...

- Recital 95 – *“It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth”*
- Recitals 97 – 99 Contracting authorities may use criteria related to any stage in the life cycle of the products/works/service including:
  - fair trade, production methods, extraction of raw materials, measures aimed at protecting staff involved in the production
  - the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life,
  - the protection of the environment or animal welfare
  - social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, e.g. employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract

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## Key Policy documents

- Circular 20/2019: Promoting the use of Environmental and Social Considerations in Public Procurement
- OGP Information Note: Incorporating Social Considerations into Public Procurement
- EU Commission Buying Social - a guide to taking account of social considerations in public procurement (2nd edition)

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# Social criteria throughout a procurement process

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## At all stages

- General principles of EU law
- Intangible/social criteria must:
  - promote equal treatment of market participants (and avoid barriers to trade)
  - be proportionate to the needs of the buyer
  - be transparently and clearly set out in the procurement documents, and be capable of verification and evaluation

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## Barriers to trade

- Award criteria and contract performance conditions “*should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States*” (Recital 98)
  - or other GPA member states or trade agreement countries
  - E.g. cannot impose a requirement that all tenderers pay an Irish minimum wage if contract can be performed remotely
  - Cannot:
    - require that suppliers be based locally
    - require that workers be sourced from a particular region
    - require conformity to specific Irish labels or badges



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## Designing the opportunity (1)

- How best to make a social impact
  - Consider sector, users, risks
    - Can social aims be achieved with the outcome of the contract?
    - Or via the methods used to deliver the contract?
  - Consider if direct intervention (public sector provision or grants) would be more effective
- Consider using lots (access to SMEs, solution tailored to specific needs e.g. in a region)
- Consider cost and budget associated with the social considerations

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## Designing the opportunity (2) - Reserved Contracts

- Reg 20 – Sheltered workshops
  - opportunity can be limited to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons.
  - 30% of the company’s employees must be disadvantaged
  - Recital 36 – disadvantaged includes unemployed, members of disadvantaged minorities or otherwise socially marginalised groups
- Reg 77 - opportunities for certain health, social and cultural services can be limited to not for profits provided that:
  - They are engaged in the pursuit of a public service mission linked to the delivery of the relevant services
  - They reinvest profits in the organisation
  - The management and ownership structure of the organisation performing the contract should be based on employee ownership or participatory principles or have active participation from employees or stake holders
  - The organisation should not have been awarded a contract for the services concerned in the preceding three years.
  - Contract cannot have a duration greater than 3 years

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## Selection Criteria

- Designed to ensure that the candidate is capable and suitable
- Criteria must be within the envelope of the criteria set out in Reg 58 of the 2016 Regulations
- Must be linked to the subject matter of the contract and proportionate
- E.g.
  - *Demonstrate experience of achieving integration of long-term unemployed persons in the delivery of a previous works contract*
  - *Demonstrate how responsible business practices have been integrated into delivery of previous contracts*

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## Award Criteria

- Must be linked to the subject matter of the contract
- *Concordia Buses* (C-513/99)
  - Finnish bus contract awarded higher marks for the lowest nitrous oxide emissions
  - Compliant with EU law because linked to the subject matter of the contract
- General corporate policies are not permitted to be used as award criteria – Recital 97
- Social outcomes must be linked to the contract rather than society at large
  - e.g. in a contract for the construction of a bridge, it is unlikely to be appropriate to score tenderers' plans for donating books to a local library.
  - However, if the contract was for the design and build of a library, their plan for including stakeholders (including the community using the library) in the process would be highly relevant

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## Award Criteria (2)

- Must guarantee equal treatment and not discriminate based on origin
  - E.g. should not award more marks for being based locally etc
- Must be capable of verification
  - *C-448/01 - EVN Wienstrom* case
- Corporate Social Reporting Directive
  - Supply chain will become increased focus – consider evaluating social impact of supply chain
  - Reporting practices – how much data will tenderers be able to provide, and in what format, to enable entities who are caught by CSRD to comply with obligations?
- Carefully consider weighting and pass/fail requirements

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# Technical Specifications

- *Dutch Coffee case C-368/10*
  - Coffee machine contract required the coffee to be stamped with a Dutch ecolabel.
  - Not compliant with EU law because it required a specific Dutch ecolabel. Therefore it disadvantaged tenderers from other member states
  - It is permissible to require certain underlying social requirements are met (e.g. fair trade) provided that they are transparently set out. Ecolabels can be accepted as *evidence* that the relevant criteria are met (provided that equivalent means of proof are accepted).
- Specification can cover output (e.g. the end-product) or inputs (e.g. the methods of production)
- Sector specific legislation governing e.g.
  - OUTPUTs – e.g. accessibility & universal design -
  - INPUTs – e.g. Forced labour (proposed EU Regulation), sustainably produced timber (EU Timber Regulation), hazardous chemicals (REACH)
- Think carefully about whether to incorporate any social elements as minimum requirements if not required by legislation

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## Assessment of intangible criteria

- Ensure that you only assess the benefits in the context of the contract
  - Promises about what will be done *on your contract*, as opposed to assurances about policy and values
  - Be clear about the benefits you see as being achieved.
    - Would it be predictable to a reasonably well informed and normally diligent tenderer that someone would be rewarded/penalised based on the relevant feature of their offer?
    - E.g. if there is a scoring benefit to incorporating the employment of disabled persons in the performance of the contract, ensure that this is stated in the tender documents and linked to subject matter of the contract
- Ensure that you what you are being promised is verifiable, and measurable
  - And then build performance management metrics into the contract
- Ensure that your reasons are clear, transparent and consistent with the underlying award criteria

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## Contract Performance conditions

- Manner of effecting social change without shutting tenderers out of the market
  - Can impose requirements that don't necessarily need to be met by bidders during the tender process
- Also a method of holding bidders to their promises
- Should include a monitoring regime (also consider KPIs/service credits )

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# Examples

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# DBFOM contract for mixed use development in a disadvantaged part of a city

- Designing the opportunity
  - Consider including requirements for e.g. library, creche, playground, sports facilities in the scope of the project
  - Transparently define social objectives e.g. integration of long term unemployed persons, community engagement and improving quality of life for those in the area
- Selection criteria
  - Assess experience of integrating long term unemployed in the contract
  - Ask for experience of previous projects involving these kinds of facilities
- Award criteria
  - Methodology for ensuring integration of long term unemployed/apprentices plus commitments about target numbers
  - Methodology for engaging with community to a) secure buy-in and b) increase benefit to community from the intervention
- Contract performance
  - KPIs around workforce composition, engagement meetings etc
  - Contractualize the commitments made in tender

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# Contract for IT platform for use by public in engaging with public service

- Designing the opportunity
  - Consider who will be using the platform – including elderly people and disabled people
  - Consider whether a “brick and mortar” option should also be offered
  - Disability Act 2005 – obligation on public bodies to ensure that their services are accessible to people with disabilities
- Selection criteria
  - Does the candidate have experience in applying universal design standards?
- Technical specification
  - Variety of EU standards depending on the type of IT solution being procured
  - S.I. 636/2023 EU (Accessibility Requirement of Products and Services ) Regulations 2023 (enters into force 28 June 2025) require user interface including ensuring that communication/interface can be supported via more than one sensory channel, including providing alternatives to vision, auditory, speech and tactile elements
- Award criteria
  - Assessment of technical proposal/functionality against minimum accessibility requirements (Pass/fail may be appropriate)
  - Approach to delivering customer support in a manner that ensures accessibility for persons with disability

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# Pitfalls

- Loose criteria that are not sufficiently clearly linked to the subject matter of the contract
  - E.g. “what social programmes will you champion”?
- Rewarding general policies rather than specific promises
  - E.g. corporate diversity policy
- Rewarding promises whose impacts are not linked to the subject matter of the contract
  - E.g. rewarding donation to National Concert Hall in a bridge construction project
- Focusing on “local” benefits in a manner that creates a barrier to trade
  - E.g. must hire 10 unemployed persons from Dublin live register
- Seeking to improve upon legal requirements in a manner that creates a barrier to trade
  - E.g. requiring Irish minimum wage be paid even in an IT contract that could be provided remotely
- Rewarding vague or wishy washy promises that cannot be verified or are not monitored during the contract.
  - E.g. “we place societal benefits at the heart of our business” without more
- Rewarding something that is not predictable to a RWIND bidder
  - E.g. scoring CVs for women artificially higher without legitimate basis stated in the tender documents



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# Questions?



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