

Bird & Bird & Sustainable Procurement

How the procurement rules can be used to achieve social, environmental and economic objectives

Chris Murray
Senior Associate



Question...

- *How do you build social value objectives into your tender? How do you score them and enforce them, such as living wage, carbon reduction, regeneration, long-term unemployed?*



- "Sustainable procurement" is a catch all term

Legal Framework – Background

- The primary objective of EU procurement law is not the advancement of social, environmental, economic, etc. objectives
- *Commission v Netherlands (Case C-368/10)* – ECJ confirmed in 2012 that authorities were able to choose award criteria on the basis of environmental/social considerations (but not minimum requirements relating to "sustainable purchasing" or "socially responsible business")
- *"Public procurement plays a key role in the **Europe 2020 strategy**...as one of the market-based instruments to be used to achieve **smart, sustainable and inclusive growth** while ensuring the most efficient use of public funds. For that purpose, the public procurement rules...should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of **small and medium-sized enterprises** (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of **common societal goals.**"*
(Recital (2) Directive 2014/24/EU)

Legal Framework – EU

- All contracts must be awarded on the basis of "*most economically advantageous tender*" criteria "*linked to the subject-matter of the public contract in question*" (Reg.67(2) PCSR)
- These criteria may comprise "*accessibility, design for all users, social, environmental and innovative characteristics...*" (Reg.67(4) PCSR)
- Life-cycle costing is now expressly permitted (Reg.68 PCSR)
- Contract performance conditions are permitted, which "*may include economic, innovation-related, environmental, social or employment-related considerations*" (Reg.70 PCSR)
- Reserved contracts – allows authorities to restrict competition to "*supported businesses*" which aim to improve social and professional integration of disabled and disadvantaged persons (Reg.21 PCSR)

Legal Framework – Scotland

- "Sustainable procurement duty" (s.9 PRSA)
 - consider how to improve economic, social, and environmental wellbeing (including reducing inequality)
 - consider how to facilitate involvement of SMEs, third sector bodies and supported businesses
 - consider how to promote innovation
 - act with a view to securing economic, social and environmental improvements
- Authorities must have regard to statutory guidance (March 2016)
 - *"robust, achievable approach to sustainable procurement that is relevant and proportionate to its scope and area"*
 - Wellbeing is widely explained and includes availability of quality jobs, lifelong learning, affordable housing, access to arts/leisure, promotion of good physical, social and mental health, availability of clean air, improving biodiversity, etc.

Legal Framework – Scotland (cont.)

- Community benefit requirements are contract performance conditions (s.25 PRSA)
- For contracts \geq £4,000,000 in value
- Authorities must consider whether to impose community benefit requirements as part of the procurement, and:
 - Include a summary of these requirements in the Contract Notice; or
 - Explain the reasons for not including any such requirements in the Contract Notice
- Again, authorities must have regard to statutory guidance (March 2016)
 - *"robust, relevant and proportionate so that they can be judged on objective and measurable outcomes"*
 - Four key national outcomes: (1) better employment opportunities, (2) improved education, skills, research and innovation, (3) young people, (4) tackling inequalities

Living Wage

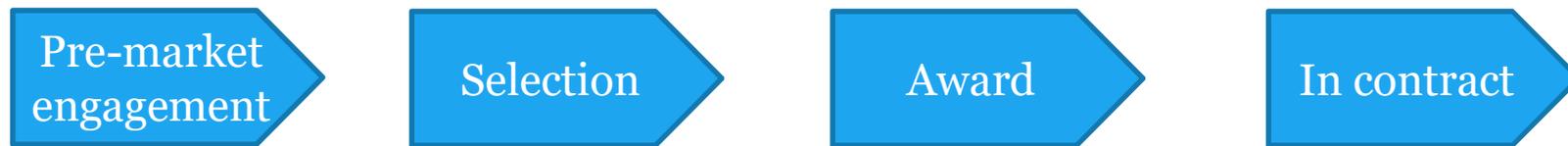
- Correspondence between Scottish Government and EU Commission between 2011 and 2014
- Living wage is not universally applicable and not required by law and, according to the Commission, "*...raises a whole series of complex legal questions*"
- Legal issue relates to such a requirement's compliance with the fundamental freedom of movement of services, including compliance with the Posting of Workers Directive (96/71/EC)
- Cases: *Rüffert* (C-346/06), *Bundesdruckerei* (C-549/13) and *RegioPost* (C-115/14)
- Scottish Government continues to champion payment of the living wage through public procurement:
 - "*It is expected that the contractor will take a positive approach to Fair Work practices, including for example paying the real Living Wage*" – suggested extract for Contract Notice
 - "*Please describe how you will commit to Fair Working practices for workers engaged in the delivery of this contract...(for example, through a commitment to paying at least the real Living Wage)*" – suggested ITT criterion/question

"Local" Content

- "Local" requirements are tricky from a procurement law perspective
- A local/national provider is more likely to be able to deliver on local requirements than a foreign provider, making these arguably discriminatory/unfair
- Easier to manage in certain circumstances – e.g. coding apprenticeships on a cloud-based IT contract -v- bricklaying apprenticeships on a school construction project
- Encourage collaboration and open opportunities up to SMEs, which are more likely to be local
- 'Risk-based approach' – make it clear and justify your reasons

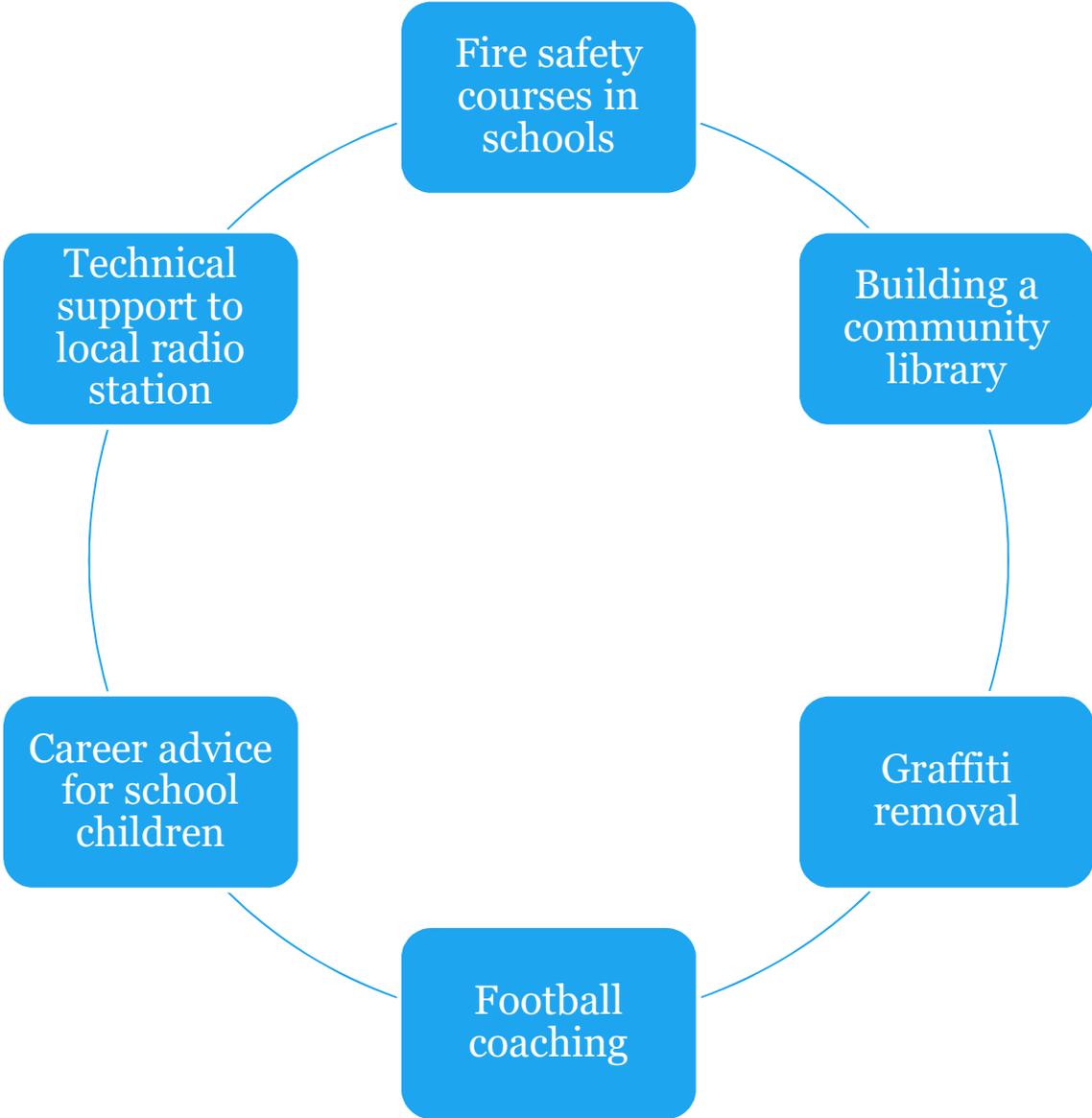
How to conduct sustainable procurement

- Reflect sustainable procurement considerations at all/appropriate stage(s) of a procurement process



- Publish PIN
- Send out questionnaires
- Conduct Open Day, etc.
- Make it clear what you want
- Case studies on delivering good outcomes
- Confirmation of appropriate policies
- Breach of environmental or social laws?
- Negotiation/dialogue
- Test as a criterion
- Ensure fair and transparent evaluation process
- Reg.56 – breach of environmental, social or labour laws
- Contract performance conditions
- Monitor compliance with promises made in tender

Thinking outside the box



Summary

- Sustainable procurement should be seen as good news story
- Potential is huge
- Market is keen to engage with authorities – and see this as an area to differentiate themselves from the competition
- Remain conscious of associated impact on price
- Think outside the box

Thank you & Bird & Bird



Chris Murray
Senior Associate

E: chris.murray@twobirds.com

T: 020 7415 6190

M: 07701 313 957

twobirds.com

The information given in this document concerning technical legal or professional subject matter is for guidance only and does not constitute legal or professional advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

This document is confidential. Bird & Bird is, unless otherwise stated, the owner of copyright of this document and its contents. No part of this document may be published, distributed, extracted, re-utilised, or reproduced in any material form.

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.