

SOCIAL VALUE AND PROCUREMENT

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ENLIGHTENED THINKING



HOW CAN YOU EFFECTIVELY
INCORPORATE AND EVALUATE
SOCIAL VALUE OBJECTIVES IN
TENDERS AND ENSURE THE
FULFILMENT OF BIDDER
COMMITMENTS, WITH REAL-LIFE
EXAMPLES OF SUCCESSFUL
IMPLEMENTATION?

OVERVIEW

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

WHAT IS SOCIAL VALUE?

- *Wider financial and non-financial impacts on the wellbeing of individuals, communities and the environment.*
 - » PPN 02/21
- Pre-procurement stage – consultation with affected communities in developing a business case
- Selection and award criteria:
 - i) compliance with relevant employment, equality and health and safety law and human rights standards;
 - ii) adherence to relevant collective agreements; and
 - iii) adoption of fair work practices for all workers engaged in the delivery of the contract: 7 measurements are (i) terms of employment, (ii) pay and benefits, (iii) job design and nature of work, (iv) social support and cohesion, (v) health, safety and psychosocial wellbeing, (vi) work/life balance and (vii) voice/representation.

WHAT IS GREEN PROCUREMENT?

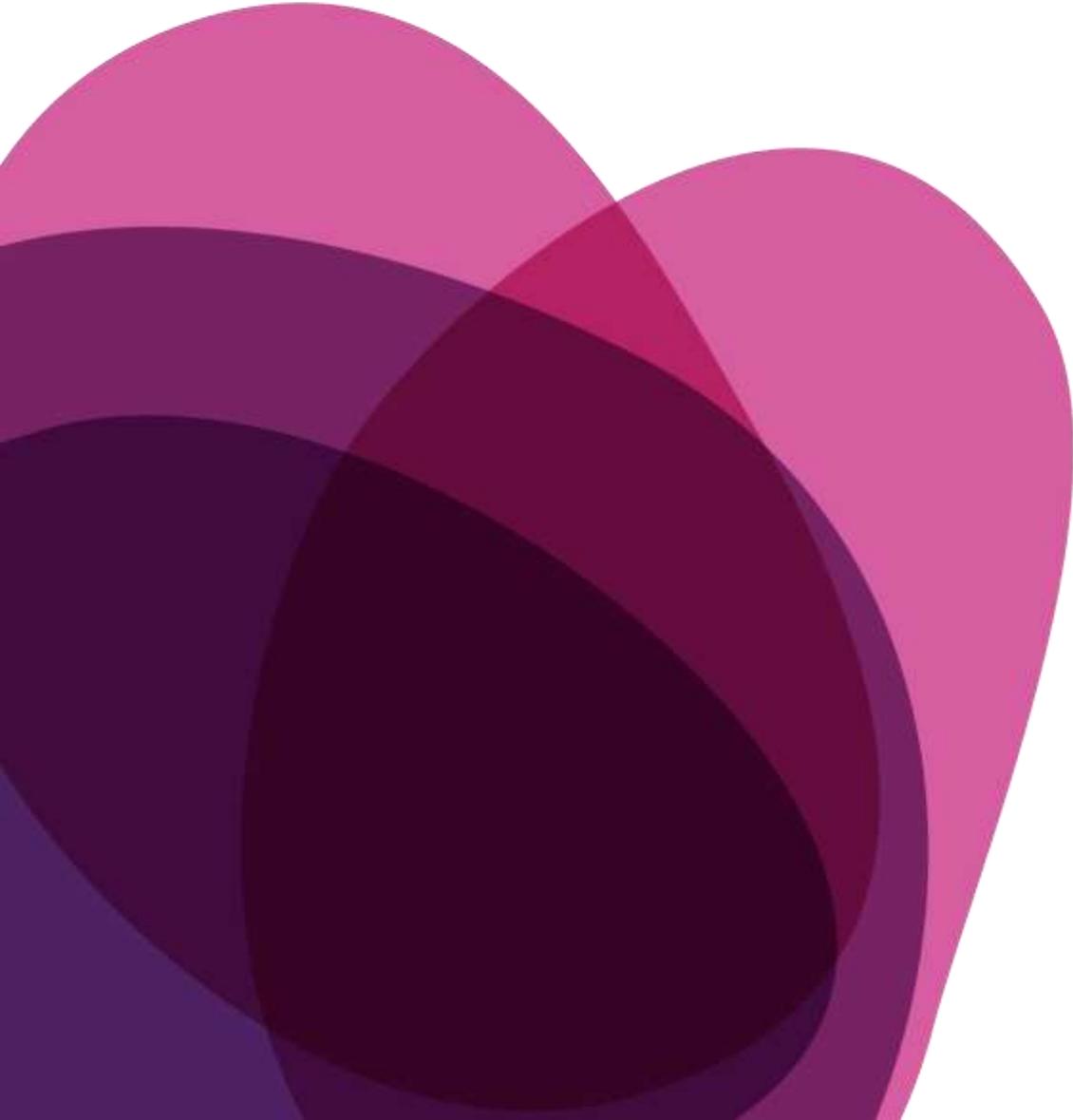
- European Commission concept of Green Public Procurement, defined in the Communication (COM -2008- 400) "Public procurement for a better environment":
 - "a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when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

WHAT IS NET ZERO?

Climate Change Act (Northern Ireland) 2022

- s.1(1): the net-zero emissions target
 - “The Northern Ireland departments must ensure that the net Northern Ireland emissions account for the year 2050 is at least 100% lower than the baseline”
- s.2: the interim targets
 - “in line” targets for 2030 and 2040 to be set by secondary legislation
 - consultation closed a week ago – proposal for 48% by 2030 and 77% by 2040
- ss.3 and 4: the targets for 2040 and 2030
 - 3. “The Northern Ireland departments must ensure that the net Northern Ireland emissions account for the year 2040 is in line with the target for the year 2050.”
 - 4. “The Northern Ireland departments must ensure that the net Northern Ireland emissions account for the year 2030 is at least 48% lower than the baseline.”

LEGISLATION



OVERARCHING OBLIGATIONS

Climate Change Act (Northern Ireland) 2022

- s.52: Duties on the Northern Ireland departments:
 - a) to exercise its own functions, so far as is possible to do so, in a manner that is consistent with the achievement of that objective,
 - b) so far as is consistent with the proper exercise of its own functions, to co-operate with each of the other departments in the performance by the other department of the other department's duty under paragraph (a), and
 - c) to draw up and implement such plans, policies and strategies as may be appropriate for the purpose of performing its duties under paragraphs (a) and (b).
- Regulations to provide for climate change reporting duties by other public bodies
- Climate and sustainability policies
- Climate action plans (inc. green procurement)

OVERARCHING OBLIGATIONS

Procurement policy note 01/21

- Policy for NI Departments
- From 1 June 2022 tenders must include a minimum of 10% of the total award criteria to score social value.
- Including environmental factors.
- 10% minimum will apply to contracts for services and works above the PCR threshold .
- Where appropriate, Departments can also score for social value on contracts outside of these thresholds.
- Departments can also give greater weight to social value than the 10% minimum.

OVERARCHING OBLIGATIONS

Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992/810

- Art.19: must have regard to SG guidance on the sustainable procurement duty
 - *“every council shall, in exercising, in relation to its public supply or works contracts, any proposed or any subsisting such contract, as the case may be, any function regulated by this Article, exercise that function without reference to matters which are non-commercial matters for the purposes of this Article.”*
- Environmental factors not specifically listed as “non-commercial” – is it an “irrelevant field of Government policy”? (Art. 19(4)(c))
- Terms and conditions of work are listed
- No equivalent of Social Value Act or Procurement Reform Act
- Authorities developing their own policy approaches e.g. sustainability and environmental impact as best value for money
- Subject to the PCR requirements

SPECIFICS

Public Contracts Regulations 2015

- **Principles (Reg 18)**
 - 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 42)**
 - Required characteristics may include environmental and climate performance levels
- **Labels (Reg 43)**
 - 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 Regulations 2015

- **Exclusion (Regs 56-57)**
 - 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 58-62)**
 - 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

- **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)

- **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

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

- “What good looks like”
 - “Procurement strategies and specifications that:
 - Deliver additional environmental benefits in the performance of the contract including working towards net zero greenhouse gas emissions.
 - contract specifications that support environmental protection and improvement.
 - supply chains that minimise carbon footprint and emissions.
 - companies employ low or zero-carbon practices and/or materials.
 - assessing and minimising embodied carbon.”

- “What good looks like”
 - “Procurement contracts that: -
 - Create employment, re-training and other return to work opportunities for those furthest from the labour market
 - Create employment opportunities particularly for those who face barriers to employment and/or who are located in deprived areas.
 - Create employment and training opportunities in industries with known skills shortages or in high growth sectors.
 - Support educational attainment in the workforce, including training schemes that address skills gaps and result in recognised qualifications.
 - increase the representation of disabled people in the contract workforce.
 - support disabled people to develop new skills and recognised qualifications. - Create opportunities for entrepreneurship and help new, small organisations to grow, supporting economic growth and business creation.
 - Support in-work progression to help people, including those from disadvantaged or minority groups, to move into higher paid work by developing new skills.”

Procurement Tools

- Northern Ireland Public Procurement Policy document
- SustainableNI Social Value Toolkit
- Finance NI Sourcing Toolkit and other Central Procurement Directorate materials
- Social Value NI resources:
 - Model criteria
 - Model questions
 - Scoring social value
 - Selecting indicators
 - E-learning modules

Other sources

- Public authority procurement policies, for benchmarking (rUK)
- European Commission “Buying Social” guidance
- 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

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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