

GREEN PROCUREMENT AND NET ZERO

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ENLIGHTENED THINKING



HOW DO YOU INCORPORATE AND
EVALUATE GREEN PROCUREMENT
AND NET ZERO OBJECTIVES IN
TENDERS – AND ENSURE THAT
BIDDERS FULFIL THEIR
COMMITMENTS?

- Green Procurement and Net Zero
- Legislation
- Case law
- Tools / reference material
- Evaluating commitments and ensuring delivery

WHAT IS GREEN PROCUREMENT?

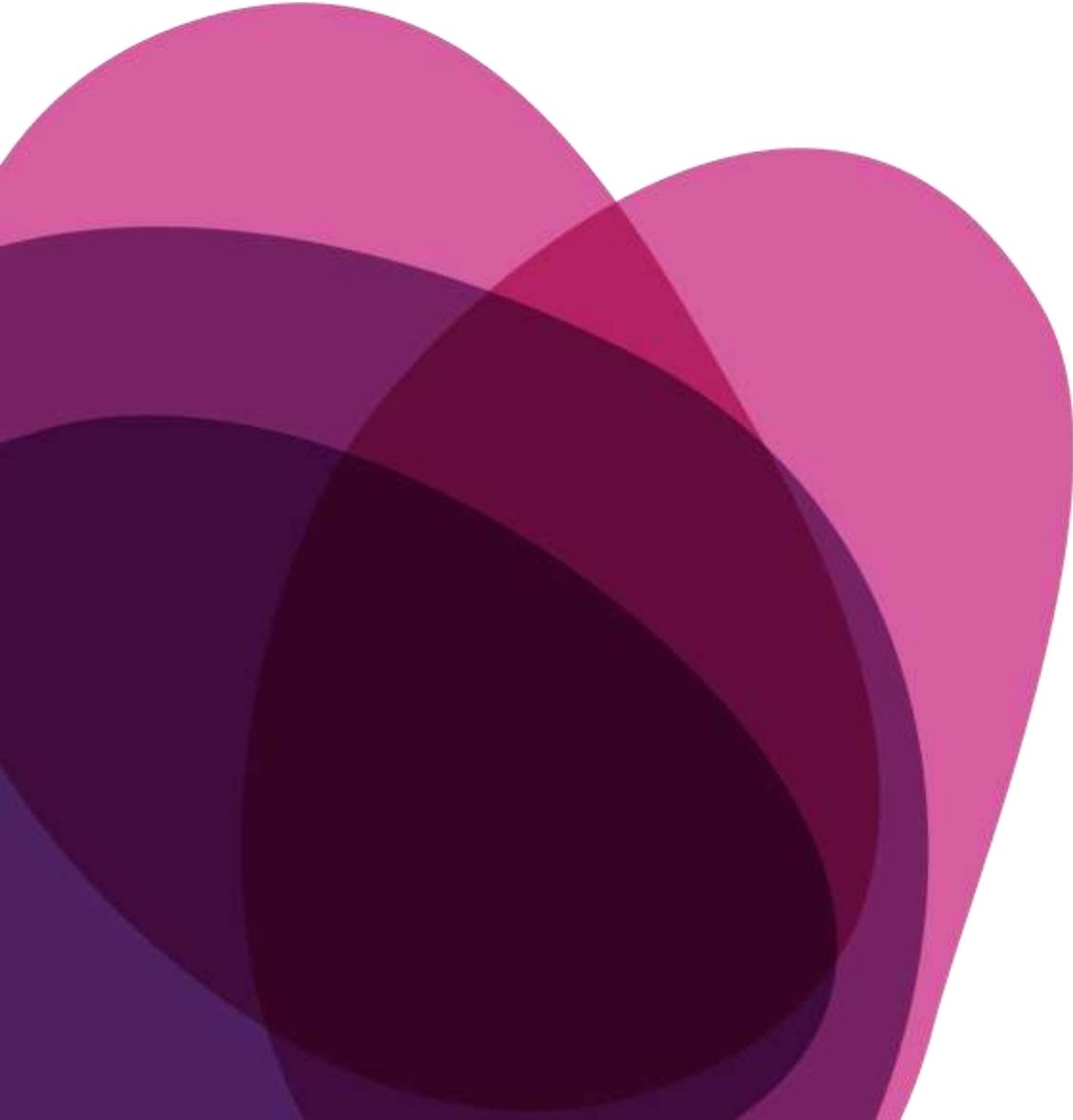
- European Commission concept of Green Public Procurement, defined in the Communication (COM -2008- 400) "Public procurement for a better environment":
 - "a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured"

WHAT IS NET ZERO?

Climate Change (Scotland) Act 2009

- s.A1(1): the net-zero emissions target
 - “The Scottish Ministers must ensure that the net Scottish emissions account for [2045] is at least 100% lower than the baseline (the target is known as the "net-zero emissions target")”
- s.2: the interim targets
 - 48.5% for 2020, 75% for 2030, 90% for 2040
- s.3: annual targets from 2021 to 2044
 - linear progress towards the relevant interim target each year

LEGISLATION



OVERARCHING OBLIGATIONS

Climate Change (Scotland) Act 2009

- s.44: A public body must, in exercising its functions, act:
 - a) in the way best calculated to contribute to the delivery of the [Part 1] targets;
 - b) in the way best calculated to help deliver the SG climate change adaptation programme (published under s.53); and
 - c) in a way that it considers is most sustainable.
- s.45: Public bodies must have regard to SG guidance
 - procurement features heavily
- s.46: reporting on climate change duties
 - s.46(2) – report must contain information on how procurement policies and activity have contributed to compliance with climate change duties
 - applies to bodies listed in the Climate Change (Duties of Public Bodies: Reporting Requirements) (Scotland) Order 2015
 - template report has a section on procurement

OVERARCHING OBLIGATIONS

Procurement Reform (Scotland) Act 2014

- s.8(2): contracting authorities must comply with the sustainable procurement duty
 - BUT subject to equal treatment, non-discrimination, transparency and proportionality
- s.9: sustainable procurement duty is the duty of a contracting authority:
 - **before** carrying out a regulated procurement, to consider how in conducting the procurement process it can
 - improve the economic, social, and environmental wellbeing of its area;
 - facilitate the involvement of SMEs, third sector and supported businesses; and
 - promote innovation; and
 - **when** carrying out the procurement, to act with a view to securing the identified improvements
- BUT considering only matters relevant to what is proposed to be procured, including the extent to which it is proportionate to take those into account (s.9(2))

OVERARCHING OBLIGATIONS

Procurement Reform (Scotland) Act 2014

- s.10: must have regard to SG guidance on the sustainable procurement duty
 - “Wellbeing includes:
 - environmental factors such as:
 - Greenhouse gas emissions reduction
 - the availability of clean air, clean water, clean streets
 - the quality of the built environment
 - the removal of objects considered hazardous to health
 - protecting communities against the threat of climate change
 - freedom from a high risk of flooding
 - improving and promoting biodiversity and accessibility to nature”
- s.15: authorities with £5m+ annual spend must have a procurement strategy
 - Set out how the authority will ensure its procurements comply with its s.8 duties
 - s.17 requires compliance “so far as reasonably practicable”
 - Report on progress against strategy in annual procurement report (s.18)
 - Must have regard to SG guidance (s.20)

OVERARCHING OBLIGATIONS

Procurement Reform (Scotland) Act 2014

- s.24: community benefit requirements
 - Contractual requirements (inter alia) intended to improve environmental wellbeing “in a way additional to the main purpose of the contract”
 - Authorities must consider whether to impose CBRs in advance of any procurement with an estimated contract value of £4m+ (s.25)
 - Must have regard to SG guidance (s.26)

SPECIFICS

Public Contracts (Scotland) Regulations 2015

- **Principles (Reg 19)**
 - Equal treatment, non-discrimination, transparency, proportionality
 - Authority must include conditions reasonably necessary to ensure compliance with environmental, social and employment law, but must be linked to the subject matter of the contract
- **Technical specifications (Reg 43)**
 - Required characteristics may include environmental and climate performance levels
- **Labels (Reg 44)**
 - If procuring works, supplies or services with specific environmental characteristics, can require a specific label as proof of the characteristics
 - As long as label requirements only concern criteria linked to the subject-matter of the contract, and labels are available to all
 - If bidder has no access to labels, or no chance to obtain within the time limits (through no fault of their own), must accept equivalent evidence

SPECIFICS

Public Contracts (Scotland) Regulations 2015

- **Exclusion (Regs 57-58)**
 - Authority can decide not to award a contract / framework to the MEAT if tender doesn't comply with environmental, social and labour law obligations
 - Discretion to exclude bidders from participation based on violation of those obligations
- **Selection (Regs 60-63)**
 - SPD – includes space for environmental management measures / standards
 - Submit up-to-date supporting documents before award (and can invite bidder to supplement or clarify)
 - Bidder can indicate environmental management measures it will apply
 - If certificates required to attest compliance with environmental management systems / standards, must refer to European or international standards
 - If bidder has no access to certificates, or no chance to obtain within the time limits (through no fault of their own), must accept equivalent evidence

SPECIFICS

Public Contracts (Scotland) Regulations 2015

- **Evaluation (Reg 67)**
 - Must award to the MEAT, identified on best price-quality ratio which must be assessed on the basis of criteria linked to the subject-matter of the contract
 - Criteria may include “quality, including ... environmental ... characteristics”
 - Criteria are linked to the subject-matter of the contract where they “relate to the works, supplies or services to be provided ... in any respect and at any stage of their life cycle”, including factors of production, provision or trading, or a process for another stage of their life-cycle, “even where such factors do not form part of their material substance”
 - Specifications must allow for effective verification of information to assess tenders against the criteria
- **Life-cycle costing (Reg 68)**
 - Part or all of the costs over the life cycle of a product, service or works
 - Can be borne by authority or other users
 - Includes use costs, maintenance costs, end of life costs and environmental externalities (as long as you can attribute a monetary value to them)

SPECIFICS

Public Contracts (Scotland) Regulations 2015

- **Contract performance (Reg 70)**
 - Authority can lay down conditions relating to the performance of a contract, if they are:
 - linked to the subject-matter of the contract; and
 - indicated in the call for competition / procurement docs
 - Can include environmental considerations

BRODIES^{LLP}

CASELAW



- *Gebroeders Beentjes BV v Netherlands* (31/87) (1990)
 - A condition regarding the employment of long-term unemployed persons was compatible with the Directive if it had no direct or indirect discriminatory effect on tenderers from other EEC States and was mentioned in the contract notice
- *Concordia Bus Finland* (C-513/99) (2002)
 - City of Helsinki awarded additional tender points for the least polluting buses in the knowledge that one of its own production units (which was successful) was one of the few undertakings that could offer them
 - ECJ held lawful
 - EU Treaties referred to environmental protection, list of procurement criteria not exhaustive, criteria linked to subject matter
 - Equal treatment not violated just because the authority's own operation was one of the few that could satisfy the requirement: criteria were objective and applied without distinction, related directly to the fleet offered, were an integral part of the system and points could be gained from other criteria

- *Evn AG v Austria* (C-488/01) (2003)
 - Public contract for the supply of electricity
 - Criterion re impact on the environment – scored higher for producing more renewable energy than required by the authority under the contract
 - ECJ held:
 - Criteria need not all be economic in nature – ecological criteria permitted provided they related to the subject matter of the contract
 - Giving weight to renewables did not prevent selection of the MEAT
 - Information supplied had to be verified, otherwise procedure lacked the necessary transparency and objectivity
 - Renewable energy criterion wasn't linked to the subject matter – re the amount of electricity supplied to other customers
 - Excess production criterion discriminated against smaller undertakings with less overall capacity

- *Commission v Netherlands* (C-368/10) (2012)
 - Authority required use of a specific eco-label for tea and coffee, rather than compliance with the specifications illustrated by the label
 - An authority can require that products be supplied from organic agriculture or fair trade, but must use detailed specifications rather than specific labels
 - Also required compliance with criteria of sustainable purchasing and socially responsible business
 - A technical requirement not authorised by the Directive
 - Requirement for bidders to state how they complied was insufficiently clear
 - “The principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract”

- *Grupo Hospitalario Quirón SA v Departamento de Sanidad del Gobierno (C-552/13) (2015)*
 - Requirement that private health centres, providing surgery facilities to patients under contract with the public health system, had to be situated in a particular municipality
 - Said to be for the benefit of patients, their families and medical personnel travelling from the public hospital
 - ECJ held:
 - Proximity and accessibility criteria inherent to the nature of the services sought
 - But a specific location requirement excluded GHQ even though proximity and accessibility were not an issue
 - Indeed, the location was at least as good for at least some patients
 - Breach of equal treatment and non-discrimination

- “Public procurement - taking account of climate and circular economy considerations”
 - Clarifies expectations with respect to climate and circular economy considerations
 - Aligns climate change reporting duties with procurement policy and legislation [re the sustainable procurement duty]
 - Highlights that public bodies should use their procurement spend to support climate and circular economy ambitions, signposting support to embed this policy in practice

TOOLS / REFERENCE MATERIAL

Scottish Government Sustainable Procurement Tools

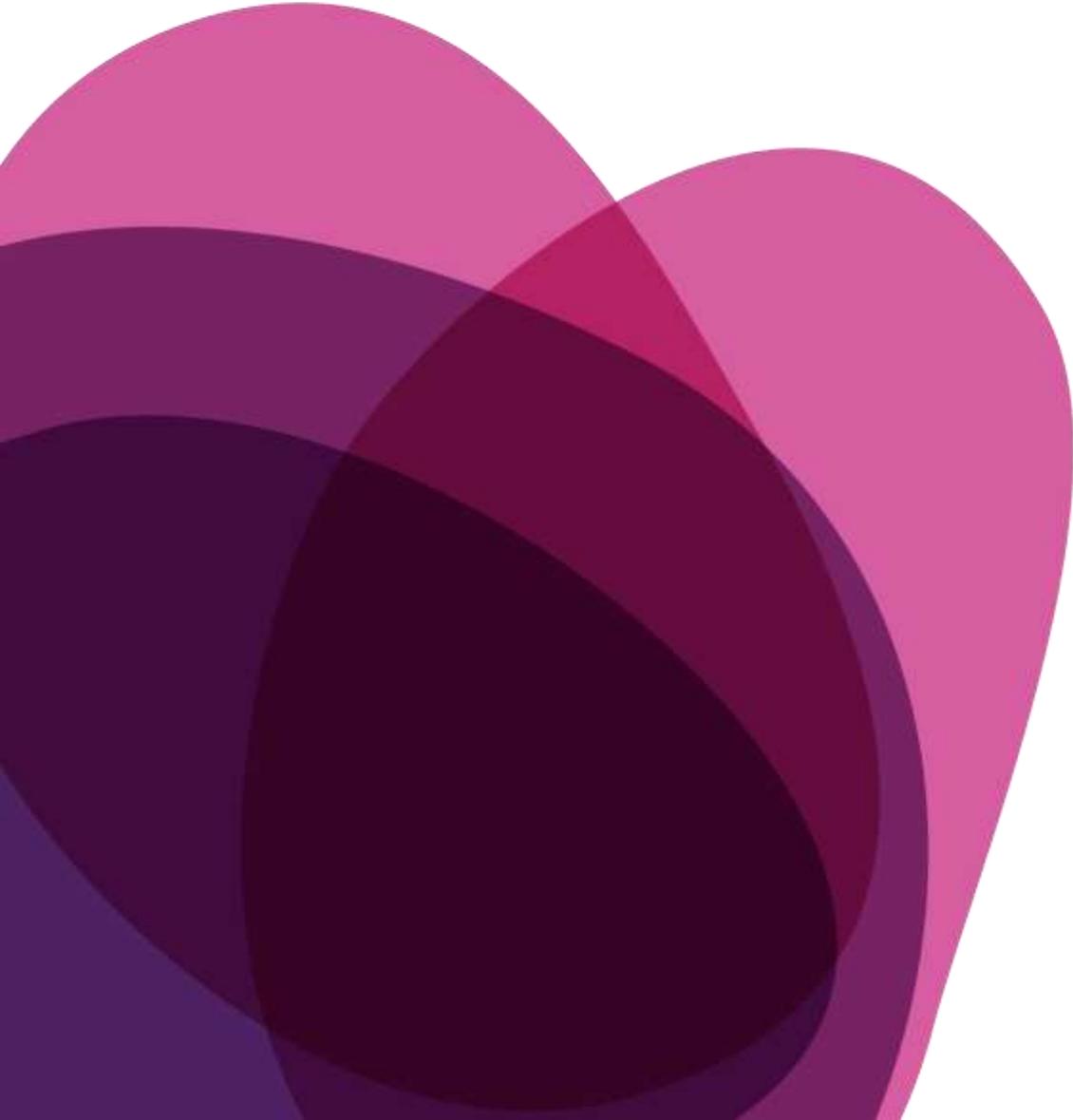
- Flexible Framework Assessment Tool
- Prioritisation Tool
- Life Cycle Impact Mapping
- Sustainability Test
- Sustainable Procurement Guidance
 - Climate Change: covering vehicles, energy, adaptation, carbon in production and standardised statements
 - Materials
 - Waste
 - Biodiversity

Other sources

- Scotland's journey of achieving sustainable procurement outcomes 2002-2022: independent review
 - Chapter 4: What Good Looks Like in Terms of Sustainable Procurement
- Public authority procurement policies, for benchmarking (Scotland and rUK)
- Common EU Green Public Procurement criteria
 - Voluntary GPP criteria covering 14 product groups
 - Electricity
 - Food catering services and vending machines
 - Indoor cleaning services
 - Office building design, construction and management
 - Road transport
- Third party guidance (e.g. Institute of Civil Engineers: Procurement and Contract Guidance on Delivering Net-Zero Carbon)

EVALUATING COMMITMENTS AND ENSURING DELIVERY

Be SMART



Specific

Measurable

Achievable

Relevant

Timely

SPECIFIC

- Bidders have to know and understand what criteria they'll be evaluated against, and what information they need to provide / commitments they need to give
 - Transparency problem otherwise (e.g. the Dutch coffee case)
- Where criteria / submissions concern the delivery of the contract itself, the contractor will need to know and understand what they're committing to via their bid
- The commitments need to be specific enough that they can form part of a contract, and the authorities can enforce performance against them if required

- Information / submissions need to be capable of being measured and scored in an objectively justifiable and replicable way
 - Transparency issue again
- Need to be able to verify the accuracy of information provided by bidders (*Evn AG v Austria*)
- Where criteria / submissions translate into contract obligations / KPIs, may need to establish a baseline against which performance can be measured, and metrics to capture progress

- Requirements need not be achievable by all potential bidders (see the *Concordia Bus Finland* case)
- But do at least want them to be achievable by sufficient bidders to ensure competition
 - Equal treatment / non-discrimination risk otherwise
- Remember also the sustainable procurement duty re SMEs
- Requiring commitments that can't be achieved just stores up problems for contract performance
 - Waiving requirements that were material aspects of the procurement process, or of the contract as advertised, may be an unlawful variation
- Pre-tender market engagement – understand what is and isn't possible (consistent with the procurement principles)

- Requirements must be linked to the subject-matter of the contract
- Avoid assessing bidders based on what they do generally, or under other contracts – only factors relevant to delivery of the contract in question (*Evn AG v Austria*)
- Consider whether restrictions / obligations are actually necessary to achieve the desired benefits (*Grupo Hospitalario Quirón SA*)
- Consider what requirements / commitments will achieve the most benefit in the context of the particular procurement – e.g. focus on scope 1 / 2 / 3, depending on the contract type
- Avoid relatively onerous restrictions that will deliver relatively little (or no) benefit, and potentially just put off otherwise qualified and capable bidders
 - Proportionality remains a key overarching principle

- If bidders are offering commitments to deliver certain things, or make progress against certain benchmarks, what deadlines / timetable will apply to them?
- Open-ended commitments can't be enforced against a contractor as they can never be in breach for failure to deliver
- Take timetables / deadlines into account when evaluating tender commitments – but be clear in advance about that

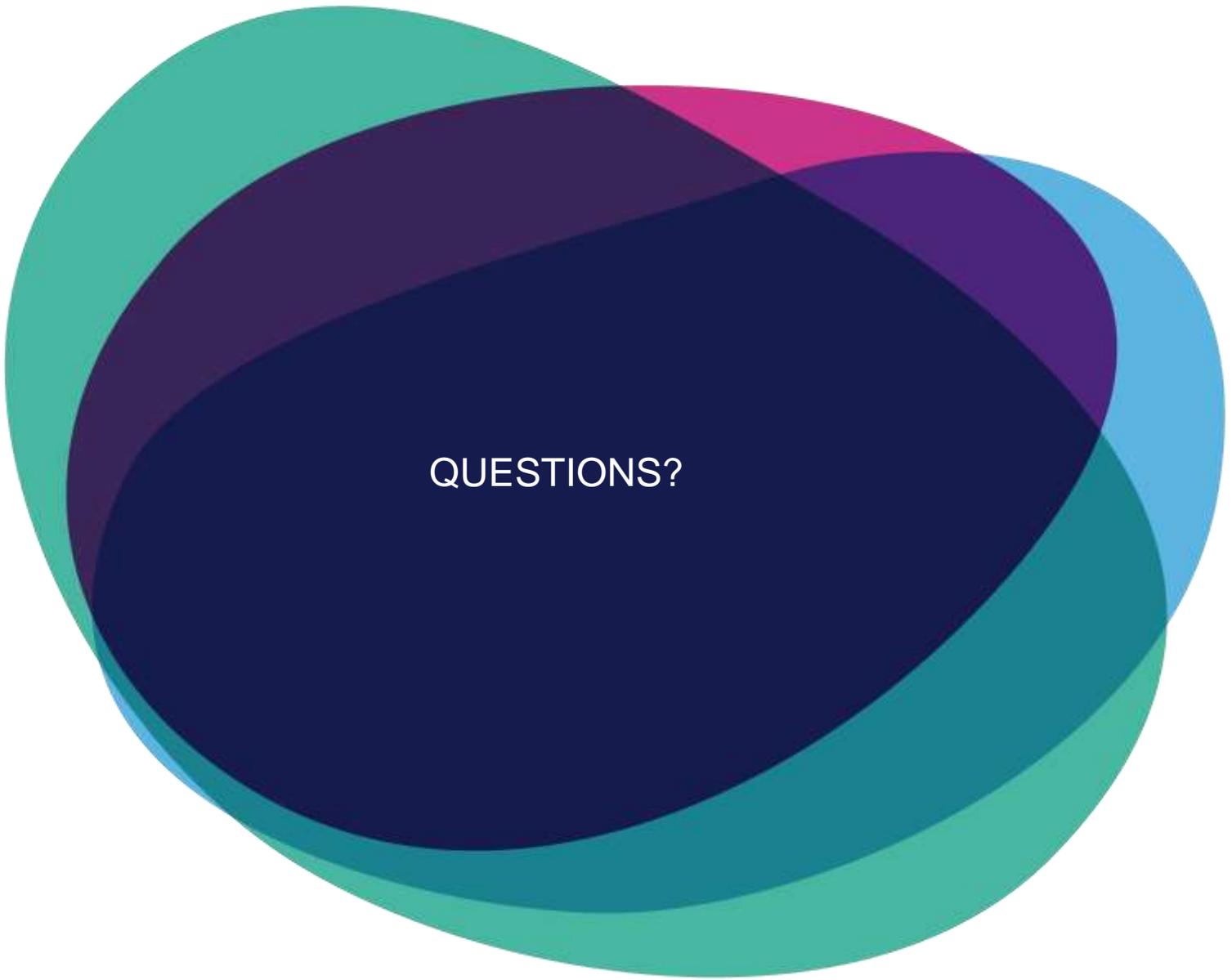


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QUESTIONS?