



Brussels, 26.5.2021
C(2021) 3573 final

Commission Notice

"Buying Social - a guide to taking account of social considerations in public procurement (2nd edition)"

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Buying Social

A Guide to Taking Account of Social Considerations in Public Procurement

2nd Edition

The second edition of the Guide has been compiled under Contract № SI2.801176 – 728/PP/GRO/SME/18/D/021a between the European Commission and ICLEI – Local Governments for Sustainability, supported by Public Procurement Analysis (PPA).

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Luxembourg: Publications Office of the European Union, 2021

ISBN XXX

doi: XXX

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Introduction

Socially responsible public procurement (SRPP) is about achieving positive social outcomes in public procurement contracts. Procurement affects a large number of people: users of public services, those involved in production and delivery, or staff of the buying organisation. Beyond those directly affected, SRPP has the potential to influence the broader market on both the demand and supply sides.

By purchasing wisely, public buyers can promote employment opportunities, up and reskilling of the workforce, decent work, social inclusion, gender equality and non-discrimination, accessibility, design for all, ethical trade, and seek to achieve wider compliance with social standards. For some products, works and services, the impact can be particularly significant, as public purchasers command a large share of the market in sectors such as civil engineering, healthcare and transport.

To address societal challenges, public authorities need to step up efforts to deliver on all aspects of sustainability (social/ethical, environmental and economic). Public buyers are major investors in Europe, spending currently over 14% of the EU's gross domestic product. By using their purchasing power to opt for goods and services that deliver positive social outcomes, they can make a major contribution to sustainable development. This Guide offers them support in covering the social dimension of sustainable public procurement.

The current COVID-19 pandemic is likely to affect employment, increase inequalities, worsen the precariousness and the working conditions of workers globally, place further pressure on the delivery of certain services to the person, and impact smaller businesses. In their recovery strategies, EU Member States will need to improve social inclusion and fairness through education and skills, employment, and social and territorial cohesion, and ensure that the green and digital transitions will create jobs, sustainable growth and socio-economic resilience. Socially responsible purchasing practices are a powerful instrument in the toolbox of EU national administrations to reach these goals.

The purpose of this document is to raise public buyers' awareness of the potential benefits of SRPP and to explain in a practical way the opportunities offered by the EU legal framework. When drafting this Guide, the Commission consulted widely with public buyers to identify good practices and examples of what can be achieved. These examples are featured throughout the text.

This Guide has been produced for public buyers, but also in the hope that it inspires others involved in procurement, whether as suppliers or service providers, private buyers, social economy players including social enterprises, or NGOs.

The chapters of this guide address all aspects of the procurement process, beyond the tendering procedure itself. They detail how social considerations can be introduced throughout the process, and provide numerous examples from actual practices of public buyers across the EU. In chapters 2 to 5, most sections are followed by a list of "good practices". These are meant to further facilitate understanding of the text, by summarizing in concrete terms the essential points covered in each section and what public buyers can do in practice if they wish to take a socially responsible approach to the procurement process.

Chapter 1 – Definition, purpose and benefits of socially responsible public procurement

1.1 Socially responsible public procurement and its definition

Socially responsible public procurement (SRPP) aims to address the impact on society of the goods, services and works purchased by the public sector. It recognises that public buyers are not just interested in purchasing at the lowest price or best value for money, but also in ensuring that procurement achieves social benefits⁽¹⁾ and prevents or mitigates adverse social impacts during the performance of the contract. As a public buyer you can consider social objectives throughout the entire procurement process, provided these are non-discriminatory and linked to the subject-matter of the contract⁽²⁾. In the European Union, SRPP must be carried out in compliance with the 2014 Public Procurement Directives⁽³⁾ and the principles enshrined in the EU Treaty⁽⁴⁾ and Charter of Fundamental Rights, as well as international agreements, such as the WTO Government Procurement Agreement (GPA) and bilateral Free Trade Agreements with procurement chapters⁽⁵⁾, and the UN Convention on the Rights of Persons with Disabilities (UNCRPD)⁽⁶⁾.

SRPP can be a powerful tool both for advancing sustainable development and for achieving international, national, regional or local social objectives. It views public procurement as a strategic instrument to spend public money efficiently and sustainably. Social considerations can be combined with green⁽⁷⁾ and circular⁽⁸⁾ criteria and procurement of innovation⁽⁹⁾ for a more comprehensive

⁽¹⁾ Including achieving compliance with the obligations and principles established in the Treaty and in the Charter of Fundamental rights of the European Union, such as equality before the law and non-discrimination.

⁽²⁾ This fundamental requirement for SRPP is explained in Section 4.1, with specific examples throughout the Guide.

⁽³⁾ Directive 2014/23/EU of the European Parliament and the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services and repealing Directive 2004/17/EC. Hereafter they will be referred to as “the Public Procurement Directives”.

⁽⁴⁾ Treaty on the Functioning of the European Union (TFEU).

⁽⁵⁾ The EU has committed itself under several international agreements to grant access to its public procurement market for certain works, supplies, services and economic operators of several third countries. The only plurilateral international agreement in the WTO is the GPA, opening up the EU procurement market to the other parties to the agreement. In addition, several of the EU's Free Trade Agreements (FTA) contain chapters on procurement. As highlighted by Article 25 of Directive 2014/24/EU and Article 43 of Directive 2014/25/EU, public buyers in the EU must accord to the works, supplies, services and economic operators of the signatories to those agreements treatment that is no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU, in so far as these are covered by these agreements. Beyond that obligation, economic operators from third countries, which do not have any agreement providing for the opening of the EU procurement market or whose goods, services and works are not covered by such an agreement, do not have secured access to procurement procedures in the EU and may be excluded. For more information on third country participation in procurement procedures launched by EU public buyers, see European Commission (2019) Guidance on the participation of third country bidders and goods in the EU procurement market C(2019) 5494 of 24.7.2019 (https://ec.europa.eu/growth/content/new-guidance-participation-third-country-bidders-eu-procurement-market_en).

⁽⁶⁾ <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

⁽⁷⁾ For guidance on green public procurement, see the 2016 *Buying Green! Handbook* (http://ec.europa.eu/environment/gpp/buying_handbook_en.htm).

approach to sustainability in public procurement ⁽¹⁰⁾. Improving professionalism and support to public buyers can greatly facilitate the successful use of social considerations and their integration with other considerations related to sustainability and quality ⁽¹¹⁾.

Socially responsible public procurement helps public authorities deliver quality services and products to their communities, to achieve additional social and ethical benefits even when budgets are limited, and can therefore contribute to countering the negative impact of the COVID-19 crisis. The recovery from the pandemic will require EU public authorities to use all available tools and instruments to tackle negative socio-economic effects. The unprecedented financial resources, which will be available under the Recovery and Resilience Facility, will often be put to use through public procurement. It is therefore crucial that public buyers can fully exploit the flexibility of public procurement rules to make sure these resources are used to achieve the highest possible positive social and economic impact for their communities. Moving away from a lowest price logic and introducing considerations related to social integration, equality, fair and inclusive employment and ethical supplies is key to maximize the recovery effect of these resources.

This Guide features a range of examples of SRPP in practice from across the EU, showcasing different approaches and the achievement of real impacts, which can be used as a source of inspiration. You can find more examples of good practices from EU and Third Countries in the two reports “Making socially responsible procurement work - 71 good practice cases” ⁽¹²⁾ and “Buying for social impact - Good practice from around the EU” ⁽¹³⁾ available on the Commission’s webpage on support tools for public buyers ⁽¹⁴⁾.

1.2 Identifying and applying social objectives in public procurement

Public buyers have many ways to include specific social considerations in purchasing decisions. Below is a non-exhaustive list of examples of social objectives that you can pursue through public procurement. Remember however that compliance with mandatory social and labour rules in the performance of the contract is not a choice, but an obligation under the Public Procurement

⁽⁸⁾ For guidance on circular procurement, see 'Public Procurement for a Circular Economy' (http://ec.europa.eu/environment/gpp/circular_procurement_en.htm).

⁽⁹⁾ For guidance on innovation procurement, see the *Commission notice Guidance on Innovation Procurement* (<https://ec.europa.eu/transparency/regdoc/rep/3/2018/EN/C-2018-3051-F1-EN-MAIN-PART-1.PDF>).

⁽¹⁰⁾ The Communication from the Commission to the Institutions: *Making Public Procurement work in and for Europe* highlights “the possibilities of public procurement as a strategic tool to support sustainable, social policy objectives and innovation.” For more information, see the communication at: <https://ec.europa.eu/docsroom/documents/25612/attachments/1/translations/en/renditions/native>

⁽¹¹⁾ For more information on professionalisation of public procurement, see Commission Recommendation (EU) 2017/1805 of 3 October 2017 on the professionalisation of public procurement Building an architecture for the professionalisation of public procurement and *ProcurComp EU*, the European Framework for Public Procurement Professionals: https://ec.europa.eu/growth/content/european-commission-unveils-procurcompeu---european-competency-framework-public-procurement_en

⁽¹²⁾ https://ec.europa.eu/growth/content/making-socially-responsible-public-procurement-work-71-good-practice-cases_en

⁽¹³⁾ <https://op.europa.eu/en/publication-detail/-/publication/3498035f-5137-11ea-aece-01aa75ed71a1>

⁽¹⁴⁾ https://ec.europa.eu/info/policies/public-procurement/support-tools-public-buyers_en

Directives ⁽¹⁵⁾. Chapters 4 and 5 of this Guide examine how you can address these issues at different stages of the procurement process. You should decide which of the below social considerations are relevant to your procurement, depending on your objectives and the subject-matter of the contract.

Promoting fair employment opportunities and social inclusion

SRPP can be a driver towards:

- Employment opportunities for youth and older workers;
- Gender equality (e.g. facilitating work/life balance, reducing sectoral and occupational segregation ⁽¹⁶⁾, ensuring equal treatment in the workplace).
- Employment opportunities for people experiencing social exclusion due to long-term unemployment, homelessness, discrimination or other vulnerabilities;
- Societal participation and employment opportunities for persons with disabilities, including through inclusive and accessible work environments;
- Improved diversity policies, social inclusion and employment opportunities for persons from disadvantaged groups (e.g. migrant workers, people with a minority racial or ethnic background, religious minorities, people with low educational attainment and those at risk of poverty and social exclusion); and
- Up and reskilling opportunities for all workers.

Providing opportunities for social economy and social enterprises

Social economy organisations and social enterprises ⁽¹⁷⁾ can help to deliver the employment opportunities and social inclusion mentioned above, providing social returns from your spend. For example, the Public Procurement Directives provide the scope to promote social inclusion by reserving contracts for work integration social enterprises or those operators which employ at least 30% persons with disabilities or disadvantaged workers ⁽¹⁸⁾. They also encourage public buyers to consider dividing contracts into lots, which may be more accessible to social economy organisations and social enterprises ⁽¹⁹⁾.

Promoting decent work

The International Labour Organisation (ILO) defines decent work ⁽²⁰⁾ as:

⁽¹⁵⁾ Article 18(2) of Directive 2014/24/EU, Article 36(2) of Directive 2014/25/EU and Article 30(3) of Directive 2014/23/EU. This set of provisions will be referred to hereafter as “the social and environmental clause”. See 4.5 for more details on this point.

⁽¹⁶⁾ Gender equality is a core value of the EU, a fundamental right and key principle of the European Pillar of Social Rights. The promotion of equality between women and men is a task for the Union, in all its activities, required by the Treaties. This includes for example, the concept of gender balance, which covers not only the under-representation of women in male-dominated sectors such as Science, Technology, Engineering and Mathematics (STEM), but also the under-representation of men in sectors such as health-, social- and childcare and primary education.

⁽¹⁷⁾ The social economy encompasses associations, foundations, cooperatives, mutual associations and social enterprises. Social enterprises are organisations that, irrespective of their legal form, combine entrepreneurial activity with a social purpose. Their main aim is to have a social impact, rather than maximise profit for owners or shareholders. Find out more at https://ec.europa.eu/growth/sectors/social-economy_en.

⁽¹⁸⁾ Articles 20 and 77 of Directive 2014/24/EU, Articles 38 and 94 of Directive 2014/25/EU, Article 34 of Directive 2014/23/EU . See Section 4.3 for further discussion of reservations.

⁽¹⁹⁾ Article 46 of Directive 2014/24/EU and Article 65 of Directive 2014/25/EU.

⁽²⁰⁾ <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm>.

‘Work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives, and equality of opportunity and treatment for all women and men.’

Under this definition and in line with the 2030 Agenda for Sustainable Development ⁽²¹⁾, the EU promotes, within the EU and in global supply chains ⁽²²⁾:

- Secure employment;
- Fair wages;
- Safe working conditions;
- Social protection;
- Equality of opportunity and treatment for all women and men;
- Gender equality and non-discrimination in access to employment;
- Social dialogue; and
- Safeguarding of rights at work.

Ensuring compliance with social and labour rights

The EU aims to promote social progress and improve the living and working conditions of European citizens ⁽²³⁾. Public procurement contributes to these aims by ensuring that suppliers:

- Comply with applicable obligations in the fields of social and labour law established by Union law, national law, collective agreements in accordance with EU law;
- Comply with fundamental ILO conventions;
- Comply with the principle of equal treatment between women and men, including the principle of equal pay for work of equal value ⁽²⁴⁾, and promotion of gender equality ⁽²⁵⁾;
- Comply with occupational health and safety laws; and
- Fight discrimination on the basis of e.g. gender, age, disability, racial or ethnic origin, religion or belief, sexual orientation and create equal opportunities.

Accessibility and design for all

Procuring goods, services and works that are accessible to all, including persons with disabilities, is a fundamental aspect of SRPP and is compulsory in public contracts. Article 42 of Directive 2014/24/EU and Article 60(1) of Directive 2014/25/EU state: ‘technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.’

This provision supports the national authorities’ compliance with the UNCRPD ⁽²⁶⁾, to which the EU and all its Member States are party. The UNCRPD establishes obligations on accessibility and the related UNCRPD Committee has identified buying accessible as a key issue for governments ⁽²⁷⁾.

⁽²¹⁾ https://ec.europa.eu/info/strategy/international-strategies/sustainable-development-goals/eu-holistic-approach-sustainable-development_en.

⁽²²⁾ https://ec.europa.eu/international-partnerships/topics/employment-and-decent-work_en.

⁽²³⁾ <https://ec.europa.eu/social/main.jsp?catId=157>.

⁽²⁴⁾ See Article 157 TFEU and Directive 2006/54/EC.

⁽²⁵⁾ The importance of gender equality is highlighted in the political guidelines of the President of the European Commission and in all the mission letters to the Commissioners of the European Commission, https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf.

The UNCRPD ⁽²⁸⁾ also recognises ‘the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices’, and ‘have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them’. In other words, public buyers:

- Should strive to procure recognizing the needs of persons with disabilities and involving them in the purchasing process. Needs assessment and supplier engagement to ensure effective public services that take into account the objectives of social and professional inclusion, and the specific needs of your users are covered in Chapter 3 of this guide;
- Must take into account accessibility in technical specifications ⁽²⁹⁾ to secure access for persons with disabilities to, for example, public services, public buildings, public transport, public information and ICT goods and services, including web-based applications; and
- May use award criteria to reward offers proposing higher standards of accessibility than those established in the technical specifications.
- May also include performance clauses to ensure that the services procured are executed in a way that ensures that the result is accessible, on the basis of a design for all approach.

Respecting human rights and addressing ethical trade issues

Public procurement can be used to address social issues within supply chains, such as human rights ⁽³⁰⁾ or fair trade principles. Respect for basic human rights is an essential part of any business relationship entered into by a State, as set out in the UN Guiding Principles on Business and Human Rights ⁽³¹⁾. In addition, the Court of Justice of the European Union (CJEU) held in 2012 that fair trade considerations can form part of procurement decisions ⁽³²⁾, and the Public Procurement Directives reflect this ⁽³³⁾.

The broad scope of public procurement contracts ⁽³⁴⁾, as well as the global nature of certain supply chains, entails a risk that human rights abuses could be linked to your procurement. Cases such as the Rana Plaza fire in Bangladesh are well known, but dangerous and inhumane working conditions

⁽²⁶⁾ General Comment 2 of the UNCRPD states that “‘As part of their review of accessibility legislation, States parties must also consider their laws on public procurement to ensure that their public procurement procedures incorporate accessibility requirements. It is unacceptable to use public funds to create or perpetuate the inequality that inevitably results from inaccessible services and facilities. Public procurements should be used to implement affirmative action in line with the provisions of Article 5, paragraph 4, of the UNCRPD in order to ensure accessibility and de facto equality for persons with disabilities.”

⁽²⁷⁾ See, respectively, Article 9 and General Comment 2 of the UNCRPD.

⁽²⁸⁾ www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html

⁽²⁹⁾ For public contracts and utilities: see respectively Article 42(1) of Directive 2014/24/EU, Article 60(1) of Directive 2014/25/EU.

⁽³⁰⁾ This includes compliance with the obligations and principles established in the Treaty and in the Charter of Fundamental rights of the European Union, and with the ILO Declaration on Fundamental Principles and Rights at Work, the International Bill of Human Rights and the United Nations Declaration on the Rights of Indigenous Peoples.

⁽³¹⁾ The UN Guiding Principles on Business and Human Rights are a set of guidelines for States and companies to prevent, address and remedy human rights abuses committed in business operations. They were endorsed by the UN Human Rights Council in June 2011 and can be accessed at: www.business-humanrights.org/en/un-guiding-principles.

⁽³²⁾ Case C-368/10 *Commission v Kingdom of the Netherlands*, paragraph 91 and 92.

⁽³³⁾ Recital 97 and Article 67(3)(a) of Directive 2014/24/EU, Recital 102 and Article 82(3)(a) of Directive 2014/25/EU, Recital 64 and Article 41 of Directive 2014/23/EU.

⁽³⁴⁾ The expression “public procurement contract(s)” is used in this document to designate indistinctly public contracts and concessions.

also exist within Europe. The Public Procurement Directives require exclusion of economic operators convicted by final judgment of child labour and other forms of trafficking in human beings, and compliance with the Fundamental ILO conventions ⁽³⁵⁾ should be verified by all public buyers. This Guide also looks at how human rights can be protected in procurement by:

- Increasing transparency in supply chains including through monitoring of subcontractors and sub-subcontractors;
- Analysing specific risks within supply chains;
- Requiring contractors and subcontractors to take measures to improve workers' conditions in the supply chain and tackle potential or identified human rights violations in the production process; and
- Encouraging strict supplier codes of conduct for social responsibility.

Delivering high quality social, health, education and cultural services

The Public Procurement Directives set out a 'light regime' for specific social, health, education and cultural services, along with various other categories ⁽³⁶⁾. Public buyers are encouraged to take into account 'quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation' ⁽³⁷⁾. Quality standards can also be applied when procuring social services, such as the 2010 Voluntary European Quality Framework for Social Services ⁽³⁸⁾. Section 4.2 looks at how public buyers have chosen to apply the light regime to achieve social benefits.

⁽³⁵⁾ Article 7 International Covenant on Economic, Social and Cultural Rights.

⁽³⁶⁾ Title III (Articles 74-77) of Directive 2014/24/EU, Title III (Articles 91-94) of Directive 2014/25/EU, Article 19 of Directive 2014/23/EU.

⁽³⁷⁾ Article 76 of Directive 2014/24/EU, Article 93 of Directive 2014/25/EU.

⁽³⁸⁾ [A Voluntary European Quality Framework for Social Services, SPC/2010/10/8 final.](#)

Setting and achieving smart SRPP targets in Nantes (France)

Procurement objective

Nantes Metropolitan Area has been implementing Responsible Public Procurement (RPP) since 2001. In 2017, a Responsible Purchasing Promotion Scheme (SPAR) was adopted to strengthen the coherence of the numerous initiatives developed over the previous 15 years, and to reinforce the links between procurement activities and initiatives to support SMEs.

Approach

SPAR created an internal guide for the implementation of responsible procurement, which highlighted practical methods and support available within the local area, and designed a SPAR Governance structure to oversee the development, implementation and monitoring of responsible procurement actions:

- At the political level, all relevant elected members of the metropolitan council are informed about the upcoming investments to collectively decide on the social and environmental clauses in each of them. These members also regularly evaluate the impact of the SPAR.
- At the technical level, the public procurement team works jointly with a network of CSR ambassadors in each directorate. The buyers support the operational directorates to integrate social and environmental clauses into their purchasing and to evaluate the quality of the offers received.

Results

Key SRPP achievements over the last two years in Nantes include:

- Inclusion clauses in 143 works and in 1,918 services contracts, which represent 326,448 hours of employment for people facing obstacles in accessing the labour market;
- Focus on diversification of contracts with an inclusion clause to broaden the scope of people concerned (e.g. works contracts reach more male than female unemployed);
- Clauses related to combatting discrimination in several trial contracts, acknowledged by the award of a Diversity label to Nantes;
- The use of reserved contracts, which allow Nantes to restrict a tender to sheltered workshops when appropriate.

Lessons learned

Defining, monitoring and updating the social and environmental criteria included in public procurement policy in partnership with all stakeholders is of central importance to the success of responsible procurement. It requires the identification of dedicated resources and the implementation of appropriate verification tools.

1.3 Purpose and Benefits of SRPP

At its most basic level, SRPP aims to ensure compliance with legal obligations in the social field. The Public Procurement Directives require EU Member States to take 'appropriate measures' to ensure that economic operators comply with applicable European Union law, national law, collective agreements and international environmental, social and labour law provisions in the performance of public procurement contracts ⁽³⁹⁾. While Member States have implemented this provision in different ways, it is clear that social obligations cannot be ignored in procurement, not least to protect against unfair competition from operators who do not comply with these rules.

⁽³⁹⁾ Article 18(2) Directive 2014/24/EU; Article 36(2) Directive 2014/25/EU; Article 30(3) Directive 2014/23/EU.

Declaration 22 regarding persons with a disability of the Treaty of Amsterdam already indicated that in drawing up measures with the aim of progressively establishing the internal market the institutions of the Community needs to take account of the needs of persons with a disability⁽⁴⁰⁾. The Treaty of Lisbon commits Europe to achieve a ‘highly competitive social market economy, aiming at full employment and social progress’ and to ‘combat social exclusion and discrimination, [...] promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child’⁽⁴¹⁾. The size of public procurement and its importance to the internal market makes it a valuable tool to achieve these ambitions. SRPP can also contribute to international commitments, such as the UN Sustainable Development Goals⁽⁴²⁾. Sustainable development requires that economic operators listen to and take into account the views and rights of individuals, communities and civil society groups⁽⁴³⁾ – a topic explored further in Chapters 2 and 3.

In addition to the obligations laid out in the Public Procurement Directives and other legislation, applying SRPP helps public buyers to:

Identify compliance risks for social and labour law

Organisations which actively implement SRPP are more likely to identify compliance risks for legislation which applies to them directly or to suppliers. No public body wants to be in the headlines for illegal or unethical working practices at any stage in their supply chains. SRPP policy and actions help you to identify supply chain risks and minimise them during procurement and contract management.

Stimulate socially conscious markets

SRPP can create demand and incentives for more responsible and sustainable production. Public buyers can stimulate innovation and increased competition by challenging the market to create new and more socially sustainable solutions. Furthermore, it can boost the development of businesses which, beyond economic performance, seek to have a positive impact on society at large, such as social enterprises. For example, specifying ICT products that are accessible for persons with disabilities can help to bring better and more affordable products onto the market.

Demonstrate socially responsive governance

You can use SRPP to ensure you are responding to community values and needs as well as to meet growing public demand for governments to be socially responsible in their actions. It can thus help to increase levels of public trust in government. SRPP can also have a positive effect on the staff performing the contract, who are creating added benefit to their communities.

⁽⁴⁰⁾ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Declaration 22.

⁽⁴¹⁾ Article 3(3) of Treaty on European Union (TEU).

⁽⁴²⁾ <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> and as highlighted in the Commission’s Reflection Paper “Towards a Sustainable Europe by 2030” COM(2019)22 of 30 January 2019.

⁽⁴³⁾ Declaration 22 of the Treaty of Amsterdam regarding persons with a disability already indicated that “ The Conference agrees that, in drawing up measures under Article 100a (now article 95) of the Treaty establishing the European Community, the institutions of the Community shall take account of the needs of persons with a disability”.

Support integration and inclusion

SRPP encourages the integration and inclusion of often marginalised groups in society (for example, persons with disabilities, persons at risks of poverty and social exclusion, minorities) in market activities. SRPP can create opportunities for businesses owned by such groups, as well as training and employment. SRPP also illustrates how social and economic considerations can be mutually reinforcing, for example social enterprises delivering public services in way that creates additional value through social outcomes and impacts.

Ensure effective public expenditure

The volume of public procurement and the limits placed on direct social intervention by budget restrictions can make procurement an attractive area for promoting social objectives. Strategic public procurement provides opportunities to use existing, planned budgets to make positive and innovative contributions to societal challenges.

1.4 Links to EU and International Policies and Legislation

This Guide focuses on the requirements and opportunities for SRPP, which arise under the Public Procurement Directives. However, many other instruments at EU and national level are relevant and affect how you implement SRPP. This section highlights some of the most important laws and policies affecting SRPP.

EU labour and non-discrimination law has been developed to protect workers across Europe. Such legislation provides workers with rights relating to equal treatment and non-discrimination⁽⁴⁴⁾, information about their working conditions, reconciliation between private and professional life⁽⁴⁵⁾, rights relating to non-standard work contracts⁽⁴⁶⁾, regulation of working time, protection of health and safety, and information and consultation of workers⁽⁴⁷⁾.

This legislation binds contractors and subcontractors in the EU, and public buyers must ensure these provisions are implemented in all workplaces. More detailed information about relevant legislation is given below and in Chapters 4 and 5.

⁽⁴⁴⁾ In the areas of employment see, inter alia, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁽⁴⁵⁾ See inter alia Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

⁽⁴⁶⁾ See inter alia Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work; Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

⁽⁴⁷⁾ An overview of the EU social acquis is presented in the Commission Staff Working Document SWD(2016)50 final of 8.03.2016. Additional initiatives developed after this date are presented in the following paragraphs.

The European Commission discusses and cooperates with different stakeholders across EU Member States on promoting quality and decent work practices in public procurement. In recent years, European social partners, namely trade unions and employers' organizations have produced several sectoral guides on procuring best value, often with the financial support of the Commission. These guides concern contract catering services ⁽⁴⁸⁾, private security services ⁽⁴⁹⁾ and industrial cleaning services ⁽⁵⁰⁾. These reference guides underscore the benefits of procuring services based on quality criteria and best value for money. The guides also provide specific examples in the field of security, cleaning and catering services contracts showing how a quality-based approach requires fair working conditions for employees. A guide on public procurement in the field of engineering services also exists, which includes indications on taking account of social considerations ⁽⁵¹⁾.

European Pillar of Social Rights

In 2017, the European Parliament, the Council, and the Commission proclaimed the European Pillar of Social Rights setting out principles for a fairer, more inclusive European Union, putting social priorities at the centre of the European agenda ⁽⁵²⁾.

In January 2020, the European Commission presented the Communication "A strong social Europe for just transitions" ⁽⁵³⁾, which sets out the first reflections for an Action plan to implement the European Pillar of Social Rights. It also mentions socially responsible public procurement as a tool to use existing funds in a way that supports inclusion and job opportunities.

Concrete legislation has also been adopted at EU level, which puts this ambition for a fairer, more inclusive European Union into practice and affects procurement procedures. Directive (EU) 2019/1152 *on transparent and predictable working conditions* aims to ensure all workers, including those in 'non-standard' working arrangements, have access to information about their working conditions and are not subject to unfair terms. Specifically, it requires that by 2022 all workers in the EU:

- Have access to written information on the essential aspects of their work, from the beginning of the working relationship;
- Are not subject to probationary periods longer than six months unless exceptional circumstances apply;
- Can seek additional employment, with a ban on exclusivity clauses and without being subjected to adverse treatment, and with limits on incompatibility clauses;
- Know a reasonable period in advance when work will take place;

⁽⁴⁸⁾ "Choosing best value in contracting food services" https://contract-catering-guide.org/wp-content/uploads/2019/09/Catering-Services_Best-Value-Guide_EN_Web.pdf .

⁽⁴⁹⁾ "Buying quality private security services" http://www.securebestvalue.org/wp-content/uploads/2014/11/Best-Value-Manual_Final.pdf .

⁽⁵⁰⁾ "Selecting Best Value – A guide for public and private organisations awarding contracts for cleaning services" <http://www.cleaningbestvalue.eu/the-guide.html> .

⁽⁵¹⁾ "How to derive MEAT criteria – Introducing quality criteria into public procurement" https://www.efcanet.org/sites/default/files/2020-01/MEAT%20booklet_final.pdf .

⁽⁵²⁾ https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en.

⁽⁵³⁾ Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A strong social Europe for just transitions" of 14 January 2020, COM(2020) 14 final.

- Receive a written reply to a request to transfer to another more secure job; and
- Receive cost-free the mandatory training that the employer has a duty to provide.

Additionally, Member States need to enact rules to avoid the abuse of on-demand contracts such as arrangements in which workers are not guaranteed work from their employers (often referred to as 'zero-hour contracts'). A strong set of enforcement provisions are also at the disposal of workers in case of no-compliance by their employer.

Public procurement contracts may include terms which ensure that employers respect these conditions (both contractors and subcontractors), and which provide for appropriate sanctions if they are breached.

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, which the Member States need to transpose by 2 August 2022, introduces several new minimum entitlements in the area of family-related leave and flexible working arrangements, including:

- Paternity leave: fathers/equivalent second parents are able to take at least ten working days of paternity leave around the time of the birth of the child, compensated at least at the level of sick pay;
- Strengthening of the existing right to four months of parental leave, by making two out of the four months non-transferable from one parent to another, and compensated at an adequate level. Parents also have the right to request to take the leave flexibly;
- Introduction of carers' leave for workers providing personal care or support to a relative or to a person living in the same household as the worker. Working carers are able to take five days per year;
- Extension of the existing right to request flexible working arrangements (reduced working hours, flexible working hours and flexibility in place of work) to all working parents of children up to at least eight years old, and all carers.

Again, public procurement contracts may contain terms ensuring that these conditions are respected by employers, including both contractors and subcontractors.

Other upcoming Commission initiatives in the field of sustainability and labour rights (e.g. the proposal for a Directive on adequate minimum wages in the European Union ⁽⁵⁴⁾) may also have an impact, in the near future, on how public procurement contracts are to be performed.

European Accessibility Act

Directive (EU) 2019/882 on the accessibility requirements for products and services ⁽⁵⁵⁾ – known as the European Accessibility Act (EAA) – sets common standards and obligations to harmonise accessibility requirements of certain product and services. As a result it will ensure that persons with disabilities and older adults can access products and services. It also reflects the obligation under the UN Convention on Rights of Persons with Disabilities (UNCRPD) to facilitate compliance with

⁽⁵⁴⁾ Proposal for a Directive of the European Parliament and of the Council of 28 October 2020 on adequate minimum wages in the European Union, [COM\(2020\) 682 final](#). This legislative proposal will require adoption by the EU co-legislators and transposition at national level.

⁽⁵⁵⁾ Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services.

accessibility obligations for State Parties. It also facilitates ensuring that persons with disabilities have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them. The Directive covers the following products and services ⁽⁵⁶⁾:

- Computers and operating systems
- Payment terminals and ATMs
- Ticketing and check-in machines
- Interactive self-service terminals providing information
- Smartphones
- TV equipment related to digital television services
- Telephony services and related equipment
- Access to audiovisual media services such as television broadcast and related consumer equipment
- Certain services related to air, bus, rail, and waterborne passenger transport
- Consumers banking services
- e-books
- e-commerce
- The answering to the single European emergency number '112'

Mandatory accessibility requirements for these products and services will apply from 2025 ⁽⁵⁷⁾.

⁽⁵⁶⁾ Article 2 of Directive 2019/882/EU.

⁽⁵⁷⁾ The Directive provides an exemption for urban, suburban and regional transport services as well as services provided by microenterprises (an enterprise which employs fewer than 10 persons and which has an annual turnover not exceeding EUR 2 million or an annual balance sheet total not exceeding EUR 2 million).

Improving accessibility of water fountains in the Basque Country (Spain)

Introduction/procurement objective

To address issues of plastic waste and to reduce spending on bottled water, Mutuality, a provider of social services and medical care, operating 17 service centres in the Basque country, decided to install water fountains connected to the public water network, offering tap water instead of buying bottled water. The goal was to offer high quality drinking water at varying temperatures.

Approach

The contract, which was below the EU threshold, was awarded to the most economically advantageous offer, weighted according to price (50%) and quality (50%). The quality criteria included accessibility considerations, such as the height of the fountains and ease of use for people with reduced mobility.

Mutuality awarded more points to the company which offered water machines that were easy to use for people with difficulties in their vision or people with reduced mobility in their hands or arms.

Results

In January 2019 Mutuality introduced 40 new water fountains in its 17 service centres, and provided its staff with reusable water bottles. Mutuality is saving an estimated €17,000 annually on water for its patients, employees, and visitors. Due to the inclusion of accessibility requirements, the winner offered bigger buttons for the identification of the type of water. In addition, the position in which the glasses are located makes it easier for people in wheelchairs to take and fill them. Apart from the position of the glasses, Mutuality took the height of the place where the glasses are filled into consideration, giving more points to those machines with a lower slot.

Lessons learned

By including accessibility criteria, Mutuality were able to ensure that the purchased water fountains work for all patients and visitors to the health centre. By enabling everyone to access water refill stations, they are not only helping people stay hydrated and healthy, but they are also saving an estimated €17,000 in costs and significantly reducing plastic waste.

Source:

https://ec.europa.eu/environment/gpp/pdf/news_alert/Issue_91_Case_Study_173_Mutuality.pdf

Under Article 42(1) of Directive 2014/24/EU and 60(1) of Directive 2014/25/EU, accessibility requirements laid down in EU legal acts must be included in technical specifications where the procurement is intended for use by natural persons, whether members of the public or staff of the public buyer. Furthermore, Directives 2014/24/EU and 2014/25/EU require that, where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications are, as far as accessibility for persons with disabilities or design for all users are concerned, to be established by reference thereto. The EAA establishes such mandatory accessibility requirements for products and services covered by it. These mandatory accessibility requirements ensure that products and services are designed and produced in such a way as to maximise their foreseeable use by persons with disabilities. They should also be accompanied where possible in or on the product by accessible information on their functioning and accessibility features. In procurement documents, you may

refer to harmonised standards or technical specifications for product or service delivery accessibility requirements developed by European standardisation organisations, for example EN 17161:2019 on Accessibility.

For products and services not falling under the scope of the European Accessibility Act (EAA), the accessibility requirements of the EAA are not binding. However, where the Accessibility Act or other EU legislation sets out accessibility rules and obligations for any product or service, if the features, elements or functions comply with the corresponding EAA requirements they can be presumed to also comply with the other legislation, unless otherwise provided. Public buyers may in any case decide to apply accessibility requirements that go beyond the accessibility requirements set out in EU Law. The EAA also includes voluntary accessibility requirements on the built environment used by clients of services covered by EAA Directive itself. Member States may decide to require compliance with these requirements ⁽⁵⁸⁾.

Revised Directive on the Posting of Workers

A posted worker is a person who, for a limited period of time, carries out his or her work in an EU Member State other than the state in which he or she normally works ⁽⁵⁹⁾. There are approximately 3 million posted workers ⁽⁶⁰⁾ within the EU, many of whom are involved in delivering public services or works. The Posted Workers Directive (PWD) ⁽⁶¹⁾ was first adopted in 1996 and significantly amended in 2018. It aims to balance the freedom to provide services across borders with protections for workers. The 2018 revision strengthened the principle of equality between posted workers and those in the host State, including equal remuneration. Under the revised PWD ⁽⁶²⁾ posted workers are entitled to all mandatory ⁽⁶³⁾ terms and conditions of employment in the host state relating to:

- a) Maximum work periods and minimum rest periods;
- b) Minimum paid annual leave;
- c) Remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- d) The conditions of hiring-out of workers, in particular, the supply of workers by temporary employment undertakings;
- e) Health, safety and hygiene at work;
- f) Protective measures concerning the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- g) Equality of treatment between men and women and other provisions on non-discrimination;

⁽⁵⁸⁾ Recital 49, Article 4(4) and Annex III of Directive 2019/882.

⁽⁵⁹⁾ Article 2 of Directive 96/71/EC.

⁽⁶⁰⁾ Source: Posting of workers - Report on A1 Portable Documents issued in 2018, European Commission Directorate-General for Employment, Social Affairs and Inclusion, November 2019, available at: <https://ec.europa.eu/social/BlobServlet?docId=22302&langId=en> .

⁽⁶¹⁾ Directive 96/71/EC *concerning the posting of workers in the context of the provision of services*, as amended by Directive (EU) 2018/957.

⁽⁶²⁾ Directive (EU) 2018/957 must be transposed into national laws by 30 July 2020 and cannot be applied before that date. For the road transport sector, the rules of the 1996 PWD remain applicable until a new enforcement directive amending Directive 2006/22/EU is adopted. For further information see the European Commission's Practical Guide on Posting of Workers (2019): <https://ec.europa.eu/social/BlobServlet?docId=21472&langId=en>

⁽⁶³⁾ Those laid down by law, regulation or administrative provision and/or by universally or generally applicable collective agreements and arbitration awards.

- h) The conditions of workers' accommodation where provided by the employer to workers away from their regular place of work;
- i) Allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

After 12 months – or, where justified by the employer, 18 months – all mandatory terms and conditions under host state employment law become applicable to the posted worker, with the exception of (a) certain terms regarding the conclusion and termination of the employment contract, including non-competition clauses; and (b) supplementary occupational retirement pension schemes.

Public buyers should be aware of these requirements when evaluating tenders and monitoring compliance with labour law.

ILO conventions

The International Labour Organisation (ILO) fundamental conventions are mentioned explicitly in the Public Procurement Directives (⁶⁴), and national public procurement laws and regulations also often require compliance with ILO conventions. The 8 fundamental conventions address:

1. Freedom of Association and Protection of the Right to Organise
2. Right to Organise and Collective Bargaining
3. Forced Labour
4. Abolition of Forced Labour
5. Minimum Age
6. Worst Forms of Child Labour
7. Equal Remuneration
8. Discrimination (Employment and Occupation)

⁶⁴) Annex X of Directive 2014/24/EU, Annex XIV of Directive 2014/25/EU, Annex X of Directive 2014/23/EU.

Creating a task force to monitor supplier working conditions in the City of Copenhagen (Denmark)

Procurement objective

The city of Copenhagen takes action against social dumping by including labour clauses in contracts to ensure fair working conditions for all employees working for its suppliers and sub-suppliers.

Approach

- 1) Fair pay and working conditions*
- 2) Fair competition for all businesses*
- 3) More apprentice and work experience places for young people in education*

Employees of the City of Copenhagen's suppliers and their subcontractors working in Denmark are entitled to a minimum rate of pay, including overtime rates, maximum work periods and minimum rest periods, and minimum paid annual holidays in accordance with both the labour clause and the Directive.

Results

Copenhagen has established a task force consisting of nine people to monitor compliance with the labour clauses by all of its suppliers, including subcontractors. The task force is entitled to visit all types of workplaces in Denmark at all times. The pay and working conditions of suppliers operating in various fields such as construction, cleaning and transport are monitored closely. Around 600 compliance checks are carried out each year. About one third are on-the-spot inspections while the rest are investigations into the conditions of specific employees based on documentation of pay, working hours, tax etc.

The task force has a risk-based approach to its inspections focusing its primary efforts in fields where the risk of foul play is considered highest. In case of violations, a dialogue will be started with the employer. If no improvement can be observed, the employer must pay a penalty and ultimately, the city has the right to cancel the contract.

Lessons learned

It turned out that a visit-based approach implemented by in-house agents is more effective than outsourcing the monitoring of the working conditions. In general, the main contractor is held responsible for all breaches along the supply chain. Most of the breaches happen down the supply chain with subcontractors and sub-subcontractors. When a breach of a contract is suspected, it is crucial to collect information on the identity of the workers employed on the site and their exact working hours. This can at times be a difficult task. A pilot project has been started by the City of Copenhagen where workers have to register themselves using an ID card when they access and leave the work site. This system makes it easier to target contracts with an increased risk of social dumping by providing information on the number of workers employed, work type, employment form, working hours etc.

The Late Payment Directive ⁽⁶⁵⁾

Less than 40% of businesses in the EU are paid within the terms agreed in contracts. The effects of late payment go beyond the specific contractual relations as they spill over the whole economy. When businesses are paid late, jobs are made redundant, payments to suppliers are delayed, and investments plans are postponed. The entire supply chain is put at risk and becomes less resilient.

Paying on time is an obligation under the Late Payment Directive ⁽⁶⁶⁾. This obligation applies both in commercial transactions between public authorities and businesses and between businesses. Public buyers have to ensure prompt payment of their contractors by making payments within the 30-day time limit imposed by the Directive (this time-limit may be of 60 days only for public entities of the national healthcare service, where this is applicable) ⁽⁶⁷⁾. Furthermore, there are actions public buyers can take during the public procurement process to increase the likelihood that subcontractors will be paid promptly during the performance of the contract. You can find more information on this in Section 5.5.

⁽⁶⁵⁾ For more information, see https://ec.europa.eu/growth/smes/sme-strategy/late-payment_en

⁽⁶⁶⁾ Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

⁽⁶⁷⁾ Article 4 of Directive 2011/7/EU.

Chapter 2 – An Organisational Strategy for Buying Social

2.1 Putting SRPP on the Agenda

SRPP requires leadership and commitment throughout management structures, from the political level, through to key decision-makers and budget holders. This chapter examines how this commitment can be secured and presents examples of organisational strategies for SRPP.

Highlight benefits and opportunities

In both smaller and larger communities, SRPP can help make measurable progress towards social goals, such as protecting human rights, promoting equality and creating high-quality employment and inclusion. So in principle, securing high-level support for its implementation should be easy.

SRPP can also contribute to global goals. For example, UN Sustainable Development Goal 12 - ‘Ensure sustainable consumption and production patterns’ – calls on governments to promote the use of public procurement practices to further the sustainable development agenda (Target 12.7) ⁽⁶⁸⁾.

Address challenges and concerns

Adopting an SRPP strategy requires you to address possible concerns of leaders, managers, and budget holders, including the perceived additional cost and resources needed to buy social.

Showing SRPP in practice, either through examples from your organisation or other public buyers, is an effective way of demonstrating its benefits. This guide includes many case studies that demonstrate cost-effective, socially responsible procurement.

In addition, highlight the cost of not taking action, such as reputational risks, non-compliance with legislation, missed targets, or the indirect costs of social problems to the public sector.

Good practice

- Secure high-level support for SRPP by highlighting its obligations and opportunities, as well as the risks of inaction. Back up your case with real-life examples of social procurement already carried out in your organisation or by others.

2.2 Defining Objectives

As discussed in Chapter 1, there are many different social considerations, which may arise in procurement. Creating an SRPP strategy can help define the focus when buying social.

Identify existing objectives

Consider basing SRPP objectives on existing European, national, regional or local priorities – such as social inclusion or creating employment opportunities for disadvantaged groups. Identify these priorities and consider the potential contribution that procurement could make.

Map procurement policies and activities

As a public buyer, you may already have procurement policies in place, such as a green or sustainable procurement policy, or innovation or industrial strategies that target specific sectors. Map the

⁽⁶⁸⁾ See <https://www.un.org/sustainabledevelopment/sustainable-consumption-production/>

existing procurement objectives and activities and identify opportunities to align SRPP with these objectives.

By identifying existing priorities and mapping current procurement policies and activities, you can identify the social objectives with the highest relevance. Anchoring SRPP objectives to existing policies and priorities can help to legitimise buying social and increase the attention and resources available for SRPP.

Good practice

- Understand your organisation's existing social objectives, and consider how this aligns with current procurement policy and practice. Identify the potential synergies, gaps, or barriers to achieving social objectives through procurement.

2.3 Stakeholder Consultation

Effective SRPP involves many stakeholders, and consultation is a crucial step when developing an organisational strategy for buying social.

Stakeholder consultation on SRPP strategy development in the Procurement Office of the Federal Ministry of the Interior, Germany

Procurement objective

The Competence Centre for Sustainable Procurement at the Federal Ministry of the Interior (KNB) worked together with the Federal Association for Information Technology, Telecommunications and New Media (Bitkom) on a common strategy for the procurement of sustainable ICT products and services. The main goal of the joint initiative is for public buyers and suppliers to work together to ensure social standards and fair working conditions in the global supply chain of ICT production.

Approach

A delegation from Bitkom, made up of suppliers of different sizes and product portfolios from the ICT sector, and KNB negotiated the 3rd version of the declaration between 2017 and 2019. According to the declaration, public buyers in the federal, state and local governments will be able to check whether large-scale contracts up to the third stage of the supply chain are transparent and review whether social labour standards have been complied with in the production of the procurement item. The declaration covers compliance with ILO core Conventions and Conventions number 1, 102, 131, 155 and 170. When a draft version was agreed, a stakeholder consultation was carried out. The experts from Bitkom and KNB invited over 20 representatives of civil society, churches and other public buyers to comment on the declaration and participate in a follow-up meeting. KNB and Bitkom directly implemented some suggestions, while some were noted for further evaluation or rejected. Following the publication of the new declaration in May 2019, KNB and Bitkom invited the stakeholders to a further meeting to explain the decisions made with regards to the proposed comments and input.

Results

The outcome of the stakeholder consultation was an updated version of the declaration of commitment. Many of the suggestions made by the stakeholders were included and helped to clarify certain aspects of the declaration. The process also helped KNB and Bitkom to link the declaration to civil society monitoring activities. The updated declaration, which includes stricter verification requirements for companies than before, serves as a template for the procurement of ICT products and services by public sector entities in Germany, who can use the declaration to help ensure suppliers fulfil contracts in a manner that is transparent and compliant with social labour standards. For large-scale contracts, this transparency can reach down to the third stage of the supply chain.

Lessons learned

The stakeholder involvement process was labour intensive, especially the evaluation of the comments provided. However, it was helpful in many respects, especially the feedback on the comprehensibility and clarity of the standard. Through this process, the parties could understand the views and needs of all stakeholders.

Stakeholder consultation can involve surveys or interviews, or the organisation of workshops, seminars and conferences which gather together relevant internal and external stakeholders and encourage a collaborative approach to social responsibility through participatory dialogue. Consultations should be accessible in order to include persons with disabilities.

Establish the baseline of social procurement

Consulting stakeholders can establish a baseline of current social procurement practices. For example, are social requirements already included in some tenders? Is the market able to meet these requirements? To what extent do current expectations reflect best practice in the market?

Gather feedback and expert insights

Involving stakeholders in the strategy development process informs and improves its content, and can build commitment to achieving its objectives.

Different stakeholders to consult include:

- Public buyers - purchasing experts, whose skills are needed to prepare and evaluate tenders;
- Users - including employees and citizens as well as civil society (e.g. persons with disabilities and their organizations), who set the demand for goods and services, and who influence social expectations;
- Social partners, namely employers' organizations and trade unions, who can help ensure the best working conditions of employees and compliance with national legislation and collective agreements before and during the execution of contracts;
- Businesses (including social economy organisations and social enterprises) - potential contractors and subcontractors, who provide insights into current practice, supply chains, and possibilities for improvement;
- Other bodies who can provide insights into labour issues;
- International organizations such as the Organization for Economic Cooperation and Development (OECD) and the International Labour Organization (ILO) provide guidance material and can be consulted for information;
- Trade or industry associations, which may be able to disseminate information and gather views from market participants; and
- Other relevant external organisations - including NGOs and citizen groups, who play a role in promoting social responsibility, technical experts (e.g. on accessibility), and whose involvement can increase the transparency and accountability of the SRPP strategy.

Identifying opportunities to support social enterprises in the City of Söderhamn (Sweden)

Procurement objective

Following a formal proposal of its town council, the City of Söderhamn started a process to investigate the opportunities to designate at least two procurements to take into account social criteria and focus on supporting social inclusion and social enterprises.

Approach

A needs assessment was carried out, and a dialogue started with social enterprises to match the buyer's needs with the services available from social enterprises. The outcome of the needs assessment and the dialogue with social enterprises was a tender to purchase fresh fruit basket deliveries for employees of the municipality once or twice a week. Only social enterprises had the opportunity to participate and submit tenders for this contract, which was below the threshold for application of the Public Procurement Directives.

Results

The winning bid offered deliveries of ecological locally produced fruit baskets delivered by a work-integrated social enterprise. The supplier had the opportunity to hire a person that had been long-term unemployed to deliver the fruit baskets. The cost of the baskets was fully comparable with a commercial company delivering to the private sector. Furthermore, the supplier had previously received a monetary allowance from the municipality amounting to 60 000 EUR/year which is no longer needed.

In 2016, the winning supplier had four employees, and by 2019, they had nine. Since winning this initial tender, the social enterprise has also established a centre which aims to help the municipality support the start-up of more social enterprises, with public procurement as one of the strategies for growth. Together with nine other social enterprises, it has also started a national association to gather all Swedish work-integrated social enterprises on a single website.

Lessons learned

A small public procurement can be very effective. In this case, it had a positive impact on both the commercial and social success of the supplier. Even though it was a small purchase, however, it still requires the time and dedication of the buyer and supportive management and guidelines.

Stakeholder consultation is valuable across all stages of strategy development, from the initial agreement of objectives to setting targets, implementation and monitoring of SRPP. An organisational approach to SRPP is only convincing if stakeholders understand the nature of the challenge, their role in the solution, and the positive impact that their actions can have.

Good practice

- Consult relevant stakeholders, both internal and external, to increase your understanding of barriers and opportunities to buying social, and to increase stakeholder buy-in to SRPP activities.

2.4 Assessing Risks, Prioritising Contracts and Setting Targets

Due to the limited resources of most public buyers, it is not possible to tackle all social issues across all products and services at once. Moreover, not all products and services have the same level of

social impacts and risk. It can therefore make sense to prioritise a smaller group of products and services where SRPP can have the highest impact on your identified social objectives.

Assessing risk

A risk assessment of your organisation's procurement can identify the social impacts associated with different purchase categories. For example, some sectors have a higher proportion of vulnerable workers or greater levels of gender inequality. Certain products may include raw materials or ingredients sourced from conflict zones or regions with low labour standards.

A risk assessment identifies events or conditions, which may prevent your procurement from meeting social objectives. It measures risk according to two factors: how likely is it that these events or conditions will occur? And if they do, to what extent will it impact on social objectives?

Issues to be considered in a risk assessment of products and services include:

- Basic working conditions - is there a risk that ILO Conventions, or relevant national or EU standards, are not being complied with within an industry? Are poor conditions a known problem in the production process (for example, textiles, electronics, paving stones) or service provision (for example, social dumping in catering, cleaning and construction)?
- Workforce - what labour type is used in the production or service provision, and what risks are associated with this? For example, does an industry typically make use of non-standard work e.g. zero-hour contracts, undocumented or migrant workers, or display differences in the treatment of workers based on gender, race or other factors?
- Continuity of services – is there a risk that by changing provider or terms of an existing contract you might adversely affect service users? Benefit and risk analysis should cover the potential effects on the safety and wellbeing of people who use services and their carers. This is particularly relevant for social services that assist people in vulnerable situations, older people, or persons with disabilities.
- Link to the subject matter – social requirements must have a sufficient link to the *specific* products or services being purchased (see Chapter 4). This link can be more difficult to establish for long and complex supply chains, such as those in the ICT sector. You should consider how far along the supply chain it is possible to evaluate risk.

One model for assessing risks is ranking – using a numerical scale – the likelihood of risks occurring and the consequences if they did. This ranking could also form part of a stakeholder consultation exercise. Products and services ranked highly in terms of likelihood and consequence, where you can establish a clear link to subject matter, should be targeted as a priority.

Risk assessment is also important for individual tenders. It helps you to identify points in the supply chain or service delivery where risks are high and ensures that the principle of proportionality is respected (meaning, requirements included in the tender are suitable to attain specific social objectives and do not go beyond what is needed).

Long and complex global supply chains lack transparency, and it can be difficult for public buyers to access information. However, many NGOs are working to make this information more accessible, for

example, Electronics Watch ⁽⁶⁹⁾ or Swedwatch ⁽⁷⁰⁾. While some of this information may focus on retail and public consumption, it is still highly relevant to similar products procured by the public sector. It can help to identify social risks for which verification tools and programs exist, thereby avoiding undue restrictions on competition.

Assessing risks in public procurement at the Agency for Public Management and e-Government (Difi), Norway

Procurement objective

The Agency for Public Management and eGovernment (Difi) in Norway has provided a list of high-risk products for public buyers to help them build awareness of the need to perform due diligence on human rights compliance. This list helps public buyers allocate appropriate resources to evaluating bids and to follow-up SRPP criteria during the contract phase. The list includes different sectors, e.g. construction materials, electronics and ICT, furniture, office supplies, textiles and food, and covers all tiers of the production process - from raw material extraction to final assembly.

Approach

Difi takes data for the risk-assessments from reports, articles, films and academic research. Suppliers, and to some degree industry organisations/initiatives, have also been interviewed to provide input to the understanding of the supply chains. Trading data has been used for the mapping of the supply chains, as transparency and traceability are often limited.

Results

The Difi High-Risk List provides useful information about the risk within product groups as well as specifically in the selected product categories. It can serve as a guidance tool for addressing the principle of proportionality concerning which product groups and specific product categories to choose when using SRPP instruments in the planning of the procurement activity. It can also help suppliers of high-risk products to prioritise human rights due diligence in their global supply chains. More information on the High-Risk List can be found here: <https://www.anskaffelser.no/public-procurement/socially-responsible-public-procurement/information-about-high-risk-products>

Lessons learned

There are several inherent difficulties in gaining access to supply chain information. There is, in most cases, a lack of transparency due to a complex and dynamic web of suppliers from raw materials to production, to arrival in Europe, or for services provided by domestic and non-domestic actors. The Difi High-Risk list is a useful tool for public public buyers when making decisions concerning which products to choose as part of SRPP. Using the list can decrease the risk that human rights violations have occurred in the supply chain of high-risk products. However, the list is not exhaustive. Products which are not currently on the list could still be high risk, and in these cases, public buyers should do further research on the human rights risk associated with those products and services.

⁽⁶⁹⁾ Electronics Watch is an independent organisation which aims to bring together public sector buyers and civil society organisations in electronics production regions, with experts in human rights and global supply chains. More information at: <http://electronicswatch.org/en>

⁽⁷⁰⁾ Swedwatch is an independent organisation with a focus on human rights and environmental abuses in various sectors, including food, metals, logging, mineral and textile sectors. More information at: <https://swedwatch.org/en/teman/public-procurement/>

Prioritising contracts

Not all contracts provide the same opportunities to meet social objectives. A prioritisation exercise can help to identify contracts with the highest potential impact. To prioritise contracts, consider the following questions:

- What social risks, or potential social benefits, are linked to the contract and how important are they?
- Are contracts of sufficient size and duration to influence supplier practices? If not, can you work with other public bodies to pool demand in the category?
- Are socially preferable alternatives available and affordable? Would the inclusion of social considerations restrict competition unduly?
- How long is the supply chain of a product? How can procurement effectively target the point in the supply chain at which risks occur, or benefits can be realised?
- Can social objectives be directly targeted by verifiable procurement criteria? Alternatively, is there a more effective way to deliver the policy using other tools available to the public buyer?
- How visible will the social action be? Can it help to raise broader awareness of social issues in supply chains among staff, suppliers, and perhaps even the general public? Is there a reputational risk of not taking action in this area?
- Do opportunities exist to reserve a contract for social organisations which directly support the employment of persons with disabilities or disadvantaged persons?

Another consideration when prioritising contracts, especially when making SRPP mandatory, is the procurement threshold at which you will introduce social requirements. The Public Procurement Directives only apply to tenders whose value exceeds defined thresholds based on the nature of the contract and the purchasing body ⁽⁷¹⁾. You may also pursue SRPP in contracts below these thresholds, or which fall outside of the scope of the Directives.

Setting targets

Setting targets demonstrates a commitment to social goals, increases motivation, and provides a framework for measuring progress.

In each relevant product or service category, set a specific target related to each social objective. Effective targets are measurable (can be quantified), achievable (set according to the current baseline), and specify the date of achievement.

Good practices

- Understand the social impacts of your procurement by conducting a risk assessment. Where necessary, consult with experts within other departments of your organisation (such as the labour department), unions, suppliers, or with independent NGOs, to better understand the supply chains and working conditions of products and services that you procure.
- Create an SRPP strategy, which outlines the procurement categories or specific contracts where you will prioritise SRPP. For each priority, set a measurable and achievable target, to be achieved by a specific date.

⁽⁷¹⁾ Current thresholds can be accessed at: https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en

2.5 Integrating SRPP in Procurement Procedures and Policies

Consider the following when implementing SRPP into procurement procedures and policies:

- The legal and regulatory framework - including how SRPP complies with EU and national procurement legislation and with the EU's international obligations;
- The institutional framework - including whether procurement is centralised or decentralised, and what this means for managing and monitoring SRPP;
- The management structure - including the creation of new structures to steer the integration of SRPP, such as a working group involving key stakeholders, or the naming of SRPP champions within relevant departments;
- Assigning responsibilities - including identifying leaders, experts and buyers in appropriate positions who can drive action and ensure achievement of targets;
- Access to expertise – including engaging experts within your organisation on issues relevant to SRPP, cooperating with relevant departments or organisations either internally or externally, and reaching out to other organisations who may be able to advise or steer the implementation of SRPP measures;
- The availability of professional capacity and resources – consider if capacity building activities or the provision of clear guidelines and criteria is required.

Supporting integration through communication

Widely communicate the objectives of SRPP to integrate it within the organisation. Ensure the role and responsibilities of staff throughout your organisation are explicit. Internal communication activities can include seminars, newsletters, or inclusion on your organisation's intranet.

External communication is also essential. Communicating social objectives to the market in advance of publishing tenders provides time for suppliers to react. Communicating objectives to the public also increases your accountability and sets an example which can inspire wider action. It may also help to build consensus around practices involving the use of social considerations.

Finally, sharing knowledge with other public buyers on good practice (or avoidable risks) can help speed up learning on SRPP. This knowledge-sharing can take place at a local, regional, national or even international level. In particular, knowledge-sharing within the EU can help raise the standards required by public buyers across Europe, promoting greater social responsibility as a norm.

Procura+ Network Working group on Socially Responsible Procurement of ICT

Procurement objective

The Procura+ Network created the Interest Group on Socially Responsible Public Procurement ⁽¹⁾ to foster exchange on procurement activities and to support public buyers in procuring information and communication technology (ICT) hardware products. The group includes public buyers from across Europe, including the Greater London Authority, the City of Stockholm, Barcelona City Council, Advanced Procurement for Universities and Colleges Scotland (APUC) and the City of Haarlem.

Approach

The members of the Interest Group communicate and share their knowledge of SRPP through regular physical and virtual meetings. With support from Electronics Watch and ICLEI Europe, the group is developing criteria, specifications and clauses that consider social responsibility throughout the whole supply-chain of ICT products.

Results

By sharing their experience and best practice examples, the participating public buyers can build up their SRPP knowledge and expertise. The group also serves as a platform to present upcoming tenders and to facilitate exchanges between public buyers and potential suppliers and resellers with regards to their respective needs and capabilities. As a joint effort, the group has developed a specific set of criteria: '[How to procure fair ICT hardware - criteria set for socially responsible public procurement](#)'. The document includes selection criteria, technical specifications, award criteria and contract performance clauses. The criteria set is ambitious as it goes beyond smelter level and addresses issues at the mining stage, too.

Lessons learned

Engaging with other buyers from the public sector and sharing market insights is rewarding as it allows public buyers to identify common needs and to develop strategies on how to purchase socially responsibly produced products that fit the needs best.

Good practice

- Integrate your SRPP strategy into your procurement activities. Assign responsibilities, consider establishing a management group, and communicate your social procurement objectives widely, so that staff and suppliers are aware of the expectations, and other public buyers are encouraged to take similar measures.

2.6 Monitoring and Reviewing Progress

Collecting data on SRPP performance

Effective implementation of SRPP involves setting up a monitoring system which measures progress towards targets. Monitoring systems range from simple databases which record the use of social criteria, to specialised systems integrated with e-procurement platforms.

Integrating SPP monitoring into existing reporting systems in Flanders (Belgium)

Procurement objective

The Government of Flanders has been working on sustainable public procurement (SPP) since 2008 when it set the target of 100% SPP by 2020 for its public procurement. During the period 2009-2015, two action plans were adopted to guide progress towards this target, after which SPP became a part of an integrated strategy on public procurement. It has set minimum sustainability criteria for nine product groups, plus guidance and criteria suggestions on a further 17 product groups. The products purchased must meet these criteria for Flanders to call the procurement sustainable.

Approach

In 2017, monitoring SPP was integrated into the contract management system of the Government of Flanders. All procurement equal to or greater than €30,000 has to be registered in the contract management system, and the following nine mandatory SPP questions have to be answered:

- 1. Use of essential sustainability criteria: entirely integrated in the tender document / not or partially integrated in the tender document / the procurement doesn't concern a product group for which essential criteria were defined*
- 2. Use of other sustainability criteria: one or more other sustainability criteria in tender document / No other sustainability criteria in tender document*
- 3. Certificates on environmental management required: relevant and in the tender document / relevant but not in the tender document because of specific reasons / not relevant*
- 4. Access limited to social enterprises: yes / no*
- 5. Part of the contract performance phase reserved for social enterprises: yes / no*
- 6. Use of non-discrimination clause : yes / no*
- 7. Use of a social clause in the tender document aimed at employment, education and training: yes / no*
- 8. Use of ethical clause: relevant and in the tender document / relevant but not in the tender document because of specific reasons / not relevant – Procurement doesn't concern goods with high risk*
- 9. Innovative procurement: the innovation is situated in a pre-commercial phase of research and development/ the innovation is situated in both the pre-commercial as the commercial phase / The innovation is situated in the commercial phase (PPI) / there's no innovative aspect*

Lessons learned

Monitoring the use of the tool is necessary to ensure its effectiveness. After noticing a drop in the reported use of SPP between 2015 and 2016, Flanders was able to address important barriers to its 2020 target, including integrating sustainability clauses in tender templates and identifying framework agreements where future action was needed.

Sources

http://www.procuraplus.org/fileadmin/user_upload/Procura_case_studies/Procuraplus_case_study_Flanders.pdf and <https://overheid.vlaanderen.be/monitoring-duurzame-overheidsopdrachten%20>

Linking the monitoring of SRPP to existing reporting systems and audit procedures is most effective. You are likely to require adjustments to your systems, such as the insertion of new data fields into

monitoring software. Also, consider external, independent auditing of SRPP performance, including benchmarking the public buyer against past performance or the performance of other organisations.

Reviewing and improving SRPP

Periodically review the results of monitoring to ensure progress towards targets and that actions are making the desired contribution to objectives.

Communicate with colleagues and externally when the organisation meets its targets. The process of consultation and target setting then starts again – ensuring continuous improvement on social objectives.

Systemic market change is not possible if good outcomes happen in isolation. SRPP can help demonstrate the ability of the market to meet higher standards, and communicating this can help to raise broader stakeholder expectations.

Good practice

- Monitor the implementation of SRPP, and periodically review results, to ensure progress and make necessary adjustments to the strategy or procurement practices.

Chapter 3 – Identifying needs and planning procurement

3.1 The Role of Needs Assessment in SRPP

Assessment of needs can be the first stage in the procurement cycle for SRPP, before launching a tender. Needs assessment aims to ensure that real demand for the goods, services or works exists, and to identify the ways of meeting that need in the most socially responsible manner. Assessing real needs in terms of outcomes sets the scope and nature of requirements, allowing a more flexible and potentially cost-effective response from the market. In an SRPP context, needs assessment is about:

- Ensuring that what is purchased meets social requirements;
- Designing procurement and contracts to allow flexibility over time and ensure that a wide range of organisations, including social economy organisations and social enterprises, non-profit or voluntary bodies can participate; and
- Increasing social impacts and outcomes: checking whether the procurement offers opportunities to advance relevant social and ethical outcomes.

Examples of how needs assessment may affect social impacts and outcomes in procurement:

- A local authority chooses more flexible and varied mobility options to provide increased freedom of transportation for older citizens and persons with disabilities;
- A local authority provides social and care services tailored to the needs of individuals with specific attention to gender aspects ⁽⁷²⁾;
- A government department includes a clause in a construction contract for employment and training opportunities for unemployed and disadvantaged people;
- A hospital asks a provider of medical equipment for transparency in its supply chain to monitor and verify the labour conditions of workers in conjunction with civil society organisations.

Needs assessment has the potential to save money as well as generating social returns, making it an essential part of pre-procurement. It may require a cultural shift within an organisation – away from thinking in terms of the number of units purchased to thinking about how to meet needs sustainably and with social outcomes in mind.

User consultation

The users of a product, service or work are often not the same people buying it. They may be other individuals within the same organisation, employees of another public body, or citizens (e.g. hospital patients, residents, school or university students). Consultation can identify social issues and ensure the tender is designed to make the most of any opportunities for positive social impacts. The following techniques may be used to consult users before launching a procurement:

- Launch a questionnaire or online survey to determine user needs and preferences;
- Observe and analyse existing use patterns;

⁽⁷²⁾ A needs assessments may also be based on gender analysis. EIGE defines it as “a critical examination of how differences in gender roles, activities, needs, opportunities and rights/entitlements affect men, women, girls and boys in certain situation or contexts. Gender analysis examines the relationships between females and males and their access to and control of resources and the constraints they face relative to each other” see: [EIGE, Gender mainstreaming, concepts and definitions](#).

- Invite all relevant stakeholders to a meeting to review current practices and plan together for improved social outcomes in the next procurement; and/or
- Invite all users to attend supplier demonstrations, held as part of preliminary market consultation (see section 3.2);
- Make the questionnaire accessible for persons with disabilities.

Consulting users with special mobility needs in the City Of Rotterdam (The Netherlands)

Procurement objective

In Rotterdam, 30,000 citizens with special needs make use of transportation services. There are different services available to different target groups, which in the past has led to fragmented and sometimes insufficient services. The City of Rotterdam decided to integrate all mobility services, operate their fleets more efficiently and as a result, provide transportation that serves the needs of their customers best.

Approach

Rotterdam undertook comprehensive customer-focused research to uncover the unmet needs and customer journeys that called for multidisciplinary solutions. The city used an innovative Forward Commitment Procurement procedure, in which it communicated its social needs and desired outcomes to the market in advance of the tender launch and agreed to purchase the newly created service if it met specifications. The market dialogue process included representatives from end-user groups giving direct feedback.

Results

The winning contractor is a consortium of various market parties, including SMEs, that is now implementing a user-centred transportation service with mechanisms for constant improvement. The service offers mobility customisation (including a personal mobility budget), so Rotterdam can account for users' personal preferences and characteristics on a day-to-day basis. It also provides personal support and coaching for learning to travel more independently for clients to increase their autonomy. Additionally, drivers are in direct contact with wellbeing organisations to monitor and respond to clients needs. The procured vehicles are nearly entirely zero-emission (electric), and the annual investment exceeds €2m in social return on investment.

Lessons learned

Do not underestimate the complexity and resources required for meaningful dialogue. Start the process early so that you can get all the required information in detail from users and suppliers, assess the legal aspects of the approach, and ensure that the customised solution is as close to user needs as possible.

Creating a needs statement

Based on the information gathered during the user consultation, it should be possible to formulate a simple needs statement, which describes the reason for the purchase and account for any alternatives to purchasing.

The needs statement can be used both to develop the business case for procurement and to inform suppliers during preliminary market consultation and tendering. Key stakeholders, such as service users, citizens or NGOs, can be asked to review, challenge and endorse the statement of needs from a social perspective.

Good practice

- Make needs assessment one of the first activities of your procurement process. Consulting with colleagues and end-users helps to ensure you are buying the right product or service, and in a way that can provide positive social outcomes.

Example of SRPP in a Needs Statement

The public buyer requires a renewal of a cleaning services contract for daily cleaning of all municipal buildings.

To meet its social policy commitments, after consultation with the current employees and other stakeholders, the public buyer requires that the contract is carried out with the following social considerations:

- *Fair remuneration of employees, including for any overtime worked;*
- *Career progression, including training and adapted rotas for attending courses;*
- *Balancing work/ family commitments, using full and part-time contracts with family-friendly rotas and shifts;*
- *Occupational health, through the use of non-harmful cleaning products.*

3.2 Market Dialogue

Before tendering, market consultation is typically used to identify potential suppliers and relevant products and services. Suppliers are given time and notice to prepare for the tender; for example, mainstream and social enterprises might form partnerships to strengthen social outcomes.

Some procedures – particularly competitive dialogues or competitive procedures with negotiation, may also allow for more opportunities of dialogue with bidders during the tendering process. Following a tender, bidders should be offered a debrief on the results and advice for how to improve their social offering in future tenders.

Market dialogue for SRPP can:

- Identify potential bidders and solutions with positive social impacts;
- Build capacity in the market to meet social needs and requirements;
- Inform the design of the procurement and contract so that social criteria are relevant, linked to the subject-matter, achievable and non-discriminatory;
- Help suppliers to submit bids that have strong social elements; and
- Provide feedback to suppliers after the process.

Benefits of market dialogue include improved planning and management of SRPP, especially when undertaken as part of a needs assessment process. These activities also improve public buyers'

understanding of the capacity of potential bidders to meet social aims and ambitions. Dialogue can increase your trust and credibility with suppliers, and many welcome the chance to react to social requirements ahead of the procurement launch. In short, market dialogue can help create the conditions needed to deliver SRPP both internally within the public buyer and in the market.

3.2.1 Preliminary market consultation

EU rules specifically allow for preliminary market consultation with suppliers, stating that ⁽⁷³⁾: ‘Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.’ They also state that in a market consultation you can seek advice from independent experts, authorities or market participants, provided this does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

In practice, it is crucial to ensure that preliminary market consultations are published transparently and well in advance. Furthermore, any information you provide to participants during the market consultation is also made available to other economic operators that are not able to participate in the market consultation, and that adequate time is allowed for the submission of tenders. Public buyers have a responsibility to ensure that all bidders are treated equally in procurement procedures so market consultation should not result in an unfair advantage or disadvantage for a bidder ⁽⁷⁴⁾.

3.2.2 Preparing for preliminary market consultation

The first step of any preliminary market consultation process is to consider what the outcomes of your contract should be – including social outcomes. Picking the right team from within your organisation to engage with the market is also an important preparatory activity. Involve procurement staff, technical staff and managers and, where relevant, end users, as well as internal or external experts with specialised knowledge on the social elements of the contract.

Next, analyse the market to think about how suppliers could meet social needs for the planned product, service or work. Questions to consider include:

- Is the market mature enough to deliver the social requirements? Are existing suppliers capable of meeting the social needs, or are there new suppliers with social innovations entering the market?
- Will the market be technically capable of meeting social requirements? For example, can suppliers react to demands for information on supply chain working conditions, or to community benefit clauses relating to employment creation? How will such commitments be verified and enforced?

⁽⁷³⁾ Article 40 of Directive 2014/24/EU. A similar provision for utilities contracts is enshrined in Article 58 of Directive 2014/25/EU.

⁽⁷⁴⁾ In some cases, market consultation prior to the launch of the tender, while still beneficial for the preparation of the procurement, may lead to inevitable distortions of the competition. This may happen, for example, when it leads one or more competitors to have certain advantages over prospective bidders who did not participate in the consultation. In these circumstances, if no other less intrusive measures can be taken to provide for a competition on an equal footing (such as the sharing of certain information with all the bidders or an appropriate formulation of the tender conditions), it might be necessary to exclude candidates or tenderers who were involved in the preparation of the procurement to remedy such distortions.

- How many suppliers can provide what is required? Does market capacity mean there will be competition for the tender, or will the social demands potentially restrict bids?
- Can social requirements bring suppliers from different business models, such as social economy organisations and social enterprises, together in a socially innovative way? How would this work, and what can the design of the tender do to promote this?
- Do suppliers operate differently or provide other goods or services in different geographical areas, and how would this affect the social aspects of the offer?

Desktop research and analysis of the particular market may uncover socially responsible solutions that are already available, or suppliers may be developing new products and approaches that can meet social needs.

Finally, before directly consulting with the market, talk to colleagues in other public buyers to find out what they are purchasing to address social problems, and their lessons learnt. Understanding what works (or does not work) from another public buyer can also get decision-makers and the more risk-averse colleagues on board with a new social approach to the procurement.

3.2.3 How to engage the market

There are several strategies and methods for engaging with the market. Much depends upon the resources and time available, and the level of social innovation required.

Supplier and market sounding questionnaires

Questionnaires are a useful and comparatively quick method for getting information, and for gauging the level of interest and capacity of suppliers to deliver social solutions. Questionnaires should be advertised as widely as possible, in the expectation of gaining maximum supplier participation.

Analysis of the responses received should help to develop the scope and next steps of the procurement strategy and process. Be mindful of not using the data to give direct or indirect advantage to any potential supplier, even if unintentionally. The transparent avoidance of such advantage should be an objective of this approach.

Prior Information Notice (PIN)

A Prior Information Notice (PIN) is a typical method for providing the market with early notification of intent to award a contract/framework and can be used to initiate a market consultation exercise. A PIN is published on the Tenders Electronic Daily (TED) website, reaching operators outside of your home region, who may have different approaches to social aspects.

A PIN does not create any obligation to commence a procurement procedure and award a contract, but where possible it should contain details and timelines for the planned procurement, as this helps to focus the minds of participants. Be sure to state in the PIN what form of response you are requesting from the market, whether completion of a questionnaire, individual responses or participation in a market consultation event.

Forward procurement plan

A forward procurement plan gives suppliers advance notice of upcoming contract opportunities and allows them time to plan and prepare to submit good quality responses. The plans can include a needs statement to provide more specific information for suppliers on your social needs and requirements.

Meet the Buyer / Meet the Supplier events

Events where potential buyers meet with potential suppliers provide a forum where:

City of Haarlem (The Netherlands) consults the market on socially responsible ICT solutions

Procurement Objectives

In 2019, the City of Haarlem hosted a 'Meet the Buyer' event for suppliers and resellers of ICT products and services. The goal of this preliminary market consultation was to review the current market response and assess the market readiness to include socially responsible award criteria and contract clauses in an upcoming ICT hardware tender.

Approach

In advance of the event, Haarlem asked all providers who wished to participate in the Meet the Buyer event to prepare responses to specific questions in advance. This included asking suppliers:

- 1. What they require a public buyer to provide in tender documentation to fully inform their proposed solutions for supply chain responsibility improvements?*
- 2. What standards relating to social responsibility should the public buyer expect as the acceptable minimum from a capable supplier for this tender?*
- 3. Would they be willing and able to disclose information related to their supplier responsibility program to public buyers upon request?*
- 4. Are labour and human rights performance data used in sourcing decisions? How could this be verified?*
- 5. Is their company, or the supply chain, taking steps to address labour and human rights impacts during the extraction phase of production? Again, how could this be verified?*
- 6. Do they have a supply chain which can a) fulfil all the requirements and b) be mobilised fairly soon after the contract award?*

The event format provided suppliers with the opportunity to deliver 'pitch slams', meaning short presentations with the aim of informing public buyers about the current state of play and what could be possible in response to the upcoming tender. A key element of the event was a World Café Session, providing public buyers and suppliers an opportunity for direct in-depth discussion on themes raised during the day. In this case, other public buyers were invited to attend and host a table to exchange with suppliers, multiplying the engagement effect.

Results

By sharing information about Haarlem's upcoming tender and related key questions in advance of the Meet the Buyer event, suppliers and resellers were able to prepare in advance. This is especially important for sectors with complex supply chains as well as cutting-edge criteria, as one supplier representative cannot be expected to have a complete overview of operations. The World Café resulted in new insights for Haarlem regarding the upcoming tender, not only encouraging the new criteria for social responsibility but combining them with a circular procurement model as well.

Lessons learned

Meet the Buyer events are most successful when the buyer has a clear objective or identified need to discuss with the market. This should be communicated in advance in order to allow suppliers to consider their own position. Try to strike a balance between providing information, which can focus discussion on the day, and not overloading suppliers with too much information. To receive key insights, provide dedicated space for direct exchange and not only plenary-style sessions.

- Buyers can discuss their needs, including social requirements;

- Suppliers can provide information about their products and services, and how they can deliver contracts in a socially responsible manner; and
- Other relevant stakeholders, such as social partners or NGOs, can provide expert input.

Many public buyers hold 'Meet the Buyer' events, where suppliers are invited to attend an open day and meet the people responsible for the purchase of specific goods and services. Suppliers can find out more about contract opportunities and develop a better understanding of procurement policies and procedures. In some cases, suppliers may also be asked to present their solutions and approaches.

3.2.3 Dialogue during and after the award procedure

Supplier dialogue during a tender

While care is required for communication with bidders during the formal procurement process, it is still possible to engage with bidders on social aspects of their tenders. This is particularly true for certain procedures such as the competitive dialogue, competitive procedure with negotiation, or procedures under the light regime (see Sections 3.4 and 4.1.1). In these procedures, it may be possible to improve social aspects of the initial offers of bidders, by providing feedback based on the award criteria for the tender.

Engaging the market for socially responsible work wear in Ghent (Belgium)

Procurement objective

In 2014 the city of Ghent updated its procurement policy to include social goals such as encouraging employment of disadvantaged groups, fostering local economic growth and integrating international standards and fair trade principles. In 2016 Ghent, together with the Association of Flemish Cities and Municipalities (VVSG), embarked on a mission to procure fairer workwear. The main objectives were to integrate guarantees regarding international labour conventions and to increase transparency throughout the textile supply chain.

Approach

Ghent undertook the procurement in three phases: first was an analysis of prior public tenders, looking for best practices in the Flanders region when it comes to incorporating sustainability in specifications for workwear. Second, Ghent and VVSG conducted an extensive market study that assessed the readiness of the market, transparency of supply chains and the potential of labels in the sector, and collected supplier viewpoints on sustainable demand and the use of social clauses in public procurement. Ghent realised that the market was not ready to deliver the level of environmental and social performance required, so in the third phase it created a [Toolbox for Socially Sustainable Workwear](#) for suppliers that provides them with guidance to improve over the course of contracts. The city divided the framework agreement into five lots that required varying levels of social and environmental performance, with the toolbox defining each level, and the proof bidders had to submit. The toolbox also details the journey towards more responsible workwear, which suppliers commit to through contract clauses.

Results

Where possible, the procured workwear is now made of organic and fair-trade cotton, and recycled polyester. The maturity of social considerations varies depending on the category of clothes and different ambitions were formulated. Transparency in the supply chain was asked from the suppliers, but in one category this transparency went further than in others. Overall, the goal was to activate the contractor to participate in a process of continuous improvement of social conditions over the course of the framework. Supplier performance is verified by third parties, working in partnership with Ghent to deliver improvements.

Lessons learned

The market is willing to cooperate to improve working conditions in the supply chain continuously, but suppliers need to be engaged, stimulated and supported to do so. Contract clauses are only a part of the solution; to be successful, dialogue and partnership with suppliers are essential, and this should start before the tender is launched and continue during the performance of a contract.

Post-tender supplier debrief

Debrief unsuccessful bidders following a tender to inform them of the reasons why their proposal fell short and explain how it performed against social criteria. A debrief can address bidder concerns, collect feedback on the procurement process (including social criteria), and encourage suppliers to improve their social offering for the next procurement opportunity. Additionally, a 'win-review' with the successful supplier can involve discussion of the strengths and weaknesses of the social elements of the bid, and implementation and monitoring during the contract.

3.2.4 Managing risks in market dialogue

Carry out market dialogue with care and in such a way as it does not distort competition. Potential risks include:

- Unfairly advantaging one supplier, e.g. by shaping the specification in favour of one potential supplier or solution;
- Engaging in a way that disadvantages one or more suppliers; or
- Failing to protect a supplier's intellectual property rights or commercially sensitive information.

Steps to help manage the risks involved in market dialogue include:

- Plan how and when to engage with the market;
- Make the process clear to all suppliers and manage expectations;
- Treat all suppliers equally – do not discriminate;
- Share the same information with all suppliers;
- Keep records of meetings;
- Ensure the same information is made available as part of the procurement documents; and
- Allow enough time for bids to be submitted – including by those not involved in the market consultation.

Consulting the market can feel daunting, but the social gains can be significant if the process can transparently shape the market to deliver new solutions that genuinely meet the needs of users.

Good practices

- Make sure to research the market before engaging with suppliers. The more knowledge you have of social innovations and possibilities for improvement, the more realistic your needs statement looks, leading to productive and relevant dialogue.
- Effective market dialogue can take time and resources, but different options are available. Consider the method that is proportional to your means, the size and value of the procurement, and the social risks involved.

3.3 What Kind of Contract?

Contract design can play a crucial role in determining the social impact of procurement.

Size and duration of the contract

Ensure the size of the contract is not an obstacle to participation by organisations that can offer social value, including SMEs, social economy organisations and social enterprises. Smaller contracts, including the division of contracts into lots, may facilitate access by organisations that are already active in delivering social benefits, as the size may be more suited to their production capacities. However, contracts which are too small may limit the field of competition and restrict the scope for investment in social outcomes. Be aware that it is prohibited to subdivide a contract with the effect of circumventing EU obligations, unless this is objectively justified ⁽⁷⁵⁾.

⁽⁷⁵⁾ Article 5(3) of Directive 2014/24/EU, Article 16(3) of Directive 2014/25/EU, Article 8(4) of Directive 2014/23/EU.

Contract duration can also play a significant role in determining the scope for social returns. Short contracts, of one year or less, may make it difficult for the contractor to invest in and deliver social outcomes. This is especially true if new methods or systems are being introduced, for example, to monitor human rights along the supply chain or to train previously unemployed staff. Such initiatives take time to bed down and to demonstrate results, so consider this when deciding on the contract length. If the duration of the contract is insufficient, it can also negatively affect the quality and continuity of a service. This may have detrimental effects on certain beneficiaries of the services (such as people in vulnerable situations). One approach is to make contract renewals/extension conditional upon attainment of specific social outcomes, as well as overall satisfactory performance.

Use of lots

EU rules highlight the possibility to divide contracts into lots and require public buyers to explain where the decision is taken not to do this ⁽⁷⁶⁾. Use of lots within SRPP can ensure that smaller operators, social economy organisations or social enterprises can compete – as they may not be able to deliver all aspects of a large contract. It is also possible to limit the number of lots awarded to any single bidder, based on objective and non-discriminatory criteria, established in advance ⁽⁷⁷⁾. Using lots may help you to ensure that multiple organisations are involved in delivering social benefits.

Public buyers can decide how to define lots, for example by:

- Type of deliverable;
- Size of individual contracts; or
- The geographic area of delivery.

Preliminary market consultation (see section 3.2) could provide you with information on how to divide lots in a way that suits the market and encourages best value for money.

You can accept bids for combined lots as well as for individual lots. In the first case, you must specify in the contract notice which lots may be combined. Conversely, you can choose to limit the number of lots for which a supplier may bid, and the maximum number of lots that any one supplier is allowed to win.

The decision not to award a contract in lots may be appropriate where lots could:

- Restrict competition;
- Risk making the execution of the contract excessively technically difficult or expensive; or
- Undermine the execution of the contract through the need to coordinate different contractors for the lots.

Choice of framework agreement or contract

One way of increasing the efficiency of tendering while implementing SRPP can be to award framework agreements. A framework agreement may be established with one or more operators and allows for the award of multiple contracts without repeating the whole procurement process. Framework agreements can contribute to SRPP by allowing greater flexibility in the award of

⁽⁷⁶⁾ Recital 78 and Article 46(1) of Directive 2014/24/EU, Recital 87 and Article 65(1) of Directive 2014/25/EU. National governments may also choose to make the division of contracts into lots mandatory for certain types of contract.

⁽⁷⁷⁾ Article 46(2) of Directive 2014/24/EU, Article 65(2) of Directive 2014/25/EU.

contracts, and may also increase the incentives for suppliers to offer solutions with higher social returns, due to the potential to win multiple contracts and therefore recoup any additional expense involved in implementing these solutions.

Chapter 5 contains further information about implementing SRPP through framework and contract terms, including those relating to subcontractors.

Good practice

- Consider at an early stage how the type and duration of contract might affect the social value of the tender. You can ask suppliers, as part of your market consultation, what type of contract or framework agreement would best allow them to deliver social outcomes.

3.4 Choosing a Procedure

Directives 2014/24/EU and 2014/25/EU provide a choice between five procurement procedures ⁽⁷⁸⁾:

- Open Procedure – bids can be submitted by any operator;
- Restricted Procedure – at least five bidders are selected to submit bids based on objective criteria;
- Competitive Procedure with Negotiation – at least three bidders are selected to submit bids based on objective criteria; bids can be negotiated;
- Competitive Dialogue – at least three candidates are chosen to supply solutions based on a description of the public buyer’s requirements; and
- Innovation Partnership – at least three candidates are chosen to develop and supply goods or services which do not yet exist on the market, using a phased contract structure.

Note that under Directive 2014/24/EU the competitive procedure with negotiation and competitive dialogue can only be used in specific situations ⁽⁷⁹⁾, and in any event, you should invite a number of candidates which ensures genuine competition. SRPP is possible in any of these procedures, but the exact approach may differ depending on the one chosen.

In an open procedure, any supplier can bid, but you can evaluate technical and professional ability (including previous experience) on a pass/fail basis either before or after the evaluation of tenders. Multi-stage procedures (i.e., all except the open procedure) offer the opportunity to select bidders in advance based on criteria, which may include the capacity to deliver social aspects of the contract. Chapter 4 contains further information about the evaluation of technical and professional ability in SRPP.

⁽⁷⁸⁾ See Chapter I of Directive 2014/24/EU (in particular Articles 26-31), Chapter I of Directive 2014/25/EU (in particular Articles 44-49).

⁽⁷⁹⁾ Article 26(4) of Directive 2014/24/EU. Under Directive 2014/25/EU, competitive dialogue and the negotiated procedure with prior publication may be used without special justification.

Using dialogue with bidders: Tender for day-care of adults with complex needs

Procurement objectives

The Scottish Borders Council wanted to evolve its day-care services for adults with complex needs. The Council reviewed the services, including consultation with users, and aimed to improve the personalisation and flexibility of the care services to match individual needs. The challenge for the Council was to attract a range of possible providers, including organisations such as social enterprises, to tender for this new type of flexible contract, given the limited pool of potential providers.

Approach

The Council first used a standard procurement process, but no bids met the requirements for flexible delivery of appropriate services. It then developed an approach that included dialogue sessions with several third sector providers. The procurement team compiled a briefing pack that explained the process and provided a basis for multiple dialogue sessions with each provider carried out over a month. Providers were allowed to present their plans to service users and their carers. This dialogue allowed stakeholders to engage with potential providers to understand and input to the final tender specification. The final co-produced model was discussed with everybody involved and was then put forward in the last part of the procurement process. The resulting tenders were evaluated and a contract awarded.

Results

The co-production model resulted in more and higher quality bids, with a better response than initially expected. The tender has resulted in the reduction in the number of people travelling out of their area to access care services and an efficiency gain of £200,000 over five years achieved through the procurement model. The contract also defined the duty of contractors to provide the services in a way that applies to all end-users, ensuring that individual needs, as well as Council requirements, are met.

Lessons learned

The collective involvement of the providers, stakeholders and the Council created positive benefits which have exceeded expectations. In particular, it kept individuals with learning disabilities and their carers on board throughout the process and created ownership of the new service. The flexible, co-production process provided significant opportunities for the third sector supplier to engage with people using the service and helped to inform the tender submission. As the supplier put it: "The opportunity to meet with families and commissioners at an early stage allowed us to meet the specific needs of the identified client group better".

The size of the relevant market offering socially responsible solutions, the specific subject matter and scope of the envisaged procurement, as well as its complexity, may also inform the choice of procedure. If it is a rather simple and standard procurement and only a small number of suppliers can provide the product/service, then an open procedure may be efficient. Conversely, the restricted procedure may be more convenient in case the product/service requires important financial and technical capacities and can be provided by a large number of suppliers, as you may then set the maximum number of candidates that will be invited to participate ⁽⁸⁰⁾. If the specific scope of the contract is more complex, the technical specifications cannot be established with sufficient precision or innovative solutions are needed, you may prefer to use the competitive procedure with negotiation or competitive dialogue, provided their access conditions are fulfilled. Minimum time

⁽⁸⁰⁾ Article 65 of Directive 2014/24/EU, Article 46 of Directive 2014/25/EU.

limits for each procedure are set out in the directives. These are subject to a general requirement to allow adequate time based on the complexity of the contract ⁽⁸¹⁾. In setting time limits, consider the quality and complexity of responses expected – short tender periods can sometimes be counterproductive if they mean that more time must be spent clarifying submissions.

Some public buyers may fear that SRPP will make it more difficult for bidders to respond to criteria of a call for tender and worry that they will not receive valid tenders. One way to address this concern is through market consultation, discussed above. Some procedures allow more interaction with bidders, which can also be used to ensure a good response to social criteria. For example, in a competitive procedure with negotiation, it is possible to negotiate aspects of social performance (above any set minimum requirements) and the reporting arrangements which will apply. The competitive dialogue and innovation partnership procedures can help to address complex social problems by allowing bidders to develop and refine new solutions.

Under Directive 2014/24/EU, the competitive dialogue or competitive procedure with negotiation can be used when the market cannot meet the needs of the public buyer without adaptation of readily available solutions, or if additional design or innovative solutions are required ⁽⁸²⁾. It is also possible to use these procedures for contracts covered by the light regime, which may allow you greater procedural flexibility (see Section 4.2).

These procedures can result in social innovation and a better understanding of the possibilities for increased social value, but they do require the commitment of resources and expertise to manage. A more straightforward solution can be to conduct preliminary market consultation in advance of an open or restricted procedure.

Finally, pre-commercial procurement (or PCP) ⁽⁸³⁾ can be helpful in cases where you need to develop innovative solutions to address your needs, including where social goals are at stake ⁽⁸⁴⁾. PCP allows public buyers to compare alternative potential solution approaches, and pick the one best suited to address a specific public need. Public authorities can use it to buy research and development from several competing suppliers in parallel to compare alternative solution approaches and identify the best value for money solutions.

Good practices

- When deciding upon the procedure, take into account SRPP factors, including current market capacity to meet your social requirements and the expected quality and quantity of bids.
- Flexible procedures can help to ensure a good response to social criteria by allowing more interaction with bidders.

⁽⁸¹⁾ Article 47 of Directive 2014/24/EU, Article 66 of Directive 2014/25/EU, Article 39 of Directive 2014/23/EU.

⁽⁸²⁾ Article 26(4) of Directive 2014/24/EU. Under the Utilities Directive, competitive dialogue and the negotiated procedure with prior publication may be used without special justification.

⁽⁸³⁾ PCP is excluded from the scope of the Public Procurement Directives (see Article 14 of Directive 2014/24/EU and Article 32 of Directive 2014/25/EU). PCP does not cover the deployment of large-scale production for commercial volumes of end products, which falls under the scope of the Public Procurement Directives. For more information on PCP, its advantages and its limitations, please see

<https://ec.europa.eu/digital-single-market/en/pre-commercial-procurement>

⁽⁸⁴⁾ For a concrete example of how PCP can be used to provide care services to more users, see

<https://ec.europa.eu/digital-single-market/en/news/bioservo-technologies-gives-humans-robotic-super-strength-cyborgs>

3.5 Defining and Challenging Specifications

As specifications can determine the scope for SRPP in a given contract, as well as affecting the field of competition, it is vital to get them right. Allowing stakeholders to comment on draft specifications as part of market consultation is one way to do this. An internal process of challenging specifications can also be useful.

Section 4.4 looks at the use of performance or output-based specifications for SRPP. Going beyond a narrow technical specification for a product or service and expressing requirements in functional terms can result in social innovations and new ideas from the market. For example, specifying:

- Fully accessible transport for all persons, including those with disabilities, instead of buses with access for wheelchairs;
- Accessible architecture to address the needs of persons with disabilities, instead of focusing on just one type, such as for example building signage using Braille or audio systems; or
- Transparency of supply chains and a process for labour rights monitoring for the offered product, instead of just requiring ILO compliance.

Early focus on the design of specifications can enhance the social outcomes of a contract. The processes of needs assessment, market consultation and choice of contract form and procedure described above ensure more relevant and realistic social outcomes can be delivered.

Good practice

- Planning for socially responsible procurement is as important as the choice of tender specifications and criteria. Where possible and appropriate, consult with staff and end-users on social needs, engage with the market to present your aims and gain supplier feedback, and choose the procurement approach that has the potential to deliver the most positive social outcomes.

3.6 Using optional fields in the standard forms

From 25 October 2023, public buyers will have to fill in new and updated standard forms⁽⁸⁵⁾ (eForms), allowing them to provide information on the use of social considerations and accessibility criteria in their procurements (for accessibility aspects, including in the standard forms, see Section 4.4.1). The updated standard forms will include an optional field where you can indicate that you are pursuing a social objective through the procurement procedure. By using this option you will contribute to more accurate data collection and analysis of the use of SRPP in your country and across the EU.

Good implementation of eForms is an investment. It requires sufficient time and resources, but will have considerable returns in time saved for all implementers and users. In particular, contrary to previous standard forms, eForms are intended to be to a large degree filled in automatically by eProcurement systems, not users, thus significantly reducing administrative burden. eForms can be tailored to national needs. To understand better the process and options please see the eForms Policy Implementation Handbook⁽⁸⁶⁾.

⁽⁸⁵⁾ Commission Implementing Regulation (EU) 2019/1780 of 23 September 2019 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) 2015/1986 ('eForms').

⁽⁸⁶⁾ See https://ec.europa.eu/growth/single-market/public-procurement/digital/eforms_en

Chapter 4 – The procurement procedure

This chapter takes a closer look at how you can implement SRPP during the contract award process. It focuses on the opportunities under the Public Procurement Directives, and follows the stages of tendering from defining the subject-matter to identifying the successful bid. Based on the needs assessment and planning discussed in Chapter 3, your organisation can choose which of the approaches set out here is appropriate for your contract. This choice often involves using more than one SRPP measure, for example combining exclusion and award criteria.

Each section includes examples from real public buyers and recommendations for actions to take.

4.1 Defining the Subject-matter and Identifying Relevant Rules

The Public Procurement Directives do not prescribe a ‘one size fits all’ approach for public procurement contracts. Public buyers can choose from a range of procedures and techniques, and some contracts or financial arrangements are not covered by the procurement rules at all – for example, employment contracts or non-economic services of general interest ⁽⁸⁷⁾. For procurement that is subject to the Public Procurement Directives, determining the subject-matter of the contract is fundamental.

The subject-matter normally takes the form of a brief description of the goods, services or works you intend to purchase. For procedures above the EU thresholds, this appears in the contract notice along with the relevant common procurement vocabulary (CPV) codes. These allow the market to know exactly what it is you wish to buy and ensure that interested operators can find out about your tender. CPV codes are also important because they determine which legal regime set forth by the Directives applies to the contract. For social and other specific services purchased in the form of a public procurement contract, the Public Procurement Directives provide a ‘light regime’, which allows greater flexibility in the contract

The Link to the Subject-Matter

Article 67(3) of Directive 2014/24/EU and Article 82(3) of Directive 2014/25/EU explain what is meant by ‘link to the subject matter’. Criteria will be considered linked to the subject-matter where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

(a) the specific process of production, provision or trading of those works, supplies or services; or

(b) a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance.

One way of thinking about this is that if you are just buying apples, you cannot require bidders to also produce oranges. You can however ask about the conditions under which they produce the apples, including factors that may not be obvious by looking at the final product (e.g. labour conditions).

Further examples in this chapter illustrate how the link to the subject-matter applies to SRPP criteria at each stage of a tender, and which approaches do not meet this requirement.

⁽⁸⁷⁾ Services such as the police, justice and statutory social security schemes, are not subject to specific European legislation or to internal market and competition rules.

award process ⁽⁸⁸⁾. The CPV determines whether the light regime covers the contract, and whether it can be reserved for organisations with a public service mission (see Section 4.3).

Deciding on the subject-matter of the contract is also crucial to identify the relevant opportunities to apply social criteria within the tender process. In fact, the Public Procurement Directives make it clear that public buyers can apply social criteria throughout the procurement process, as long as these criteria are linked to the subject-matter of the contract (see box above for more information on what this means). The below table gives some examples of different types of contract, the applicable rules, and potential SRPP approaches.

Subject-matter	Applicable rules	Example of SRPP approach
Supply of hospital uniforms (estimated EUR 300,000 value)	Directive 2014/24/EU (fully covered)	<ul style="list-style-type: none"> • Exclusion and selection criteria to ensure ethical labour practices along the supply chain • Award criteria include a reference to third-party labels certifying ethical production • Contract clauses reinforce commitments and allow monitoring of supply chain • Technical specifications require accessibility and disability inclusiveness
Care services for vulnerable youth (estimated EUR 1 million value)	Directive 2014/24/EU (light regime)	<ul style="list-style-type: none"> • Preliminary market consultation to decide on the most effective way to deliver service • Consultation with users and experts to identify needs of users, including on accessibility • The contract may be reserved for public service mission organisations (Reserved contracts for social services) • Award criteria focus on quality and social inclusion (e.g. prioritizing disability-inclusive characteristics and accessibility elements) • Contract clauses may link payment to results, e.g. defined positive outcomes for youth
Public-private partnership (PPP) to develop an urban area including social housing and community services (estimated EUR 25 million value)	Directive 2014/23/EU (Concessions Directive)	<ul style="list-style-type: none"> • Selection criteria include experience in delivering previous projects in a socially inclusive manner • Technical specifications must include accessibility criteria for all buildings, public areas and amenities • Contract clauses include recruitment and training of a certain number of disadvantaged workers

Table 4.1 Examples of SRPP approaches linked to the subject-matter of a contract

⁽⁸⁸⁾ Title III (Articles 74-77) of Directive 2014/24/EU, Article 91-94 of Directive 2014/25/EU, Article 19 of Directive 2014/23/EU. See section 4.2 below

While the above table presents only a small selection of the types of contract where social considerations may be at the forefront, it demonstrates the range of approaches available under EU law. The SRPP approaches outlined above are all linked to the subject-matter of the contract. Some examples of approaches which would not be linked to the subject-matter are:

- A requirement that bidders have third-party labels/certification for all of their products (including those not being purchased) or recruit disadvantaged workers throughout their operations (rather than just for the specific contract at hand);
- Awarding extra marks to bidders who agree to make a charitable donation or support a project unrelated to the contract being awarded;
- A requirement that bidders have a general corporate social responsibility policy, rather than specific requirements for how they carry out the contract.

The third example is reinforced by Recital 97 of Directive 2014/24/EU and Recital 102 of Directive 2014/25/EU. Rather than requiring a company-wide policy, you should focus on the specific aspects of social responsibility, which it wishes to address in the contract. In some cases, a corporate social responsibility policy may serve as (partial) evidence in relation to a specific requirement. For example, if your contract includes conditions to protect whistle-blowers along the supply chain, bidders may point to their general whistle-blowing policy as well as any specific measures to be put in place for the contract.

4.2 The Light Regime

During the 2014 reform of the Public Procurement Directives it was recognised that for certain services – in particular, those relating to social, health, education and community activities – separate rules should apply. By their nature, these services are generally of limited cross-border interest, and are also organised in different ways across the EU, reflecting different cultural traditions. For these reasons, a separate ‘light regime’ was established which creates unique opportunities for SRPP.

The light regime for social and other specific services ⁽⁸⁹⁾ sets a higher threshold for application of EU rules to such services and allows Member States to put in place national rules regarding their award. Because of the wide margin of discretion left to Member States in this area, procedural rules applicable to social and

European Quality Framework for Social Services

In 2010, the voluntary European Quality Framework for Social Services was adopted. The Framework defines quality principles for social services, and operational criteria to help with implementation and monitoring. It is addressed both to the public buyers in charge of social services, and to service providers and their employees.

The overarching quality principles state that social services should be available, accessible, affordable, person-centred, comprehensive, continuous and outcome-oriented. Further explanation of each of these principles is given in the Framework.

The principles and criteria are particularly relevant for services covered by the light regime. For example, they can help to structure user consultation and engagement in the planning and award of services. The full Framework can be found [here](#).

⁽⁸⁹⁾ Title III (Articles 74-77) of Directive 2014/24/EU, Article 91-94 of Directive 2014/25/EU. Article 19 of Directive 2014/23/EU provides that for concessions for social and other specific services, only the rules on publication of a prior information notice, award notice and the rules on remedies apply.

other specific services can vary significantly across the EU. Under EU law, only the basic Treaty principles of transparency and equal treatment, as well as the requirement to publish a notice advertising the contract and announcing its award, continue to apply.

Within these basic principles, it is possible to apply award procedures for light regime contracts, which are more flexible than those used for fully covered contracts. For example, users and potential service providers may be more closely involved in the design of the service, and negotiations may be held on various aspects such as quality, coverage, and staffing arrangements. It is also possible to apply procedures based on those set out in the Public Procurement Directives, but with specific adaptations which make them more suitable to the services you are buying ⁽⁹⁰⁾. For example, you may wish to hold dialogue meetings with bidders before publishing the invitation to tender/descriptive document, or to adjust the time limits or the number of bidders to be invited to tender.

Further examples of how the light regime is used in national practice are in the boxes accompanying this section.

Examples of National Law/Guidance on the Light Regime: France and Scotland

In 2019, an updated [guidance on social aspects of procurement](#) was published jointly by three French ministries. This reflects the Public Procurement Directives, as implemented into French law by [décret 2016-360 of 25 March 2016](#).

Amongst many other topics, the guide looks at the use of the ‘adapted procedure’ which can be used for social and other specific services, as set out in Articles 27 and 28 of the décret. It suggests ways in which this procedure can be used to achieve social objectives such as insertion into the labour market of unemployed people. For example, variants may be offered by bidders to propose different ways of achieving social objectives.

The guide also emphasises that the adapted procedure does not allow contracts to be set aside for one particular enterprise, but that reservations may be used where appropriate.

The French Direction des Affaires Juridiques has also published [guidelines](#) on use of the adapted procedure, emphasising that this should allow greater participation of SMEs and other ‘non-traditional’ bidders.

In Scotland, specific [guidance](#) has been prepared on the procurement of care and support services under the light regime. This outlines best practice in terms of involving service users and care providers, planning the procurement, including community benefit requirements where appropriate, and managing contracts after their award. It gives examples of how the continuity and quality of services can be protected at each step of the procurement process.

A significant number of services regulated under the light regime are services to the person. As such, they have a relevant impact on the wellbeing of the individuals receiving them and require the performance of labour-intensive activities. EU rules on public procurement recognise the importance of taking into account a number of qualitative aspects and considerations when procuring these services. This is why national rules for light regime contracts must ensure that public buyers can take

⁽⁹⁰⁾ It is important to indicate in the contract notice if you are using one of the regular procedures, or if you have adapted it for the purpose of awarding a light regime contract.

into account: quality; continuity; accessibility; affordability; availability and comprehensiveness of the services; the specific needs of different categories of users, including disadvantaged and vulnerable groups; the involvement and empowerment of users; and innovation. National rules may also specify that the award criteria for such contracts include quality and sustainability of services.

It is worth recalling that there may be different ways to organise the provision of a service, including social services. Some are not covered by the procurement rules at all. For example:

- You may award a grant to one or more community organisations ⁽⁹¹⁾;
- Your organisation may decide to provide the service using its own resources; or
- Your organization may use an in-house provider or cooperate with other public buyers to provide the service ⁽⁹²⁾.

The rules on State aid set out in Articles 107 and 108 of the Treaty need to be considered if there is a risk of conferring a selective advantage on any undertaking ⁽⁹³⁾.

The full list of services covered by the light regime is set out in the Public Procurement Directives ⁽⁹⁴⁾; a selection of those most relevant for SRPP is shown on the next page. Those listed in bold can be reserved for public service mission organisations (see Section 4.3).

Good practices

- When defining the subject-matter of your contract, consider how this determines which legal rules apply, for example, if it is covered by the light regime.
- The subject-matter of your contract, along with the relevant CPV codes, also determine the scope of SRPP criteria which you can apply, so be sure to include all relevant aspects (e.g. development of an urban area including social housing and community services).
- If the light regime applies, you need to consult national rules and guidelines, and you should consider how to organise the procedure to maximise social value, for example, by involving users in the procurement procedure.

⁽⁹¹⁾ As provided in Recital 4 of Directive 2014/24/EU: "...the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall within the scope of the public procurement rules." See also Recital 114 of Directive 2014/24/EU and Recital 120 of Directive 2014/25/EU.

⁽⁹²⁾ In this case, the rules on public contracts and concessions between entities in the public sector, set out in Article 12 of Directive 2014/24/EU and Article 17 of Directive 2014/23/EU apply. Articles 28-30 of Directive 2014/25/EU set forth rules applicable for special relations for procurement of utilities.

⁽⁹³⁾ For further information, see http://ec.europa.eu/competition/state_aid/overview/index_en.html

⁽⁹⁴⁾ Annex XIV of Directive 2014/24/EU, Annex XVII of Directive 2014/25/EU, Annex IV of Directive 2014/23/EU.

Examples of Contracts Awarded under the Light Regime

Notices published in the Official Journal show some of the ways in which the light regime is being used to achieve social objectives. For example, in a contract for ‘Community prevention and wellness services’, a public buyer chose to use a competitive procedure with negotiation. The objective was to engage in collaborative co-design and subsequent execution of a network of services.

The notice specified expected outcomes from the procurement, including:

- Improved quality of life for individuals and for communities;
- People's overall health and wellbeing from birth throughout their lives is improved, and people are supported to maintain their independence;
- People have choice and control over the services and support they access.

The award criteria focus on social value and other qualitative aspects of the service.

Another example is a framework agreement for the provision of welfare services to older people. This was also awarded on the basis of the competitive procedure with negotiation. Interested providers were asked to submit concepts for the support of fragile people living at home, including the provision of equipment for remote assistance.

The award criteria focused primarily on the quality of the service provided, including the expertise and resources committed, and the methods used to allow recipients to stay at home. A total of four offers were received and the winning bidder was an SME.

Table 4.2 Extract from Annex XIV of Directive 2014/24/EU – Selected services subject to the light regime and the Article 77 of Directive 2014/24/EU or Article 94 of Directive 2014/25/EU reservation (in bold)

Description	CPV Code
Health, social and related services	75200000-8; 75231200-6; 75231240-8; 79611000-0; 79622000-0 [Supply services of domestic help personnel]; 79624000-4 [Supply services of nursing personnel] and 79625000-1 [Supply services of medical personnel], from 85000000-9 to 85323000-9 [Health and social work services]; 98133100-5, 98133000-4 [Services furnished by social membership organisations]; 98200000-5; 98500000-8 [Private households with employed persons] and 98513000-2 to 98514000-9 [Manpower services for households, Agency staff services for households, Clerical staff services for households, Temporary staff for households, Home-help services and Domestic services]
Administrative social, educational, healthcare and cultural services	85321000-5 and 85322000-2, 75000000-6 [Administration, defence and social security services], 75121000-0 [Administrative educational services], 75122000-7 [Administrative healthcare services], 75124000-1; from 79995000-5 to 79995200-7; from 80000000-4 Education and training services to 80660000-8 including 80110000-8 [Pre-school education services], 80300000-7 [Higher education services], 80420000-4 [e-learning services], 80430000-7 [Adult education services at university level], 80511000-9 [Staff training services], 80520000-5 [Training facilities], and 80590000-6 [Tutorial services]; from 92000000-1 to 92700000-8 including

	92500000-6 [Library, archives, museums and other cultural services], 92600000-7 [Sporting services] 79950000-8 [Exhibition, fair and congress organisation services], 79951000-5 [Seminar organisation services], 79952000-2 [Event services], 79952100-3 [Cultural event organisation services], 79953000-9 [Festival organisation services], 79954000-6 [Party organisation services], 79955000-3 [Fashion shows organisation services], 79956000-0 [Fair and exhibition organisation services]
Compulsory social security services ⁽⁹⁵⁾	75300000-9
Benefit services	75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1
Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services	98000000-3; 98120000-0; 98132000-7; 98133110-8 [Services provided by youth organisations] and 98130000-3
Religious services	98131000-0
Other administrative services and government services	75100000-7 to 75120000-3; 75123000-4 [Administrative housing services] ; 75125000-8 to 75131000-3
Provision of services to the community	75200000-8 to 75231000-4
Prison related services, public security and rescue services to the extent not excluded pursuant to point (h) of Art. 10	75231210-9 to 75231230-5; 75240000-0 to 75252000-7; 79430000-7; 98113100-9
International services	98900000-2 [Services provided by extra-territorial organisations and bodies] and 98910000-5 [Services specific to international organisations and bodies]

⁽⁹⁵⁾ These services are not covered by the Directive where they are organised as non-economic services of general interest. Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as non-economic services of general interest.

4.3 Reservations

In many EU Member States sheltered workshops and employment programmes play an important role in helping to integrate persons with disabilities or otherwise disadvantaged people into the workforce. These workshops often perform services which are needed by public buyers, for example, maintenance and repair, warehousing or production and assembly. In addition, sheltered employment programmes exist within enterprises engaged in a wide range of activities, such as tourism or IT services. These workshops and programmes offer employment to persons with disabilities, and may also employ other disadvantaged workers.

Under the Public Procurement Directives ⁽⁹⁶⁾, Member States may reserve the right to participate in procurement procedures for sheltered workshops and economic operators whose main aim is the social and professional integration of persons with disabilities or disadvantaged persons. It is also possible to provide for contracts to be performed in the context of structured and stable sheltered employment programmes. To benefit from the reservation, at least 30% of the employees of those workshops, economic operators or sheltered employment programmes must be persons with disabilities or disadvantaged. It is also possible to reserve only certain lots of a contract.

What is meant by a person with disabilities or a disadvantaged person? While the exact definition will depend on the Member State(s) who decided to act under EU provisions on reserved contracts, and thus will be reflected in national law, the box below identifies typical categories of people who may be considered under these headings ⁽⁹⁷⁾. Note that the categories of persons with disabilities and disadvantaged workers are not mutually exclusive.

⁽⁹⁶⁾ Article 20 of Directive 2014/24/EU, Article 38 of Directive 2014/25/EU, and Article 24 of Directive 2014/23/EU.

⁽⁹⁷⁾ The lists below are indicative and inspired by, respectively, Article 1 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and (with some additions) Article 2 of Commission Regulation (EU) No. 651 of 2014 (General Block Exemption Regulation).

Who are Persons with disabilities and Disadvantaged People?

Persons with disabilities in accordance with the UNCRPD include any person who has otherwise long-term physical, mental, intellectual or sensory impairment(s) which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with other persons.

Sometimes a person with disabilities gets an official recognition when:

- (a) is recognised as having a disability under the national legal framework; or
- (b) has an EU Disability Card.

Disadvantaged people could include any person who falls into one or more of the following categories:

- (a) long-term unemployed (the period may vary, e.g. people who have not been in regular paid employment for the previous 6 to 24 months);
 - (b) youth (e.g. between 15 and 24 years of age);
 - (c) not having attained an upper secondary educational or vocational qualification (International Standard Classification of Education 3), or has completed full-time education within the last two years and has not previously obtained his or her first regular paid employment;
 - (d) over the age of 50 years;
 - (e) living as a single adult with one or more dependents;
 - (f) working in a sector or profession in a Member State where the gender imbalance is higher than the average gender imbalance across all economic sectors in that Member State (e.g. 25 %), and belongs to that underrepresented gender group;
 - (g) members of an ethnic minority within a Member State and/or requiring development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment;
 - (h) who may be considered at risk of poverty or severely deprived (e.g. people in a condition of material deprivation, persons living in households with very low work intensity, homeless, etc.);
- or
- (i) experiencing other conditions causing a situation of vulnerability (e.g. domestic violence, persons suffering from addictions, etc.)

In addition to the general provision on reservations explained above, a separate reservation is available to Member States for certain services covered by the light regime⁽⁹⁸⁾. This focuses on organisations which pursue a public service mission linked to the contract being awarded, for example, a non-profit foundation which promotes literacy and which wishes to tender for the provision of adult literacy classes. Participation in a tender may be reserved for such organisations if they meet a number of conditions relating to their objectives, reinvestment of profits, and employee ownership or participatory governance⁽⁹⁹⁾. Organisations covered by this reservation may include social enterprises, employee-led mutuals and charities.

The list of services to which this reservation can be applied is exhaustive, meaning it cannot be applied to other services. In addition, an organisation awarded a contract under this reservation

⁽⁹⁸⁾ Article 77 of Directive 2014/24/EU, Article 94 of Directive 2014/25/EU. The relevant services are listed in bold in Table 4.2.

⁽⁹⁹⁾ These conditions are specified in Article 77(2) of Directive 2014/24/EU and Article 94(2) of Directive 2014/25/EU.

cannot have been awarded a contract for the same services by the same public buyer under the reservation during the previous three years. If during the three-year time frame an organisation has been awarded a contract for the services concerned by the same public buyer in the course of a non-reserved procurement, it will not incur this limitation. Finally, the maximum duration of contracts awarded under the reservation is three years.

These rules are intended to ensure that the reservation does not unduly distort competition. It is important to keep in mind that the use of reservations is optional. The fact that a given service is listed among those for which a reservation is available, does not prevent you from awarding a contract for that service under a non-reserved procedure in accordance with the light regime rules.

Reserved tender for food processing in Vendée (France)

Procurement objective

In 2011, the Department of Vendée awarded a contract to a social enterprise working with persons with disabilities for the operation of a consolidation centre for organic agricultural products. The centre supports the storage, processing, packaging and delivery of meals to secondary schools. The aim was to purchase sustainable, quality products at a lower cost, and facilitate access to local producers.

Approach

The contract was designated as a reserved tender. The winning bidder was the organisation ADAPEI-ARIA 85. This social enterprise works with persons with disabilities and offers them not only a work place but also medical and social support. In total, more than 1400 people are employed by the organisation. A buyers' group was established to jointly procure food, encouraging the use of the consolidation centre. The contract for the operation of a consolidation centre was renewed in 2015.

Results

By awarding a reserved contract to a social enterprise working with persons with disabilities, the Department ensured a positive social impact as well as the use of organic food produced locally. More than 1,800,000 meals are delivered to 31 secondary schools per year.

Lessons learned

This has been a successful model in establishing a shared and global purchasing approach to the food and catering sector, covering the three pillars of sustainable development – environmental, social and economic. The approach has effectively linked the needs of agri-food service suppliers to the supply needs of various buyers, through the awarding of a reserved contract to a social enterprise. The Department is now considering broadening the programme to include other buyers (retirement homes, schools, municipalities), and potentially to take a similar approach to fish, with market engagement activities currently underway.

Good practices

- Reserving a contract for competition by organisations or programmes with a social purpose can be an effective way of delivering social value through procurement.

- Market consultation can help to identify relevant organisations which meet the criteria set out in provisions on reserved contracts, and their capacity to deliver contracts (see Section 2.3 – Stakeholder Consultation).
- If social enterprises lack the capacity to tender for reserved contracts on their own, consider dividing the contract into lots, or whether partnerships or consortia may be formed to meet the requirements. Keep in mind that it is possible to reserve specific lots within a larger contract for performance by social enterprises.

➤ 4.4 Technical Specifications

Once you have decided on the subject-matter of a contract, this needs to be developed into more detailed requirements. Technical specifications tell the market precisely what you wish to purchase, and may include social aspects where this is an essential part of what is to be delivered. Tenders which do not comply with technical specifications must be rejected⁽¹⁰⁰⁾, so it is important only to include essential requirements⁽¹⁰¹⁾. Preferences should be reflected in award criteria, as discussed in Section 4.7.

There are different ways to formulate specifications: by using recognised European, international or national standards, performance or functional requirements, or some combination of these approaches. Performance-based specifications may be particularly appropriate for services, including those which have a social element. For example, if you are buying home care services for older people, the specifications may require certain outcomes in terms of the independence and well-being of recipients of the service. You should formulate these objectively and transparently so they can be understood by all bidders. You also need to think about how to evaluate compliance – for example, a statement from bidders regarding their approach to home visits, staff training and quality control.

The Link to the Subject-Matter and Technical Specifications

The Public Procurement Directives state that technical specifications may refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life-cycle. This also applies when these elements are not part of the material substance of the procurement, as long as they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

This means that it is not necessary for all specifications to relate to factors which are visible or discernible in the final product or service. For example, textiles which are produced using toxic dyes (which present a serious health risk to workers) may be identical to those which are produced more safely.

In technical specifications, you can require the use of non-toxic dyes in the specific products being purchased. More general requirements regarding worker safety may form part of selection criteria and/or contract performance clauses.

⁽¹⁰⁰⁾ The obligation to reject tenders which do not meet specifications was highlighted by the CJEU in Case C-243/89 *Commission v Kingdom of Denmark (Storebaelt)* and Case C-561/12 *Nordecon AS and Ramboll Eesti AS v Rahandusministeerium (Nordecon)*.

⁽¹⁰¹⁾ Variants can be used to allow greater flexibility in specifications where needed. The rules on variants are set out in Article 45 of Directive 2014/24/EU and Article 64 of Directive 2014/25/EU.

An overarching requirement for technical specifications is that they afford equal access for all bidders, so you need to consider how your requirements affect the ability of different operators (including, e.g. social economy organisations and social enterprises) to compete. One way to do this is to prepare a draft version of your specifications at the pre-procurement stage, and request feedback from all interested operators as part of a market consultation. This can help to ensure you do not include any elements which might be a barrier to participation, or which unduly favour or disadvantage any operator.

Consultation with users can also help to ensure that specifications reflect true needs – and do not contain any unnecessary elements. For example, library users may be able to advise on the variety and format of material to be provided, as well as the facilities and services desired. Chapter 3 looks in detail at the role of needs assessment and user consultation in SRPP.

4.4.1 Accessibility Requirements in Technical Specifications

Article 42(1) of Directive 2014/24/EU and Article 60(1) of Directive 2014/25/EU state that:

For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users ⁽¹⁰²⁾.

This means that it is not optional for public buyers (or utility sector entities) to provide goods, services and works which are accessible to all users – it is a legal obligation. You will be able to use specific optional fields in the updated standard forms (for further information on the new standard forms, see Section 3.6) to indicate whether you are introducing accessibility criteria in your procurement and to provide a justification when this is not the case.

Where mandatory accessibility requirements are defined under EU law, these must be referred to in technical specifications.

This is the case under Directive (EU) 2019/882 *on the accessibility requirements for products and services* – known as the European Accessibility Act, which sets common accessibility requirements to ensure that persons with disabilities and older people can access products and services on an equal basis with others. It also reflects the obligation under the *UN Convention on Rights of Persons with Disabilities* (UNCRPD) that State Parties provide accessible products, services and infrastructures.

Although the European Accessibility Act (EAA) accessibility requirements only apply from 2025 ⁽¹⁰³⁾, given the obligation applicable under Directive 2014/24/EU and Directive 2014/25/EU, there is a strong case for referring to them in tender documents published before this date. This may help to comply with EU rules on technical specifications and ensure the market is prepared to deliver full accessibility from 2025.

The EAA covers the following products and services:

- Computers and operating systems

⁽¹⁰²⁾ There is no corresponding provision applicable to concessions regulated under Directive 2014/23/EU.

⁽¹⁰³⁾ The Directive provides an exemption for urban, suburban and regional transport services as well as services provided by microenterprises (an enterprise which employs fewer than 10 persons and which has an annual turnover not exceeding EUR 2 million or an annual balance sheet total not exceeding EUR 2 million).

- Payment terminals and ATMs
- Ticketing and check-in machines
- Interactive self-service terminals providing information
- Smartphones
- TV equipment related to digital television services
- Telephony services and related equipment
- Access to audiovisual media services such as television broadcast and related consumer equipment
- Certain services related to air, bus, rail, and waterborne passenger transport
- Consumer banking services
- e-books
- e-commerce
- The single European emergency number '112'

Accessibility requirements for online advisory services in Espoo, Finland

Procurement objective

The City of Espoo has included an accessibility requirement in the technical specifications of its calls for tender for online advisory services to make the content accessible to persons with disabilities or impairments.

Approach

The service offered must be accessible and compliant with the A and AA levels of WCAG 2.0 Web Content Accessibility Guidelines. These include, for example, blindness and visual impairment, deafness and hearing impairment, learning difficulties, cognitive limitations, reduced mobility, speech disorders, light sensitivity and combinations of the above. The success criteria in WCAG 2.0 are defined as statements that can be tested and thus are not dependent on individual technologies.

Results

The resulting website has improved the accessibility of the City's online advisory services, helping Espoo to provide better support its citizens with disabilities or impairments.

Lessons learned

Including accessibility requirements in calls for tender increases the usability of the service provided and enables citizens to make optimal use of public services.

Source: Ministry of Economic Affairs and Employment of Finland, [Guide to Socially Responsible Public Procurement](#) (2017)

The mandatory accessibility requirements ensure that products and services are designed and produced in such a way as to maximise their foreseeable use by persons with disabilities and are accompanied where possible in or on the product by accessible information on their functioning and accessibility **features. In addition, Annex III of the EAA sets out accessibility requirements for the built environment**, which may be applied by Member States. As the obligation to include accessibility requirements in technical specifications also applies to works contracts, the Annex can provide a useful starting point for design and construction contracts.

Harmonised standards or technical specifications for product or service accessibility requirements developed by European standardisation organisations, including those developed under the EAA,

may be referred to directly in procurement documents. For example, standard EN 301 549 ⁽¹⁰⁴⁾ contains accessibility requirements for ICT products and services, and EN 17210 ⁽¹⁰⁵⁾, includes accessibility requirements for a wide variety of buildings and infrastructures.

Other EU legislation may also set out accessibility requirements for products or services, and compliance with the EAA may help to establish compliance with this legislation.

Good practices

- Technical specifications should be carefully drafted to include any essential social aspects without introducing any unnecessary restrictions on competition.
- Functional or performance-based specifications may be particularly appropriate for service contracts which include social aspects, e.g. to define the desired outcomes of the service.
- Technical specifications may relate to the production process, which will not necessarily be obvious in the final product. However, they must be linked to the subject-matter of the contract and proportionate to its value and objectives.
- It is mandatory to include accessibility requirements in technical specifications for all procurement which will be used by people. The European Accessibility Act defines some of these requirements for a number of commonly purchased products and services.
- Once they become available, use the specific optional fields in the new standard forms to clarify whether you used accessibility criteria, and explain why this has not been possible in duly justified cases.

4.5 Compliance with Social and Labour Law, and Collective Agreements

The Public Procurement Directives include a social and environmental clause ⁽¹⁰⁶⁾, stating that Member States need to take appropriate measures to ensure that in the performance of public procurement contracts economic operators comply with “applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions”.

The international agreements mentioned in this provision are listed in an Annex ⁽¹⁰⁷⁾, and include the 8 core conventions of the International Labour Organisation (ILO):

- Convention 87 on Freedom of Association and the Protection of the Right to Organise
- Convention 98 on the Right to Organise and Collective Bargaining
- Convention 29 on Forced Labour
- Convention 105 on the Abolition of Forced Labour

⁽¹⁰⁴⁾ See https://www.etsi.org/deliver/etsi_en/301500_301599/301549/03.01.01_60/en_301549v030101p.pdf

⁽¹⁰⁵⁾ See <https://ec.europa.eu/growth/tools-databases/mandates/index.cfm?fuseaction=search.detail&id=392>

and https://standards.cen.eu/dyn/www/f?p=204:110:0:::FSP_PROJECT,FSP_LANG_ID:65077,25&cs=1B1F504D7DC F7711690E22BAE7CED456A

⁽¹⁰⁶⁾ Article 18(2) of Directive 2014/24/EU, Article 36(2) of Directive 2014/25/EU and Article 30(3) of Directive 2014/23/EU.

⁽¹⁰⁷⁾ Annex X of Directive 2014/24/EU, Annex XIV of Directive 2014/25/EU, Annex X of Directive 2014/23/EU.

- Convention 138 on Minimum Age
- Convention 111 on Discrimination (Employment and Occupation)
- Convention 100 on Equal Remuneration
- Convention 182 on Worst Forms of Child Labour

In addition to the general obligation on Member States to ensure respect of these provisions in the performance of public contracts, this “social and environmental clause” has a number of more specific applications. Evidence that the bidder failed to comply with applicable social or labour law, or collective agreements, can have serious consequences such as:

- Rejection of the most economically advantageous tender ⁽¹⁰⁸⁾;
- Exclusion from the procurement procedure ⁽¹⁰⁹⁾;
- Rejection of an abnormally low tender ⁽¹¹⁰⁾; and/or
- Joint liability of sub-contractors and main contractors for any breach of the relevant environmental, social and labour law obligations ⁽¹¹¹⁾.

The social and environmental clause is a strong tool to support SRPP. National authorities may have specific measures in place to ensure compliance with the obligations referred to in the social and environmental clause, or may rely on public buyers to verify compliance on a case-by-case basis. One way to help ensure its effectiveness is to refer in tender documents to specific obligations under social and labour law and collective agreements which apply to the contract, and to ask bidders to confirm their compliance. To this end, public buyers can ask for evidence of compliance or self-declarations from bidders. This should then be reinforced by contract terms requiring compliance with the relevant obligations during execution of the contract and accompanied by effective monitoring measures (see Sections 5.2 and 5.4).

National obligations in the field of social and labour law must always be applied consistently with EU law and with the principles of transparency, non-discrimination and equal treatment. Therefore, any requirement imposed on the bidders based on national social and labour law or collective agreements should not lead to direct or indirect discrimination against bidders or workers from other Member States.

Similarly, tender requirements based on national social and labour law or collective agreements should not lead to discrimination against works, supplies, services and economic operators of GPA countries or countries having a bilateral agreement with the EU which includes a procurement chapter, in so far as these are covered by these agreements.

For example, it is not possible to apply your own State’s labour conditions where a contract is delivered remotely in another Member State, in GPA countries or in countries having a bilateral agreement with the EU which includes a procurement chapter.

⁽¹⁰⁸⁾ Article 56(1) of Directive 2014/24/EU, Article 76(6) of Directive 2014/25/EU.

⁽¹⁰⁹⁾ Article 57(4)(a) of Directive 2014/24/EU, Article 80(1) of Directive 2014/25/EU, Article 38(7)(a) of Directive 2014/23/EU.

⁽¹¹⁰⁾ Article 69(3) of Directive 2014/24/EU, Article 84(3) of Directive 2014/25/EU.

⁽¹¹¹⁾ Article 71(6) of Directive 2014/24/EU, Article 88(6) of Directive 2014/25/EU, Article 42(4) of Directive 2014/23/EU.

Section 5.2 contains further information on the application of social and labour laws and collective agreements in public contracts.

Using procurement in Catalonia (Spain) to strengthen workers' rights in electronics supply chains

Procurement objective

The Catalan Association of Local Authorities (L'Associació Catalana de Municipis – ACM) represents over 1000 local bodies, or 95% of municipalities in the region. One of its functions is to act as a central purchaser, combining needs and providing administrative savings for its members. In 2018, ACM became an affiliate of [Electronics Watch](#), whose social clauses are now being added to tenders, including a recent printer framework in which 80 municipalities are participating.

Approach

Electronics Watch's clauses require contractors to perform due diligence to achieve supply chain transparency, collaborate with independent monitors, and remedy breaches of labour rights and safety standards. They are consistent with Directive 2014/24/EU on public procurement and reflect the UN Guiding Principles on Business and Human Rights and the OECD Guidelines on Multinational Enterprises. The clauses contain a code of labour standards referring to domestic laws as well as fundamental ILO conventions.

Results

The initial disclosure request met with a positive response from contractors. Contractors provided detailed supply chain information about specific product models and production locations used under the contract. Based on existing monitoring results for these models and locations, Electronics Watch was able to prepare a risk assessment for ACM. Disclosed details from one supplier strengthened an on-going engagement process in a printer factory in South Asia. Based on production location details a monitoring plan will be implemented, making use of local expertise to monitor labour rights. ACM is already planning to include the Electronics Watch contract conditions in two more framework agreements – for IT and video reporting of plenaries.

Lessons learned

There is a need for the industry - both resellers as well as brands and their suppliers – to further develop supply chain transparency. Currently, disclosing component-level information is still challenging for the industry, but fundamental to enable supply chain transparency which is linked to the subject-matter as required by the Public Procurement Directives. If more public buyers ask for disclosure of production locations, it will help to establish this as standard practice in the industry.

4.6 Exclusion and Selection Criteria

4.6.1 Exclusion grounds

The Public Procurement Directives recognise that certain operators should not be eligible to win public contracts due to serious criminal or unethical practices. They also recognise that documented breaches of corporate responsibility or poor previous performance may be grounds for exclusion.

The grounds for exclusion are divided into two categories: mandatory (which must be applied in all tenders) and discretionary (which public buyers can choose to apply, or which may be made mandatory under national law). The below table shows the mandatory and discretionary exclusion grounds that are most relevant for SRPP – additional grounds are set out in the Public Procurement Directives ⁽¹¹²⁾.

Mandatory exclusion grounds ⁽¹¹³⁾	Discretionary exclusion grounds ⁽¹¹⁴⁾
Conviction by final judgment for child labour or other forms of trafficking in human beings.	Breach of obligations relating to the payment of taxes or social security contributions – demonstrated by any appropriate means
	Violation of applicable obligations under the social and environmental clause, i.e. environmental, social and labour law obligations set out in EU, national law, collective agreements or ILO core conventions
Breach of obligations relating to the payment of taxes or social security contributions – established by judicial or administrative decision having final and binding effect.	Grave professional misconduct which renders integrity questionable
	Significant or persistent deficiencies in the performance of a substantive requirement under a prior contract
	Serious misrepresentation or inability to submit supporting documents

Table 4. 3 Exclusion grounds linked to SRPP

All bidders must be asked to confirm that none of the mandatory exclusion grounds and none of the discretionary grounds applying to the procedure concern them. Preliminary evidence of compliance is provided via the European Single Procurement Document (ESPD) or may be provided via another form of self-declaration depending on the specific contract concerned; however you can ask for supporting documents at any time where this is necessary for the proper conduct of the procedure ⁽¹¹⁵⁾.

For the mandatory exclusion grounds, the maximum period of exclusion is five years from the date of the final conviction, unless a longer period has been specified in the judgment. For the discretionary grounds, the maximum period of exclusion is three years from the relevant event ⁽¹¹⁶⁾. In both cases, bidders may seek to establish their reliability despite the existence of one or more grounds of exclusion (known as ‘self-cleaning’). To do so, they must provide evidence of the specific measures taken to address and prevent further criminal offences and misconduct, such as the payment of compensation in respect of any damage caused, active collaboration with the investigating authorities and concrete technical, organisational and personnel measures ⁽¹¹⁷⁾.

⁽¹¹²⁾ Article 57 of Directive 2014/24/EU, Article 80 of Directive 2014/25/EU, Article 38 of Directive 2014/23/EU
⁽¹¹³⁾ Articles 57(1) and (2) of Directive 2014/24/EU. See also Article 80(1) of Directive 2014/25/EU and Article 38(4) and (5) for concessions regulated by Directive 2014/23/EU
⁽¹¹⁴⁾ Articles 57(2) and 57(4) of Directive 2014/24/EU and Article 38(7) of Directive 2014/23/EU. For contracts on utilities applicability of discretionary grounds may vary depending on national rules (see Article 80(1) of Directive 2014/25/EU)
⁽¹¹⁵⁾ Article 59(4) of Directive 2014/24/EU. It is also possible to terminate a contract if a contractor was in one of the mandatory exclusion situations at the time of award (Article 73(b) of Directive 2014/24/EU, Article 90(b) of Directive 2014/25/EU, Article 44(b) Directive 2014/23/EU).
⁽¹¹⁶⁾ Article 57(7) of Directive 2014/24/EU, which may also apply to utilities (see Article 80 of Directive 2014/25/EU), Article 38(10) of Directive 2014/23/EU. Shorter periods of exclusion may also be specified in national law.
⁽¹¹⁷⁾ Article 57(6) of Directive 2014/24/EU, Article 80 Directive 2014/25/EU, Article 38(9) of Directive 2014/23/EU.

It is up to the public buyer to evaluate these measures and decide whether they are sufficient to allow the bidder to participate in the procedure. If not, a statement of the reasons for that decision must be given to the bidder.

Combatting Child Labour in Supply Chains – French and Dutch Laws

It is mandatory to exclude companies convicted of offences related to child labour or human trafficking from procurement procedures. Because such violations often occur within complex supply chains, it can be difficult to obtain reliable information about them. Both France and the Netherlands have adopted due diligence laws, which place the obligation on companies to determine whether there are risks of child labour in their supply chains, to take action against it, and to report publicly about these actions.

Where such laws apply to bidders for a contract, failure to comply with due diligence obligations may trigger exclusion under Article 57(4)(a) of Directive 2014/24/EU (violation of applicable obligations under the social and environmental clause). This would not be the case if the due diligence law does not apply to a bidder, for example due to the location of its headquarters or number of employees.

4.6.2 Selection Criteria⁽¹¹⁸⁾

While exclusion criteria focus on negative factors which may prevent you from awarding a contract to a bidder, selection criteria can help you to identify those best placed to deliver social aspects of your contract. In particular, setting appropriate selection criteria based on economic and financial standing, technical and human resources, and experience can help to deliver SRPP, while ensuring a wide range of organisations can bid for your contract.

Some examples of selection criteria which may contribute to SRPP are:

- Financial standing requirements (e.g. turnover, profitability) which are limited to what is necessary to ensure that the bidder is capable of delivering the contract and do not restrict participation by social economy organisations, social enterprises, non-profits and community organisations;
- Criteria requiring demonstrable specific experience and expertise of organisations and/or their teams in dealing with social issues relevant to your contract, e.g. accessibility, gender equality and non-discrimination;
- Technical capacity to monitor labour practices along the supply chain ⁽¹¹⁹⁾, including management systems and partnerships with other organisations; and/or

⁽¹¹⁸⁾ Article 58 of Directive 2014/24/EU, Article 80 of Directive 2014/25/EU, Article 38(1) and (2) of Directive 2014/23/EU

⁽¹¹⁹⁾ As set out in Annex XII, Part II, point (d) of Directive 2014/24/EU.

- Evidence of successful completion of previous contracts involving similar social requirements, e.g. recruitment and opportunities for up-skilling of apprentices or disadvantaged workers.

Evidence in relation to selection criteria comes, in the first instance, from the ESPD or may come, in some cases, from another form of self-declaration. As with exclusion criteria, it is possible to request supporting documents at any point in the procedure. Unlike exclusion criteria, selection criteria should be specific to each contract, to ensure their proportionality and link to the subject-matter.

In relation to accessibility, the standard EN 17161:2019 on Design for All ⁽¹²⁰⁾ sets out an accessibility design approach for products, goods and services which aims to extend the range of users. This standard might be referred to in selection criteria as part of your technical capacity requirements, to determine whether bidders have appropriate procedures in place to deliver accessible products and services. Evidence of compliance with equivalent standards should also be considered in this case.

The Link to the Subject-Matter and Proportionality in Selection Criteria

All selection criteria need to be related and proportionate to the subject-matter of the contract. This means that you should not take a generic approach to setting selection criteria, but check that they are appropriate to achieve your objectives (including SRPP objectives) and do not go beyond what is needed.

If you are requesting evidence of supply chain management measures, for example, you cannot require these to go beyond the scope of what you are purchasing (e.g. to include all of a company's operations). You should also avoid setting requirements for previous experience which are either too extensive, or too restrictive – keep in mind that some bidders may have relevant experience gained in other sectors or fields of activity. This approach to selection criteria will also help to ensure social economy organisations, social enterprises and non-profits can compete for your contract.

Good practices

- Use mandatory and optional exclusion criteria to ensure that bidders have not committed any violations of applicable social or labour law, or collective agreements.
- Develop selection criteria which are specific to your contract and which target relevant social aspects linked to technical and human resources and previous experience. Avoid financial or other criteria which may prevent social economy organisations and social enterprises from participating.
- Consider in advance the type of evidence to request from bidders prior to contract award, and how this information is kept up to date during contract delivery.
- When you receive bids from another EU Member State you can consult eCertis ⁽¹²¹⁾, which will help you understand what evidence is provided by the other party.

⁽¹²⁰⁾ See

https://standards.cen.eu/dyn/www/f?p=204:110:0::::FSP_PROJECT:62323&cs=13275480BC8D2104048D1E2104EAD11A2

⁽¹²¹⁾ eCertis is the information system that helps you identify different certificates used in procurement procedures across the EU. Its search function is supported in any of the EU languages. You can consult it here: <https://ec.europa.eu/tools/ecertis/#/search>

Application of ILO Conventions in Czech Ministry Procurement of Textiles

Procurement objective

In 2015, the Czech Ministry of Labour and Social Affairs (MoLSA) developed its own Socially Responsible Procurement Strategy, which it uses to guide tender development. This was applied in a tender for garments to be distributed by charities to people in need. This purchase was co-funded by European Funds.

Approach

To prevent violations of labour and social rights in the process of manufacturing of textiles, MoLSA required bidders to have a system that guarantees that labour rights protected under the ILO Conventions (child labour, forced labour etc.) have not been violated during the manufacturing of the purchased goods. This was a selection criterion. At this stage, MoLSA only focused on the conditions in the actual textile manufacturing processes, and not on the production of raw materials. Bidders could demonstrate compliance with this requirement through membership of the Fair Wear Foundation or could submit a self-declaration. In the second case, the bidders had to identify the manufacturer of each type of product, the brand and the place of manufacturing. This is to allow the buyer to have some level of control over the working conditions in the supply chain.

Results

The risk of a violation of labour and social standards during the production of the textiles was decreased by using social requirements at selection stage, ensuring bidders' supply chains became more transparent. According to information submitted by the winning bidder, a significant part of the production is located within the EU. In addition, part of the production is being done by prisoners, who in the process are developing working skills and references which will support their reintegration into society upon release.

Lessons learned

Simple demands for supply chain transparency can lead to unexpected benefits which go beyond contract requirements. This tender established the ability to apply supply-chain transparency as a condition of participation. Monitoring conditions during the delivery of the contract remains a challenge.

Addressing human rights through procurement in the Municipality of Stavanger (Norway)

Procurement objective

The Norwegian municipality of Stavanger is a forerunner in applying ethical criteria in its procurement – including the use of targeted selection criteria. Since 2010 it has required bidders to document their supply chains with a focus on those contracts which present the greatest risks of human rights violations.

Approach

An annual risk assessment is carried out for all upcoming contracts. For high risk contracts, such as textiles, ICT equipment and medical equipment, comprehensive selection criteria relating to ethical trade are applied. These include requiring suppliers have systems for supply chain traceability, a risk assessment process and a supplier code of conduct in place. The code of conduct must be in accordance with Stavanger's ethical contract terms (which are based on key UN and ILO conventions and national legislation at the place of production). Supplier seminars are held to prepare the market. During the contract delivery phase, information from third-party systems such as the Ethical Trading Initiative are used, as well as individual supplier meetings and questionnaires.

Results

The use of ethical criteria and efforts to secure compliance to the terms set in the targeted contracts, is slowly but surely making an impact. The continuous focus on human rights, sustainability and social responsibility in procurement is considered to have put these issues on suppliers' agendas, and also those of other parts of public and private sector. Through dialogue with suppliers and different networks, desk audits, factory inspections, etc., Stavanger is increasing its in-house expertise within the field. The municipality hopes to be ready very shortly to try even more in-depth methods, such as supplementing selection criteria with new award criteria, to ensure human rights and sustainability in procurement. Currently, the criteria that are being used are connected to the qualification process. The use of award criteria is therefore the obvious next step.

Lessons learned

There is a need for more streamlined procedures to ensure compliance with the ethical contract terms. The municipality is therefore participating in an expert committee with other municipalities, government agencies and universities in Norway. Stavanger is leading a team focused on the textile industry and also participating in a team focused on construction and building materials. Furthermore, Stavanger is participating in the Procura+ Interest Group on SRPP of ICT. These networks provide the municipality with relevant cases and input to the tender documents and compliance work.

4.7 Award Criteria

Contracts covered by the EU Public Procurement Directives are awarded on the basis of the 'most economically advantageous tender' (MEAT), with public buyers able to apply a wide range of qualitative and cost-related criteria. The Directives specifically mention social aspects as being amongst the factors which can be included in award criteria, along with accessibility, design for all

users and trading and its conditions ⁽¹²²⁾. Social award criteria can send a strong message to the market regarding the importance of these aspects of the contract. Some examples of social award criteria would be:

- *Methodology for ensuring social inclusion in the delivery of the service.* Bidders must submit a detailed plan to reach each of the target groups specified in the tender documents.
- *Number and quality of apprenticeships/training opportunities created in the delivery of the contract.* Bidders must detail their approach to recruitment and training, provide a sample job specification for apprenticeships and describe the support structures to be put in place.
- *Third-party certification for ethical sourcing of products delivered under the contract.* Marks are awarded based on the percentage of products with Fair Trade or equivalent certification. If you do not have a third-party certification, indicate the reason for this and describe any internal measures taken to ensure ethical sourcing of products ⁽¹²³⁾.
- *Measures to ensure gender equality.* Marks are awarded based on specific measures to fight discriminations and support gender equality (e.g. training of staff, work/life balance, flexible work schedule etc...).
- *Additional accessibility requirements.* Marks are awarded based on specific measures to enhance accessibility beyond the requirements included in the technical specifications ⁽¹²⁴⁾

The Link to the Subject-Matter and Award Criteria

Award criteria must relate to the specific goods, services or works being purchased. This means marks should not be awarded (or deducted) due merely to the presence (or absence) of a corporate social responsibility policy. However, such a policy *may* serve as evidence of a specific commitment made by bidders in response to the award criteria.

For example, if an award criterion focuses on how the wellbeing of elderly people will be improved under a contract, bidders may rely in part on a policy which defines their approach to engaging with service users and training staff. It would not be appropriate however to award marks based on activities which bidders carry out under other contracts.

To use social award criteria effectively, you should consider how to formulate them, their weighting, and how you will evaluate them.

Regarding the formulation of social award criteria, the same transparency requirements apply as to other award criteria. They must be stated in the contract notice or tender documents, together with their weightings and any sub-criteria. They must be clear enough so that any ‘reasonably well-informed and normally diligent’ tenderer will be able to understand them ⁽¹²⁵⁾. They must ensure the

⁽¹²²⁾ Article 67(2)(a) of Directive 2014/24/EU, Article 82(2)(a) of Directive 2014/25/EU, Article 41(2) of Directive 2014/23/EU. ‘Trading and its conditions’ may include fair trade considerations, as set out by the Court of Justice in Case C-368/10 (see box).

⁽¹²³⁾ See Section 4.8 for discussion of the requirements related to labels/third-party certification.

⁽¹²⁴⁾ For example, where technical specifications require Web content to comply with Web Content Accessibility Guidelines (WCAG) 2.1 AA conformance level, additional points could be scored to any bid offering AAA conformance level.

⁽¹²⁵⁾ Case C-19/00 *SIAC Construction Ltd v County Council of the County of Mayo*, at para 42

possibility of effective competition and allow information submitted by bidders to be verified ⁽¹²⁶⁾. Finally, they must be linked to the subject-matter of the contract, as explained in the box.

In terms of weighting, there is no maximum or minimum percentage of marks you can assign to social award criteria. For contracts where either the social risks (e.g. of human rights violations) or the potential social benefits (e.g. of measurable improvements in wellbeing for a vulnerable group or participation of persons with disabilities) are high, it may make sense to have social award criteria with a high weighting. This also depends on whether social aspects are addressed in the technical specifications or elsewhere in the tender.

Examples of Social Award Criteria Combined with Other Criteria

Example 1 – Creating employment opportunities for disadvantaged workers

Selection criteria: Bidders must provide evidence of their ability to recruit, train and retain workers from one or more of the defined disadvantaged groups. This experience may relate to previous contracts carried out in any sector. It must be shown that the bidder and/or its sub-contractors have the capacity to recruit, train, and retain such workers over a similar period to that covered by this contract.

Award criteria: Up to 15% of the available marks will be awarded to tenders based on the number and quality of employment opportunities to be made available to disadvantaged workers. These marks will be awarded based on the specific plans submitted to recruit, train and retain disadvantaged workers.

Example 2 – Food products certified as meeting fair trade conditions

Award criteria: Up to 10% of the available marks will be awarded to tenders which incorporate one or more products certified by Fairtrade International or an equivalent label. For the purpose of comparing tenders, the value and volume of the product(s) carrying this certification to be supplied under the contract will be taken into account. Where bidders do not have fair trade certification for reasons which are not attributable to them, an explanation should be provided within the tender.

Contract performance conditions: During the contract period, the supplier will work towards incorporating additional products with Fair Trade certification or equivalent into their offer. A portion of the contract price is reserved based on this condition being met, with a payment equal to the additional wholesale cost of supplying fairly traded products to be made available once these products are incorporated into the offer.

Finally, the approach to evaluation determines how effective social award criteria can be. Even if a social award criterion does not have a particularly high weighting, you may set a threshold (e.g. 60% of the available marks for that criterion) which the bidder must achieve for the tender to be eligible for further evaluation ⁽¹²⁷⁾. It is also important to use the full range of marks available for the criterion to properly distinguish between the social performance of each bid.

⁽¹²⁶⁾ Article 67(4) of Directive 2014/24/EU, Article 82(4) of Directive 2014/25/EU, Article 41(2) of Directive 2014/23/EU.

⁽¹²⁷⁾ The CJEU approved this approach in Case C-546/16 *Montte SL v Musikene*.

Award criteria may be most effective when combined with other SRPP measures in selection criteria, technical specifications and contract performance conditions, as illustrated by the below examples.

Good practices

- Social award criteria may stimulate the market to deliver more socially responsible outcomes and should be carefully formulated and weighted to maximise their impact.
- Consider how you will evaluate and verify the claims made by bidders in response to award criteria – including the use of third-party certifications and labels where appropriate.
- Combine award criteria with technical specifications, selection criteria and contract performance clauses to address social risks and improve social outcomes.

Case C-368/10 Commission v Kingdom of the Netherlands

This case concerned the award of a contract for tea and coffee by a Dutch public buyer, which included a number of environmental and social responsibility criteria. The Court of Justice reviewed these criteria in detail, and found that some of them lacked the necessary transparency (e.g. requiring that bidders engage in ‘sustainable purchasing and socially responsible business’ without further details).

However, it also held that labels which dealt with fair trade considerations could be considered linked to the subject-matter of the contract. Article 43 of Directive 2014/24/EU and Article 61 of Directive 2014/25/EU codified and clarified the principles formulated in this judgement. For more information on the use of labels see Section 4.8.

Developing social award criteria for the procurement of IT hardware and services in Germany

Procurement objective

Dataport procures IT hardware and IT services for public buyers in the German federal states of Schleswig-Holstein, Hamburg and Bremen, and IT services for the tax administration of the federal states of Mecklenburg-Western Pomerania and Lower Saxony. The contract comprised the delivery of IT hardware (PCs and notebooks, monitors, keyboards, PC-mice and components) for 60,000 workplaces and IT services for 30,000 workplaces. The aim was to purchase exclusively IT hardware and services produced and delivered in compliance with the standards set by the International Labour Organization.

Approach

The contract was awarded in 2013. Bidders were requested to submit a concept on social criteria including measures to ensure the compliance of their suppliers and sub-suppliers with the eight fundamental ILO conventions. To address specific social issues in global IT production, the award criteria also referred to the additional ILO Conventions 1, 30, 102, 115, 131, 135, 155, 158, 169, 170. Points were awarded based on three aspects of the concept:

- *extent of labour and social standards covered;*
- *plausibility of the concept to comply with social standards;*
- *the verification provided*

As the bidders offered a wide range of choices, two steps were taken to ensure the quality of the control mechanism. First, the tender documentation outlined one possible verification scheme, a set of examples of measures that could be taken by the bidders and possible questions to be answered in a report. Second, the plausibility of the concept (which accounted for 50 % of the score) and the verification offered (40% of the score) were given particularly high priority in the award criteria. The bidders had to agree on a regular review of the measures presented in their concept during the contract term. The concept and the obligations stated within the concept became part of the new framework agreement.

Results

All bidders presented a concept on how to ensure fair working conditions in their supply chain. This targeted the objective of creating awareness in the IT sector about fair working conditions in the supply chain (including raw material extraction). A dedicated specialist assessed the socially responsible procurement concepts based on the extent to which the bidder could demonstrate how their procedures included a wide coverage of the ILO Conventions above, and that their method was of the required quality. The social concept criteria were influential in the awarding of the contract, as they accounted for 10% of the points allocated to quality. The winning bidder developed a Code of Conduct for suppliers and agreed on reporting twice a year to a working group on compliance with the ILO Conventions.

Lessons learned

Despite a difficult market situation and complex global supply chains, the reaction of the bidders was positive. Sustainability criteria are becoming more important for bidders in competitive tenders, due to similar prices and performance of their products. Transparency is increasing on working conditions along the supply chain, audits carried out on the production sites, detected deficiencies and corrective measures taken. To date, there is no IT device available that is completely produced under fair trade conditions. Dataport focuses on the dialogue between clients, service providers and manufacturers during and after the tender procedure. This requires intensive engagement with the topic.

4.8 Evaluating Tenders and Verifying Commitments

The approach taken to evaluating and verifying SRPP commitments is just as important as the criteria you choose. You need to think carefully about how to assess the claims made by bidders, and how to evaluate tenders. The Public Procurement Directives do not prescribe any particular evaluation method, although the principles of transparency and equal treatment must be applied. For contracts with particular social risks or intended social benefits, it may make sense to take a different approach to evaluation than applies to more 'standard' contracts. For example, you may wish to include social partners, user representatives or other experts on the evaluation panel (provided there is no conflict of interest).

Cork (Ireland) provides affordable social housing through competitive dialogue

Procurement objective

In order to increase the supply of affordable social housing, Cork City Council (Ireland) used a competitive dialogue procedure that sparked innovation and broadened the Council's options for housing locations and design.

Approach

The competitive dialogue procedure followed a number of stages. First, housing developers were asked to submit project proposals that were assessed according to, for example, location, access to amenities, public transport, existing tenure mix and likelihood of obtaining planning permission. Cork used the competitive dialogue in order to improve upon and coproduce solutions that best met the city's social housing needs. After several rounds of increasingly detailed discussion, the dialogue was closed, and shortlisted projects were invited to submit a tender for assessment.

Results

The competitive dialogue procedure resulted in the procurement of 11 social housing schemes of mixed density and tenure, providing 215 new homes. By unlocking brownfield sites, the new schemes are contributing to urban regeneration, and families and individuals on housing waiting lists have been provided with appropriate housing.

Lessons learned

Although requiring greater up-front resources, the collaborative approach which competitive dialogue supports helped keep developers better informed of the city's needs, gave greater certainty to solutions and avoided disputes, and created scope for achieving better value for money and risk allocation.

Using procedures which allow more direct interaction with bidders, when the conditions to use them are met ⁽¹²⁸⁾, can also help to achieve SRPP. For example, the competitive dialogue allows you to meet with bidders and progressively refine solutions, potentially improving the social content of

⁽¹²⁸⁾ See Section 3.4.

bids. For contracts which target the delivery of an entirely new product or service, the innovation partnership may be appropriate. Keep in mind that these procedures require time and resources to manage, and for bidders to participate in them. This may be time well spent if it results in a contract which delivers measurable social benefits.

For all procedures where you have included social criteria, you need to think about how to verify bidders' claims. One way to do this is by reference to third-party certification or labels. Under the Directives 2014/24/EU and 2014/25/EU, these can be referred to in technical specifications, award criteria and contract performance clauses ⁽¹²⁹⁾. Examples of third-party labels which address social considerations are:

- The Fairtrade International certifications
- TCO Certified
- SA 8000
- Fair for Life
- World Fair Trade Organization
- WAI WCAG 2.1 AAA label, and/or other disability organisations labels
- DALCO accessibility requirements for standard UNE 170001-1:2007 on built environment

To require specific labels in the tender documents, they must meet several conditions, intended to ensure that they are objective and accessible to all interested operators. The labels must:

1. Only concern criteria which are linked to the subject matter of the contract;
2. Be based on objectively verifiable and non-discriminatory criteria;
3. Be established using an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
4. Be accessible to all interested parties; and
5. Be set by a third party over which the economic operator applying for the label cannot exercise a decisive influence ⁽¹³⁰⁾.

If all label criteria comply with these requirements and you choose to refer to the whole label in your procurement, the tender documents should include a precise and unequivocal reference to it, (for instance by referring to the relevant act adopting the label or the related documentation) so as to guarantee full transparency. Even where you refer to a label which meets all of these requirements, you must still consider labels with equivalent criteria. You should assess equivalence on a case-by-case basis, but generally, you can consider requirements to be equivalent if they are at least as ambitious as the ones referred to in the tender document. In cases where bidders cannot obtain a label within the relevant time limits for reasons not attributable to them, you must consider other appropriate forms of evidence (i.e. technical dossier).

For labels which do not meet one or more of the above requirements, you can refer to individual label criteria which are linked to the subject-matter of the contract, but not require the label as

⁽¹²⁹⁾ Articles 43 and 44 of Directive 2014/24/EU, Article 61 and 62 of Directive 2014/25/EU.

⁽¹³⁰⁾ Article 43(1) of Directive 2014/24/EU; Article 61(1) of Directive 2014/25/EU.

Fair trade food for Munich's schools (Germany)

Procurement objective

In 2017 Munich launched a tender for a framework agreement to provide meals for over 300 schools. Munich has a long tradition of working on socially responsible procurement. As early as 2002, the City decided not to purchase any products which involved the use of child labour (or violated Convention 182 of the International Labour Organisation - ILO), and the City has since taken measures to promote fair trade in its procurement of textiles and food.

Approach

The tender was divided into four lots and contained requirements regarding the percentage of organic food to be supplied and training requirements for kitchen staff. In addition, 5% of the award criteria were reserved for further social and environmental aspects, such as the presence of raw materials certified through Fairtrade International, the World Fairtrade Organisation, or equivalent.

Results

Three bids were received for each Lot - all from SMEs. A total of three suppliers were awarded contracts across the four Lots. In total, these contracts cover over 300 facilities and will cater for over 490,000 school children.

Lessons learned

It is important to secure commitment of all involved parties (that is, management, employees, parents, children, etc.) to promote a sense of ownership to ensure the success of the project, as well as to collect good ideas.

such. If a label contains some requirements which are relevant to your contract but others which are not linked to the subject-matter, such as those relating to general management practices, then you can only refer to the specific label criteria which are linked to the subject-matter and not require the label itself⁽¹³¹⁾. Indicating clearly the relevant label criteria in the tender documents (for instance by copying them) will help potential bidders and facilitate the understanding and transparency of the tender requirements.

Good practices

- Consider how you will evaluate bidders' SRPP claims by including relevant experts on the evaluation panel and requesting third-party labels or certification.
- Where the conditions to launch them exist, procedures which allow direct interaction with bidders, such as the competitive dialogue, may help to develop and refine effective approaches to social objectives.
- Review the criteria and requirements underlying any label you wish to refer to in tender documents, to ensure they are linked to the subject-matter of the contract, objective and non-discriminatory.

⁽¹³¹⁾ Article 43(2) of Directive 2014/24/EU; Article 61(2) of Directive 2014/25/EU.

- You must accept equivalent labels or certifications which address the same criteria, and in cases where the bidder is unable to obtain a label or certification within the relevant time limits, for reasons which are not attributable to them, you must accept other appropriate forms of proof.

4.9 Abnormally Low Tenders

In some cases, the pricing of a tender causes concerns that the bidder will not be able to deliver social requirements, for example ensuring compliance with applicable workplace safety rules. Such situations are dealt with in the rules on abnormally low tenders ⁽¹³²⁾. These require you to investigate any tender which appears to be abnormally low and to seek an explanation from the bidder regarding its pricing. Some examples of factors which may indicate a tender should be investigated are:

- Pricing which does not appear to cover the basic costs of meeting the tender requirements;
- Pricing which is significantly below the average cost of other tenders; or
- Pricing which is significantly below the next lowest-priced bid.

Explanations provided by the bidder may relate to their particular process of production or provision or to favourable conditions available to them – in which case the tender should not be rejected if it respects all legal requirements. However, the bidder should also be asked to confirm their compliance with applicable social and labour legislation and collective agreements as set out in the “social and environmental clause” ⁽¹³³⁾. In cases of non-compliance, the bid must be rejected ⁽¹³⁴⁾. Where you establish that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone. You can do this only after consulting the tenderer, if he is unable to prove, within a sufficient time frame, that the aid in question was compatible with the internal market ⁽¹³⁵⁾.

The presence of abnormally low pricing may also arise in tender procedures where bids are received from countries outside of the EU. The basic principle of equal treatment applies. Bidders from third countries may legitimately be able to offer lower prices, but it is important to verify compliance with all applicable social and labour legislation (see Sections 4.5 and 5.2 for further information on the application of social and labour laws and collective agreements in public contracts). Further information on evaluating tenders from third countries, including the possibility of abnormally low tenders, is available in a dedicated guidance document published by the European Commission ⁽¹³⁶⁾.

⁽¹³²⁾ Article 69 of Directive 2014/24/EU; Article 84 of Directive 2014/25/EU.

⁽¹³³⁾ Article 18(2) of Directive 2014/24/EU, Article 36(2) of Directive 2014/25/EU and Article 30(3) of Directive 2014/23/EU. See Section 4.5 for further information.

⁽¹³⁴⁾ Article 69(3) of Directive 2014/24/EU; Article 84(3) of Directive 2014/25/EU.

⁽¹³⁵⁾ Article 69(4) of Directive 2014/24/EU, Article 84(4) of Directive 2014/25/EU. Further information on application of the State aid rules is available at: https://ec.europa.eu/competition/state_aid/overview/index_en.html

⁽¹³⁶⁾ European Commission (2019) *Guidance on the participation of third country bidders and goods in the EU procurement market* C(2019) 5494 of 24.7.2019 available at: https://ec.europa.eu/growth/content/new-guidance-participation-third-country-bidders-eu-procurement-market_en

Care is needed when investigating abnormally low tenders – it is vital that a consistent and objective approach is applied and that bidders are given a right of reply. However, it is up to the public buyer to decide whether the explanations provided are sufficient to establish confidence in the bid, or if it should be rejected. Keep in mind that other bidders who respect social requirements may be disadvantaged if you allow an abnormally low tender to go unexamined.

Analysing abnormally low tenders in Wallonia

Under its [Action Plan on Responsible Procurement](#), the Walloon Public Procurement Commission created a working group to look into the issue of abnormally low tenders. The working group brings together representatives specialised in public procurement from the regional administration, local authorities, the Walloon Federation of Construction Companies, trade unions, as well as external audit bodies such as the Court of Auditors and the financial inspector.

Following analysis of the relevant legislation and case law, the working group proposed a methodology for the investigation of abnormally low tenders. The methodology involves five steps:

- 1. Correction of arithmetic errors;*
- 2. Examination and verification of pricing;*
- 3. Requesting justification for apparently abnormally low pricing;*
- 4. Deciding on the regularity of pricing;*
- 5. Providing information to the bidder.*

To identify abnormally low tenders, information such as the public buyer's own cost estimates, prices paid by other departments or agencies, statistical information from the market, the difference in quality in tenders and the explanations provided by the bidder should be taken into account. For works contracts and services susceptible to fraud, a more specific methodology based on the deviation from an adjusted average price of the other offers is set out in the [guidance](#).

Good practices

- Detecting and investigating abnormally low tenders is an essential part of SRPP. Knowing the wages, social security contributions and other costs which apply in the sector can help.
- Bidders must be allowed to explain any apparently abnormally low pricing – exclusion cannot be automatic.
- Where abnormally low pricing is due to non-compliance with applicable social, labour law or collective agreements, it is mandatory to reject the bid.

Chapter 5 – Setting and Enforcing Contract Terms

It is during the performance of a contract that SRPP commitments are truly put to the test. Without appropriate contract conditions – and the means to monitor and enforce them – SRPP will not be effective. This chapter looks in detail at how contracts can be designed and delivered to maximise social value. In addition to explaining the relevant provisions of the Public Procurement Directives, it features a range of different approaches being applied by public buyers across Europe.

5.1 Turning SRPP Commitments into Reality

SRPP calls for special attention to be paid to contract conditions because it typically requires the parties to act outside of ‘business as usual’. For this reason, it is important to draw bidders’ attention to social conditions included in the contract, as well as the monitoring that will be carried out and the consequences for non-compliance. The use of standard terms and conditions, without the addition of specific social clauses, is seldom appropriate for SRPP. Treating contract terms as an afterthought can undermine the delivery of SRPP, which requires considering contract conditions from the very outset of a planned procedure.

During a tender procedure, you may include proposed conditions of contract in the procurement documents. These may be in draft form, with bidders invited to comment or mark up the conditions. In any event, the contract should incorporate relevant aspects of the successful tender, such as price and any commitments made in response to the award criteria – including those linked to SRPP. Where commitments made in the tender go beyond the baseline conditions set out in the contract, you will need to adapt the contract provisions. For example, if your draft contract stipulates that at least five apprenticeships are to be created in the first year of the contract, and the winning bidder proposes to deliver eight apprenticeships, you should insert the latter number in the contract.

Unlike technical specifications, selection and award criteria, compliance with contract conditions is not usually explicitly evaluated during a tender procedure. While practices vary between countries and organisations, it is common for bidders to either indicate their acceptance of the contract conditions or to indicate any specific reservations they have, which may be subject to negotiation (depending on the procedure). Again, SRPP can demand a different approach, as you want to be certain that bidders can deliver any specific social aspects of the contract, and that these conditions also flow down to subcontractors where needed. For example, if your draft contract includes a commitment to ensure the ILO core conventions are respected throughout the supply chain, you need to know that the successful bidder has appropriate systems in place to monitor its subcontractors. To fully evaluate the capacity and commitments of the bidders in this domain and to ensure transparency and equal treatment, these considerations should be appropriately reflected in either the selection criteria or award criteria, as well as in the contract conditions. Where the bidder proposes a specific method for monitoring its subcontractors, you should ensure that you incorporate this in the contract. You may also stipulate that the clause requiring compliance with the ILO conventions forms part of any subcontract, while maintaining the liability of the main contractor to ensure compliance throughout the supply chain.

A final step for turning SRPP commitments into reality is making sure that those directly involved in the delivery of the contract – on both sides – are aware of the social clauses. Within your organisation, the contract may be managed by someone not directly involved in the procurement. It

is essential that this person has the time, information and motivation to effectively oversee compliance with the social clauses. Alternatively, it may make sense to set up a committee comprising representatives from your organisation and any third parties with a direct interest in enforcing the social commitments, such as unions, disability rights organisations, accessibility experts, NGOs or citizens/users. On the contractor side, you may wish to require them to appoint an individual with direct responsibility for ensuring social commitments are delivered, and ensure that this person attends contract review meetings.

Good practices

- Social conditions should be included in draft contract terms and published at the beginning of the tender procedure, with bidders' attention drawn to these conditions.
- Standard contracts may not be suitable for SRPP, and all terms should be carefully reviewed to ensure they don't conflict with the tender requirements.
- Bidders may be invited to comment on or mark-up the draft contract as part of the procedure. The final version should reflect all specific commitments in the winning tender.
- Ensure that the person or people responsible for managing the contract on both sides are aware of the SRPP provisions and have the capacity to ensure they are applied.
- Contracts and documents should be available in accessible formats.

5.2 Contract Performance Conditions

Contract performance conditions describe how a contract is to be executed. The Public Procurement Directives provide that contract conditions may include economic, innovation-related, environmental, social or employment-related considerations ⁽¹³⁷⁾. As with selection and award criteria, there is a requirement for these conditions to be linked to the subject-matter of the contract and included in the notice or procurement documents. The meaning of the link to the subject-matter requirement is explained in the box (right). Contract performance clauses must comply with EU law, including the social pillar legislation mentioned in Chapter 1.

To be effective, contract performance conditions should be:

- Clearly drafted, avoiding any unnecessary legal jargon;
- Adequately specific, with defined timelines and deliverables;
- Assigned to a particular party or individual;
- Accompanied by suitable remedies in the event of non-performance, such as financial penalties or remedial actions.

Section 5.6 further explores the role of penalties and incentives in delivering SRPP. Examples of social conditions which meet the above criteria, and which address different aspects of SRPP are given in Table 5.1. These terms are not complete in themselves; they would require definitions and monitoring and enforcement clauses to be effective.

Contract Conditions and the Link to the Subject-Matter Requirement

Contract conditions will be considered linked to the subject-matter of the contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

- (a) the specific process of production, provision or trading of those works, supplies or services; or
- (b) a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance (Article 67(3)). What this means is that you can include conditions such as human rights compliance along the supply chain, fair trade, or specific social outcomes from the contract. You cannot include general corporate social responsibility requirements, unless these are legal obligations which apply to the contractor. An example of a contract condition which would not be linked to the subject-matter is a requirement for a company to donate a certain percentage of its profits to charity each year.

Topic	Example of draft contract condition ⁽¹³⁸⁾
Accessibility (in a contract for office ICT equipment)	The contractor is required to provide the specified accessible equipment configured for use by persons with disabilities. Training sessions for users with disabilities will be made available on dates to be agreed with the public buyer, and follow-up assistance via a dedicated helpdesk provided throughout the contract duration.
Social Inclusion (in a contract for advertising state services)	The contractor is responsible for reaching each of the target groups set out in the specifications and for implementing the special measures included in its tender to reach older users, those suffering from social isolation and those without access to the internet. A review of the effectiveness of these measures will be carried out after three months, with the contractor required to implement any remedial measures

⁽¹³⁷⁾ Article 70 of Directive 2014/24/EU, Article 87 of Directive 2014/25/EU, see also Recitals 64-66 of Directive 2014/23/EU.

⁽¹³⁸⁾ These draft contract conditions are purely indicative and would need to take account of and be adjusted to specific circumstances.

	specified by the public buyer.
Employment (in a contract for building works)	The contractor is responsible for recruiting, training and providing employment in the course of this contract for at least X [number specified in the bid] people who fall into one or more of the defined categories of Disadvantaged Worker. The terms of this employment are specified in an Annex to the contract. Monthly reports must be submitted specifying the number of disadvantaged workers employed, training provided, hours worked and wage receipts.
Gender Equality	The contractor will ensure that all line managers for the staff performing the contract complete training on gender equality aspects of recruitment and employment, including pregnancy and maternity; menopause; sexual harassment; family related leaves, such as parental leave and work/life balance, etc.
Minimum rates of pay	The contractor and all subcontractors operating within the jurisdiction where the contract is carried out will comply with the minimum rates of pay set out in [relevant law or collective agreement] and will keep records of all hours worked and wages paid. The public buyer may require access to these records and evidence of wages paid at any time.
Human and Labour Rights (in a contract for uniforms)	The contractor will ensure that no violation of Human Rights and the eight core conventions of the International Labour Organisation occurs in the performance of this contract. The names and places of business of all subcontractors and sub-subcontractors under this contract are set out in an Annex to the contract, and the contractor confirms that it has put in place an appropriate system, audited by an independent third party, to ensure that accurate information about the working conditions of all people involved in the delivery of the contract is available throughout the duration of the contract.
Ethical Trade (in a catering contract)	Food and drink items with a value equal to at least 5% of the annual Contract Price will be provided with Fair Trade certification or equivalent. As part of the quarterly menu planning cycle, the contractor will specify which fair trade products it proposes to include in the menu and their estimated value. At the end of each Contract Year, the value of fairly traded products will be reviewed, and additional certified products included for the following Contract Year.

Table 5. 1 Sample SRPP contract clauses

Ongoing Compliance with Exclusion Grounds

The role of certain mandatory and discretionary exclusion grounds (such as those for child labour/people trafficking and compliance with social and labour law) in SRPP is explained in Section 4.6. Compliance with these basic obligations should not be limited to a snapshot taken during the tender procedure.

Contract conditions should require ongoing compliance during the performance of the contract with all of the mandatory exclusion grounds and any discretionary grounds applied in the tender, with the contractor and subcontractors responsible for updating declarations on a regular basis. As discussed in Section 5.6, it must be possible to terminate the contract where new information comes to light regarding compliance with the mandatory exclusion grounds.

Contract performance conditions may be subject to review during the lifetime of the contract, and this includes the opportunity to increase the level of ambition over time ⁽¹³⁹⁾. As the contractor gains experience and confidence in meeting social conditions, their capacity to deliver should also

⁽¹³⁹⁾ Any modifications to contracts after their award must comply with the provisions on modifications of contracts (Article 72 of Directive 2014/24/EU, Article 89 of Directive 2014/25/EU and Article 43 of Directive 2014/23/EU).

increase. Consider how best to incentivise the contractor to deliver even greater social value – whether by linking this to additional payments under the contract ⁽¹⁴⁰⁾, agreeing to publicise the positive results, or linking social performance to contract renewals or extensions as set out in the tender.

Good practices

- Include contract performance conditions which target social and employment-related considerations, and which are linked to the subject-matter of the contract.
- Draft contract clauses carefully to avoid any unnecessary jargon, specify timelines and deliverables, assign responsibility, and include suitable remedies in the event of non-performance.
- Consider whether the level of ambition for social commitments should increase throughout the contract, and how to incentivise the contractor to increase ambition.

⁽¹⁴⁰⁾ This possibility should of course be included already in the initial tender documents; otherwise, any similar contractual change would have to satisfy the conditions of rules on modifications of contracts (see footnote 148).

Region of Wallonia: Use of professional integration contract clauses

Procurement objectives

The Region of Wallonia aims to achieve 100% responsible public procurement by 2020. To do so, it has implemented a range of procurement actions designed to foster professional integration, avoid social dumping, support SMEs, improve resource efficiency and reduce environmental impact.

Approach

In order to support professional integration, Wallonia has developed standard social clauses to be inserted into tenders, which commit companies to support training opportunities for unemployed people when carrying out public works. The clause has been designed to be flexible, meaning that the company can decide whether to provide placements for trainees directly in their own workforce, or to instead subcontract specific work (such as carpentry, painting, demolition etc.) to social enterprises with a minimum 50% of employees classed as people with disabilities or disadvantaged (for example long-term unemployed). The result is a partnership approach to professional integration between the public buyer, companies, social enterprises and training organisations. Wallonia has also created a Helpdesk to assist public buyers integrate clauses into tenders, and companies to execute them. Several guidance documents and tools are also available online.

Results

By December 2018, social clauses were included in 442 contracts (with a total value of almost €400 million). The result is the creation of 410 trainee placements, as well as 70 contracts with social enterprise subcontractors. Out of 129 contracts containing social clauses, 78% were fully executed, 9% partially executed and 13% not executed. Of the trainee placements created, 83% were in professions experiencing skill shortages (including electrical engineering, carpentry, and construction). After training, 60% of long-term trainees received permanent or fixed-term contracts (29% and 31% respectively). Finally, 30 social enterprise subcontractors have received over €3.5 million for subcontracted services.

Lessons learned

Five years after the first contracts with social clauses were published, the results are positive: public procurement has proven to be a good tool to foster professional training and to build partnership between companies and social enterprises. A strong political commitment and the involvement of all relevant stakeholders in the project were key to success. Going forward, Wallonia will do more to simplify procedures in order to reduce the administrative burden related to the implementation and monitoring of the social clauses.

5.3 Social Outcomes Contracting

In traditional contracts, payment is based on the contractor carrying out a specified activity. Whether the activity is delivering office supplies, building a road or providing social care services, they receive payment based on completing the defined activity. However, for many types of public contract, the public buyer is more interested in the outcome of an activity than the activity itself. This can be particularly true for contracts with a social dimension. For example, if you are tendering for service providers to work with ex-offenders, you may be interested in reducing rates of

reoffending. A social outcomes contract could define a target rate of reoffending (lower than the baseline) and reserve part of the contract payment for successfully meeting that target.

Various forms of ‘payment by results’ can be seen in public contracts across Europe and globally, evolving as a response to the need for greater effectiveness in service delivery and demonstration of value for money. They have sometimes been criticised for exposing service providers to excessive risk, especially where the service is provided by small businesses, charities or social enterprises which have limited capacity to take on financial risk. For this reason, several models of social outcomes contract which reduce risk to the service provider have been developed. One model involves paying a premium to the service provider for social outcomes which exceed the public buyer’s basic expectations – for example, where a higher than expected number of unemployed people are placed into employment. These types of contract require careful work to define the appropriate desired outcomes, baseline and levels for additional payments, but can be an effective way to incentivise performance. Successful social outcomes contracts often involve partnership with social enterprises and jointly designing services ⁽¹⁴¹⁾.

Another model is the social impact bond (SIB), also known as a development impact bond (DIB) when used in a developing country context. SIBs involve at least three parties: a public buyer (sometimes known as the ‘outcome payer’), a service provider, and a private investor (risk taker). The public buyer identifies an area which is suitable for a SIB (examples include public health campaigns, training, active labour market measures) and defines the outcomes it would like to see achieved (for example number of persons in vulnerable situations or with disabilities employed, health outcomes, staying in education). The private investor provides the capital finance to pay the service provider, and is repaid by the public buyer only if the defined outcomes are achieved. The service provider delivers the service, and may receive additional payments based on outcomes. A key question for SIBs is how to evaluate outcomes, and this is sometimes carried out by an independent third party. Depending on the structure of the contracts and selection process for the service provider, a SIB may or may not be covered by the Public Procurement Directives.

⁽¹⁴¹⁾ For further information on social outcomes contracting and impact bonds, see <https://golab.bsg.ox.ac.uk/the-basics>

Using Social Impact Bonds to improve learning outcomes in Lisbon

Procurement Objective

In 2015, the Municipality of Lisbon established a Junior Code Academy Social Impact Bond (SIB) which aimed to reduce the number of children repeating school years or dropping-out of school. It also aimed to generate evidence about the effect of computer programming on cognitive skills, including school performance and problem-solving ability, in order to inform public policy.¹

Approach

The SIB focused on three public schools in Lisbon. In each school one class was selected to receive two-hour computer programming classes on a weekly basis for one year. In addition, a control group in each school was established, against which the performance of children in the computer programming class could be compared, by a comparison of improvements gained across Portuguese, mathematics, logical thinking and problem solving. In order to reduce the risk of this pilot project, Lisbon entered into a SIB with the Calouste Gulbenkian Foundation, which provided upfront funding of €120,000, to be reimbursed by the city if and when the project achieved the agreed results (as assessed by an independent evaluator).

Results

At the end of the pilot, it was found that students who had participated in the computer programming classes had improved their maths and logical reasoning skills. However, not all agreed SIB metrics were achieved, and as a result, Lisbon reimbursed the Calouste Gulbenkian Foundation around 25% of their initial investment.¹

Lessons learned

SIBs can be used to reduce the risk of funding an innovative pilot. Results however can take time to accumulate, and pilots should be long enough to allow investors to achieve the desired impact. In this case, the monitoring indicated performance was improving over time, suggesting that the desired impacts could have been achieved with more time.

Sources: <http://www.oecd.org/cfe/leed/SIBsExpertSeminar-SummaryReport-FINAL.pdf> and <https://maze-impact.com/report-sib-junior-code-academy/>

Innovative approaches to contracting for and financing public services are continually being developed, and it is worth considering their benefits and drawbacks at the planning stage. The above models may help to incentivise delivery of social outcomes, to foster increased collaboration within and between the public sector and other stakeholders, including social enterprises and civil society, and to unlock new resources through private finance. However, they have their own costs and risks. Consulting other public buyers who have used these models can help you determine whether they are suitable for your needs.

Good practices

- Consider whether your contract should include payments linked to defined social outcomes, and work with service providers to define appropriate targets, measurements and supportive payment conditions.

- Make sure your scheme is designed to proportionately reach all target groups. Avoid situations where treatment of beneficiaries with easier to solve social problems could financially overshadow the treatment of the most vulnerable groups.
- If risk and lack of capital finance are limiting your ability to achieve social impact, you may wish to consider social impact bonds as a means of bringing in private investment.
- Carefully weigh the benefits and drawbacks of these approaches, and where possible, speak with other public buyers who have implemented similar models before undertaking them. Consider potential positive and negative outcomes, for instance by taking into account the potentially high cost of input needed to launch social outcomes contracts and SIB and their cost-effectiveness.

5.4 Monitoring Compliance

Social clauses may be challenging for the contractor to implement, particularly where they are new. You can expect some additional time and resources to be needed on both sides to manage the contract, and maintaining open communication between the parties to help identify and resolve any problems is a good idea. Your contract should also include more formal mechanisms for monitoring compliance. The appropriate form of monitoring will depend upon several factors:

- The nature of the social clauses, e.g. do they relate to the supply chain or end-users;
- The experience of both parties in applying these clauses;
- The level of trust and communication between the parties;
- The resources and capacity to effectively monitor performance; and
- The availability of suitable third parties to assist with monitoring.

Broadly speaking, there are four forms of contract monitoring: client, contractor, joint or third party. The below table summarises the key features of each of these four approaches.

Type of monitoring	Key features
Client	The public buyer is responsible for monitoring compliance with social clauses, and may apply sanctions for non-compliance.
Contractor	The contractor is responsible for collecting and reporting information on its own compliance with social clauses (self-reporting).
Joint	The contractor is responsible for collecting and reporting information, with the public buyer reviewing or verifying this information. Alternatively, the contractor may be responsible for monitoring some aspects, and the public buyer responsible for others.
Third party	A third party, such as an auditor or certification body, is responsible for monitoring compliance with social clauses and providing reports.

Regardless of the model chosen, it is important for the contract to assign responsibility for monitoring, define the activities (e.g. questionnaires, meetings, inspections, reports, audits) to be carried out and their frequency, and specify the escalation and mediation measures that will apply if problems arise. When setting monitoring mechanisms which require the bidder to report information, take into account the nature, level of detail and type of evidence which will be necessary to monitor the execution of the contract appropriately. You should consider which information is truly relevant and proportionate to the nature and risks of the contract, as well as your organisation's ability to assess and verify that information. Identification of the profiles of those

undertaking the monitoring through requesting relevant certificates proving their expertise would be useful for monitoring accessibility of a service, for example. Section 5.6 looks at the remedies which may be available where social clauses are breached. Keeping accurate records of all monitoring activities is particularly important to support the use of remedies.

Good practices

- Anticipate the need for additional time and resources to monitor compliance with social clauses.
- A mix of informal, open communication and more formal monitoring can be highly effective.
- Based on the nature of the social clauses and other factors, consider whether client, contractor, joint or third-party monitoring is most suitable for your contract.
- Assign responsibility for monitoring and specify the activities, frequency, escalation and mediation measures which will apply clearly in the contract.

5.5 Subcontracting

Subcontracting is part of many public contracts, and needs to be considered when drafting and enforcing SRPP provisions. Under the Public Procurement Directives you may require bidders to indicate in their tenders any share of the contract they may intend to subcontract, and any proposed subcontractors ⁽¹⁴²⁾. Furthermore, you may verify or may be required by national law to verify whether there are grounds to exclude any of the known subcontractors ⁽¹⁴³⁾. If that is the case you may have to require bidders to replace them ⁽¹⁴⁴⁾.

When the contract is awarded, you should ask the contractor to provide the names, contact details and legal representatives of its subcontractors, in so far as they are known at that time. If this information changes or any new subcontractor is appointed, the contract should require the contractor to notify you. These information requirements are mandatory under the Public Procurement Directives for works contracts and services provided at a facility under the direct oversight of a public buyer ⁽¹⁴⁵⁾. For other contracts, such as supply contracts, they are voluntary ⁽¹⁴⁶⁾ but are highly recommended for the purposes of SRPP. Without basic information regarding the identity and location of subcontractors, it can be very difficult to enforce social clauses. These information requirements should also be extended to sub-subcontractors and others along the supply chain.

Beyond having information about the identity of subcontractors, your contract should also ensure that the basic social obligations set out in the Directives are applied to them. This includes the mandatory and discretionary exclusion grounds (including prohibitions on child labour and people trafficking; requirements to pay tax and social security; etc.) and the obligation to comply with applicable environmental, social and labour laws in the performance of the contract, as set out in the “social and environmental clause” ⁽¹⁴⁷⁾ (see Section 4.5). As discussed in Section 5.2, contract conditions should require ongoing compliance with all of the mandatory exclusion grounds and any discretionary grounds applied. You should require all subcontractors to provide a declaration of their compliance, and to update this regularly.

Liability for breaches of the social and environmental clause may be joint (or joint and several) between the contractor and subcontractors where national law provides for this. The main contract may also stipulate that social clauses are to be included in all subcontracts, but that the main contractor has overall responsibility for ensuring compliance throughout the process of production or provision. Keep in mind that the ‘applicable’ laws and collective agreements defined in the social and environmental clause will differ depending on the location of the subcontractor. It is a good idea to specify which laws apply based on the information you have about the location of all subcontractors.

⁽¹⁴²⁾ Article 71(2) of Directive 2014/24/EU, Article 88(2) of Directive 2014/25/EU, Article 42(2) of Directive 2014/23/EU.

⁽¹⁴³⁾ Article 71(5) of Directive 2014/24/EU, Article 88(5) of Directive 2014/25/EU, Article 42(3) of Directive 2014/23/EU.

⁽¹⁴⁴⁾ See footnote 166.

⁽¹⁴⁵⁾ Article 71(5) of Directive 2014/24/EU, Article 88(5) of Directive 2014/25/EU, Article 42(3) of Directive 2014/23/EU.

⁽¹⁴⁶⁾ Unless made mandatory under national law, as provided for in Article 71(5) of Directive 2014/24/EU, Article 88(5) of Directive 2014/25/EU.

⁽¹⁴⁷⁾ Article 18(2) of Directive 2014/24/EU, Article 36(2) of Directive 2014/25/EU and Article 30(3) of Directive 2014/23/EU.

An aspect of subcontracting that also has economic and social consequences is timely payment to subcontractors by the main contractor. Delays in the payment of subcontractors may trigger dangerous cascading effects which jeopardize the resilience of the whole supply chain, as payment delays will be passed from one supplier to the next. You can contribute to preventing these effects, and support prompt payment. For instance, you can use contract clauses to require the main contractor to report his timely payments to subcontractors, especially if these are SMEs. If payments are delayed, the main contractor should demonstrate that it has paid statutory interest rates. Directive 2014/24/EU and 2014/25/EU also provide for the possibility to make direct payments to the subcontractor at his request ⁽¹⁴⁸⁾. Keep in mind that you need to specify the arrangements for this mode of payment in the procurement documents.

Good practices

- Keep a register of all subcontractors and sub-subcontractors under your contract; the main contractor should be responsible for updating this if any changes occur.
- Require the main contractor to 'flow down' basic social obligations in all subcontracts, including the mandatory and discretionary exclusion grounds and compliance with applicable laws as defined in the social and environmental clause.
- If a subcontractor breaches any social obligations, the main contractor must replace them.
- Consider how best to apply joint liability, or joint and several liability, for breaches of social obligations under the contract, while respecting the requirements of the national law.

⁽¹⁴⁸⁾ Article 71(3) of Directive 2014/24/EU, Article 88(3) of Directive 2014/25/EU.

Public procurement and human rights – Applying due diligence to subcontractors in Sweden

Procurement objective

Region Stockholm (formally Stockholm County Council) has been pioneering the inclusion of environmental and social criteria in ICT since September 2010, when it first contracted with Dell to supply desktop and laptop computers for its public employees. In September 2014, the region signed a new four-year framework contract for computers worth 156 million SEK (€17 million) with the reseller Atea, which also provides Dell computers. Dell was a subcontractor under the contract.

Approach

In November 2013, the Danish NGO, DanWatch, released a report on labour rights and safety violations in four electronics factories in China, which supply a range of electronics brands, including Dell. The report presented evidence of severe labour rights and safety violations, including: excessive working hours (up to 74 hours a week); forced overtime and wages below the local legal minimum wage; and inadequate occupational health and safety conditions. When the Swedish Social Responsibility in Public Procurement network of county councils learned about the report in early 2014, they contacted Dell and initiated a long-term engagement process to ensure the company used its full leverage and capacity to remedy the labour rights violations and to prevent their recurrence.

Results

In order to strengthen the due diligence of Atea and the subcontractor Dell to ensure compliance with the County Council code of labour standards in the supply chain connected to the respective contract, Stockholm added the following four compliance conditions. These required the contractor, Atea, to: improve risk identification and risk mitigation; increase supply chain transparency; improve the quality of social audit, and; develop a short and long-term compliance plan. The Swedish county councils have made a significant contribution to human rights due diligence in global supply chains, and helped to increase the capacity of both the main contractor, an IT reseller, and a global computer brand to manage their supply chains responsibly.

Lessons learned

Legally binding contract performance clauses are necessary to hold contractors and subcontractors accountable for failure to perform effective human rights due diligence. The effectiveness of clauses can be enhanced through long-term contractor and subcontractor engagement and through collaboration with other public buyers to enhance their leverage. The experience of Stockholm demonstrates that resellers and distributors are capable of exercising effective due diligence, and public buyers should build internal capacity to be able to hold contractors accountable. Transparency is a necessary step to improving human rights due diligence, and public buyers should seek to independently verify compliance with human rights and labour rights, for example through engagement with workers (facilitated in this case through an NGO partner).

Source [Public Procurement and Human Rights Due Diligence to Achieve Respect for Labour Rights Standards in Electronics Factories: A Case Study of the Swedish County Councils and the Dell Computer Corporation.](#)

5.6 Dealing with Problems

Even the best-managed contract can sometimes run into problems during the performance phase. Where these relate to SRPP clauses, having some tools at your disposal to resolve the problem is advised. While the precise rules regarding contractual penalties and remedies vary between jurisdictions, similar basic principles apply. To begin with, allow the possibility to raise issues with the contractor and for them to respond within a defined time. This period may vary depending on the gravity of the problem – for example, a report of illegal labour used on a contract might require a response within one or two days, whereas problems with an online database showing locations of subcontractors might take longer. While you cannot anticipate every possible problem in advance, try to think through the main potential scenarios and draft clauses accordingly.

If a problem is not resolved within the defined period, it will need to be escalated – either to a higher level of management, to a board governing the contract, or to an objective third party such as a mediator. Failure to resolve problems at this level may lead to concrete sanctions, such as financial penalties, shortening a contract or even termination. The Public Procurement Directives require it to be possible for public buyers to terminate a public contract where it is found that one of the mandatory exclusion grounds applied to the contractor at the time of contract award ⁽¹⁴⁹⁾. You may wish to extend this to include breaches of other social clauses, and to allow assignment of the contract to another qualified bidder or the public buyer to ‘step in’ and directly manage subcontracts ⁽¹⁵⁰⁾. Such clauses should not prevent you from accessing other remedies which may be available under national law.

Good practices

- Contracts should contain several tools and procedures to deal with problems in the implementation of social clauses.
- You should include a clause which allows you to terminate the contract where the contractor was subject to one of the mandatory exclusion grounds at the time of the award.

⁽¹⁴⁹⁾ Article 73(b) of Directive 2014/24/EU, Article 90(b) of Directive 2014/25/EU, Article 44(b) of Directive 2014/23/EU.

⁽¹⁵⁰⁾ The assignment of the contract to another qualified bidder or by the public buyer stepping in to directly manage subcontracts constitute contractual changes which must respect the terms set in the rules on modifications of contracts (Article 72(1)(d) of Directive 2014/24/EU, Article 89(1)(d) of Directive 2014/25/EU, Article 43(1)(d) of Directive 2014/23/EU).

Oslo's City Council Regulation against Child Labour (Norway)

Procurement objective

Oslo's City Council Regulation against Child Labour¹ has been in use for a limited number of contracts since 1996, and was extended to all standard contracts in 2005. The policy was developed by Oslo's City Council together with the Corporate Procurement department. The City Council has since adopted new guidelines and contract clauses on SRPP with regard to human rights and child labour in particular, known as the Oslo Model.

Approach

Suppliers have to guarantee that all products supplied are manufactured in compliance with the UN Convention on the Rights of the Child and ILO Convention 138 on Minimum Age, as well as the other core ILO conventions.

Results

National and local authorities in the producing countries are incentivized to take an active role against child labour by implementing the City Council Regulation against Child Labour. A breach of the regulations against child labour that becomes apparent during the contract period will be considered as major breach of contract and can lead to the termination of the contract.

Lessons learned

Under the previous contract clauses, the city administration issued a warning on termination of a contract twice. In the first case this was done after a third-party audit at a production site for work clothing in China. In the second case, the warning was issued after a third-party audit at the main office of a former medical equipment supplier in Norway. However, in both cases the suppliers applied corrective measures, which were well documented and approved by the administration. As such, a contract has never had to be terminated solely due to a breach of social contract clauses related to global supply chains. That said, the social contract clauses do allow the city administration to terminate a contract due to a breach of child labour or other fundamental labour and human rights laws, even where suppliers apply corrective measures.

5.7 Drawing Lessons for Future Contracts

To make SRPP successful, public buyers need to learn from their own experience and that of others. This can only be done where the results of SRPP – including where problems have arisen – are documented and communicated. This Guide has featured many examples, and each of them includes lessons learned by the public buyer. Within your organisation, consider how to collect information regarding the implementation of SRPP measures, and how this can be shared. Some possibilities are to organise events for other buyers and suppliers, to participate in national or European networks and projects, or to publish reports or case studies. You can also ask for feedback from users and users associations to learn more about how the contract met their needs overall, and whether measures taken to address them were sufficient. In addition to helping others, these activities promote the results of your efforts internally and to build an understanding of what

Auditing suppliers of cleaning services for compliance with social criteria in Catalonia (Spain)

Procurement objectives

In 2018, the Catalan Regional Government awarded a €75m framework agreement for cleaning services for all buildings, premises and facilities. The tender included social and environmental criteria and clauses. To increase access to the tender for SMEs and social enterprises, the Catalan Regional Government divided the contract into nine lots, with one lot reserved for special employment centres and reintegration companies who could also bid in the other lots.

Approach

After an extensive market engagement process, the Catalan Regional Government defined a range of social criteria in the tender, including occupational health and safety aspects, gender equality measures, measures to reconcile personal and family life with work, a procedure for resolution of incidents, and limitations on hazardous substances in textiles of the uniforms. Bidders were asked to submit a monitoring plan to ensure that they could meet sustainability requirements.

Results

Of the 39 companies admitted to the framework agreement, 16 companies (i.e. all the companies with contracts currently in operation) were audited for their compliance with social criteria. The auditing team, comprised of technicians from the Directorate-General for Labour Relations and Quality at Work (Ministry of Employment, Social Affairs and Families), analysed employee's views and opinions, payrolls, employment contracts and working time registrations to verify the fulfilment of the criteria. Some cases of non-compliance were found, and the Catalan Regional Government was able to work with the suppliers to improve the social performance of the services. The results of this audit along with a new round of market consultation was used to inform the next framework, which will run between January 2018 and January 2020.

Lessons learned

Comprehensive market research and prior market consultation should be a priority. If social and environmental clauses are included, it is necessary to alert contractors in advance to ensure they are feasible, and to design a monitoring plan with personnel and economic resources for implementation. In addition, appropriate penalties for non-compliance should be included within the contract.

worked and what did not. Where possible, you should actively include the contractor in these efforts to recognise their part in delivering SRPP.

Evaluating SRPP, whether done formally or informally, creates a baseline for future contracts. Over time, you should be able to increase the level of ambition and to see inspiring results.

Good practices

- Document the results of SRPP and use this information to form a baseline to increase levels of ambition within your organisation progressively.
- SRPP results can provide valuable insight for other organisations, even if you did not achieve all of your aims. Sharing your approach and results through events, case studies and social media help to build recognition, understanding and uptake of SRPP.