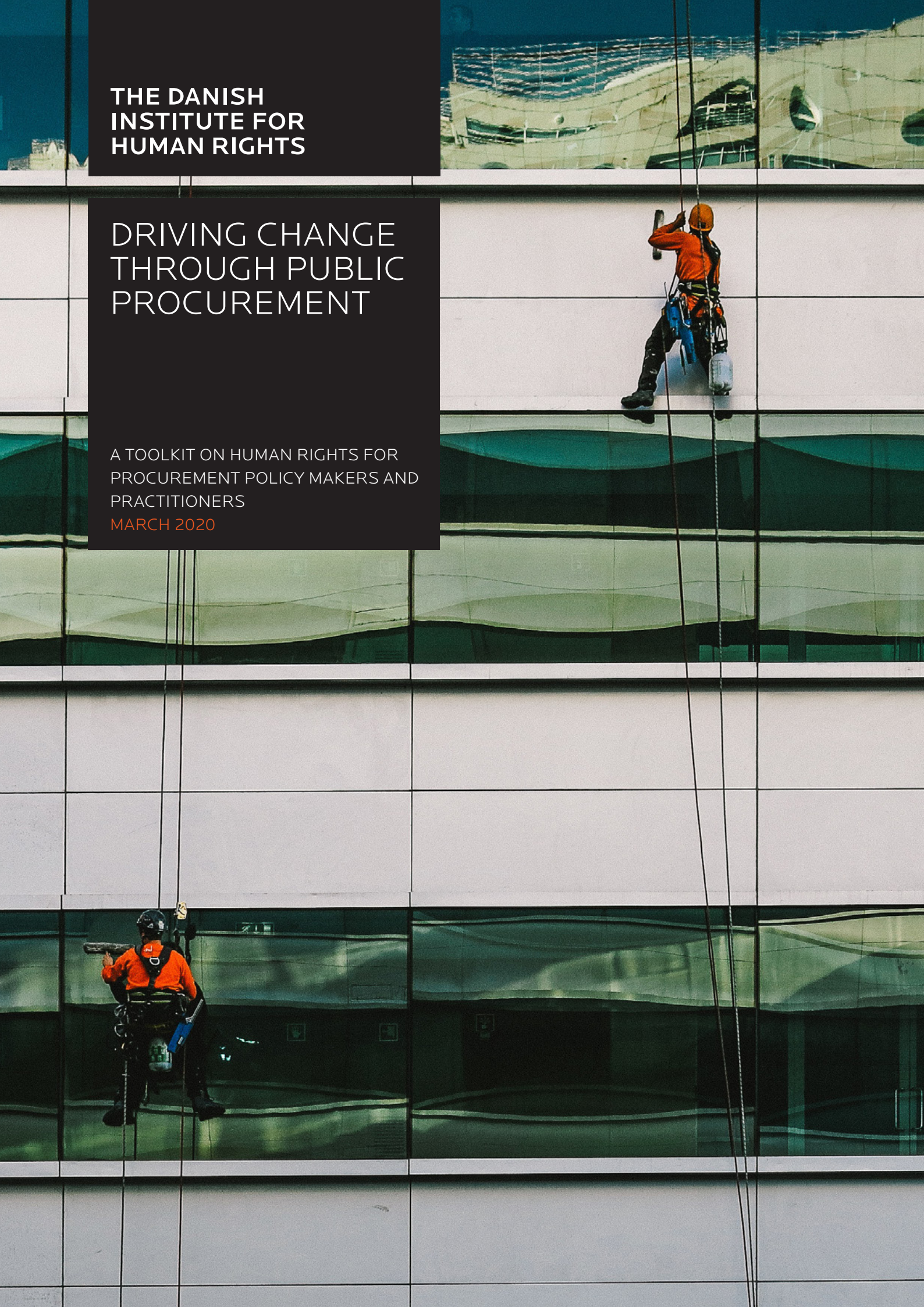

THE DANISH INSTITUTE FOR HUMAN RIGHTS

DRIVING CHANGE THROUGH PUBLIC PROCUREMENT

A TOOLKIT ON HUMAN RIGHTS FOR PROCUREMENT POLICY MAKERS AND PRACTITIONERS

MARCH 2020

The objective of this Toolkit is to enable public procurement policy makers, buyers and contract managers to implement requirements to promote respect for human rights by their suppliers.

The public procurement cycle consists of procurement planning, the procurement process, and contract management.[1] This Toolkit will highlight how requirements that suppliers respect human rights can be incorporated across different stages of the procurement cycle. The scope of goods and services bought by public authorities ranges widely, from large-scale infrastructure and urban development projects, to the acquisition of complex items such as weapon systems, to commissioning of essential public services in the health and social care sector, and to buying common goods such as stationery, furniture, and foodstuffs. This Toolkit will highlight how human rights requirements can be integrated into the majority of procurement exercises.

Given variation across national public procurement regimes, this Toolkit outlines a general approach intended to be relevant to different legal and market contexts. However, national laws and policies relating to public procurement may limit the direct applicability of some of the approaches outlined in this Toolkit or, on the other hand, may demand more stringent requirements. Therefore, the suggestions outlined in this Toolkit should be adapted by users to ensure their alignment with national laws and policies. In addition, adaption to the local context should be informed by an assessment of current levels of knowledge, capacity and budget within the procurement function.

This Toolkit does not highlight human rights abuses in public value chains or survey gaps in procurement systems.[2]

For most public buyers, responsibility for setting procurement policy, for buying, and for contract management reside with different teams and individuals. To be relevant to readers with different roles and responsibilities, this Toolkit is structured as follows:

A – Introduction

B – Guidance for procurement policy makers

C – Guidance for procurement practitioners

Sections B and C can be read independently of each other. It may however be useful, where time allows, to read the full Toolkit, to understand the responsibilities and roles of other actors involved in the procurement process, as regards human rights.

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DRIVING CHANGE THROUGH PUBLIC PROCUREMENT
A toolkit on human rights for procurement policy makers and practitioners
March 2020

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Acknowledgements: This Toolkit draws from reports by the International Learning Lab on Public Procurement and Human Rights.[3] We would also like to acknowledge the input of Vinge (Sweden) and the contribution of this Toolkit's Expert Review Group listed below.

Individual	Institution
Andy Davies	The Natural History Museum (UK)
Björn Claeson	Electronics Watch (Sweden)
Elena Mora	ChileCompra (Chile)
Kaori Kuroda	CSO Network Japan (Japan)
Kevin Funk	United States General Services Administration (USA)
Marcus McKay	United Nations Office for Project Services
Nikki Archer and Lorraine Hook	Scottish Government (UK)
Olga Martin-Ortega	University of Greenwich (UK)
Pauline Göthberg	Nationella Kansliet Hållbar Upphandling (Sweden)
Radu Cucos	Organization for Security and Co-operation in Europe
Stine Foss	ETI Norway (Norway)
Théo Jaekel	Ericsson (Sweden)
Thomas Trier Hansen	Law firm Trier Law ApS (Denmark)

We would also like to thank those who provided comments on the road-testing version.

ISBN: 978-87-93893-32-0, e-ISBN: 978-87-93893-31-3
Layout: Hedda Bank, Infographics: Semin Alekic,
Frontpage photo: Nuno Silva, Unsplash, Backpage photo: Ryoji Iwata

© 2020 The Danish Institute for Human Rights
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This Toolkit was financed by Danida and Sida. Responsibility for the content rests entirely with the Danish Institute for Human Right.

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A

INTRODUCTION

In recent years, public procurement has increasingly been recognised as a means for states to fulfil their human rights obligations and to realise sustainable development. Including requirements within public procurements that suppliers respect human rights can help prevent human rights abuses – including modern slavery, child labour, human trafficking, excessive working hours, and unsafe working conditions – from occurring within value chains. Such requirements are also a crucial part of human rights protection where public services are contracted out for private service delivery, for instance, in the health, education and criminal justice spheres. Finally, with the increasing digitalisation of states and emergence of artificial intelligence, human rights need to be integrated into the design and delivery of IT procurements.

WHAT ARE VALUE CHAINS?

A value chain encompasses all the activities and materials that go into goods or services. It covers the production of raw materials, manufacturing stages, transport, delivery, and end-of-life disposal. It also includes the activities of suppliers and sub-contractors.

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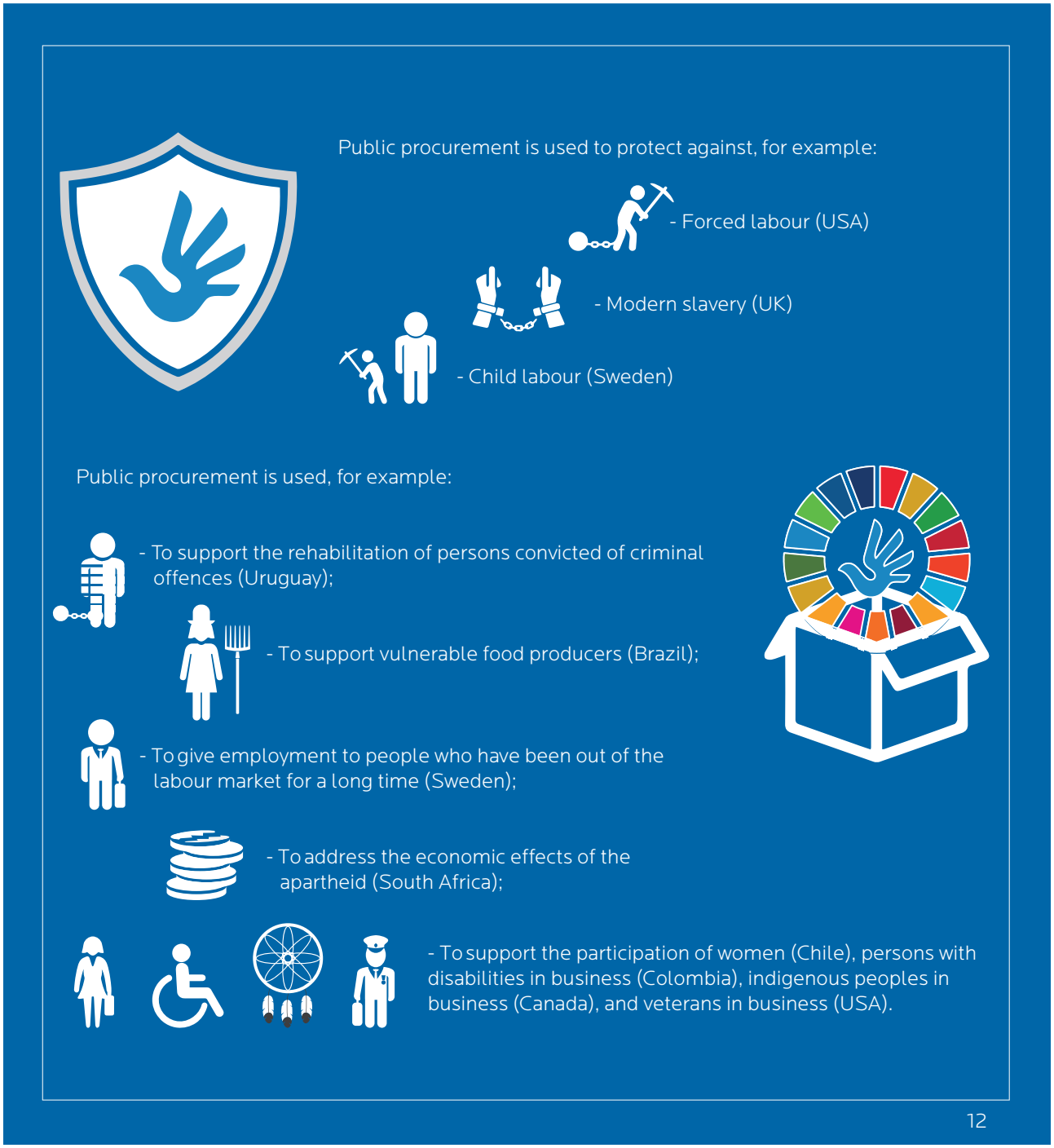
HARM TO INDIVIDUALS THROUGH HUMAN RIGHTS ABUSES IN STATE VALUE CHAINS

In Australia, G4S was contracted to provided security services to the Manus Regional Processing Centre, one of Australia's offshore detention facilities for refugees and asylum seekers. In 2014, G4S staff were involved in violence at the Centre which saw one person killed and 77 injured. A G4S security guard was later convicted of murder.[4] The incident was also the subject of a class action which resulted in Australia's largest human rights settlement and the defendants, including the Australian state and G4S, were forced to pay AUS$70m in compensation.[5] In 2018, staff at the facility began legal action claiming they suffered physical and psychological harm during riots and that the contractor and the Australian government did not provide a safe workplace and failed in their duty of care.[6] Subsequently, the Australian Government has found it difficult to secure reputable service providers for Regional Processing Centres. The latest provider, Paladin, was awarded a AUS$423m contract through a closed tender process. In 2019, the head of the Department of Home Affairs was forced to deny allegations that the contract was awarded to Paladin because they were "desperate", although they conceded that the award took place against an "urgent" set of circumstances. It was conceded that Paladin was approached because businesses were not interested in tendering because there was "too much noise around regional processing".[7]

In January 2016, a documentary aired on national TV in the UK showing staff at a secure training centre using excessive force to restrain children. The staff were employed by the security company G4S which ran the centre under contract to the UK.[8] Investigations by the NGO Danwatch in 2015 showed that the Chinese manufacturers of servers for brands such as HP, Dell, and Lenovo, relied on the forced labour of students. The students were required by their schools to work up to 12 hours a day on production lines without pay on so-called 'traineeships' in order to graduate and receive their diplomas – in unrelated disciplines, such as nursery school teaching and accounting. The Danwatch report highlighted that the servers produced with students' forced labour were purchased by higher education institutions in Europe.[9]

In 2017 North Korean slave labour was reported in the construction of Danish warship Lauge Koch, with workers reportedly seeing their wages withheld and their freedom of movement limited.[10] Since 2018, European health services have stood accused of purchasing rubber gloves and condoms produced through forced labour in Malaysia, with reports of workers facing recruitment fees, excessive overtime, passport confiscation, poor accommodation, and withheld wages.[11]

In addition to preventing human rights abuses from occurring within value chain, public procurements can also promote the rights of vulnerable and at-risks groups by favouring them, or businesses which support them, in public procurement exercises.



Public procurement is a substantial component of the overall economy and gives states a significant opportunity to influence global value chains. Public buying is a mechanism through which states can encourage and influence sustainable business practice by the private sector (see Section B3.1 Increasing leverage).[13] Indeed, businesses already see human rights requirements from public buyers as a strong reason to adopt measures to respect human rights.[14] As mega-consumers, states have the purchasing power to set standards that can shift markets towards more humane norms of practice and competition, and to secure the accountability of suppliers responsible for human rights abuses, as well as remedy for victims.[15]

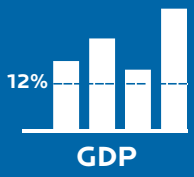
States are "the largest consumers in the global marketplace through the acquisition of goods, services and works to carry out their functions and to deliver services to citizens."

Public procurement accounts for 15-20% of global gross domestic product (GDP) across Organisation for Economic Co-operation and Development States.

€1.3T

World Trade Organisation General Procurement Agreements commitments represent around €1.3 trillion in business opportunities worldwide.

Public contracts account for 12% of GDP on average.



€2T

In 2016 globally public procurement contracts were estimated to total €2 trillion.

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A1. THE REASON TO ACT

There are several reasons to include requirements within public procurement that suppliers respect human rights.

FULFILLING LEGAL OBLIGATIONS

The state has a legal obligation to protect human rights, which includes the human rights of individuals in the value chains of businesses supplying goods and services to the state, who are in its territory/ jurisdiction.[17] In addition, the state should support suppliers in meeting the business responsibility to respect human rights. Introducing requirements within public procurement that suppliers respect human rights is increasingly being recognised as a means of meeting these obligations.[18]

RISK MANAGEMENT

The primary risk that public buyers must address is that public procurement is linked to serious harm to individuals. However, there are other risks that public buyers and suppliers must consider, including legal risks (incurring liability for human rights abuses, for example), financial risks (costs associated with delays in contract delivery, re-running procurement exercises or remediating harms to victims, for example) and reputational risks. If addressed effectively, some such risks may become opportunities. For instance, a supplier that takes effective steps to respect the human rights of workers may be viewed, and evaluated, more favourably by procurers and investors. Reputation also has value for public buyer; association with human rights abuses may deter potential employees or undermine the credibility of policy commitments to uphold human rights in other areas.

LEADING BY EXAMPLE

If public buyers implement requirements that suppliers respect human rights this will encourage the corporate sector towards the same aim. Such requirements can be applied to first tier suppliers and then cascaded through the value chain to sub-contractors at home and abroad. They also provide a mechanism for states to enforce existing laws, for example, in the areas of labour standards, human trafficking and child protection. In addition, they can support public policies in areas such as promoting inclusive labour market development.

CREATING A LEVEL PLAYING FIELD IN THE CORPORATE SECTOR

If public buyers require suppliers to respect human rights when providing the state with goods and services, this helps to create a level playing field for suppliers that strive to respect human rights. Businesses that abuse human rights, for example, by employing children to perform hazardous tasks, taking workers' passports away, or making excessive deductions from their wages, may gain an unfair competitive advantage over businesses which respect human rights. Some businesses are moving ahead with measures to respect human rights. Yet when these efforts are not recognised or valued in public procurement exercises, it may discourage such businesses from sustaining responsible business practices. It may also deter other businesses from addressing human rights risks or abuses. State buying practices should ensure that all suppliers play by the same rules and that public procurement promotes a 'race to the top' business environment.

A2. HUMAN RIGHTS AND PUBLIC PROCUREMENT

Human rights are rights inherent to all human beings. They are universal legal guarantees protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity. Human rights are:

- Applicable to all human beings;
- Equally valuable, meaning that there is no hierarchy between different human rights;
- Universal, meaning that they should be enjoyed by everyone equally, irrespective of race, sex, ethnic origin, religion, age or other protected status.

Human rights are set out in international and regional treaties and declarations.[19] There are nine 'core' human rights treaties which articulate states' human rights obligations, including:

- The Universal Declaration of Human Rights;
- The International Covenant on Civil and Political Rights;
- The International Covenant on Economic, Social and Cultural Rights.

The remaining 'core' human rights treaties further elaborate on rights of specific groups including women, children, persons with disabilities and migrant workers and expand on the prohibition of racial discrimination, torture and enforced disappearances.

In addition, the eight fundamental conventions, or 'core labour standards' of the International Labour Organization (ILO) are recognised as protecting human rights: freedom from discrimination in the workplace, freedom from child labour, freedom of association and collective bargaining, and freedom from forced labour. These are supplemented by many other important ILO standards in areas such as health and safety at work, wages and social protections.

Public procurement refers to the process by which public authorities, such as government departments/ ministries, local or municipal authorities, and state-owned enterprises, purchase work, goods or services from businesses.[20] The public procurement cycle usually consists of procurement planning, the procurement process and contract management.[21] The scope of goods and services bought by public authorities ranges widely, from large-scale infrastructure and urban development projects, to the acquisition of complex items such as weapon systems, to commissioning of essential public services in the health and social care sector, and to buying common goods such as stationery, furniture, and foodstuffs.

A state's human rights obligations are applicable to all public bodies procuring goods and services, from government departments to local councils, from central and local procurement agencies to public hospitals and libraries. International standards set a minimum benchmark and states can go beyond these and implement increased human rights protections of their own design.

In 2013 the Northern Ireland Human Rights Commission published a report which spells out the state's human rights obligations related to public procurement. In 2018 the Northern Ireland Department of Finance developed a procurement guidance note which explains how and why human rights will be included within their procurement activities in practice, observing that:

"Failure to respect an individual's human rights conflicts with international standards and domestic law. Public authorities when discharging their duties are explicitly tasked with respecting, protecting and promoting human rights, including during the public procurement process. ... A human rights based approach to public procurement can be used to both prevent human rights violations and abuses and to take an active role in respecting, protecting, and fulfilling human rights."

Amongst the human rights risks that have been addressed in the procurement process through legislation or policy are:

- Child labour;
- Discrimination and unequal treatment;
- Excessive working hours and low wages;
- Freedom of association (for example, joining unions);
- Human trafficking;
- Unsafe working conditions (see Section C1.1 Human rights risk identification and assessment for examples of what this can include).

In September 2018, the United Kingdom (UK) along with Australia, Canada, New Zealand and the United States of America (USA), adopted four Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains. The first principle states that "Governments should take steps to prevent and address human trafficking in government procurement practices". Governments should "provide tools and incentives and adopt risk assessment policies and procedures that require their procurement officers and contractors to assess the nature and extent of potential exposure to human trafficking in their supply chains".

Measures in public procurements have also been used to promote the rights or situation of:

- Persons with disabilities;
- Women and children;
- Persons convicted of criminal offences;
- Veterans;
- Economically disadvantaged minorities;
- Migrant workers;
- Persons living in conflict zones.

In Chile, the 2003 public procurement law and Directive 17 of 2014 allow for procurement processes to favour persons with disabilities, unemployed youth and indigenous peoples. Directive 17 states:

"12.9% of the Chilean population has some type of disability. Within this group, 50% are of working age and only 29% of them perform any activity of this type. If the fact that 2 out of 5 people live in a low socioeconomic condition is added to this, there is a need to introduce concepts, criteria and guidelines that encourage the inclusion of these groups, through public procurement."

ChileCompra, the central procurement body in Chile, has adopted a programme to promote the participation of businesses led by women in the public procurement market to contribute to gender equality and address the structural disadvantages faced by women in the labour market in Chile.

In Mexico, the Law on Acquisitions, Leases and Services of the Public Sector of 2014 provides in Article 14:

"...In the case of public tender for the acquisition of goods, leases or services which use the evaluation of points and percentages, points will be awarded under the terms of this Law, to persons with disabilities or to the company that has workers with disabilities in a proportion of five percent at least of all of its employees, whose seniority is not less than six months, which will be verified with the notice of discharge to the mandatory regime of the Mexican Social Security Institute... Similarly, points will be awarded to companies that have applied gender equality policies and practices, in accordance with the corresponding certification issued by the authorities and bodies empowered to do so."

Requirements have also been used to contribute to the progressive realisation of the human right to adequate food through the public catering sector, including school meal programmes.[22]

Brazil's Act No. 11.947 of 16 June 2009 provides that a minimum of 30% of the financial resources transferred by the federal government to states and municipalities in order to implement the National School Feeding Programme (PNAE), now covering more than 49 million children, must be used to buy food sourced from family-based farms, including indigenous communities, Quilombolas (descendants of Afro-Brazilian slaves), and beneficiaries of land redistribution programmes.[23]

RISKS TO HUMAN RIGHTS OF END-USERS AND SERVICE-USERS

Goods and services provided to individuals should not harm their human rights. This is relevant when suppliers deliver essential public services, such as personalised health or social care services for persons with disabilities or special needs. It is also relevant where goods are supplied directly to end-users, such as drugs and mobility devices including wheelchairs.

The state can contract out the supply of goods and services, but it cannot contract out its human rights obligations. The public buyer should therefore take steps to manage the risk of harm to individuals through human rights due diligence (see Section B3.2 Risk management) and consult with service-users and end-users as relevant stakeholders (See B3.6 Engaging stakeholders).

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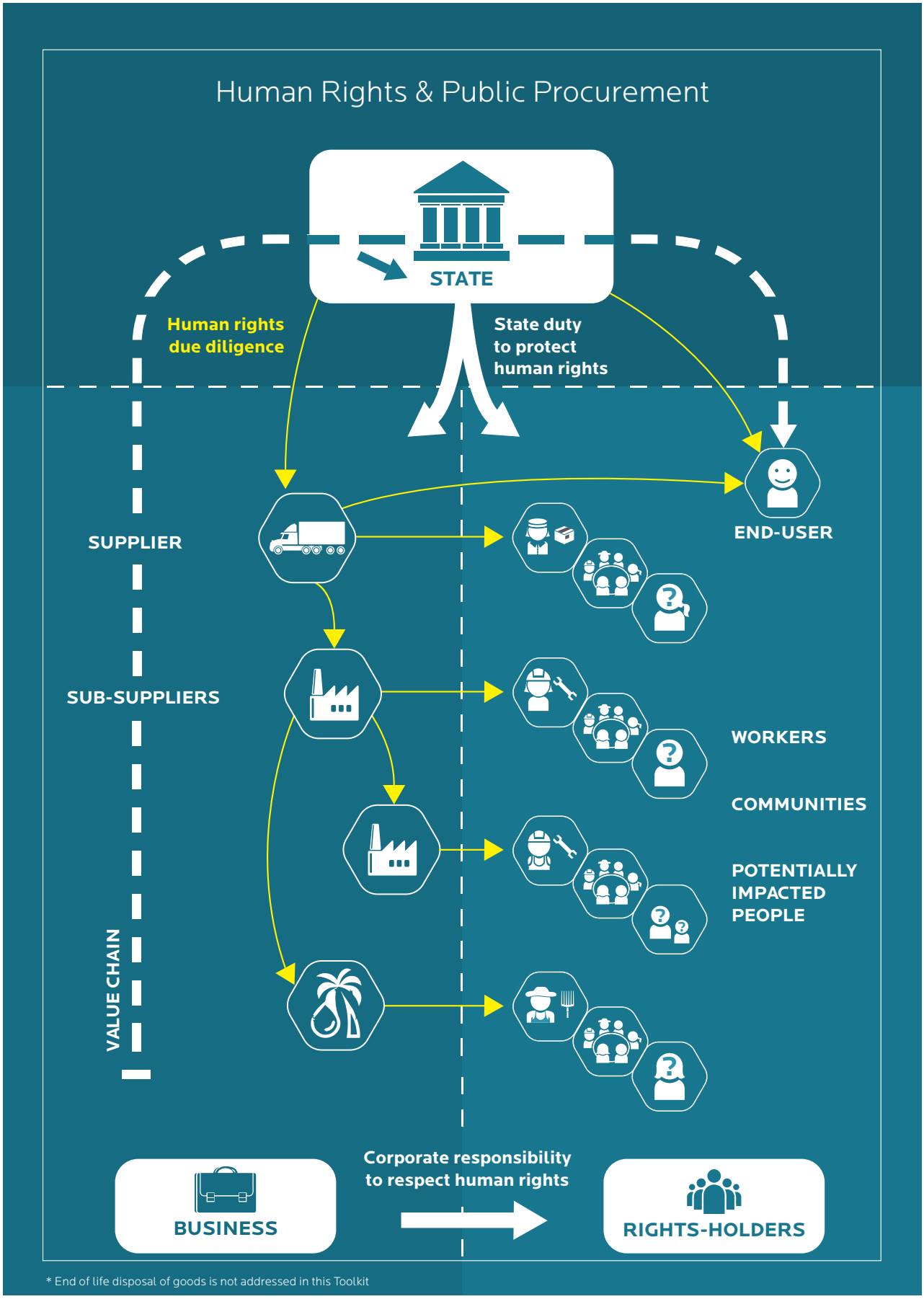
The UN Guiding Principles on Business and Human Rights (UNGPs) affirm the state's duty to protect against business-related human rights abuses, along with the duty to remediate such abuses effectively should they occur. The UNGPs also clarify that all businesses have a responsibility to respect human rights, including in their supply chain relationships.[24] The UNGPs were endorsed by the UN Human Rights Council in June 2011 and are the first widely accepted international framework articulating the respective duties and responsibilities of states and businesses in relation to human rights. The UNGPs draw their authority from pre-existing international human rights laws. Moreover, the UNGPs explicitly affirm that the state duty to protect against human rights abuses extends to public procurement.[25]

Currently, businesses are not considered to have direct legal obligations under international human rights law. Instead businesses have a 'responsibility to respect' human rights, that is, to 'do no harm'.[26] According to the UNGPs:

"The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts."

Businesses should take active steps to avoid negatively impacting on human rights through a process called human rights due diligence (see B1.1 Human rights instruments and Section B3.2 Risk management).[27]


Human Rights & Public Procurement
STATE
Human rights due diligence
State duty to protect human rights
SUPPLIER
SUB-SUPPLIERS
VALUE CHAIN
END-USER
WORKERS
COMMUNITIES
POTENTIALLY IMPACTED PEOPLE
BUSINESS
Corporate responsibility to respect human rights
RIGHTS-HOLDERS
* End of life disposal of goods is not addressed in this Toolkit

A3. HOW TO ACT – FIRST STEPS

This section highlights potential first steps for procurement law and policy-makers and for procurement practitioners towards implementing requirements that suppliers respect human rights. Information on additional first steps is included in Section B and C, alongside guidance on further measures for procurers with more established human rights risk management programmes.

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FIRST STEPS FOR PROCUREMENT POLICY MAKERS

- Identify relevant national laws, policies and guidance relating to public procurement, sustainability, and human rights to see what human rights requirements are allowed and/ or required.

Section B1. Legal and policy procurement frameworks and human rights

- Identify current public procurement policy objectives and explore how human rights are, or could be, incorporated within these.

Section B2. Human rights as a policy objective

- Investigate whether there are existing framework agreements and purchasing consortia that have started to address human rights issues that you can use or join.

Section B3.1 Increasing leverage

- Learn about human rights due diligence as described by the UN Guiding Principles on Business and Human Rights and take steps to implement it within existing procurement systems.

Section B3.2 Risk management

- Establish a human rights working group with members from the different teams and departments working across the procurement cycle to design an approach tailored to the local environment;
- Seek political, management and team buy-in to facilitate work with human rights requirements;
- Mobilise existing induction, training, management, evaluation and budget systems to build competence in human rights due diligence.

Section B3.3 Ensuring coherence in implementation

- Begin with pilot projects to build knowledge and capacity gradually, spot challenges, capture learnings and generate team confidence before a wider roll-out;
- Develop internal policies with guidance and training to provide clarity and help manage expectations on what can be achieved and what is required of staff, accompanied with training and capacity building;
- Gather good practices and lessons learned and make them accessible across teams;
- Talk to other public buyers and adapt successful elements of approaches from elsewhere.

Section B3.4 Supporting procurement personnel

- Use the market testing stage to identify how knowledgeable suppliers are about human rights risks, what measures they currently apply, and how they would respond to new requirements;
- Provide user-friendly guidance and training for suppliers and potential suppliers with practical examples of how to address human rights risks.

Section 3.5 Supporting suppliers and market dialogue

- In addition to market testing for suppliers, consider ways to get feedback from other relevant stakeholders, such as supplier associations, workers, worker organisations, civil society actors, end-users/ service-users, as well as communities which have been impacted, or are potentially impacted by human rights abuses in the state's value chain.

Section B3.6 Engaging stakeholders

- Consider a small-scale pilot project to test requirements and calibrate budgetary estimates.

Section B3.8 Resources

- Map internal grievance/ feedback mechanisms, identify who can access them (for example, staff, contractors, suppliers, sub-contractors and other relevant external stakeholders) and for which types of grievances/ feedback.

Section B3.9 Remedy

FIRST STEPS FOR PROCUREMENT PRACTITIONERS

- Map the top tiers of your value chain for upcoming large-scale tenders;
- Use public data to see if there are reports of human rights issues for geographic regions, countries, sectors, or specific businesses relevant to your tender;
- Select an upcoming tender with high risks to use as a pilot project.

Section C.1.1 Human rights risk identification and assessment

- Incorporate a session on human rights in market testing exercises to gain an understanding of the maturity of the supplier base; to identify areas where progress can be achieved immediately, and those where change will take more time;
- In addition to market testing for suppliers, consider ways to get feedback from other stakeholders, such as supplier associations, workers, worker organisations, civil society actors, end-users/ service-users, as well as communities which may be impacted by human rights abuses in the state's value chain.

Section C1.2 Market testing and engagement

- Consider introducing exclusion grounds for suppliers who have been found responsible by courts of other official bodies of serious human rights abuses within a specific timeframe.

Section C2.1 Exclusion grounds

- Identify whether there are social labels or certificates relevant to the goods, services or works procured which could be referred to as requirements.

Section C2.2 Technical specifications

- Include simple selection criteria which are transparent and readily achievable for suppliers, and easily assessable for public buyers, such as a requirement that the supplier has a policy which addresses human rights.

Section C2.3 Selection criteria

- Consider how to give weight to human rights protections when scoring bids.

Section C2.4 Contract award criteria

- Include requirements that suppliers disclose incident and remediation reports on labour issues, discrimination, harassment or other relevant issues lodged with regulators or by other means.

Section C3.1 Conditions for performance of contracts

- Consider cascading contractual requirements for suppliers to their sub-contractors.

Section C3.2 Sub-contracting

- Establish a dialogue with suppliers on goals, risks and expectations, and how they intend to comply with the contractual human rights requirements.

Section C4.1 Supplier performance monitoring

- Include a requirement that suppliers report annually on how they are meeting human rights requirements within the contract;
- Discuss annual reports with suppliers and support them in developing action points to address risks and opportunities identified in reports.

Section 4.2 Supplier reporting

- Consider including a requirement that suppliers provide access to an effective grievance mechanism for alleged victims of human rights abuses in their value chain.

Section C4.3 Grievance mechanisms

- Adapt existing termination and escalation clauses to include severe human rights abuses as grounds for remedial action and termination.

Section C4.4 Enforcement and termination of contracts

B

GUIDANCE FOR PROCUREMENT POLICY MAKERS

This section is primarily aimed at public procurement planners and policy makers at central and local levels. The objectives of this section are to:

- Explain the legal basis for states to include requirements within public procurement that suppliers respect human rights;
- Explain how to frame human rights as a procurement policy objective;
- Identify how to implement system-wide planning to support requirements that suppliers respect human rights.

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B1. LEGAL AND POLICY PROCUREMENT FRAMEWORKS AND HUMAN RIGHTS

There is a legal basis for including requirements in public procurements that suppliers respect human rights. International, supranational/ regional, and national laws require states to protect and respect human rights. Besides, states have legal obligations and policy commitments in the areas of sustainable development, transparency, corruption, and accountability.

FIRST STEPS

- **Identify relevant national laws, policies and guidance relating to public procurement, sustainability and human rights to see what human rights requirements are allowed and/ or required.**

This section is structured around three types of legal instruments:
B1.1 Human rights instruments
B1.2 Sustainable procurement instruments
B1.3 Public procurement instruments

B1.1 HUMAN RIGHTS INSTRUMENTS

The United Nations Guiding Principles on Business and Human Rights (UNGPs) detail the state duty to promote respect for human rights in their own value chains and highlight that businesses have a responsibility to respect human rights, including in their relationships with suppliers.[28]

The UNGPs were endorsed by the United Nations (UN) Human Rights Council in June 2011 and are the first universally accepted international framework articulating the respective duties and responsibilities of states and businesses in relation to human rights. The UNGPs have subsequently been affirmed by other UN human rights bodies,[29] numerous national governments,[30] a range of international and regional organisations (including the Organisation for Economic Co-operation and Development (OECD) and International Organization for Standardization (ISO), which aligned respectively their Guidelines for Multinational Enterprises, and ISO 26000 standard with the UNGPs), the European Union (EU) and the Council of Europe, the International Finance Corporation and other international finance institutions, and investors.[31] Accordingly, it can be said that state's obligations to protect human rights extend to protecting human rights within their value chains.[32]

The UNGPs draw their authority from pre-existing international human rights laws. The UNGPs affirm that the state duty to protect human rights extends to situations where a commercial "nexus" exists between public actors and businesses.[33] The UNGPs highlight that:

"States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."[34]

The UNGPs elaborate on existing obligations under international law. They note that states should require, where appropriate, state-owned or controlled enterprises to exercise human rights due diligence.[35] They clarify that this duty extends to situations where states enter into commercial relationships, including through public procurement.[36] Where states engage in privatisation or "contracting out" services that may impact on human rights, they must "exercise adequate oversight", including by ensuring that contracts or enabling legislation communicate the state's expectation that service providers will respect the human rights of service-users, i.e. their citizens.

The UNGPs provide that "States should promote awareness of and respect for human rights by business enterprises with which they conduct commercial transactions".

The UNGPs note that:

"States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States' relevant obligations under national and international law."[37]

The UNGPs also highlight that states must ensure 'policy coherence', in other words, alignment with human rights obligations of standards and policies across all state departments, agencies, and other state-based institutions that shape business practices,[38] which includes public procurement bodies.

Colombia Compra Eficiente's Guide on Socially Responsible Public Procurement highlights that "state entities and suppliers, both national and foreign, should apply processes in public procurement which advance the UN Guiding Principles on Business and Human Rights."

Turning to businesses; all businesses have a responsibility to respect human rights, just as the state has a duty to implement laws, policies, and guidance to ensure that all businesses meet their responsibility to respect human rights. The

UNGPs confirm that business' responsibility to respect human rights applies "to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure".[39] On the other hand, it is recognised that measures by individual businesses to meet this responsibility will reflect their varying capacities and resources. More sophisticated measures to address human rights risks will be expected of a multi-national enterprise, for example, than of a small and medium-sized enterprise (SME).

According to the UNGPs, businesses should "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts." The UNGPs further highlight that "business enterprises may be involved with adverse human rights impacts either through their own activities, or as a result of their business relationships with other parties". "Business relationships" are understood to include relationships with "entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services".[40]

An increasing number of states are adopting a business and human rights national action plan (NAP) to articulate priorities and actions that it will adopt to support the implementation of the UNGPs.[41]

In addition to the UNGPs, the International Labour Organization (ILO) Labour Clauses (Public Contracts) Convention 1949 establishes a legal base for protecting worker's rights in public procurements.

HUMAN RIGHTS DUE DILIGENCE

Human rights due diligence is a process described by the UNGPs to operationalise the corporate responsibility to respect human rights. The responsibility for businesses of all sizes to undertake human rights due diligence has been reinforced by UN bodies and the OECD, amongst others.[42] Some states have already established laws and policies to require businesses to do due diligence. This includes France's Corporate Duty of Vigilance Law and the Netherlands' Child Labour Due Diligence Law.

By undertaking human rights due diligence a business can identify, prevent, mitigate and account for human rights impacts that it may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services via business relationships. The UNGPs highlight that human rights due diligence:

- Should cover all potential and actual adverse human rights impacts;
- Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

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The OECD has also developed 'Due Diligence Guidance for Responsible Business Conduct' which takes the UNGPs as a starting point. (see Section B3.2 Risk management to see what human rights due diligence could look like for public buyers).

RECENT POLICY DEVELOPMENTS ON PUBLIC PROCUREMENT AND HUMAN RIGHTS

A range of bodies have developed recommendations and guidelines on public procurement and human rights in the wake of the UNGPs.

The OECD Guidelines for Multinational Enterprises address 'responsible business conduct' (RBC) in a range of areas including human rights, employment and industrial relations, environment, combating bribery, and science and technology.[43]

Building on the OECD Guidelines for Multinational Enterprises, a recent OECD concept note highlights that using public procurement to encourage responsible business conduct and respect human rights makes sense for several reasons:

- Public funds should not contribute to adverse environmental or social impacts of business operations;
- States expect business to behave responsibly. So states should lead by example, for instance, by requiring suppliers to perform human rights due diligence;
- A growing body of evidence indicates that RBC pays off for business. The potential benefits of behaving and procuring responsibly, such as reduced lifecycle costs, higher quality products, less disrupted and more efficient supply chains, also apply to governments;
- States have a national interest to encourage other countries to integrate RBC considerations into their public procurement processes to promote a level playing field for their own companies when operating abroad.

Modern slavery, forced labour and human trafficking are widespread violations of human rights affecting most states. According to the US Trafficking In Persons Report of June 2019 "traffickers are robbing a staggering 24.9 million people of their freedom and basic human dignity". The Organization for Security and Co-operation in Europe (OSCE) adopted Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Supply Chains in 2018. These are a practical tool to assist states in introducing concrete measures to prevent trafficking in human beings in supply chains. The OSCE Model Guidelines include templates for legislation and policies to promote transparency to ensure that public supply chains are free from trafficked labour and to promote the fair and ethical recruitment of workers.

For some states, ratifying an international human rights convention means that it becomes immediately binding at the national level. In others, states must pass separate national laws to implement human rights conventions. International standards set a minimum benchmark and states can go beyond these and implement higher human rights protections of their own design. It is therefore important to identify which human rights laws are binding on procurement authorities in each country individually.

In Indonesia, Law No. 39 Year 1999 - Concerning Human Rights, provides:

"Article 71: The government shall respect, protect, uphold and promote human rights as laid down in this Act, other legislation, and international law concerning human rights ratified by the Republic of Indonesia.
Article 72: The duties and responsibilities of the government as referred to in Article 71, include measures towards effective implementation in law, politics, economics, social and cultural aspects, state security, and other areas."

In the UK, the Human Rights Act 1998 introduces human rights protections in line with the UK's international legal obligations. Section 6 of the Human Rights Act makes it unlawful for any public authority to breach human rights. Section 6 extends to all acts of public authorities, including purchasing, so applies to contracts for the delivery of public services, including housing, social care, security services, and the management of prisons and detention facilities related to asylum and immigration.[44]

B1.2 SUSTAINABLE PROCUREMENT INSTRUMENTS

In 2015, the UN General Assembly unanimously adopted the 2030 Agenda for Sustainable Development (the 2030 Agenda) as "a plan of action for people, planet and prosperity". It provides a comprehensive and universal framework uniting the environmental, social and economic dimensions of sustainable development. The 2030 Agenda and its 17 Sustainable Development Goal (SDGs) "seek to realize the human rights of all" while encouraging all stakeholders to focus on implementation by "acting in collaborative partnership". It contains 169 global targets and 232 indicators to measure progress in implementation, and a set of follow-up and review principles and mechanisms.

SDG 8 addresses decent work and economic growth. SDG 9 sets targets for industry, innovation and infrastructure and SDG 12 addresses responsible consumption and production. The role of business in relation to each of these three SDGs is self-evident. But contributions from business are needed to fulfil the vast majority of the 2030 Agenda's other goals and subsidiary targets as well.

Consequently, many business associations and individual businesses have embraced the SDGs.[45] Various platforms and initiatives have emerged to harness the power of business in realising the SDGs.[46] Today, the 2030 Agenda is a leading narrative about the role of business in society.[47]

The transformative potential of public procurement as a driver for human rights and sustainable production and consumption is highlighted in SDG 12.[48] Target 12.7 calls on all states to "[p]romote public procurement practices that are sustainable, in accordance with national policies and priorities". This provides an opportunity for states not only to procure from suppliers which deliver the cheapest product quickest but also to prioritise procurement from suppliers which respect the three dimensions of sustainable public procurement; economic, social and environmental. For example, procurement exercises can place a focus on procuring from suppliers which have effective measures in place to eliminate forced labour and human trafficking, in line with target 12.7, but also as a means of realising target 8.7 and 16.3 to end child labour, forced labour, modern slavery and human trafficking.[49] Including requirements that suppliers respect human rights can be applied to first tier suppliers and cascaded down to sub-contractors both at home and abroad to support the fulfilment of the SDGs across the world.

Until recently, sustainable public procurement largely concentrated on environmental impacts, through 'green' procurement policies and initiatives.[50] Over time, greater emphasis has been put on achieving the appropriate balance between the three pillars of sustainable development – economic, social, and environmental – across all stages of the public procurement process, where the social element reflects human rights.[51] This is visible in the increasing emphasis that significant procurement frameworks, such as the EU 2014 Directives and World Trade Organisation, have placed on sustainable considerations (see Section B1.3 Public procurement instruments).

The International Institute for Sustainable Development in coordination with the Inter-American Network on Government Procurement produced a handbook on Implementing Sustainable Public Procurement in Latin America and the Caribbean in 2015, recognising that "Sustainable Public Procurement (SPP) is about ensuring that the products and services purchased by governments are as sustainable as possible, both in the sense of generating the lowest possible environmental impact, and in the sense of producing the most positive social impacts."

Colombia Compra Eficiente's Guide on Socially Responsible Public Procurement states that:

"Sustainable development implies the application of socially and environmentally responsible practices by the authorities when contracting goods and services. The objective is to reach an appropriate balance between all the pillars of sustainability: economic, environmental and social, at all stages of the public procurement process. In this way, public policy for sustainable development implies fostering a cycle in which these three aspects reinforce and do not undermine each other.

The objectives of social sustainability are based on the duty of the State and its entities to protect and providers to respect human rights in the interactions they have in the public procurement system. It also includes the adoption of measures and criteria that generate local employment and promote equal opportunities for vulnerable groups such as people with disabilities, ethnic minorities, women and victims of the armed conflict.

The incorporation of these measures and criteria generates value for money in public purchases, optimizing public resources in terms of time, money and capacity of human talent and efficiency in processes to meet the needs of State Entities and fulfil their mission."

Besides the SDGs, in the wake of the UNGPs, a range of organisations have promoted the importance of responsible global value chains, including the G7, OECD, ILO, and OSCE.[52]

Including requirements within public procurement that suppliers respect human rights is a means of realising the SDGs.

The International Organization for Standardization (ISO), with a membership of 164 national standards bodies, creates requirements, specifications, guidelines or characteristics to ensure that materials, products, processes and services are fit for purpose. ISO 20400:2017 on Sustainable Procurement Guidance includes a list of main principles for sustainable procurement, highlighting that "[a]n organization should respect internationally recognized human rights." It builds from ISO 26000 on Social Responsibility and is guidance rather than a certifiable standard. It identifies core subjects of sustainable procurement including:

- Human rights: due diligence, human rights risk situations, avoidance of complicity, resolving grievances, discrimination and vulnerable groups, civil and political rights, economic, social and cultural rights, fundamental principles and rights at work;
- Labour practices: employment and employment relationships, conditions of work and social protection, social dialogue, health and safety at work, human development and training in the workplace;
- Community involvement and development: community involvement, education and culture, employment creation and skills development, technology development and access, wealth and income creation, health, social investment.

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B1.3 PUBLIC PROCUREMENT INSTRUMENTS

Public procurement is regulated through law and policies at international, supranational/ regional, and national (state and federal) levels.

INTERNATIONAL

The United Nations Commission on International Trade Law Model Law on Public Procurement (2011) is intended to serve as an outline for national legislation to improve domestic regulatory regimes for public procurement. It contains principles and procedures aimed at achieving value for money and avoiding abuses in the procurement process, for instance, corruption. In its Preamble, the Model Law sets out six main objectives: economy and efficiency; international trade; competition; fair and equitable treatment; integrity, fairness, and public confidence in the procurement process; and transparency. Although there is no specific mention of human rights in the Model Law, it does allow for the integration of social and economic criteria into procurement processes, such as promoting accessibility of procurement to SMEs or disadvantaged groups, environmental criteria, and ethical qualification requirements. The Guide to Enactment further notes that human rights can feature as social aspects of sustainable procurement and can be addressed through socio-economic evaluation criteria.[53]

The World Trade Organization (WTO) Agreement on Government Procurement (1994) is a pluri-lateral agreement within the framework of the WTO.[54] It applies only to the members of the WTO who have acceded to it. The fundamental objectives of the Agreement are:

- Greater liberalisation and expansion of international trade;
- Non-discrimination: measures prepared, adopted, or applied to public procurement must not afford more protection to domestic suppliers, goods, or services, or discriminate against foreign suppliers, goods, or services;
- Integrity and predictability, to ensure efficient and effective management of public resources; and
- Transparency, impartiality, avoidance of conflicts of interest and corruption.[55]

SUPRANATIONAL/ REGIONAL

In the EU, all public buyers are required to abide by EU procurement directives for specific procurements over certain thresholds.[56]

Article 18(2) of EU Directive 2014/24/EU stipulates that "Member States shall take appropriate measures to ensure that in the performance of public 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 listed in Annex X." Annex X references several environmental conventions and the 8 ILO Core Conventions.

Article 57(1) contains mandatory grounds for exclusion. These include when an economic operator has been convicted of criminal offences relating to participating in a criminal organization, corruption, human trafficking, or breach of obligations relating to tax payments. Further, discretionary grounds for exclusion pursuant to Article 57(4) EU include the possibility for public authorities to exclude suppliers when the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2).

Article 69 requires contracting authorities to reject tenders that are abnormally low due to poor human rights standards, in case the supplier is unable satisfactorily to account for the low level of the price.

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NATIONAL

Almost all states have national laws specific to public procurement, and other laws which are applicable to public procurement in the areas of environment, anti-corruption, and transparency, for example. As highlighted above, a state can utilise public procurement as a vehicle to respect, protect, and fulfil human rights, in line with its international obligations.

Belgium's Public Procurement Act of 2017 requires that suppliers and sub-contractors comply with environmental, social and labour laws. Under the law, failure to do so can be used as a ground for exclusion. The public buyer can require a specific label as evidence of human rights compliance for goods and services. The buyer can also introduce minimum standards as technical specifications applicable across the lifecycle of the goods and services, including the recycling stage.

The Swedish Public Procurement Act of 2016 states that:

"A contracting authority shall, if it is necessary, require that the supplier performs the contract according to stated requirements under the core conventions of the ILO, if the performance is made under such conditions that Swedish labour law is not applicable."[57]

Switzerland's updated National Action Plan 2020–23 on business and human rights notes that:

"Public procurement practices in Switzerland are governed by the Federal Act on Public Procurement (PPA) and the Ordinance on Public Procurement (PPO).[58] The PPA stipulates that the federal government must, as a minimum, monitor compliance with the core ILO conventions where goods and services are to be supplied abroad. The contracting authority may require bidders to comply with other core international labour standards, provide proof of compliance, and agree to audits."

In the USA, the rules for procurement by federal agencies are contained in the Federal Acquisition Regulation (FAR).[59] The FAR consolidates public laws adopted by Congress, Executive Orders issued by the President, and treaties that have the force of law in the USA. It is managed by a FAR Council, which is composed of three federal agencies—the General Services Administration (GSA), the Department of Defense (DOD), and the National Aeronautics and Space Administration (NASA). All federal agencies must comply with the FAR, but individual agencies may issue their own supplements.[60]

The federal procurement framework in the USA addresses some human rights issues. For example, the FAR prohibits federal contractors and their sub-contractors from engaging in trafficking in persons and trafficking-related activities, such as charging workers recruitment fees or using misleading and fraudulent recruitment tactics. Contractors are required to report possible violations of the FAR's policy prohibiting trafficking in persons to the United States Government contracting officer and the agency Inspector General. In addition, contractors providing supplies or services (other than commercially available off-the-shelf items) acquired or performed outside the USA with an estimated value exceeding USD $500,000 are required to maintain a compliance plan that is certified annually.[61]

The FAR also implements Executive Order 13126, which prohibits the acquisition of products produced by forced or indentured child labour and mandates the United States Department of Labor to produce a 'List of Products Produced by Forced or Indentured Child Labor'. Federal contractors who supply products on the Department of Labor's list are required to certify that they made a good faith effort to determine whether forced or indentured child labour was used to make the item supplied.[62]

Under the FAR, federal contractors that source their goods or services domestically are prohibited from discriminating on the basis of various categories such as race and national origin.[63] Contractors are required to pay all employees in the USA the prevailing wages and benefits for the locality in which the work is performed.[64] In addition, the Walsh-Healey Public Contracts Act of 1936 establishes minimum wage, maximum hours, and safety and health standards for work on contracts in excess of USD $15,000 for the manufacturing or furnishing of materials, supplies, articles, or equipment to the United States Government.[65]

Local (i.e. federal states) and municipal governments within the USA have implemented additional regulations on human rights (e.g. the California Transparency in the Supply Chains Act 2010 (SB657)).

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SUB-NATIONAL

For some federal states or states with regions which can legislate, there may also be laws at sub-national level which address public procurement. Such sub-national laws can exist where there are no national laws. Even if there is a national law on public procurement, local procurement laws may, in some cases, impose higher human rights requirements.

In Scotland, the Procurement Reform (Scotland) Act 2014 (the Act) introduced a sustainable procurement duty on the Scottish public sector to "improve the economic, social, and environmental wellbeing of the authority's area, facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses in the process, and promote innovation" throughout the procurement process. The Act also requires public organisations with an estimated annual regulated spend of GBP £5 million or more (excluding VAT) to develop and review a procurement strategy annually before the start of the next financial year.

The Scottish Government has also devised a procurement strategy, that provides guidance to local buyers on principles for their own strategies. Each body's procurement strategy should thus demonstrate how the organisation's approach to procurement supports delivery of its broader aims and objectives, including the sustainable procurement duty. Once the procurement strategy is developed, it should be approved by Heads of Service/the Senior Management Team (or equivalent). The procurement strategy should be measured and reported on an on-going basis with any significant slippages or deviations being highlighted to the appropriate stakeholder(s) for information, advice and assistance to get back on track.[66]

B2. HUMAN RIGHTS AS A POLICY OBJECTIVE

There is not a one-size fits all approach to including supplier requirements on human rights in public procurements. To start with, human rights requirements can be framed within a current policy objective or developed as a standalone policy objective.

FIRST STEPS

Identify current public procurement policy objectives and explore how human rights are, or could be, incorporated within these.

The EU Directive on Public Procurement (2014/24/EU) is intended to modernise public procurement by increasing the efficiency of public spending, facilitating the participation of SMEs in public procurement, and enabling procurers to use procurement to further common societal goals.[67]

This and the EU's other procurement directives allow public authorities in its member states to "engage in socially-responsible public procurement by buying ethical products and services, and by using public tenders to create job opportunities, decent work, social and professional inclusion and better conditions for disabled and disadvantaged people."

LOWEST COST, BEST VALUE FOR MONEY, OR SUSTAINABLE PROCUREMENT?

Ensuring best value for money is gradually becoming a well-established policy objective as procurement policy-makers around the world move away from procurement based exclusively on cheapest price. Procurement focused on lowest price have been associated, in the private sector, with human rights abuses. The tendency towards so-called 'fast fashion',[68] for instance, was implicated in the 2013 Rana Plaza disaster in Bangladesh where five garment factories collapsed killing at least 1,132 people and injuring more than 2,500.

Under the concept of best value for money it is understood that public funds should be used to achieve the best results to meet requirements. By contrast with lowest price, best value for money encompasses other considerations, including economic, but also social (human rights) and the environmental aspects of sustainability.

With the adoption of the UN 2030 Sustainable Development Agenda, there has been an increasing focus on SDG 12.7 on sustainable public procurement. More and more states, for instance, are now adopting national action plans on sustainable public procurement. Sustainable public procurement encompasses

environmental, social and economic considerations, where the social element is informed by human rights. As such, sustainable public procurement can be a good policy vehicle to drive the inclusion of requirements within public procurement that suppliers respect human rights.

In Costa Rica, the National Policy of Sustainable Public Procurement and Creation of the National Steering Committee of Sustainable Procurement of 2015 provides in Article 4:

"For the purposes of this National Sustainable Public Procurement Policy, the Public Sector, which supplies goods, works and services, must take into account innovation and the following considerations when making the purchase:

a) Economic: The monetary value, price, availability, quality and functionality of the products, associated with a sustainable perspective.
b) Environmental: the environmental effects that a product or service has throughout its life cycle must be taken into account.
c) Social: social effects linked to issues such as poverty eradication, equity in the distribution of resources and human rights should be considered. As well as compliance with labour and social norms and guarantees that protect the workers involved in all stages of the elaboration of products purchased or services contracted by the Administration, considering the related laws on the eradication of child labour, protection of workers, Law for the Promotion of Women's Social Equality and the Law on Equal Opportunities for Persons with Disabilities.

In each of the above considerations, the promotion of SME participation should be taken into account."

Colombia's Compra Eficiente states in its Guide on Socially Responsible Public Procurement that "[t]he incorporation of responsible business conduct in public procurement allows the State to obtain value for money because it addresses risk factors, such as negative impacts on sustainability and human rights violations and abuses."

In Peru, Article 51 of the Regulation of Law No. 30225, State Contracting Law of 2018 defines evaluation factors for the procurement of different categories of goods, services and works. The majority of categories provide for the evaluation of factors "related to environmental or social sustainability". Subsequent directives elaborate that the evaluation factors related to sustainability include:

- A certificate that accredits that a system of health and safety management at work has been implemented in accordance with the OHSAS 18001: 2007 norm or similar standard (ISO 45001: 2018)
- A certificate that certifies that a social responsibility management system has been implemented in accordance with the SA 8000: 2014 standard
- A certificate that certifies a business as a "Safe company, free of violence and discrimination against women" granted by the Ministry of Women and Vulnerable Populations (MIMP).

The Northern Ireland Executive has defined best value for money as the most advantageous combination of cost, quality and sustainability to meet customer requirements. In this context:

- Cost means consideration of the whole life cost;
- Quality means meeting a specification which is fit for purpose and sufficient to meet the customer's requirements;
- Sustainability means economic, social and environmental benefits, considered in the business case, in support of the Programme for Government.

In Scotland, Regulation 67 of The Public Contracts (Scotland) Regulations 2015 requires EU-regulated contracts to be awarded to the 'most economically advantageous tender', also known as MEAT. MEAT criteria must be made up of price or cost, and other criteria associated with the quality of products and services. This means that EU-regulated contracts may not be awarded on the basis of lowest price or lowest cost only. Statutory guidance published under the Procurement Reform (Scotland) Act 2014 makes it clear that this approach should also be applied to regulated procurements (GBP £50,000 up to EU thresholds).

In Kenya, the Public Procurement and Asset Disposal Act 2015, contains ten guiding principles for public procurement, including, amongst others:

- National values and principles (defined in the Constitution to include the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability, and sustainable development);
- Equality and freedom from discrimination;
- Affirmative action programmes for youth and minorities and marginalised groups;
- Value for money;
- Promotion of local industry, sustainable development and protection of the environment.

SELECT ONE OR ALL HUMAN RIGHTS?

Around the world, there are many examples of procurement policies that directly or indirectly promote the inclusion of human rights within public procurement. Some are found in national legislation or policy, while others originate with decisions by local municipalities.

In practice such policies often address selected human rights issues, rather than addressing all human rights at once. Where one or a sub-set of human rights issues is prioritised, this should be on the basis of a risk assessment that should be revisited on a regular basis (see Section C1.1 Human rights risk identification and assessment and the Human Rights Impact Assessment Guidance and Toolbox).

The UK adopted the Modern Slavery Act in 2015. The Crown Commercial Service, the biggest public procurement organisation in the UK, has introduced specific requirements on modern slavery including on grounds for mandatory exclusion and in contracts. In November 2018 Electronics Watch and Crown Commercial Service began working in partnership to detect and address modern slavery in supply chains of public sector customers seeking assured technology hardware purchasing options.

In Zambia, section 63 of the Public Procurement Act 2008 states that a procuring entity may "grant a margin of preference for the benefits of bids by a target group offering goods, works or services manufactured or performed by the target group", with target groups including "enterprises owned by women" or "any other group designated by Government policy".

HUMAN RIGHTS AS A PRIMARY OR SECONDARY POLICY OBJECTIVE?

According to the OECD's Public Procurement Toolbox:

- A "Primary procurement objective" refers to delivering the goods and services necessary to accomplish a government mission in a timely, economical and efficient manner.
- A "Secondary policy objective" refers to "any of a variety of objectives such as sustainable green growth, the development of small and medium-sized enterprises, innovation, standards for responsible business conduct or broader industrial policy objectives, which governments increasingly pursue through use of procurement as a policy lever, in addition to the primary procurement objective."[69]

However, there is a tension in treating human rights as a secondary policy objective, given the state's obligation to protect human rights (see Section B1.1 Human rights instruments).[70] Given this, complying with the state's obligations under human rights laws should not understood as an optional or discretionary objective. Meeting these obligations can be advanced by framing existing primary objectives, such as best value for money, most economically advantageous tender, or value chain risk management as including human rights requirements – and following through with supporting measures (see Section B3. System-wide planning).

The Belgian Public Procurement Act of 2017 requires that tenders are selected on the "most economically advantageous quotation" and provides three ways to reach this:

- Cheapest price;
- Cost efficiency (total cost of ownership / life cycle cost);
- The best price-quality ratio (based on cost and other criteria including environmental and social issues).[71]

EMPOWERING VULNERABLE AND AT-RISK GROUPS

The main focus of including requirements within public procurement that suppliers respect human rights should be to address the risk of human rights abuses occurring in state value chains. However, public procurement can also be used a means to realise the rights of groups at risk of vulnerability or marginalisation by favouring businesses which support, employ, or are owned by members of such groups, in public procurement exercises. In general a decision to favour a particular group on human rights grounds should follow an objective assessment with reference to human rights standards (see Section C1.1 Human rights risk identification and assessment and the Human Rights Impact Assessment Guidance and Toolbox).

South Africa has developed a programme of Broad-Based Black Economic Empowerment to redress inequality and discrimination stemming from the Apartheid era. As part of this approach, public procurement legislation grants preferential treatment to black-owned businesses which have been verified. Preferential treatment varies by sector and size of business.

The USA has a system of 'set-aside' contracts to help provide a level playing field for small businesses, by limiting competition for certain contracts to small businesses. The federal government tries to award:

- At least 5% of all federal contracting dollars to small disadvantaged businesses each year;
- At least 3% of all federal prime contracting dollars to HUBZone-certified small businesses each year;
- At least 5% of all federal contracting dollars to women-owned small businesses each year;
- At least 3% of annual federal contracting dollars to service-disabled veteran-owned small businesses.

Canada established the Procurement Strategy for Aboriginal Business in 1996 to support indigenous businesses pursue federal procurement tenders. In 2019 the Canadian Government began a process to review "the federal approach to Indigenous procurement including the Procurement Strategy for Aboriginal Business in order to:

- Increase the number of federal procurement opportunities for Indigenous business
- Increase the number of Indigenous small to medium sized enterprises bidding on and winning federal contracts
- Grow Indigenous business
- Create employment opportunities for Indigenous peoples
- Increase self-reliance
- Increase employment and training opportunities for Indigenous peoples"

In Scotland, the sustainable procurement duty, outlined in the Procurement Reform (Scotland) Act 2014, requires that, before a contracting authority buys anything, it must think about how it can improve the social, environmental and economic wellbeing of the area in which it operates, with a particular focus on reducing inequality. It also requires a contracting authority to consider how its procurement processes can facilitate the involvement of SMEs, third sector bodies and supported businesses, and how public procurement can be used to promote innovation. Each contracting authority must set out in its procurement strategy how it intends to comply with the duty and must report annually on progress.[72]

The Scottish Government has developed a Scotland Government Procurement Strategy which details how it approaches the sustainability procurement duty and the human rights and equality element of this.

In 2008, the Dominican Republic adopted a law setting out a programme of preferential purchasing to support SMEs and legislated that 20% of purchases through this programme should be from businesses run by women, who have a shareholding or share capital of more than 50%.

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B3. SYSTEM-WIDE PLANNING

It is important for policy makers and planners to develop a systematic approach to including requirements within public procurement that suppliers respect human rights. This is essential to maximise impact and efficiency and also to support front-line staff in implementing human rights protections within public procurement.

This section is structured around the following issues:

B3.1 Increasing leverage
B3.2 Risk management
B3.3 Ensuring coherence in implementation
B3.4 Supporting procurement personnel
B3.5 Supporting suppliers and market dialogue
B3.6 Engaging stakeholders
B3.7 Continuous evaluation and learning
B3.8 Resources
B3.9 Remedy

B3.1 INCREASING LEVERAGE

FIRST STEPS

- Investigate whether there are existing framework agreements and purchasing consortia that have started to address human rights issues that you can use or join.

Leverage refers to the ability to effect change in the wrongful practices of another party which is causing or contributing to a human rights abuse. In the context of procurement, leverage can be exerted by a public buyer over its actual and potential suppliers, and likewise by a supplier with regard to its suppliers and sub-contractors.[73]

Individual procurement exercises may not have the leverage needed to influence actual and potential suppliers in a state buyer's value chain. Grouping procurement exercises internally, in collaboration with other public buyers, and/ or through framework contracts, can increase purchasing power. SMEs may not be able to bid for large single procurements, so care should be taken allow them to compete through the use of lots, for example. Grouping procurement exercises also promotes common standards for suppliers, which increases the incentive for suppliers to meet them and avoids creating a range of different requirements.

A prerequisite for collaboration between public buyers is mutual recognition of other public buyers' policies, provided that they set equivalent standards. This applies both to collaborations between public buyers within the same state and cross-border collaborations. Such collaborations include:

- Establishing central purchasing bodies;
- Framework agreements/ sign-on provisions;
- Implementing collective monitoring and information sharing.

In Sweden, the Legal, Financial and Administrative Services Agency (Kammarkollegiet) streamlines public administration by concluding framework agreements for all national level authorities. The Agency concludes framework agreements for goods and services that national authorities procure often, to large amounts or for a substantial value, for example, ICT, office supplies, transportation and security services. The Agency has conducted risk assessments, focused on human rights, for all their framework agreements and include requirements based on these assessments. By representing all national level authorities in Sweden, the requirements in these framework agreements create a level playing field across the supplier base. Because the framework agreements are continuously used, suppliers are also prepared for the requirements and can enter into dialogue with potential buyers at an earlier stage which thereby better enables continuous improvement among the suppliers.

Smaller public buyers may not have the resources to develop relevant criteria of their own. Instead, they can 'piggy-back' on the work of other public buyers that have already done so. This minimises the risk of suppliers not answering a call for tender because they simply do not see the added benefit of adapting to requirements in contracts with a relatively low value. Public buyers can also consider joining a purchasing consortium.

In the UK, there are six regional higher education purchasing consortia which work collaboratively, and with other specialist sector purchasing organisations, to tender and manage more than 100 EU-compliant framework agreements for their members to use. One of these, the London Universities Purchasing Consortium, is a not-for-profit professional buying organisation owned by its members. It mainly comprises universities and colleges of higher education in and around London. However, around half of LUPC's membership is also drawn from other not-for-profit organisations from neighbouring sectors in the arts, sciences and education. The LUPC has established a Responsible Procurement Advisory Group which provides advice to its members. It has also developed Equiano, a risk assessment tool for human rights abuses in supply chains which is available for members to use.

FRAMEWORK AGREEMENTS

Many procurement bodies operate framework agreements. Under such agreements, a public buyer can place orders with a supplier, or range of suppliers, without undertaking a new procurement exercise for each purchase. In some jurisdictions, central state bodies are mandated to use these framework agreements in their own procurement exercises above a certain value. Elsewhere, framework agreements are established for voluntarily use by state bodies, self-governing institutions, and local state institutions (for example, cities and regions). Framework agreements are a good way to increase leverage and influence a supplier base.

The City of Madison, USA, in consultation with the Sweatfree Purchasing Consortium, has created a collaborative 'piggy-back' contract for apparel, mainly used by Fire, Metro Transit, Police and other municipal operations agencies. The contract is available for use by all City of Madison agencies, approximately 167 other local government counties, cities, towns, villages, school districts, libraries, utilities and other public entities in the South-eastern Wisconsin area, as well as other public agencies in the USA. Each agency has the opportunity to join in the bid, which helps agencies with limited resources to participate in tenders where the ground work of setting requirements has already been done.

Electronics Watch is an organisation to which contracting authorities can become affiliates. It currently has 45 affiliates globally. The contracting authorities that affiliate with Electronics Watch gain access to country and factory specific risk assessments, a guide and toolkit to implement labour rights standards in tenders, template contracts, information on worker-driven monitoring, and platforms to engage with the electronics sector. This model allows Electronics Watch to coordinate sector engagement for all affiliates making the leverage towards the sector much stronger. The cost to affiliate depends on the organisational spend on ICT hardware.

COLLECTIVE MONITORING AND INFORMATION SHARING

Collaboration amongst public buyers can greatly increase the impact – and reduce the costs – of value chain mapping, risk assessment and third party audits of high risk suppliers, for example. It also facilitates continuous learning. Public buyers purchase many of the same goods and services as each other. This would result in duplication and cost inefficiencies, if each individual public buyer were to conduct the same risk assessments and audit the same production sites.

Instead, public buyers should seek to identify opportunities for sharing information gained by conducting risk assessments and audits with each other. They should also consider allocating roles and tasks between themselves to cover a wider range of goods, services and works than they could reach individually.

The Swedish central purchasing body SKL Kommentus provides a service for local and regional contracting authorities to sign on to a centralised supplier monitoring system. SKL Kommentus continuously audits suppliers under their framework agreements through third party audits. Each year, two or three high risk categories of goods are chosen for further monitoring through a three-step process of supplier self-assessment, desktop audit, and on-site audit. The results and corrective action plans are published on the SKL Kommentus website. This approach avoids potential duplication of audits and the results can also form a basis for contracting authorities when conducting risk assessments.

B3.2 RISK MANAGEMENT

FIRST STEPS

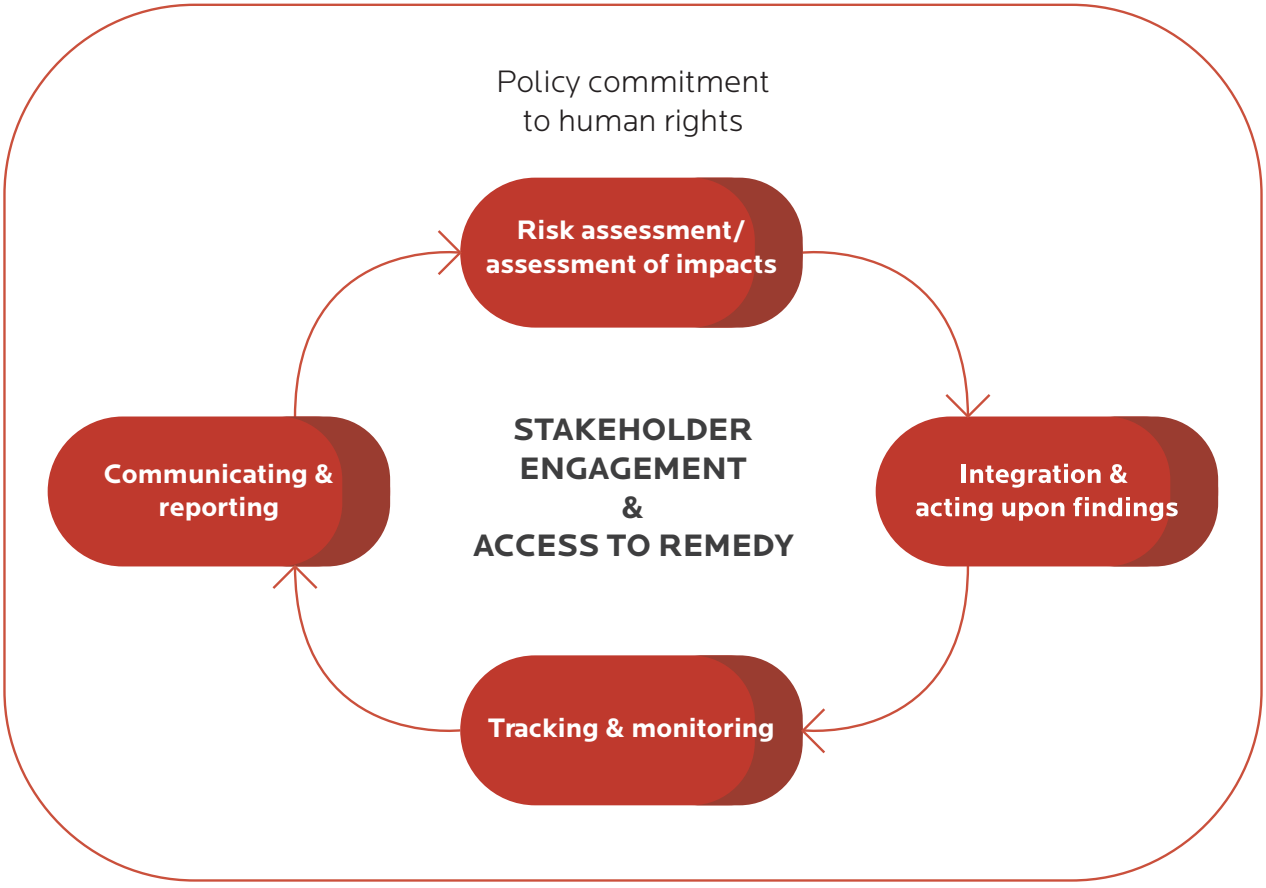
- **Learn about human rights due diligence as described by the UN Guiding Principles on Business and Human Rights and take steps to implement it within existing procurement systems.**

Many public buyers and suppliers already have established risk management systems that address, for example, financial risks, fraud, corruption, reputational damage, and waste or inefficiency. Such measures are recommended as good procurement practice, amongst others, by the OECD.[74] Human rights due diligence is a process to manage the risk to rights-holders of negative human rights impacts from business activities, and to provide access to remedy when human rights violations and abuses occur. Human rights due diligence should be integrated into existing risk management processes and systems with a specific emphasis on the risk to rights-holders.

Requiring suppliers to respect human rights is one way that a public buyer can manage risk and maintain the integrity of the public procurement system. Such requirements also incentivise suppliers to implement their own human rights due diligence processes.

Colombia Compra Eficiente, the governing body of the Colombia's Public Procurement System, published a Guide on Socially Responsible Public Procurement in November 2018 which highlights that:

"Human right due diligence in the Public Procurement System reduces the risk of human rights violations in the performance of contracts and future legal actions, provides transparency to the processes and contributes to sustainable development in social and economic terms. Additionally, it allows suppliers to demonstrate that they took all reasonable measures to avoid any participation in the violation of human rights."



The table below provides an overview with examples of what human rights due diligence could look like in practice for a public buyer.

	Public buyers can:	Public buyers can use procurement exercises and contracts to:
Policy commitment This step involves developing and publishing a human rights policy commitment, whether as an individual policy or as a chapter within pre-existing policies.	• Develop an internal policy commitment on human rights or integrate human rights policy objectives within existing policies; • Share their human rights policy commitments with all relevant stakeholders (including staff and suppliers) and explain how these work in practice; • Encourage de-centralised procurement bodies to adopt a policy commitment on human rights.	• Require that suppliers provide a human rights policy agreed at the highest management level of the business, which is publicly available; • Require that a human rights policy addresses the full range of internationally recognised human rights; • Require that suppliers commit to support their own suppliers, with a focus on small and medium sized enterprises (SMEs), to develop a human rights policy.
Risk assessment/ assessment of impacts This step involves assessing the risk of human rights abuses occurring within operations and value chains.	• Undertake a mapping exercise of state value chains, beginning with the higher tiers, but moving in to lower tiers as the process is repeated; • Train and support staff to understand and carry out human rights risk assessments, and/ or establish a list of consultants with expertise in risks assessments; • Undertake human rights risk assessments for specific categories and types of procurement before going to tender, including stakeholder engagement (market testing, for example) to identify risks and opportunities in related product categories and upcoming tenders.	• Require suppliers to provide a map of their value chain or undertake a mapping exercise should they not have this information. The level of the market and category of contract will impact how extensive such requirements can be; • Require suppliers to identify and assess human rights risks. The public buyer could share some basic information with actual and potential suppliers (including information produced by others) on how to do this or develop their own guidance for supplier as suppliers may be held liable for their sub-contractors.

	Public buyers can:	Public buyers can use procurement exercises and contracts to:
Acting on the findings of the risks assessment This step requires acting on the findings of the risk assessment and designing measures to prevent or mitigate the risks from becoming a reality.	• Develop a database of pre-selected requirements that actual and potential suppliers respect human rights which can be included within different types of procurement exercises and contracts; • Establish a risk matrix to identify which procurement exercises have greater risk of impacting on individuals' human rights and therefore require greater prioritisation.	• Require suppliers to adopt an action plan to address the identified risks with specific, measurable, achievable, relevant, and time-bound targets, and revise these on a regular basis; • Provide support for suppliers to develop and implement mitigation measures through training exercises, roundtable discussions, websites, resources and guidance documents, contact points, and signposting to material produced by other buyers, for example.
Tracking and monitoring This step requires tracking and monitoring the effectiveness of the measures taken to address the identified risks.	• Ensure access to an effective grievance mechanism for victims (see section B3.9 Remedy); • Record statistics including on the number of measures the public buyer has implemented to ensure suppliers respect human rights and the number of human rights abuses the state has been made aware of, investigated, and remedied, and use these findings to inform future requirements and develop key performance indicators to monitor progress.	• Require suppliers to establish a grievance mechanism so they can be made aware of human rights abuses (whether by the direct supplier or its own suppliers); • Require suppliers to record allegations of human rights abuses made against them or their suppliers and detail what actions were taken to resolve these; • Include contractual measures to require a supplier to act when human rights abuses are identified, with penalties attached for non-compliance.

	Public buyers can:	Public buyers can use procurement exercises and contracts to:
Communicating and reporting This step requires communicating how human rights are addressed as well as the real-life outcomes, in an accessible, timely, and regular manner (for example in different languages and with understandable terminology), in accordance with national laws on transparency and accountability.	• Highlight and explain the commitment to human rights to stakeholders and articulate what will be expected of suppliers during the market testing stage; • Publish key documents including standard contractual terms, proposed procurement regulations, risk assessment criteria, minutes of meetings, contributions from stakeholders, and value chain mappings; • Include information in public reporting exercises on the adopted requirements that suppliers in their value chains respect human rights, the recorded human rights abuses within the value chain and remedies provided, and the resources dedicated to realising these; • Input to reports to regional and international bodies (for example, highlighting requirements that suppliers respect human rights when the state is reporting to UN human rights mechanisms).	• Require suppliers to publish information on how they work with human rights such as a human rights policy; • Require suppliers to report their actions to the public buyer on a regular basis; • Require suppliers to include information within their reports such as an action plan to address human rights risks, what issues they have followed up on, what abuses they have found, what has been communicated with the board and shareholders, for example;

Human rights requirements should encompass all operations connected to the performance of the contract and should ensure that the fundamental terms are fulfilled by sub-contractors in all parts of the value chain.

Article 18(1) of EU Directive 2014/24/EU stipulates a principle of proportionality, which means that the requirements, award criteria, technical specifications, etc. must be proportional and linked to the subject-matter of the public contract – the principle thus requires an inquiry into whether any measure exceeds what is necessary to achieve for the procurement in question. Criteria are considered linked to the subject-matter of the contract where they relate to the works, supplies or services to be provided under the contract in any respect and at any stage of their life cycle. These include factors involved in the specific process of production, provision or trading.

The requirement that criteria and conditions shall be linked to the subject-matter of the procurement excludes however general corporate policy, which cannot be considered as a factor characterizing the specific process of production or provision of the purchased works, supplies or services. This means that a contracting authority can require that all supplies which the authority purchases are produced in accordance with, for example, Fair Trade labelling, but not that all the supplies produced by the tenderer, including supplies not produced for the contracting authority, shall be made according to such a standard.

DIGITALISATION, ARTIFICIAL INTELLIGENCE AND HUMAN RIGHTS

Digitalisation and artificial intelligence can be utilised to support the realisation of human rights in a large variety of ways. However, they also create risks of negative human rights impacts. Some risks related to the digitalisation of public administration are clear, such as risks related to data management and sensitive information. However, artificial intelligence and algorithms are introducing new risks, such as the risk of discrimination through the use of automated sentencing processes in criminal justice systems,[75] and the algorithmic analysis of children at risk of abuse.[76] Smart cities and facial recognition raise a range of human rights risks which are beginning to be explored.[77]

B3.3 ENSURING COHERENCE IN IMPLEMENTATION

FIRST STEPS

- Establish a human rights working group with members from the different teams and departments working across the procurement cycle to design an approach tailored to the local environment;
- Seek political, management and team buy-in to facilitate work with human rights requirements;
- Mobilise existing induction, training, management, evaluation and budget systems to build competence in human rights due diligence.

LEGAL AND POLICY COHERENCE

In most states, officials responsible for procurement policy and practice will be located elsewhere from officials responsible for human rights, sustainability or environmental matters. This makes it crucial to deploy deliberate efforts to promote coordination across the state when establishing human rights requirements in the procurement context. This can begin with joint trainings, dialogue and engagement during policy design and training design phases, and the distribution of key contact directories, for example. A human rights working group with members drawn from relevant state bodies, at central and local state levels, can be established to support the development and roll-out of supplier requirements.

The Dutch government procures around €73.3 billion of work, services and supplies every year, with most of this expenditure at local level. To stimulate the market for sustainable products, the central government, together with regional and local authorities established an organisation called PIANOo. PIANOo works to professionalise procurement and tendering in all government departments, with a view to improving efficiency and compliance with the rules, and train public buyers on criteria and practical instruments to implement Sustainable Procurement within their organisations.

The Directorate of ChileCompra, the central procurement body in Chile, publishes directives in which recommendations are given to public buyers on how to make public purchases under certain sustainability guidelines:

- Directive No. 13. Instructions for making sustainable contracts in the Chilean public market;
- Directive No. 17. Instructions for carrying out inclusive public contracts that promote equal opportunities in the public market;
- Directive No. 20. Gender approach to public procurement;
- Directive No. 23. Guidance on payment to suppliers in public procurement processes.

Responsibilities for the procurement of goods and for contract management often sit with different teams and individuals. As such, the procurement team is unlikely to be involved in the day-to-day execution of the contract. It is important to ensure that the contract management team has the capacity and knowledge to ensure the human rights requirements are met and provide feedback to the procurement team to improve future requirements.

In Sweden, the City of Malmö has developed a working process for sustainability coordinators and procurement officers to secure the sustainability perspective throughout the procurement project. The process identifies the different elements in a procurement process, starting with the needs assessment and ending with the closure of the contract, and concretises the role of the sustainability coordinator in relation to each element. This process has resulted in methodical working routines based on strategic sustainability considerations, rather than, for example, individual personal commitments by employees, which makes the overall system vulnerable to staff turnover.[78]

COHERENCE ACROSS SYSTEMS

Many public buyers and suppliers already have strategies, action plans, codes of conduct, performance monitoring, checklists, and evaluation systems in place relating to the environment, social, and economic aspects of public procurement. For instance, some buyers have codified environmental requirements for their procurement. Suppliers may have quality control audit regimes in place to minimise defects in their production process for all clients. Many public buyers and suppliers also have established risk management systems. Where possible, human rights due diligence should be integrated into such structures. Minimising redundancies across systems has the dual benefits of reducing up-front costs, and minimising supplier and sub-contractor burdens, thereby contributing to greater overall efficiencies.

Certain requirements that actual and potential suppliers respect human rights can be simple to measure (for example, does a supplier have a human rights policy?). Verifying other human rights requirements requires more sophisticated indicators and analysis (for example, does the supplier's human rights policy address the full range of human rights? Are the measures to mitigate risk effective?). Systems, such as e-procurement platforms, may allow human rights indicators and analysis to be incorporated in the procurement process. They can also provide a consistent platform through which buyers can exercise their judgment and make decisions based on qualitative data.

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B3.4 SUPPORTING PROCUREMENT PERSONNEL

FIRST STEPS

- Begin with pilot projects to build knowledge and capacity gradually, spot challenges, capture learnings and generate team confidence before a wider roll-out;
- Develop internal policies with guidance and training to provide clarity and help manage expectations on what can be achieved and what is required of staff, accompanied with training and capacity building;
- Gather good practices and lessons learned and make them accessible across teams;
- Talk to other public buyers and adapt successful elements of approaches from elsewhere.

According to the UNGPs, "States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support."[79]

This is important for public buyers as they need to have sufficient knowledge about the market and potential risks, as well as the capacity to evaluate tenders in a fair and transparent manner. Without this, there is a risk of actual or potential suppliers initiating legal challenges to the procurement process if they feel it has been unfair, or simply declining to participate in tenders due to uncertainty over their terms. If a public buyer has codes of conduct, performance monitoring, checklists, and evaluation systems in place, human rights considerations should be transparently integrated into them.

Information, training and support through tools, guidance, peer-to-peer support and mentoring are vital to help staff comprehend new concepts and requirements when including human rights requirements. E-learning solutions may be the most cost-efficient option for larger workforces. To promote accessibility to learners and easy-updating, human rights content should ideally be integrated into existing training formats and materials. Piloting of any new instructional human rights materials is also recommendable.

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) has developed A Contract Guidance Tool for Private Military and Security Services which includes practical examples and clauses public buyers can include as pre-award measures and post-award measures.

The Scottish government has developed a range of public procurement tools including:

- A Flexible Framework Assessment Tool which helps public buyers determine and implement actions to embed good procurement practice and realise intended outcomes by completing questions which generate an action plan;
- A Prioritisation Tool which helps public buyers identify relevant economic, environmental and social, and human rights considerations, focusing on identifying and assessing risk and opportunities, categories, and spend;
- A Sustainability Test which helps public buyers embed relevant and proportionate sustainability requirements in the development of contracts and frameworks;
- A range of guidance on specific issues including climate change, materials, waste, equality, fair work, fairly and ethically traded products, health and safety.

In the USA, the State Department, in conjunction with the NGO Verité, provides resources and tools to assist United States federal contractors, procurement officials, and other companies to identify, prevent, and address the risks of human trafficking in their global supply chains, and to develop effective risk-management systems. The Responsible Sourcing Tool (RST) includes an in-depth examination of eleven key sectors and 43 commodities at risk for human trafficking or trafficking-related practices. RST includes ten comprehensive risk-management tools; and tailored tools for the seafood sector and for the food and beverage sector. The tools include items such as:

- A sample code of conduct;
- A sample vendor agreement;
- A tool on screening and evaluating labour recruiters;
- A sample supplier and sub-contractor self-assessment;
- A tool on conducting migrant worker interviews; and
- A sample compliance plan for the U.S. Federal Acquisition Regulation on Ending Trafficking in Persons.

The United States Department of Defense and Homeland Security have also developed specific trainings on combating human trafficking.[80] In 2019, the United States Office of Management and Budget released an Anti-Trafficking Risk Management Best Practices & Mitigation Considerations Memorandum describing best practices, resources, and risk mitigation techniques that government contracting officers can use to help contractors meet their responsibilities under the Federal Acquisition Regulation.

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In 2017 the London Universities Purchasing Consortium, University of Greenwich, and the Chartered Institute of Procurement and Supply produced Protecting human rights in the supply chain, A guide for public procurement practitioners.

A 2019 UK policy note on Tackling Modern Slavery in Government Supply Chains sets out how UK Government departments must take action to ensure modern slavery risks are identified and managed in government supply chains and is tailored specifically for commercial and procurement professionals with check-lists and questions to consider. The UK has also developed a Modern Slavery Assessment Tool to "help public sector organisations work in partnership with suppliers to improve protections and reduce the risk of exploitation of workers in their supply chains. It also aims to help public sector organisations understand where there may be risks of modern slavery in the supply chains of goods and services they have procured."

The Association of Flemish Cities and Municipalities and the City of Ghent (Belgium) published a guide for public purchasers on socially responsible workwear in 2018 which highlights existing labels and certificates public buyers can utilise and provides a process which public buyers can follow to realise socially responsible procurement.

Staff will need technical support and platforms to incorporate human rights into existing information systems, templates, decision protocols that rely on in the ordinary course of their work. Even if integrating human rights into existing procurement infrastructure usually presents the most cost-effective option, it still implies non-negligible costs associated, for instance, with modifications to large IT systems, making the issue of resources an essential topic (see Section B3.8 Resources).

B3.5 SUPPORTING SUPPLIERS AND MARKET DIALOGUE

FIRST STEPS

- Use the market testing stage to identify how knowledgeable suppliers are about human rights risks, what measures they currently apply, and how they would respond to new requirements;
- Provide user-friendly guidance and training for suppliers and potential suppliers with practical examples of how to address human rights risks.

Applying supplier requirements aims to ensure respect for human rights in the public supply base. It is not intended to exclude or limit supplier access to public procurement contracts unnecessarily or permanently. To ensure that suppliers are able to improve so they can meet buyers' human rights requirements, the UNGPs highlight that states should provide guidance, tools and training for businesses on how to respect human rights and perform effective human rights due diligence.[81] The market testing stage provides an opportunity for public buyers to engage suppliers to see what type of support they require and highlight to the market their expectations.

Including requirements that suppliers respect human rights can be applied to first tier suppliers and then cascaded down to sub-contractors both at home and abroad. Guidance and support can be tailored to meet the differing needs of suppliers throughout the value chain (for example, lower tiers in the value chain may include more SMEs with different needs to those of multi-national enterprises).

Support for suppliers should also reflect how demanding given requirements are for the suppliers and their sub-contractors. Some sectors and some businesses, such as SMEs, may require more support. Such support could include, for example, adopting minimum time-periods to allow SMEs, which may not have the same experience and capacity as larger businesses, to submit tenders. It could also include providing an unsuccessful supplier with an explanation of the reasons why its tender was not selected, and the relative advantages of a successful supplier's tender.[82]

The Netherlands has a responsible business conduct team (RBC) within the Ministry of Foreign Affairs which works to stimulate Dutch businesses to follow international guidelines on responsible business conduct, in particular the OECD's Guidelines for Multinational Enterprises and the UNGPs. The RBC team uses International Responsible Business Conduct Agreements, which are partnerships between businesses, NGOs, trade unions, and governments, to stimulate businesses in a given sector to avoid and address human rights and environmental issues in international value chains.

The Danish Ministry of Business and Growth and the Confederation of Danish Industry has developed guidance for business on responsible supply chain management. This guidance does not target public procurement specifically. However, it does provide orientation on how to manage suppliers that is relevant for public purchasing. Furthermore, a coalition of Danish state actors produced an online portal with information for responsible public buyers. In 2019, Denmark's National Contact Point under the OECD Guidelines for Multinational Enterprises, and the Danish Institute for Human Rights, produced a report highlighting how municipalities and other public purchasers can act with respect for human rights in public procurement.

B3.6 ENGAGING STAKEHOLDERS

FIRST STEPS

- **In addition to market testing for suppliers, consider ways to get feedback from other relevant stakeholders, such as supplier associations, workers, worker organisations, civil society actors, end-users/ service-users, as well as communities which have been impacted, or are potentially impacted by human rights abuses in the state's value chain.**

A stakeholder is a person, group or organisation with an interest in, or influence on, a business project or activity, as well as those potentially affected by it.[83] It is important to engage stakeholders in the design of systems which affect them and allow wide access to public procurement information to ensure transparency.[84] Public procurement has both internal and external stakeholders.

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Types of stakeholders

Internal stakeholders include staff who will be working with the design and implementation requirements that suppliers respect human rights. This may include:

- Staff from different parts of the government, including various departments or ministries (for example, justice or human rights);

- Staff from different levels of the state (for example, regional and local government);

- Staff from oversight entities;

- Significant stakeholders from other branches of government (for instance, legislative and judicial).

External stakeholders may include:

- Suppliers (including potential suppliers) and supplier associations;

- Workers and worker organisations;

- Human rights advocates and other civil society actors;

- Communities which have been impacted, or are potentially impacted by human rights abuses in the state's value chain;

- End-users and service-users.

In many states, public procurement and human rights issues will be new to many stakeholders. Where this is the case, stakeholders will need to be informed of the process to requirements that suppliers respect human rights and be provided with opportunities to share their opinions. This can be achieved through online dialogues or webinars, in-person workshops, consultation exercises and receiving written submissions. Stakeholders, may require capacity-building to allow them to participate effectively and contribute meaningfully to the formulation of effective requirements.

In 2014, the City of London established a social value panel consisting of representatives of local business, community and environmental sectors. The panel is presented with proposals from the procurement team on requirements that suppliers address the economic, social and environmental impacts of relevant contracts and engages in an open dialogue on these proposals. The procurement team incorporate the panel's suggestions and reports back regularly to the panel on the measures taken.

In 2014, the Dominican Republic enacted Law 188-14 establishing Citizen Oversight Commissions to:

- Observe and monitor the procurement and contracting processes of all the 24 state institutions engaging in public procurement;
- Receive reports, observations, complaints and suggestions from suppliers, citizens and organisations;
- Collect evidence of corruption and illegal activity linked to the procurement and public procurement processes;
- Present follow-up reports with observations, assessments and findings on public procurement processes and practices observed, which should be disseminated;
- Recognise and disseminate good practices so that they can be replicated.

B3.7 CONTINUOUS EVALUATION AND LEARNING

Continuous evaluation and learning is a critical concept.[85] Human rights abuses in the global value chains of most public buyers and higher tier suppliers are widespread and dynamic, changing with many factors, including labour migration patterns, legislation and policy developments. Identifying and abating a single abuse or structural concern, moreover, does not necessarily prevent a recurrence or the emergence of other human rights issues in future. It is therefore vital that monitoring and control systems are continuously activated to re-check compliance, and that they evolve and improve to achieve better results over time. Continuous learning is also supported by regular identification and sharing of good practices and challenges faced by public buyers. Monitoring, evaluating, learning and updating should always be 'work in progress'.

Electronics Watch supported the Swedish Regions in reviewing their IT contractor and sub-contractors in light of alleged human rights abuses within their value chain. This was published as a case study which "contains valuable lessons for other public sector buyers that seek to ensure compliance with international labour rights standards in their global supply chains by holding contractors accountable for any failure in investigating and addressing labour rights violations."

B3.8 RESOURCES

FIRST STEPS

- **Consider a small-scale pilot project to test requirements and calibrate budgetary estimates.**

It is a plain reality that the level of resources allocated to designing and implementing human rights requirements will impact on their effectiveness. Some efficiencies may be captured by using standardised, digital or web-based approaches (for example, electronic supplier check-lists), but such tools also require up-front investments in the human rights knowledge of their developers. In-depth, on-site qualitative supplier assessments, important for monitoring of compliance with contract clauses, for example, also require the involvement of trained staff.

Securing sufficient resources for tools and training is a routine challenge for public procurement bodies. Yet, introducing human rights requirements without sufficient preparation or resources carries its own legal, economic, and reputational risks, as seen above (see Section C4.1 Supplier performance monitoring).

The Swedish Regions model has three full time staff working on sustainable public procurement (two working on the environment and one on human rights) and a budget of 5 million Swedish krona per annum (€470,000) for human resources and follow-up activities such as audits. The budget is provided by the 21 Regions which contribute 50 Swedish cents per inhabitant. There are eight regional co-ordinators and a contact person at each of the 21 Regions. Region Stockholm in addition employs one full-time person as regional coordinator, whereas other Regions have allocated hours for existing staff.

In Norway all procurement exercises for hospitals are undertaken by an organisation called Sykehusinnkjøp (Norwegian Hospital Procurement). The sustainability unit has four people who work with environmental issues, anti-corruption, human rights and workers' rights. The budget for the sustainability unit is approximately 6 million Norwegian kroner per annum (€560,000). The Norwegian Hospital Procurement is divided into six divisions and every division has a contact person/ coordinator for sustainability work.

The City of London is modifying the Swedish county councils' Code of Conduct to the UK context by including incorporating references to relevant UK legislation, such as the Modern Slavery Act 2015. The City of London will then share this with the other London municipal authorities for their use. This will increase the leverage of government buyers across London and increase their ability to apply and enforce requirements that businesses respect human rights within their value chain.

B3.9 REMEDY

FIRST STEPS

- **Map internal grievance/ feedback mechanisms, identify who can access them (for example, staff, contractors, suppliers, sub-contractors and other relevant external stakeholders) and for which types of grievances/ feedback.**

Human rights abuses can occur at different stages in a value chain, and public purchasing bodies should consider establishing an internal grievance mechanism to provide remedy to victims, wherever in the value chain they are found, in line with the UNGPs.[86] Grievance mechanisms for victims are important risk management tools as they allow public buyers to become aware of, and address, human rights abuses at an early stage, prevent ongoing abuses and help prevent abuses from re-occurring.

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Advantages of an internal grievance mechanism	Limitations of an internal grievance mechanism
• It can provide a direct route to remedy for victims without requiring them to engage in more formal and costly judicial remedy processes; • It provides an early warning system so that human rights abuses can be addressed and prevent ongoing or escalating abuses; • It provides valuable information on actual risks and abuses in a sector, geography, or value chain which can inform future risk analysis and measures to address identified risks.	• It may require new legislation or institutional policy to establish a mandate for the mechanism where public buyers are concerned; • An effective internal grievance mechanism requires resources and dedicated staff capacity; • It is unlikely that workers at lower tiers of the state's value chain will have knowledge of the existence of the public buyer, let alone its grievance mechanism.

Grievance mechanisms should be open to employees of suppliers, sub-contractors, individuals and communities impacted by actual or potential human rights abuses, and end-users/ service-users, including civil servants using procured goods and services. Internal grievance mechanisms should not prevent victims from accessing legal remedies. Effective remediation of abuses can involve providing victims with reparation including compensation, cessation of any on-going abuse or violation, disciplinary actions or punishment against those responsible, access to relevant information, public disclosure of the truth, guarantees of non-repetition, rehabilitation, an apology or public memorials.

The London Organising Committee of the 2012 Olympic and Paralympic Games established a Sustainable Sourcing Code in 2008, carried out audits to ensure compliance, and established a complaint mechanism to address alleged violations of the sourcing code. An Ergon report details how this grievance mechanism operated.

The Tokyo Organising Committee of the Olympic and Paralympic Games (2020) developed a Sustainable Sourcing Code, and codes specific to timber, agricultural products, livestock products, fishery products, paper, and palm oil. They have designed a grievance mechanism to receive reports of non-compliance of the sourcing code, investigate, facilitate dialogue, formulate resolutions, and require improvement measures. Information on the grievance mechanism is available in languages used in the region.

In 2019 the International Olympic Committee developed an Olympic Games Guide on Sustainable Sourcing highlighting the importance of grievance mechanisms and that they align with the UNGPs.[87]

The three delivery partners for the Fifa World Cup Qatar 2022 have adopted a sustainability strategy. This includes an objective to "[e]nable access to effective remedy for workers engaged in the construction of, and provision of services for, FIFA World Cup 2022™ sites". A key initiative to realise this objective is an operational-level grievance and remedy mechanism:

"Continuing the implementation and enhancement of the [Supreme Committee for Delivery & Legacy]'s grievance and remedy mechanisms and considering expanding their scope or developing parallel mechanisms to be accessible to all future workers engaged in the provision of services for FIFA World Cup 2022™ sites, including during the staging of the tournament. Such mechanisms will follow guidance from the effectiveness criteria of UN Guiding Principle 31. This initiative will include:

- Ensuring that workers are aware of the mechanisms and related avenues for complaints
- Engaging with the relevant stakeholders and those affected to assess complaints
- Striving to use our leverage with any third parties involved to address and remedy adverse impacts
- Seeking cooperation with other institutions and organisations with a relevant mandate that may help to effectively address and remediate specific cases
- Addressing complaints raised in adequate ways, recognising the need for context-specific and timely solutions
- Reporting on the mechanisms' performance in a meaningful manner"

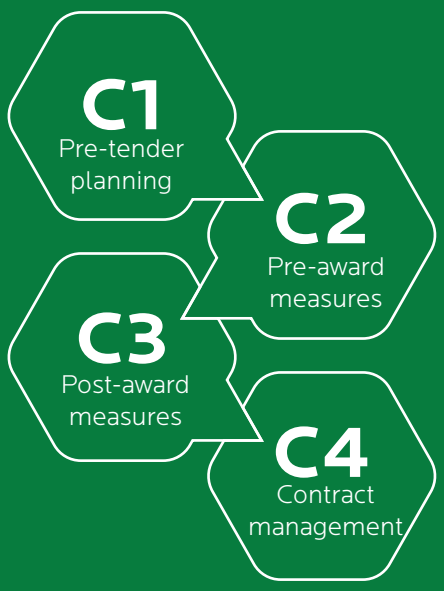
C

GUIDANCE FOR PROCUREMENT PRACTITIONERS

This section is primarily designed for procurement practitioners – in other words, personnel with responsibility for procuring goods and services and for contract management. The objective of this section is to:

- Explain how requirements that suppliers respect human rights can be included at each stage of the procurement process;
- Provide examples of how this has been done in practice;
- Highlight the advantages and limits of including requirements that suppliers respect human rights at the different stages of the procurement process.

Given variations between national public procurement regimes, this section is structured to follow the most common stages of public procurement:



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Public procurements are commonly segmented into three types: i) goods (supply of products); ii) services; and iii) works (construction). The scope of goods and services bought by public authorities ranges widely, from multi-billion infrastructure and urban development projects, to the acquisition of complex items such as weapon systems, to commissioning of essential public services in the health and social care sector, to buying common goods such as stationery, furniture, and foodstuffs. This section highlights supplier requirements on human rights that can be included in most categories and types of public procurements. The term **public buyer** in this section is a reference to public procurement bodies and to individuals with responsibility for the procurement of goods and services and for contract management.

The approach outlined in this section should be balanced against the everyday practicalities encountered by procurement practitioners. For example, for some buyers, there may only a few procurement exercises per year where it is possible to consider including human rights requirements, whether due to the size of expenditure, type of product or service being bought, staff capacity or other considerations.

Overall, this section describes a comprehensive or '360-degree' approach to integrating human rights into public buying. It is recognised that applying this in its entirety may not be practically viable for practitioners new to the topic who rather need to identify an accessible entry point or 'first steps'. Consequently, each section contains a box highlighting 'first steps'. In addition, the measures suggested should be tailored to the local context and be tested initially on a pilot basis.

C1. PRE-TENDER PLANNING

It is essential to include human rights in pre-tender planning if human rights requirements are to be included at subsequent stages of a procurement process.

This section is structured around three components of pre-tender planning:
C1.1 Human rights risk identification and assessment
C1.2 Market testing and engagement
C1.3 Increasing leverage

C1.1 HUMAN RIGHTS RISK IDENTIFICATION AND ASSESSMENT

FIRST STEPS

- Map the top tiers of your value chain for upcoming large-scale tenders;
- Use public data to see if there are reports of human rights issues for geographic regions, countries, sectors, or specific businesses relevant to your tender;
- Select an upcoming tender with high risks to use as a pilot project.

The first step in including human rights requirements in a procurement is to identify and assess the risks of negative human rights impacts occurring in relevant value chains. Once these risks are identified and assessed, measures to encourage suppliers' respect for human rights can be selected and included in different stages of the procurement cycle to try and prevent these risks from becoming realities.

To assess human rights risks in value chains, it is necessary to discover whether there are human rights abuses associated with the goods and services to be procured. This requires identifying the relevant risks associated with specific geographic regions, countries, sectors, or individual businesses. Certain risks are common to sectors or geographic regions. Such risks are likely to have been highlighted previously by other actors. For example, it is well documented that garments production in South East Asia is associated with risks of child labour, modern slavery and other labour rights abuses.[88]

RISKS AND IMPACTS

The terms 'risks' and 'impacts' are often used interchangeably. However, the term risk has different meanings for different audiences. In a business context, risks are often understood from the perspective of risk to business (for example, damage to profitability, reputational damage). In a human rights context, however, discussion of both impacts or risks focuses on risks of harm to the human rights of an individual or group as the rights-holder (for example, being a victim of forced labour, suffering discrimination or harassment, losing your land or means of livelihood).

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A risk assessment can be done through desk research. Alternatively, it can be an in-depth analysis undertaken via field research, where needed and if resources and capacity allow. Risk-assessment during the procurement planning stage should be broad in scope, as risks in other areas can also impact on human rights (for example, the environment and corruption).

Human rights risk assessment in the public procurement context should:
- Be based on international human rights standards and address all human rights;
- Be an ongoing process;
- Focus on actual and potential adverse human rights risks;
- Identify the human rights risks applicable to suppliers and down to the end of the value chain;
- Consider the aggregative or cumulative effect on human rights where multiple business have similar operations in the same area (for example, cumulative water use can lower the water table which impacts on farming);
- Focus on the human rights risks to individuals and groups rather than risks to the procuring body, the state body it is responsible to, or its suppliers. Such individuals or groups can include the end-users/ service-users (especially where essential public services are being provided by a supplier),[89] the contractor's staff (i.e. the first tier of the value chain for the procurement authority), and workers further tiers down the value chain;[90]
- Look at risk across the full life-cycle of goods and services, including raw materials production, manufacturing, transport, service delivery, and end-of-life disposal;
- Involve meaningful consultation with potentially affected groups and other relevant stakeholders as appropriate to the size of the procurement process and the practicalities of international value chains;
- Be gender-sensitive and pay attention to human rights impacts on individuals from other groups that may be at heightened risk of vulnerability or marginalisation, such as migrant workers, persons with a disability and children;
- Consider risks to the environment that may have consequences for human rights (for example, pollution of waterways, localised air pollution, loss of biodiversity or habitat destruction affecting livelihoods).

Practical tools and guidance such as the following can help procurement professionals identify and assess risks:
- The Difi High Risk List contains information on so called high risk products;
- The CSR Risk Check tool contains information on risks throughout the value chain;
- The Children's Rights and Business Atlas provides country-by-country data on children's rights related to the workplace;
- The Responsible Sourcing Tool helps identify human trafficking in the value chain;
- Human Rights and Business Dilemmas Forum provides case studies on how to address human rights risks;

- The Business and Human Rights Resource Centre publishes a wide variety of information which can help inform risk assessments;
- The Swedish National Agency for Public Procurement's sustainable procurement criteria library provides examples of social requirements.

The Northern Ireland Department of Finance produced a guidance note in December 2018 which lists questions to consider when assessing the risk of negative human rights impacts occurring in procurement processes focusing on risks to specific groups: end users, the contractor's staff, and staff working for suppliers below the first tier.

A risk assessment can address a specific procurement exercise or groups of similar procurements. Some public buyers pool their resources in order to undertake joint risk assessments. In some cases it may be possible to access risk assessments performed by other organisations, though when using such materials, account should be taken of the fact that human rights risks vary with changing circumstances on the ground, and might need to be updated.

The US General Service Administration's Sustainable Facilities Tool includes guidance for public buyers on identifying risks in specific sectors. The tool provides public buyers with a list of sources that can be consulted to determine whether and what risks may exist in specific sectors for procurements.

Risks should be addressed according to the **severity** of their human rights consequences. All human rights are of equal importance and there is no list of 'priority' human rights. The purpose of establishing severity is therefore not to establish which risks need to be addressed, but to determine the order in which the identified risks should be addressed, if they cannot be addressed simultaneously.[91]

To determine how severe a human rights risk is, you need to know its scope (number of people affected), scale (seriousness of the impact) and whether it is 'remediable' or not (can an individual impacted by the risk be restored to at least the same, or equivalent, situation as before the adverse impact occurred?). Thus assessing severity may require inputs from experts, dialogue with rights-holders, consideration of whether a particular impact gives rise to others (for example, low adult wages can force families to rely on child labour) and long-term consequences (for example, workplace injuries are associated with negative economic consequences not just for affected workers but also their families).[92] The severity and type of risks in question will influence what requirements are required to mitigate the risk across the procurement lifecycle.

Some questions procurers can ask themselves that can help identify more severe human rights risks include:

- Is the value chain completely mapped? Are all sub-contractors known? Do sub-contractors regularly change?
- Are there known actual or potential human rights issues in the value chain, based on reports on human rights abuses according to country, sector or specific businesses? Or based on links to known-high risk areas, such as conflict and post-conflict zones?
- Do the products or services procured rely on high risk forms of labour, such as manual labour, mass production, home production, use of hourly, unorganised, migrant, unskilled or seasonal labour?
- Does the nature of any activity, including production, delivery, and disposal of goods or services procured, anywhere in the value chain, create a heightened risk of human rights abuses for workers, end-users/ service-users or the public? For example, will workers come in to contact with harmful chemicals in the production or disposal of a product? Will workers in the value chain transport commodities through conflict zones? Does the value chain generate waste, for instance electronic waste, which if not disposed of properly may result in harm to human health or the environment?
- Do goods or services procured carry inherent risks? For example, are security guards employed who carry firearms? Are individuals' sensitive personal data gathered and stored?

Public buyers must be aware that certain business requirements, practices or contract terms imposed on suppliers by the public buyer can increase the risk of human rights abuses occurring in the value chain. For example, delayed or late payments, retention fees, orders for large volumes at short notice and 'just-in-time' orders can directly lead to abuses of workers' human rights, via excessive hours, 'lock-ins' and increased workplace injuries.[93] Such factors should be integrated into a human rights risk assessment.

The UK's 2019 policy note Tackling Modern Slavery in Government Supply Chains outlines steps to be taken by government departments to identify and manage modern slavery risks in government supply chains. The note relates modern slavery risks to type of industry, nature of workforce, supplier location, context in which the supplier operates, commodity type and business or supply chain model.

Procurement exercises carrying higher risks of human rights abuses need to be prioritised to prevent abuses occurring. The size of the procurement exercise, in terms of spend, is also relevant as larger procurement exercises usually represent a greater chance to exercise leverage over the market. Hence, grouping procurement exercises together, by increasing overall spend, tends to make human rights requirements on suppliers more effective.

The following table categorises procurement exercises according to the risk of human rights abuses occurring and the size of the procurement exercise.

	Low human rights risk	Medium human rights risk	High human rights risk
Low spend	Category A	Category B	Category C
Medium Spend	Category B	Category C	Category D
High Spend	Category C	Category D	Category E

Procurement exercises which fall in the high or medium risk categories should be prioritised for stronger human rights requirements than those attracting a low risk designation.

Public buyers can establish a database with standard clauses on human rights requirements. Standard clauses can be developed in-house or based on good practices shared by other public buyers. Standard clauses should be tailored to each procurement exercise, according to the human rights risks identified. Risk categorisation can be a basis for deciding whether to make standard clauses discretionary or mandatory for a given procurement. Geography, sector and market maturity should also be considered when customising standard clauses to a given procurement exercise.

Establishing a risk categorisation scheme and database of standard clauses on human rights requirements allows procurers to share good practices, ensures a coherent approach which is not overly burdensome, and guards against loss of in-house knowledge with staff turnover.

In Sweden, the National Agency for Public Procurement provides a free of charge sustainable procurement criteria library. The library includes draft environmental and social requirements that can be used when purchasing goods, services and works, according to a three-level scheme: basic, advanced and very advanced ('spearhead').

The Scottish government has developed a Prioritisation Tool which helps public buyers identify economic, environmental and social considerations for procurements. The tool supports buyers to identify and assess risk and opportunities based on categories and spend. In addition, a Sustainability Test helps public buyers embed relevant and proportionate sustainability requirements in the development of contracts and frameworks. Both tools were updated in September 2018 to take account of the UNGPs as well as risks of modern slavery and human trafficking.

Sweden's municipal districts and Regions have collaborated to allocate responsibility for performing human rights due diligence in relation to a range of goods and services (for example, medical supplies). The results of such due diligence exercises are then shared collectively.

In 2010, Sweden's City of Malmö conducted a risk analysis, segmenting spend categories by high, medium and low risk for abuses relating to supply chain working conditions. Three product groups were identified as high-risk: electronic equipment, furniture and office materials. Follow-up measures, such as implementing a Code of Conduct to be signed by suppliers of goods, were based on this assessment.[94]

In 2020, the City of Malmö is introducing a scheme to analyse procurement exercises through a sustainability filter. The goal is to prioritise procurement exercises with the greatest environmental and social impact. Prioritised procurement exercises receive a special focus from sustainability coordinators. Such procurement may be subjected to advanced pre-tender, post-tender, and contract award requirements. Besides rating procurement exercises by potential risk, they are also rated by how many of the city's environmental and social goals they target.

As an example, one of Malmö's environmental goals is to create a cleaner and more silent city. A procurement exercise related to transport will get a higher rating on the list of prioritised procurement exercises if it contributes to realising this goal. The scheme takes into consideration a procurement's economic value as well as scope for positive impact. Where leverage is higher to influence the market, projects are also ranked higher on the list of prioritised procurement exercises.[95]

C1.2 MARKET TESTING AND ENGAGEMENT

FIRST STEPS

- Incorporate a session on human rights in market testing exercises to gain an understanding of the maturity of the supplier base; to identify areas where progress can be achieved immediately, and those where change will take more time;
- In addition to market testing for suppliers, consider ways to get feedback from other stakeholders, such as supplier associations, workers, worker organisations, civil society actors, end-users/ service-users, as well as communities which may be impacted by human rights abuses in the state's value chain.

Market testing is an important mechanism for hearing the market's reaction to the inclusion of human rights requirements. It allows public buyers to gain an understanding of the maturity of the supplier base, to identify areas where progress can be achieved immediately, and those where change will take more time. If buyers set requirements that are too demanding, no or few suppliers may answer a call for tender – or suppliers may commit to terms that they cannot deliver. On the other hand, if requirements are set too low, this human rights risks may not be adequately addressed, while it may also fail to create a level playing field. (see Section A1. Reasons to act).

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Early engagement with suppliers is especially important when a procurement involves new supplier requirements that have not previously been tested on suppliers. It is also important when requirements may entail significant changes to suppliers' business operations, or when suppliers may be uncertain how to comply with the requirements.

Advantages of market testing and early engagement	Limitations of market testing and early engagement
• Market testing and early engagement can ensure human rights requirements align with relevant sectors, markets, and geographies; • It can help gauge the market's reaction and designing human rights requirements which are effective but sensitive to market concerns at the outset; • The market's knowledge can be utilised to identify common or increased human rights risks in a sector or geography that should be addressed; • It allows for the early identification of human rights risks for the public buyer which could affect the procurement process at a later stage; • The public buyer can communicate a clear position to suppliers on the importance of human rights to the public buyer and give actual and potential suppliers advanced notice of what will be expected in the future.	• Market testing can provide engagement with first tier and higher tier suppliers, but often does not engage with lower tier suppliers, especially those abroad; • Suppliers may be reluctant to see more advanced human rights requirements, so buyers should ensure they are well informed and prepared to respond to supplier questions to facilitate a constructive dialogue.

Questions to be addressed through market testing and engagement include:

- Is the market ready and capable to deliver what is required? Do potential suppliers have sufficient technical and management capacity to deliver on relevant requirements?
- How many suppliers could meet the proposed terms and requirements: will the procurement be sufficiently competitive? It is important that requirements do not implicitly single out one supplier, or unfairly impact specific suppliers or groups suppliers (SMEs, for example);
- Are there other, better approaches or solutions that have not been considered? Human rights requirements can be included in different stages of the procurement. Which stage is the most effective, considering desired outcomes, to address the risks in question?

- Are there any disadvantages to the proposed approach? Could the requirements proposed be excessive or redundant in addressing underlying risks?
- Could the proposed approach encourage the progressive realisation of human rights requirements and development of the supplier base? Even if the market is not yet ready to meet the requirements, is it possible to create awareness and incentivise suppliers by including human rights considerations as award criteria?
- How much information can be shared with the public buyer through reporting requirements? Are there contractual limitations in the sector which would prevent full disclosure of documentation?
- What labels or certificates relating to human rights, environment, and transparency are used within the sector?
- What support would be required or desirable, to help suppliers meet human rights requirements? What form should support take? Should support should focus, for example, on SMEs, or other categories of suppliers?

Market testing and engagement can be performed through a wide range of activities including:

- Identification and analysis of existing industry or sector standards relating to human rights;
- Inviting potential suppliers to discussion events;
- Feedback forms and questionnaires.

It is important for buyers in this context, as always, to maintain impartiality and conduct activities transparently, avoiding the exercise of any real or perceived preference for specific suppliers in any way.

Region Stockholm engaged potential suppliers at an early stage prior to a new procurement of ICT equipment through a series of hearings. The invitation to the first hearing was publicly announced and open to all interested parties. During the hearing, Region Stockholm presented the goals of the procurement and identified human rights risks that the proposed requirements were aimed to address. Participants were invited to comment on the proposal. They were also given an opportunity to sign up for a second round of individual hearings, in case some suppliers felt reluctant to discuss sensitive issues in front of competitors. During the hearings, the suppliers provided insight on the relevance and ambition level of proposed requirements. They also commented on possible means of verification of proposed requirements. After the second round of hearings, Region Stockholm partially modified the requirements before publishing a final call for tender. By involving the supplier base at an early stage, Region Stockholm reduced the risk of legal challenges the requirements. One year later, after eight ICT procurements had been conducted, Region Stockholm invited suppliers to a roundtable discussion to get feedback on their experience of both the tender process and requirements.

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C1.3 INCREASING LEVERAGE

Leverage refers to the ability to effect change in the wrongful practices of another party which is causing or contributing to a human rights abuse. In the context of public procurement, leverage can be exerted by a state over its actual and potential suppliers, and likewise by a supplier to its actual and potential subcontractors. Approaches that public buyers can adopt to increase their leverage are discussed in more detail in Section B3.1 Increasing leverage.

Public buyers may not have sufficient leverage to influence suppliers in their value chains at the level of individual procurement exercises. However, public buyers can increase their leverage by grouping procurement exercises, collaborating with other public buyers, or through framework contracts.

Adopting common standards for grouped procurement exercises provides suppliers with a greater incentive to meet them, in terms of a higher overall contract price, while it also promotes certainty by avoiding a range of different requirements across individual tenders. As SMEs may not have the capacity to bid for large procurements, however, mechanisms such as lots should be used to facilitate their access, where relevant.

As regards collaboration, smaller public buyers may lack resources to develop requirements of their own. Instead they may consider joining other public buyers that have already done this. Such collaboration also reduces the risk that suppliers do not respond to a call for tender because they assess that the costs of meeting new requirements are too high for a single contract of relatively low value.

C2. THE PROCUREMENT PROCESS - PRE-AWARD MEASURES

Procurement processes can generally be divided into the pre-award and post-award stages. It is important to distinguish between these as legal scope to include requirements that businesses respect human rights, and the form such requirements should take, differs across the two stages.

Advantages of pre-award measures	Limitations of pre-award measures
• Pre-award measures enable public buyers to engage with actual and potential suppliers on human rights issues at an early stage so that the public buyer can assess how mature the market is in human rights requirements; • Pre-award measures communicate how a public buyer values human rights and indicates to potential suppliers the expectation that suppliers respect human rights; • Pre-award measures increase the likelihood of excluding potential suppliers that do not meet the human rights standards expected by the public buyer; • In mature markets where suppliers are experienced in implementing human rights requirements, pre-award measures can ensure a level playing field at the outset and reward potential suppliers which have implemented, or are implementing, human rights due diligence.	• If the market is not mature in implementing the human rights requirements, onerous pre-selection requirements can prevent some, or all, potential suppliers from bidding, limiting competition, so that the procurement exercise may need to be re-run with less demanding requirements; • Pre-award measures generally require a high commitment and capacity from the public buyer to assess tenderers over a short timeframe and with limited information.

The section is structured around the following primary issue areas:

C2.1 Exclusion grounds
C2.2 Technical specifications
C2.3 Selection criteria
C2.4 Contract award criteria
C2.5 Notice to suppliers

C2.1 EXCLUSION GROUNDS

FIRST STEPS

- **Consider introducing exclusion grounds for suppliers who have been found responsible by courts of other official bodies of serious human rights abuses within a specific timeframe.**

Applying exclusion grounds may prevent potential suppliers from tendering based on previous or continuing problems in their operations, including human rights abuses. The aim of including requirements within public procurement that suppliers respect human rights is not to exclude potential suppliers per se, but to encourage suppliers to increase respect for human rights. However, exclusions may be necessary and practical for suppliers that do not meet legal requirements or have, or continue to be, involved in serious human rights abuses.[96]

Excluding potential suppliers from participating in public procurement exercises can have serious consequences, especially for businesses which exclusively or largely supply public buyers. Hence, public buyers applying discretionary exclusion criteria should be prepared for the possibility that potential suppliers affected by exclusion criteria may seek to challenge this by way of judicial review.[97] On the other hand, applying exclusion grounds can send a clear message to the market on the public buyer's standards. Exclusion grounds can also be an effective way of rewarding suppliers that do ensure respect for human rights at an early stage of the procurement process.

Exclusion grounds are either mandatory (a buyer **must** exclude a potential supplier from tendering) or discretionary (a potential supplier **may** be excluded from tendering), depending on the law or policy establishing grounds of exclusion. If a public buyer chooses to apply a discretionary ground of exclusion it must be applied throughout that particular procurement to all potential suppliers.

For both mandatory and discretionary grounds, excluded suppliers must be given the opportunity to demonstrate that sufficient measures to remedy previous human rights abuses and prevent further occurrences have been taken to be considered in procurement procedures ('self-cleaning'). Such measures might comprise, for example:

- Severing all links with persons or organisations involved in the misconduct;
- Appropriate staff reorganisation measures;
- The implementation of reporting and control systems;
- The creation of an internal audit structure to monitor compliance;
- Establishing a grievance mechanism accessible to staff, suppliers, and those impacted by the supplier's operations.

In many jurisdictions public buyers are not allowed to exclude suppliers which have applied sufficient self-cleaning measures.

Article 57(1) of the EU Directive 2014/24/EU contains mandatory grounds for exclusion. These include that an economic operator has been convicted of criminal offences relating to participating in a criminal organisation, corruption, human trafficking, or breach of obligations relating to tax payments. Further, discretionary grounds for exclusion pursuant to Article 57(4) of Directive 2014/24/EU include the possibility for public authorities to exclude suppliers when the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2) of Directive 2014/24/EU, which refers to obligations in the fields of environmental, social and labour law. Furthermore, according to Article 57(4)(c) contracting authorities may exclude suppliers guilty of "grave professional misconduct". This may include misconduct relating to human rights.[98]

An important distinction between discretionary and mandatory grounds for exclusion is that the latter requires a conviction by final decision. For discretionary exclusions, on the other hand, a public authority is only required to demonstrate using "appropriate means" that a violation has occurred. Subject to national rules of evidence and proof this test could for example be met on the basis of information gathered in previous procurements, as well as reports from NGOs and expert organisations. The contracting authorities carry the burden of proof for circumstances required for exclusion of suppliers. Notably, however, not all illegal actions or past misconduct by suppliers provide grounds for exclusion: any exclusion must be proportionate, in line with general legal principles of EU public procurement law.

In Scotland, statutory guidance has been published under the Procurement Reform (Scotland) Act 2014 advising contracting authorities on mandatory exclusion grounds:

"An economic operator must not be excluded indefinitely from participating in procurement activity. In respect of mandatory exclusion grounds, an economic operator must only be excluded for a maximum of five years from the date of the conviction, three years for a breach of the blacklisting regulations, or in the case of a breach of tax or social security obligations, until the amount owed is paid, including any applicable interest or fines, a binding agreement to pay it has been entered into, or it becomes otherwise no longer owed."

C2.2 TECHNICAL SPECIFICATIONS

FIRST STEPS

- Identify whether there are social labels or certificates relevant to the goods, services or works procured which could be referred to as requirements.

Technical specifications are used to define the characteristics of goods or services to be procured. Such characteristics may relate to a specific process or method of production, or another stage in the life cycle of a product.

Technical specifications must be drafted to avoid artificially narrowing competition through requirements that favour a specific supplier. This might happen, for example, if requirements mirror a specific supplier's processes or where a requirement refers to one social label when a number of equivalent labels exist. Technical specifications can be **open** or **descriptive**.

Open specifications detail what should be achieved without prescribing the means of achieving the desired outcome. For instance, in relation to the risk of child labour in quarries in the value chain of stone for construction work, an open specification could include a requirement that all stone supplied is guaranteed to originate in quarries free from child labour. While open specifications allow suppliers flexibility of means in meeting requirements, the challenge they pose for buyers is that expertise and capacity are required to assess and compare tenders in a fair and transparent manner.

Descriptive specifications detail solutions or processes that potential suppliers must fulfil. Descriptive specifications relating to human rights may refer to standards, labels, or certifications.[99] These can provide an objectively-based and transparent means of evaluation. Environmental labels and certifications are relatively widely used and experiences of their inclusion in descriptive specifications can provide useful orientation in the use of standards, labels or certifications relating to human rights. However, most markets are not mature in terms of the use of standards, labels or certifications relating to human rights. Buyers should therefore verify that social standards, labels or certifications are available, and that they adequately address human rights risks of concern to the procurement in question, before referring to them in technical specifications. An analysis of relevant labels or certificates, such as the SA8000 Standard and BSCI audit certificate, or product certifications, such as Fair Trade certification, should be included at the market testing and engagement stage.

The German Federal Ministry for Economic Cooperation and Development's Sustainability Compass provides information for government buyers on how to implement sustainability at all stages of the procurement process and contains a searchable database of labels and certifications for important product groups.

The EU Procurement Directives establish that a contracting authority may refer to a specific label (Article 43) when:

- The label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;
- The label requirements are based on objectively verifiable and non-discriminatory criteria;
- The labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organizations, may participate;
- The labels are accessible to all interested parties;
- The label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

The Directive further provides that contracting authorities requiring a specific label shall accept all labels that confirm that the works, supplies or services meet equivalent label requirements. In addition, contracting authorities may not exclude suppliers not in possession of any such label if there is not sufficient time for the supplier to attain the label before the tender deadline.[100]

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C2.3 SELECTION CRITERIA

FIRST STEPS

- **Include simple selection criteria which are transparent and readily achievable for suppliers, and easily assessable for public buyers, such as a requirement that the supplier has a policy which addresses human rights.**

Selection criteria allow a public buyer to stipulate minimum human rights standards, capabilities, and experience a potential supplier must have to be considered in a procurement. Selection criteria are not optional ways for a supplier to score points during evaluation of bids; potential suppliers must meet the criteria to be considered in a procurement at all. Including human rights considerations as selection criteria sets a clear minimum requirement that all suppliers need to fulfil to be eligible for evaluation and ensures a minimum level playing field. Selection criteria have potential application in many tenders, but their use may be limited in some case, for instance, open tenders in the EU.

Region Stockholm applies the selection criteria that its potential suppliers of rubber gloves must be able to report on:

- The traceability of the rubber gloves to the factories where they are produced;
- The methods the supplier uses to follow-up on compliance with contractual clauses relating to health and safety, working conditions, human rights and the environment at factories within its value chain;
- Whether migrant workers are present in factories within its value chain, and the percentage of migrant workers at factories producing rubber gloves supplied to Region Stockholm;
- The supplier's policies relating to forced labour and, if migrant workers are present, policies to ensure there are no recruitment fees;
- An action plan on how the supplier will work towards ensuring such policies are enforced, listing specific steps to be taken.

The stringency of selection criteria that public buyers apply is generally linked to the maturity of the market as regards human rights risks and their effective management. Selection criteria should typically focus on recognised industry and sector standards and practices, to avoid any undue discrimination between potential suppliers, and should be adapted to the character and context of the relevant sector.

Article 58 of the EU Directive 2014/24/EU establishes that selection criteria may relate to:

- An economic operator's suitability to pursue the professional activity in question (for example, possessing authorisations or associational memberships necessary to perform the contract);
- economic and financial standing (for example, minimum yearly turnover or possession of professional risk indemnity insurance);
- technical and professional ability (for example, possessing the necessary human and technical resources and experience to perform the contract).

Of the above, selection criteria linked to human rights considerations may be based on c) technical and professional ability. For example, they may require suppliers to demonstrate that they have the necessary expertise to evaluate human rights risks and conduct audits, for instance, based on past performance; or that they have access to sufficient human and financial resources to monitor their supply chain appropriately.

C2.4 CONTRACT AWARD CRITERIA

FIRST STEPS

- **Consider how to give weight to human rights considerations when scoring bids.**

Contract award criteria often take the form of a list of weighted criteria. Tenders are then evaluated according to the criteria, to yield an overall score. Unlike selection criteria, they are not mandatory for suppliers, however, the more criteria the supplier meets, the higher its score will be. Award criteria focus on the bid rather than the bidder and can be grouped into three categories: economic (concerning price); environmental; and social (including human rights considerations), with procurers seeking to strike a balance between these. They can encourage progress at sector level by incentivising responsible business practices, even without exclusion.

Contract award criteria linked to human rights should be based on widely accepted international instruments such as the UNGPs or other relevant instruments (see Section B1.1 Human rights instruments). For human rights criteria to be effective, their weight within the overall evaluation scheme must be sufficient to influence the final award decision. Award criteria can then be used to reward bids which demonstrate robust measures to promote respect for human rights in connection with performance under the contract in question. For instance, contract award criteria can relate to the scope and quality of suppliers' due diligence procedures (see Section B1.1 Human rights instruments).

Public buyers should ensure that award criteria linked to human rights, as other award criteria, align with transparency and accountability requirements under relevant procurement laws.[101] Thus, public buyers must inform suppliers prior to submission of tenders what weight will be applied to each criterion and what needs to be demonstrated to get a specific point. Public buyers have a margin of appreciation in evaluating and weighing tenders. Nevertheless, award criteria should be designed so that suppliers can substantiate their fulfilment and buyers can measure this. Buyers further need to provide clear and sufficient information on the basis of the evaluation of bids and what evidence tenderers should supply to substantiate their fulfilment of requirements.

Further merits of contract award criteria are that they can be used to promote best practice. They can also support buyers in addressing complex issues that are hard to capture through mandatory requirements i.e. technical specifications or selection criteria. For example, awarding criteria could be used to advantage suppliers who can demonstrate that the goods or services covered by the contract are produced by workers who earn a living wage when working under the contract, basing the awarded points on the disclosure of the lower tiers of the value chain relating to the contract. Labelling and certifications can be used as award criteria (see Section C2.2 Technical specifications for information on labelling and certifications).

Article 18(1) of EU Directive 2014/24/EU lays out the proportionality principle, where only criteria linked to the subject matter of the contract may be used as contract award criteria.

According to Article 67, contracting authorities shall base the award of public contracts on the most economically advantageous tender (MEAT). Contracting authorities shall identify the MEAT using a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio, which shall be assessed on criteria including qualitative, environmental and/or social aspects. Human rights considerations can therefore form a part of identifying the MEAT.

Furthermore, Article 69 requires contracting authorities to reject tenders that are abnormally low due to poor human rights standards, in case the supplier is unable satisfactorily to account for the low level of the price.[102]

In 2015 the City of Madison, USA, included transparency requirements in a procurement of apparel typically used by Fire, Metro Transit, Police and other municipal operations agencies. All potential contractors submitting a tender were required to include a disclosure statement which provided the name, address and contact information of each facility or factory that had or would produce apparel under this contract. The disclosure statement also required information on basic hourly wages, benefits paid, average working hours and overtime policy for disclosed facilities and factories. Besides these requirements, the procurement also provided that the winning tenderer would work with the City of Madison and the Sweatfree Purchasing Consortium to implement a compliance programme including worker education, a grievance process, responsible purchasing practices and prevention measures to address health and safety conditions in high-risk areas.

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In 2010 Region Stockholm developed a methodology where the price quoted by a supplier could be treated as if it were up to 30% cheaper if they met all award criteria (e.g. tenderer 1 offers the products for 100 SEK and tenderer 2 offers the products for 120 SEK but tenderer 2 meets all the award criteria. A fictitious reduction of 30% allows tenderer 2's offer to be treated as if it was 84 SEK and they would win the contract). Initially, this method was applied only to environmental criteria. However, in 2018, it was extended to human rights criteria including, for example:

- The level of supply chain disclosure, where contractors were offered a price reduction in relation to how many stages of their supply chain they were able to disclose;
- If risk assessments had been conducted on the sub-contractors disclosed, and mitigation plans implemented;
- If the supplier could demonstrate that worker participation was ensured and encouraged, for example, through worker committees and continuous dialogue on working conditions with management;
- If the products supplied were produced by a manufacturer applying the methodology of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

Depending on the level of disclosure and verification in each of the above-mentioned areas, suppliers were awarded a certain level of price reduction. This approach has since been applied to 9 procurement exercises relating to information and technology, and other procurement exercises relating to surgical instruments, rubber gloves and other medical products.

For the procurement of rubber gloves in Region Stockholm, award criteria require potential suppliers to report:

- The identified risks in the supply chain and how these risks were assessed;
- The results of 'code of conduct' audits of factories where the gloves are manufactured, which must be performed by third parties in accordance with current and relevant audit standards and methods such as SA8000, SMETA IV-Pillar methodology, BSCI 2.0 or an equivalent third-party audit methodology. Reported audits must not moreover be more than two years old.

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C2.5 NOTICE TO SUPPLIERS

The aim of providing notice to suppliers at the pre-award stage is to highlight to potential contractors human rights risks of which they should be aware and about which they should be prepared to disclose mitigation measures. While public buyers are not generally under legal requirements to notify potential contractors of human rights risks, they can be useful means of requiring a supplier to take account of a particular risk.[103]

The EU Directive 2014/24/EU does not stipulate explicit requirements for contracting authorities to notify potential contractors when a particular contract presents a significant risk of human rights abuses. However, Article 18(1) does require contracting authorities to adhere to the principles of equal treatment and transparency. This means that all tenderers must have access to the same information at the same time, so that no supplier gains advantage or suffers losses due to unequal conditions. Thus, public buyers should communicate all requirements to be applied at any stage of the procurement process to potential contractors in the procurement documents, which can be done through a notice to suppliers on the prevalence of human rights risks.

The USA Federal Acquisitions Regulation (FAR) requires an agency to notify potential contractors if a good being solicited is on a list of goods produced with forced labor and child labor that is annually updated by the Department of Labor. If so, the contractor must certify that it (a) will not source from countries listed as high risk, or (b) has made a good faith effort to determine whether the good was produced with forced or child labour. This certification is only applicable to the "end product" and not to its components, and unless there is contrary information, the FAR requires the procurement officer to rely on this certification.[104] Concerning human trafficking, in 2015, the United States Department of State provided support to the NGO Verité to conduct research and compile a report looking at the sectors at greatest risk for trafficking or trafficking-related activities in order to better inform government purchasing. The resulting list includes apparel and textiles, agriculture, construction, electronics and electrical, extractives, mining and metal, fishing and aquaculture, forestry, health care, hospitality and facilities operation and transportation. The contents of this study are now available in the Responsible Sourcing Tool, an online risk assessment tool, which contains information on 43 additional commodities and 10 comprehensive risk-management tools; as well as tailored tools for the seafood and food and beverage sectors. Agencies are not required to give notice to suppliers in these high-risk sectors, but a recent guidance document from the United States General Services Administration and Department of Energy encourages this. This guidance has also been incorporated into a procurement guidance website managed by the United States General Services Administration. At the sub-national level, public buyers that are members of the Sweatfree Purchasing Consortium treat all apparel purchases as high risk and notify bidders that they must comply with the code of conduct of the relevant city or state for apparel suppliers. As these codes vary from one jurisdiction to the next, the Consortium has published a Model Sweatfree Code to promote their harmonisation.

C3. THE PROCUREMENT PROCESS – POST-AWARD MEASURES

Post-award measures are taken after a contract has been awarded and are therefore limited to the supplier or suppliers that have been awarded a given contract. Although post-award measures, including human rights considerations, will be validated after the contract has been awarded, applicable requirements need to be included in tender documents and highlighted to suppliers at the pre-award stage.

Advantages of post-award measures	Limitations of post-award measures
• Fewer resources are required to assess contracted suppliers (as compared to assessing all potential suppliers at the pre-award stage); • Suppliers can develop measures that meet the buyer's human rights requirements over a specified period, yielding a gradual transition to higher standards; • The public buyer has the entire contract period to evaluate a supplier's compliance with human rights requirements included as post-award measures. Given pressure on public buyers to deliver essential products for public functions, time may be too limited at the front end of most procurement process to monitor, investigate and evaluate supplier practices adequately; • It can be more effective to ensure respect for human rights through post-award measures and dialogue with the winner of the contract to ensure suppliers aren't prevented from bidding and competition thus limited. This may be particularly relevant if the potential suppliers are SMEs; • As it is impossible to fully assess the risk of all human rights abuses occurring at the pre-selection stage, public buyers have a responsibility and opportunity to address these issues (detect, prevent, remedy) during contract performance.	• If using only post-award measures, public buyers may be unable to verify which potential supplier is best suited to comply with the human rights requirements until after the contract has been awarded, especially if a value chain is not mapped and human rights risks are not known; • It can be difficult to reward those who already have robust human rights protections in place, when only including human rights considerations as contract performance clauses; • Enforcing post-award measures (i.e. contract performance clauses) requires an investment in monitoring suppliers; • Once a contract has been awarded, leverage may decrease as the public buyer is contractually bound to the supplier; if contractual human rights requirements are not implemented, the public buyer can either require corrective actions or take other non-compliance measures including termination of contract. Termination could leave the public buyer without a supplier of essential products or services and require a new procurement, which brings additional costs; • In the case of short-term contracts, or if there is a one-off delivery, it may be difficult to review performance and implement corrective actions before the contract has ended and after that the public buyer has no more leverage over the supplier.

The section is structured around the following primary issue areas:
B3.1 Conditions for performance of contracts
B3.2 Sub-contracting

Pre-award measures and post-award measures should be viewed as tools in a single toolbox. By using them together, public buyers can compensate for their respective limitations. Coupling mandatory minimum requirements in the form of pre-selection criteria with more challenging post award measures allows public buyers to ensure a level playing field for suppliers and reward those who are already implementing human rights protections.

C3.1 CONDITIONS FOR PERFORMANCE OF CONTRACTS

FIRST STEPS

- **Include requirements that suppliers disclose incident and remediation reports on labour issues, discrimination, harassment or other relevant issues lodged with regulators or by other means.**

Requirements included in public procurements through conditions for performance of contracts (contract performance clauses) take effect after the contract is awarded. Suppliers must meet contract performances clauses as detailed in the contract and compliance with them is evaluated across the term of the contract. A breach of contract clauses may lead to penalties, for instance, suspending the contract or contract termination (see Section C4.4 Enforcement and termination of contacts).

Public buyers need to consider that if they are going to rely on contract clauses, they need to be in a position to monitor and evaluate suppliers' performance of them. This does not mean that every single supplier and every single contract must be evaluated: evaluation can be prioritised based on the size of the procurement exercise and severity of potential and actual risks (see Section C1.1 Human rights risk identification and assessment). However, requirements should be susceptible to monitoring. If there is no way of determining whether a requirement can be met, then it should not be included in a contract performance clause. This applies to qualitative indicators whose monitoring requires staff with human rights knowledge and relevant training.

For many public buyers, the person or team responsible for defining contract performance clauses for a given procurement will not be the same as the person or team responsible for contract management. Thus, there needs to be ongoing dialogue between the different procurement actors responsible for designing, monitoring and evaluating contract performance conditions.

Some elements of monitoring may be allocated to suppliers. For instance, a supplier can be contractually required to self-report, in other words, to describe risks and measures it has taken to address risks (see Section C4.1 Supplier

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performance monitoring). Suppliers can also be required to work with an external body to develop an assessment of risks and measures taken to be provided to the public buyer. Where necessary, a public buyer can follow up on self-reporting or an external assessment, for example, by requesting a more detailed explanation of the highest risks or where measures taken do not seem adequate. However, buyers need to consider what information suppliers may be prevented from sharing, such as previous audits results, through legislation or other contractual obligations (see Section C4.2 Supplier reporting – Legal considerations). In addition, self-reporting should take place in conjunction with other forms of monitoring rather than as a stand-alone exercise.

Contract performance conditions can take many forms. For example, they may require a supplier:

- To demonstrate that it has established specific polices or procedures relating to human rights and the subject matter of the contract;
- To disclose the performance of sub-contractors working under the contract in question to the public buyer on a continuous basis;
- To disclose, for instance, incident and/or remediation reports on labour issues, discrimination, harassment, issues with regulators;
- To conduct audits (See C4.1 Supplier performance monitoring);
- To implement capacity building initiatives, such as worker education.

According to Article 70 of EU Directive 2014/24/EU, contract performance conditions need to be linked to the subject matter of the contract, indicated in the call for competition or in the procurement documents, and may include social or employment-related considerations.

Social labels and certifications can also be used as contract performance conditions, on the same basis as for technical specifications (see Section C2.2 Technical specifications).

In 2018 the Association of Flemish Cities and Municipalities and the City of Ghent (Belgium) published a guide for public purchasers on socially responsible workwear. The guide defines the following expectations for suppliers:

ENGAGEMENT

Suppliers must sign a code of conduct and complete a questionnaire to map how advanced they and their sub-contractors are on socially responsible procurement.

TRANSPARENCY

Suppliers must offer transparency on the social risks in the value chain as defined in the code of conduct. Specifically, suppliers must have audit reports of the sites where the purchased workwear is produced independently verified by an independent third party within 6 months of award of the contract. The following forms of proof will be admissible:

- "Third-party verified risk reports on sustainability performance: ECOVADIS or equivalent
- Third-party verified audit reports: SEDEX/SMETA or equivalent
- Audits verified within the process of a management system: BSCI, Fair Wear Foundation, FLA, SA 8000 audit or equivalent"[105]

ACTION

Suppliers must remedy social risks that do not comply with the principles set out in the signed code of conduct by means of a corrective action plan (mandatory) and the continuous improvement of the social risks in the chain (desirable). The risk/audit report (as required under Transparency) must indicate what actions are needed to comply with the signed code of conduct. A direct supplier must submit an annual action plan to the purchaser within three months after submission of the risk/ audit report. This report must detail actions of both the direct supplier and the suppliers in the value chain as needed to meet the social requirements in the specifications.

LEADERSHIP

Suppliers are recommended continuously to improve their performance as demonstrated "by a positive trend (better score and/or fewer risks and less required corrective actions) in the scores on social risks in the chain and/or having been working on the implementation of a management system focused on continuous improvement of the social risks in the chain for more than 2 years."

The Swedish Regions have adopted a joint code of conduct for all 21 Regions. Contract performance clauses included in procurements of high-risk goods and services are based on the requirements of the code. A supplier who is awarded a contract must be able to demonstrate it has met the following conditions at the time of the contract entering into force:

- It has adopted a policy commitment to respect the terms of the code. The policy shall be publicly available and adopted by the management of the company;
- It has implemented procedures for disseminating the commitment within the organisation and the supply chain;
- It has appointed a member of the management team who is responsible for adherence to the code;
- It has implemented due diligence procedures to identify and mitigate potential and actual adverse impacts;
- It has implemented monitoring procedures;
- It has implemented procedures for corrective actions and remedy.

A contractor is also obligated, within six months from signing the agreement, to produce a written report on progress and results. This report shall be updated annually during the term of the contract and shall include:

- A strategy for risk management, including indicators showing progress over time;
- A summary of recent audit results;
- Information on how the contractor is ensuring good working conditions, in relation to health and safety, worker representation and collective bargaining, and working hours;
- Information on whether the contractor supports the payment of a living wage and how this is implemented in the supply chain;
- Information on how the contractor is ensuring that severe abuses of worker's rights such as forced labour and child labour are not present in the supply chain;
- Information on any violations of the code that might have occurred, and actions taken to mitigate and remedy the impacts.

Depending on the goods or services procured, the required information can also be tailored to specific industries and risks.

Electronics Watch evaluates supplier compliance with contract performance clauses as a means of assessing compliance with the Electronics Watch Code of Labour Standards. Supplier obligations under the Code include:

- Complying with all applicable labour, anti-slavery and human trafficking laws;
- Exercising due diligence to identify and mitigate the risk of potential breaches of the code;
- Including provisions obliging sub-contractors to produce goods in accordance with the code;
- Implementing an appropriate system of training of employees to ensure compliance with the code;
- Using reasonable and proportionate measures to ensure that sub-contractors engage with Electronics Watch in remedying adverse impacts and preventing breaches of the code.

Moreover, the contractor is also required, within 25 working days of the date of the contract, to complete a disclosure form informing Electronics Watch and the contracting authority of the names and addresses of factories where goods are produced, as well as the specific products and components produced in each factory. The contractor shall also "use reasonable and proportionate endeavours to disclose the compliance findings in summary or in whole (or, if available for disclosure, the audit reports) relating to the factories conducted within the previous 24 months which it is able to discover and obtain through reasonable enquiries" relating to the factories where the goods are produced. Updated information relating to sub-contractor compliance with the code shall also be provided every six months.[106]

C3.2 SUB-CONTRACTING

FIRST STEPS

- **Consider cascading contractual requirements for suppliers to their sub-contractors.**

Value chains can be vast in their extent. Unilever has estimated that its value chain includes approximately 76,000 suppliers, for example.[107] Ensuring that requirements that actual and potential suppliers respect human rights flow down the value chain and apply to sub-contractors is key to unlocking the potential of public procurement to advance business respect for human rights.

In addition, risks of severe human rights abuses often affect the lower tiers of value chains. Establishing requirements that sub-contractors respect human rights is therefore key to addressing human rights risks effectively.

In Sweden, contracting authorities may be obliged to require that sub-contractors that are "directly involved" in carrying out the works or services covered by the contract apply certain minimum social standards. The 2016 Swedish Public Procurement Act states that:

"A contracting authority shall, if it is necessary, require that the supplier performs the contract according to stated requirements under the core conventions of the ILO, if the performance is made under such conditions that Swedish labour law is not applicable. The authority shall also require that the supplier shall ensure that its subcontractors that directly contribute to the performance of the contract satisfy the requirements made under the first paragraph."[108]

The cascading of requirements to sub-contractors can be achieved, for example, by transparency requirements that require disclosure of the tiers of the value chain.[109] Public buyers can ask suppliers to indicate in their tenders any share of the contract they intend to sub-contract to third parties and any proposed sub-contractors. Alternatively, buyers can require that suppliers provide compliance performance information and annual certifications. On the basis of such information, public buyers can focus monitoring where it is most needed by, for example, conducting audits at relevant points in the value chain. (see Section C4.1 Supplier performance monitoring).

The UNGPs acknowledge the challenges that businesses with large value chains may face in monitoring whether all their suppliers conduct human rights due diligence. If this is the case, businesses "should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these".[110]

Besides, changes to sub-contracting arrangements can significantly alter human rights risks identified by audits, self-reporting or other means. Accordingly, public buyers may wish to introduce a requirement for suppliers immediately to inform them of replacement of sub-contractors; in some cases, it may also be desirable to make substitution of a sub-contractor subject to buyer approval. Alternatively, a supplier can be required to report to the buyer if a sub-contractor substitution changes identified risks and to report on how it will manage changes to the risk landscape (see Section C4.2 Supplier reporting).

Electronics Watch includes specific requirements relating to sub-contractors in contract performance conditions applicable to main contractors. If a sub-contractor is found in breach of the Electronics Watch code of labour standards, main contractors are required to collaborate with the contracting authority and Electronics Watch to obtain access for monitors to the factories where there has been an actual or potential breach and provide the contracting authority and Electronics Watch with a full written report of the findings.

The UK's Crown Commercial Service has developed Joint Schedule 5 (Corporate Social Responsibility) setting out expectations on suppliers:

"3.1 The Supplier:
3.1.1 shall not use, nor allow its Subcontractors to use forced, bonded or involuntary prison labour;
3.1.2 shall not require any Supplier Staff or Subcontractor Staff to lodge deposits or identify papers with the Employer and shall be free to leave their employer after reasonable notice; ...
3.1.5 shall make reasonable enquires to ensure that its officers, employees and Subcontractors have not been convicted of slavery or human tracking offenses anywhere around the world; ...
3.1.9 shall not use, nor allow its employees or Subcontractors to use physical abuse or discipline, the threat of physical abuse, sexual or other harassment and verbal abuse or other forms of intimidation of its employees or Subcontractors;
3.1.10 shall not use or allow child or slave labour to be used by its Subcontractors;
3.1.11 shall report the discovery or suspicion of any slavery or trafficking by it or its Subcontractors to CCS, the Buyer and Modern Slavery Helpline."

Article 71(6) of the EU Directive 2014/24/EU provides examples of appropriate measures a contracting authority may take in order to ensure that sub-contractors observe the obligations referred to in Article 18(2) (which requires that public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law).

For example, when national law provides for a mechanism of joint and several liability between sub-contractors and the main contractor, these rules shall be applied in compliance with the conditions set out in Article 18(2). Public authorities also have the option of requiring a contractor to replace sub-contractors that the contracting authority has found to be in breach of any ground of exclusion (See C2.1 Exclusion grounds). This enables the contracting authority to give the contractor the possibility of replacing sub-contractors found lacking in relation to human rights considerations, instead of terminating the contract.

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C4. CONTRACT MANAGEMENT

This section focuses the contract management stage of a procurement. It addresses two elements of the due diligence cycle described by the UNGPs: monitoring the effectiveness of measures taken to address human rights risks; and communicating about this internally and externally. Both monitoring and reporting are essential elements of accountability. They ensure that human rights requirements applied in a given procurement are actually implemented in practice.

Contractually, a supplier bears the responsibility to ensure that post-award human rights requirements are met. However, public buyers should monitor suppliers' performance of such terms as part of their own human rights due diligence and risk-management processes.

Selection and award measures are not adequate in themselves to ensure human rights are fully respected throughout the value chain. Even if factories have been audited in the past to obtain a social certification, for example, circumstances on the ground may change over time. It is therefore important that buyers engage with suppliers over the duration of the contract, particularly during delivery when risks of human rights abuses may become realities. Where contract management periods are lengthy, this can provide an opportunity to bring about change in suppliers' conduct through sustained dialogue and engagement.

Responsibility for the procurement of goods and services and responsibility for contract management often rest with different teams or individuals. Procurement teams are unlikely to be involved in the day-to-day execution of a contract. So it is important to ensure that the contract manager has the capacity and knowledge to ensure that human rights requirements are met and provide feedback to the procurement officer to improve future human rights requirements. In this section, for the sake of simplicity, where the term 'public buyer' is used it refers to public procurement bodies and to individuals with responsibility for the procurement of goods and services and the responsibility for contract management.

The section is structured as follows:

C4.1 Supplier performance monitoring
C4.2 Supplier reporting
C4.3 Remedy
C4.4 Enforcement and termination of contacts

C4.1 SUPPLIER PERFORMANCE MONITORING

FIRST STEPS

- **Establish a dialogue with suppliers on goals, risks and expectations, and how they intend to comply with contractual human rights requirements.**

This section outlines a few key concepts regarding the design of performance monitoring requirements in public procurement value chains. Public buyers can require a range of monitoring practices from their suppliers in the exercise of human rights due diligence as recommended by the UNGPs. Suppliers can in turn impose requirements on their sub-contractors at lower tiers. While these two levels of performance monitoring are distinct they are discussed together here since approaches to be applied are similar in both cases.

VALUE CHAIN MAPPING AND RISK ASSESSMENT

Monitoring a complex value chain requires, at minimum, a basic understanding of its tiers and linkages. Most large suppliers possess at least a basic map of their value chain. In public procurement, it is vital, as a first step in monitoring and evaluation, that public buyers map their value chain in as much detail as possible. To facilitate this, state suppliers in turn should, if they have not already done so, undertake a detailed mapping of their suppliers and sub-contractors. An accurate mapping of the lower tiers will enable proper planning and allow suppliers to report to the public buyer more effectively.

However, in most sectors, detailed value chain mapping will become more challenging further down the value chain. Suppliers may decline to disclose to public buyers everything they know about subcontracting arrangements for instance, where they consider this information to be commercially sensitive. Alternatively, suppliers may simply lack full knowledge or understanding of the value chain beyond a particular tier. Public buyers need to keep such obstacles in mind when mapping and monitoring suppliers and setting requirements for supplier compliance.

Once a value chain has been mapped, public buyers next need to assess risk and prioritise those risks requiring higher levels of monitoring. The means to accomplish this vary widely according, for instance, to the kind of risk, sector, product, service or commodity, and geographic location. Public buyers may rely on desk research, supplier self-assessment questionnaires, worker or community interviews or surveys, third party audits or any combination thereof. Public buyers should ensure that risk identification and review of monitoring measures are ongoing processes, informed and improved over time by continuous evaluation (for further information see Section C1.1 Human rights risk identification and assessment).

Sweden's 21 Regions purchase approximately €13 billion in goods and services annually. The Regions have adopted a collective model to leverage their procurement power and mitigate harms. Together they have identified eight high-risk categories of goods (pharmaceuticals, foodstuff, surgical instruments, surgical gloves, IT, textiles, dressings and medical technology). Responsibility for monitoring and evaluation in relation to each category has been allocated amongst the different Regions. In this way, the Regions can pool their buying power to increase leverage over suppliers while also cutting the costs of monitoring by capturing economies of scale.

Copenhagen Municipality in Denmark previously monitored compliance with contractual labour clauses through unannounced site visits executed on a random basis. On this basis, it was found that 5.5% of workers were not paid in line with minimum wage requirements. In 2018, the municipality transitioned to a risk-based approach, targeting unannounced visits on types of works analysed as having a higher risk of subcontracting and reliance on migrant workers and other vulnerable groups. Applying this new method of monitoring, Copenhagen Municipality identified that 70% of the workers present during the visit were not receiving the agreed minimum wage. As a result of its findings, affected workers were paid an average compensation of 15.700 DKK (roughly €2,100) each.

AUDITS AND REVIEWS

Audits can take several forms, including, for example:

- Desktop-based assessment of documents shared by the supplier, for example, reviews of pay and employment conditions applied by service providers; on-site inspections of supplier or sub-contractor facilities; or a combination of these;
- Risk-specific audits targeting previously identified risks, such as child labour and human trafficking;
- A checklist to compare a business' practice against a recognised standard (for example, SA8000) or an individual business, sector- or product-specific code of conduct, or a more general audit of a supplier's approach with parameters set by the public buyer;
- Audits conducted by third party specialists providing an outcome report. Public buyers can enter a dialogue with suppliers about how to address any issues identified in the outcome report and require that the supplier adopts a corrective action plan;
- Audits conducted by the individual public buyer (if the public buyer has internal auditors) or jointly with an external auditor. This approach allows for direct dialogue between public buyer and supplier; can increase the public buyer's influence over the supplier; and can focus on strengthening the supplier's ability

to prevent human rights impacts more than audits based on a third-party checklist can;
- Audits conducted jointly by two or more public buyers which, in addition to reducing the costs of audits by sharing them, can increase public buyers' leverage and hence their ability to influence positive change by the supplier.

The Swedish central purchasing body SKL Kommentus continuously audits suppliers under their framework agreements through third party audits. Each year, two or three high risk categories of goods within 11 priority product areas are chosen for further monitoring through a three-step process of supplier self-assessment, desktop audit and on-site audit. The results and corrective action plans are available to all municipalities and Regions and are published on the SKL Kommentus website.

Audits are not unique to the human rights field and exist to monitor other dimensions of compliance, for instance, environment. However, human rights audits usually require reference to qualitative indicators, whereas financial or environmental audits rely more heavily on quantitative indicators. It is important to ensure coherence between auditing requirements and consider grouping different kinds of audits together to reduce auditing costs, overlapping requirements and supplier audit 'fatigue'. Besides, assessments of supplier respect for human rights should not be based on audits alone. An increasingly significant supplement to audit is worker-driven monitoring. Worker-driven investigations at supplier or site level often succeed in identifying issues that are missed by third-party social audits.[111]

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Nevertheless, and though much has been written about the limitations of social audit, currently it remains a primary vehicle for monitoring of corporate human rights performance.

Advantages of social audit	Limitations of social audit
• Public buyers and suppliers are familiar with audits and accept the purpose of them; • Social audit standards and providers of social auditing services are readily available for use; • Social audit reports are easily understood by suppliers at all tiers of the value chain; • Social audits can identify at least some human rights risks and abuses.	• Comprehensive social audits are resource-intensive. Correspondingly, social audits are often under-resourced and inadequately executed; • There a structural mismatch between the time and expertise available during short on-site social audit inspections and the dynamic, varied character of supplier human rights risks; • The 'snapshot' examination permitted by social audits often fails to reveal human rights abuses, even in worksites audited with on-site inspections; • Social audits often fail to achieve adequate worker engagement, and so do not identify all human rights abuses and risks, as well as potential solutions; • Many social audits are predominantly paper-based exercises, which lack the ability to contextualise and identify root causes, including issues that are not visible at the work location; • Suppliers may be trained or mandated to provide generic or stock answers to social audits, to avoid detection of human rights issues; • Social audits may not be subject to follow-up to discover whether suppliers' answers reflect the reality on the ground or investigate whether policies and plans recommended by audits are implemented in practice; • Suppliers may be required to undertake multiple overlapping audits on behalf of different buyers, entailing disruption for management or production. Consequently, suppliers may not fully commit to audit process.

Some of the above limitations of social audit can be mitigated, for instance, through choice of an appropriate audit approach for the value chain, supplier or priority risks in question, or ensuring allocation of sufficient resources. Supplementing or substituting a social audit with worker-driven monitoring, including interviews with workers off-site, without management presence, in workers' own languages, and during paid working hours, may address some deficiencies of the conventional social audit model. Diversifying the information base of an audit, through dialogue and collaborative monitoring with local labour or civil society organisations, human rights experts and monitors can likewise strengthen a supplier assessment.

The timing of a social audit should be carefully considered. If a contract runs over a long period with multiple deliveries, or if there is a framework agreement, then an audit and follow-up can occur during the contract period, but before the last delivery. In the case of short-term contracts, or if there is a one-off delivery, the audit should be done early and either before the last (or only) delivery. If the audit occurs after the last delivery, there is a risk that a supplier may object as the intended audit would not link to the contract object. It is also difficult to follow up on an audit if the contract is soon to expire and the contractual relationship ends.

A collaboration between the City of Madison, USA, and Sweatfree Purchasing Consortium in apparel procurements included the establishment of an independent review panel, coordinated by the Sweatfree Purchasing Consortium. This panel assists the City of Madison in evaluating contractor compliance at the proposal, award, and contract performance stages of the process, and includes experts in international labour law as well as representatives from the public agencies that use the contract.

WORKERS' VOICE

Including feedback from workers is a vital part of a robust audit process. This is because workers have a unique line of sight into, and understanding of, operations in their workplaces. They are also the people whose human rights are most often directly impacted by poor supplier practices. It is thus important to engage and empower workers in monitoring, evaluation and reporting because of their inherent human dignity, besides the value that their insights add to the quality of assessment. The rights to freedom of association and collective bargaining and to decent work are enshrined in international law. Involving workers and ensuring they have a proper role during due diligence and audit processes can help realise these rights, in line with the public buyers' duty to protect as well as suppliers' responsibility to respect human rights, as highlighted by the UNGPs.[112]

Electronics Watch is based on a worker-driven monitoring methodology. It engages with workers employed by electronics manufacturers through monitoring partners located near workers' communities. The monitoring partners are independent labour rights experts that already have or whom develop relationships of trust with workers. By being situated locally near sites of production, Electronics Watch's monitoring partners can quickly respond when workers report a problem.

Recently, new IT solutions have emerged which allow the gathering of worker feedback. Such electronic applications can allow the confidential or anonymous registration of complaints by individual workers. If trends are analysed across all complaints registered, they may also provide useful global information on the success, or failure, of measures deployed by public buyers or suppliers, to address human rights risks. On the other hand, such solutions bring their own challenges. These may be practical, for instance, not all workers have access to internet or smart phone access. They may also be connected to separate human rights concerns, linked to privacy or personal data.

The NGO Issara Institute's Inclusive Labour Monitoring system is based on continuous monitoring of workplaces through direct engagement with workers who report issues and seek assistance through the Issara hotline and other smartphone-enabled worker voice channels.

As a further measure to facilitate workers' voices, public buyers can consider engaging in dialogue with workers alongside market testing to identify human rights risks in the value chain. In global value chains, where in-person events may be impractical, electronic means can be used to obtain input from workers and representative bodies, such as trade unions and NGOs. Public buyers can also consider publishing summaries of in-person events and submissions received and detailing how they are taking workers' voices onboard.

INTEGRATION INTO EXISTING SYSTEMS

Many public buyers and suppliers already have codes of conduct, performance monitoring systems and evaluation systems in place in areas other than human rights. Public buyers may, for instance, have codified environmental procurement requirements, while many suppliers apply quality control audit regimes to their production processes. It usually makes sense to leverage such existing infrastructure, as well as existing training and management systems, in human rights performance monitoring. This has the dual benefits of minimising costs and enhancing overall efficiency.

SUPPLIER DIALOGUE

Start-up meetings provide contract managers with an opportunity to engage suppliers on goals, risks and expectations, and to discuss how suppliers intend to comply with contractual human rights requirements. Such meetings can also help gain an understanding of the supplier's maturity in working with human rights, and whether the supplier meets similar requirements from other buyers, whether public or private. Start-up meetings can be especially beneficial for contracts which fall into higher risk categories and for contracts with a one-off delivery as they may provide the only opportunity in practice for preventive supplier engagement.

For a contract manager, getting to know a supplier's situation and challenges through ongoing dialogue increases the possibility of preventing and rectifying issues. It also gives the public buyer an opportunity to increase its influence. An ongoing dialogue which provides an opportunity to discuss how a supplier can in practical terms respect human rights can be particularly valuable for SMEs. Dialogue allows a supplier to share its opinion on the buyer's handling of the contract and can ensure that the buyer does not impose requirements that can contribute to the supplier's failure to comply with its human rights obligations, for example, where a change of deadlines may pressure a supplier, or its sub-contractors, to impose unreasonable overtime requirements.

C4.2 SUPPLIER REPORTING

FIRST STEPS

- **Include a requirement that suppliers report annually on how they are meeting human rights requirements within the contract;**
- **Discuss annual reports with suppliers and support them in developing action points to address risks and opportunities identified in reports.**

In this section, 'reporting' refers to the stage of a monitoring and evaluation process that communicates back to the higher tiers of supply, or with the public buyer, providing information or certifying compliance with policies and procedures. This section mainly focuses on the level of reporting that public buyers should require of suppliers. However, it also discusses what reporting requirements higher tier suppliers may require of lower tier sub-contractors.

Public buyers and suppliers have a wide range of options in terms of what they may require by way of reporting, and what systems and structures they may establish to collect reports. Such options include reporting on key performance indicators of compliance; reporting of raw data from audits or self-analysis questionnaires, employee interviews and surveys; or reporting of certification statements that formally attest to compliance and that may in addition entail liability for non-compliance. Exploring all possible types of reporting lies outside the scope of this Toolkit. Instead, this section describes some key aspects for consideration.

LEGAL CONSIDERATIONS

When defining supplier reporting requirements, public buyers may choose to require that all information, or substantial elements, be made public in the interests of transparency and accountability. Before doing so, two key questions to ask are, firstly, can suppliers legally share the information requested, for example, on the lower tiers of the value chain or on their compliance performance indicators, with the public buyer? And secondly, what expectation of confidentiality are suppliers under to protect confidential business practices?

Contractors may be unable to share information, for example, audit results or other data that sub-contractors control, due to contractual or legislative obligations, for example, under anti-monopoly or anti-trust laws. When defining supplier monitoring and reporting requirements, public buyers thus need to consider potential limitations in the type of information their contractors can obtain and share with third parties.

Limitations deriving from statute vary according to the jurisdiction. Laws, policies, and guidance relating to corporate non-financial reporting and financial reporting obligations, and transparency requirements can orient public buyers about how much information they can require suppliers provide or publicly share. The scope of contractually-derived limitations can be investigated during market testing dialogue. In practice, it is likely that business-sensitive information will need to be removed from reports submitted to buyers, though what is considered sensitive will depend on the jurisdiction.

Another key consideration is collecting and storing reports. Supplier reports can contain confidential information so secure storage is important. Supplier reports should also be categorised as they will provide benchmarks for future reports from the same supplier and can provide guidance and good practice examples for public buyers when designing new human rights requirements or as a basis of comparison when assessing other suppliers.

THE NUMBER OF TIERS FOR SUPPLIERS TO REPORT ON

Public buyers must address the question of how many tiers down their value chains they can reasonably expect to exert influence, which is a relevant factor in determining requirements on suppliers to report on compliance. The first tier of the value chain should usually be a priority. However, engaging with lower tiers of the value chain is essential to allow the primary supplier to report with a meaningful degree of confidence. This can be achieved through ‘flow down’, where requirements imposed on a high-level supplier can be required to cascade down through formal mechanisms to sub-contractors at lower tiers of the value chain. However, in practice there may be limited circumstances where you can legally oblige sub-contractors to provide information. In contrast, utilising leverage can be a more practical and effective means to get information from lower tiers of the value chain.

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A challenge in accessing information, whether through legal obligations or through leverage, lies in the diminishing visibility and increasing complexity of value chains as they move to lower tiers of supply. Furthermore, cascading requirements down a value chain can become more complicated in global value chains operating in different jurisdictions with different laws. For example, some jurisdictions may not require businesses to keep records on the details required, and if these exist, they may be paper-based and in local languages. This complexity and opacity will vary depending on sector, geography, and countries involved, and reporting requirements should be tailored accordingly.

COMPLIANCE PERFORMANCE INFORMATION

Compliance performance metrics are probably the most important type of information to include in reporting requirements. These may be Key Performance Indicators. Alternatively, they can be more qualitative, drawing on worker interviews or broader audit reporting. In either case, data on compliance performance must be sufficient to assess effectiveness, target areas of risk, mitigate adverse impacts and continuously evaluate, learn and improve supplier requirements over time. Deciding what should be reported on can only be achieved by involving all relevant stakeholders in the design process. Procurement documents should include specific and clear expectations for suppliers around their compliance performance reporting obligations, as well as their obligations to report such metrics for sub-contractors at various tiers.

Some public buyers require suppliers, or a subset of suppliers at specific tiers or purchasing levels, to create compliance plans for the implementation of human rights due diligence. Such compliance plans are not performance monitoring or reporting per se (though they should certainly include these elements). However, the requirement to develop a plan, and report on it, can serve as assurance for the buyer that monitoring and reporting are taking place. Compliance plan requirements should be related to the level of complexity and risk of a particular contract and complex value chains require more robust compliance plans than simple direct service contracts.

ANNUAL CERTIFICATION

One way of ensuring compliance is to impose an annual certification requirement. Such certifications are legally binding statements that must be endorsed at senior levels of a supplier's management structure, attesting to actual compliance or the implementation of robust compliance plans and monitoring or control mechanisms. For instance, under the United States' anti-trafficking procurement regime, suppliers who are required to create compliance plans must also annually certify that such plans are in place and being implemented. Such certification requirements ensure that suppliers have a clear legal liability for implementing practices to monitor and address abuses. Similarly, certifications could be required by higher-level suppliers of their sub-contractors, ensuring flow down of the liability to ensure requirements that suppliers respect human rights are in place at lower tiers.

C4.3 GRIEVANCE MECHANISMS

FIRST STEPS

- Consider including a requirement that suppliers provide access to an effective grievance mechanism for alleged victims of human rights abuses in their value chain.

The UNGPs highlight that business enterprises have a responsibility to ensure access to effective grievance mechanisms. Public buyers can consider including requirements that suppliers provide access to an effective operational-level grievance mechanism. A grievance mechanism is an important risk management tool that may allow a public buyer to become aware of and address human rights abuses at an early stage, prevent ongoing abuses and prevent abuses from re-occurring.

Advantages of requiring suppliers to provide access to an operational-level grievance mechanism	Limitations of requiring suppliers to provide access to an operational-level grievance mechanism
• It can provide a direct route to remedy for victims without requiring them to engage in more formal and costly judicial remedy processes; • It can provide an early warning system so that human rights abuses can be addressed early and prevent ongoing or escalating abuses;[113] • It provides valuable information on actual risks and abuses in a sector, geography, or value chain which can inform future risk analysis and measures to address identified risks.	• Running an operational-level grievance mechanism requires resources and staff capacity and knowledge; • Workers at lower tiers of the value chain are unlikely to have knowledge of the grievance mechanism.

Requirements for suppliers to establish or demonstrate effective operational-level grievance mechanisms need to be highlighted to suppliers at an early stage and communicated in tender documents. Such requirements can be included in selection criteria, contract award criteria or conditions for performance of contract, as long as the specific conditions of each method are adhered to.

Public buyers can consider establishing or participating in grievance mechanisms that receive complaints from workers in their value chain. Public buyers can, for example, act as an oversight body or mediator for complaints; or they can provide

information on, and access to, their own grievance mechanism for parties who do not accept the outcome of a supplier's operational-level grievance mechanism. Such approaches can strengthen the legitimacy of a supplier's grievance mechanism and can give the public buyer better access to information regarding risks in the value chain, which will strengthen the design of requirements in public procurements.

Suppliers can establish their own grievance mechanisms or join already established grievance mechanisms. If the public buyer has its own grievance mechanism, this can be opened to suppliers to use, which can support SMEs that lack capacity to establish their own. There are a range of industry and sector-based grievance mechanisms which suppliers can sign up to which can provide effective access to remedy. Examples of industry and sector-based grievance mechanisms include:

- Fair Wear Foundation
- Bangladesh Accord Complaint Mechanism
- Aluminium Stewardship Initiative

A challenge when including requirements for suppliers to establish or demonstrate effective operational-level grievance mechanisms in public procurements is that risks of the most severe adverse human rights abuses can occur further upstream from the supplier who bids for the public contract. It is therefore important to tailor relevant requirements to the specific procurement as this enables the requirements to flow down to the necessary stages of the value chain. Still, in practice there may be limited circumstances where sub-contractors can be legally obliged to establish operational-level grievance mechanisms. In contrast, using leverage can be a more practical and effective means to achieve this with sub-contractors at lower tiers of the value chain (see Section C1.3 Increasing leverage).

The UNGPs' effectiveness criteria for grievance mechanisms should be considered when defining relevant requirements in public procurements. According to the UNGPs, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:
h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.[114]

By referring to the UNGPs and these effectiveness criteria public buyers can ensure that the requirements are based on clear and transparent standards, against which suppliers can be evaluated. Requirements can, for example, ask suppliers to demonstrate how the effectiveness criteria are met, either as a mandatory requirement or that the performance of the suppliers are scored based on their ability to demonstrate effectiveness.[115]

C4.4 ENFORCEMENT AND TERMINATION OF CONTRACTS

FIRST STEPS
- **Adapt existing termination and escalation clauses to include severe human rights abuses as grounds for remedial action and termination**

For human rights considerations to be enforceable and effective, public buyers need to have a range of sanctions at their disposal for non-compliance. The option to terminate is one of these sanctions, but this should not be undertaken lightly. Clauses related to the enforcement and termination of contracts provide essential tools to require suppliers address human rights abuses when they arise, and the ability to cut ties to suppliers which do not respect human rights. They are likely to be scrutinised in detail by the supplier, so can also provide a useful means of facilitating a dialogue on human rights.

Before resorting to termination, a public buyer can turn to other measures such as dialogue or stopping work and suspension of the contract or supplier. Stopping work and suspending the contract or supplier enables the buyer, depending on the circumstances, to immediately halt the supplier's operations causing the human rights harm. Subsequent contractually mandated steps can include an investigation and, if human rights abuses are found, a requirement that the contractor undertakes

a formal process to remedy human rights abuses and prevent reoccurrence, including through the development of an action plan. This action plan should include monitoring requirements to ensure the actions are effective. Associated costs can be placed on the supplier. However, this is more effective with longer term contracts as for short-term contracts, or one-off delivery, it may be difficult to implement escalation measures before the contract has ended, after which the public buyer typically has little or no leverage over the supplier. Public buyers can also consider including clauses on withholding final payment, payment rates, whereby part of the contract sum is subject to the fulfilment of certain requirements, fines for not providing documentation or addressing a default.

Where no other options are viable, the public buyer can include provisions regarding termination of the contract. Grounds for termination might include:

- A supplier's unwillingness to implement corrective actions, entailing non-compliance with requirements of the contract;
- When severe human rights abuses are found, which would have constituted grounds for exclusion had they been known before awarding the contract;
- Repeated violations of the terms of the contract.

Immediate grounds for termination could be considered when non-compliance involves the supplier's business operations being connected to gross or serious human rights abuses, such as abuses of the right to life or the prohibition on torture and other cruel, inhuman or degrading treatment or punishment.

In January 2019, Region Stockholm terminated an agreement 'SLL833 Servers and Storage' with its supplier. An audit conducted by Region Stockholm in 2016 showed several non-compliances regarding social responsibility in the supply chain for servers. An action plan to address the non-compliances was drafted and approved. However, after several contacts with the supplier over a period of two years, the non-compliances were not rectified. After a final warning, Region Stockholm decided to terminate the contract, not due to the severity of the non-compliances but because the supplier failed to act to ensure it was in compliance with the contractual terms.

The Scottish Government's standard contract terms and conditions allow for contract termination in the event of failure by a contractor to comply with environmental, social and employment law. Guidance was issued to encourage all public bodies in Scotland to consider a similar approach.

GLOSSARY

Audit – a systematic inspection of a process or procedure to assess compliance with requirements or regulations

Award criteria – a set of criteria according to which a tender is chosen

Bid – the price offered by a tender participant during the bidding procedure

Contract management – the management of the performance of contracts where requirements are monitored and evaluated

End user/ service user – the individually using or receiving of the goods (end-user) and services (service-user) procured

Framework agreement – an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged

Goods – objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves

Grievance mechanism – a routinised, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought

Human rights due diligence – a process to identify, prevent, mitigate and account for how a business addresses the adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships

Human rights impact – the impact of an action (or lack thereof) on human rights

Human rights obligations – obligations of states to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups

Human rights requirements – requirements within public procurement that actual and potential suppliers respect human rights

Leverage – the ability to effect change in the practices of another entity that causes harm; a business's ability to influence the behaviour of others (for example, through contractual requirements, dialogue, and/or multi-stakeholder initiatives and approaches)

Market testing – an engagement exercise to listen to the supplier base and gain an understanding of the maturity and progress on particular issues, such as human rights

Notice to suppliers – notice provided by the public buyer at the pre-award stage to clarify for potential contractors that they need to be aware of potential human rights risks and should be prepared to disclose how such risks are being mitigated

Post-award measures – requirements that take effect after the contract is awarded and are evaluated during the term of the contract (also known as contract performance clauses)

Pre-award measures – requirements that take effect before the award of the contract and provide a basis for awarding the contract

Public buyer – the institution which undertakes public procurement and individuals connected to this institution (for example, policy makers, public buyers, contract managers). Other terms used to describe the institution include contracting authority, procurement body, procurement agency

Policy maker – individuals who have the authority to set or influence the policy framework of public procurement; the main decision makers of the implementation of a good practice but can also directly benefit from it if, for instance, the good practice enhances accountability

Public procurement – the process by which public authorities, such as government departments, local authorities, and state-owned enterprises, purchase work, goods or services from companies

Procurement cycle – includes the following activities: needs assessment, tender phase and contract award, payment and contract management, as well as monitoring and audit

Procurement policy objective – a desired outcome that policy makers want to achieve through public procurement

Remediation/ remedy –t he process of providing access to remedy for an adverse human rights impact and the substantive outcomes that can counteract the adverse impact; these may take a range of forms, such as apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions, as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition

Risk – the probability of an event occurring; non-technical risks relate to the managerial, legal, social and political issues of a business project or activity, whereas the technical risks are the physical, structural, engineering and environmental aspects

Services – Work, duty or labour performed by a contractor pursuant to a contract. Rendering of services may involve the associated provision of utilities or facilities if specified in the terms of the contract. Typical examples of services include security, catering, cleaning, travel management, event management, IT services, training, freight forwarding, and consulting

Sub-contractor – a party that carries out work for a contractor as part of a larger project

Supplier – a supplier supplies goods and services to the buyer

Supply chain – the network involved in the supply of goods and services to the buyer

Sustainable public procurement – a process whereby public organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life cycle basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst significantly reducing negative impacts on the environment

Stakeholders – a person, group or organisation with an interest in, or influence on, a business project or activity, as well as those potentially affected by it

Selection criteria – criteria which stipulate minimum human rights standards, capabilities, and experience a potential supplier must have to be considered in a procurement

Technical specifications – the totality of the technical prescriptions contained in the procurement documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority, such as quality levels, environmental and climate performance levels etc.

Tender – a type of public procurement procedure that involves bidding

Termination of a contract – cancellation of the contract before it is fully performed

UN Guiding Principles on Business and Human Rights (UNGPs) – an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity

Value chain – a value chain encompasses all the activities and materials that go in to goods or services. It covers the production of raw materials, manufacturing stages, transport, delivery, and end-of-life disposal. It includes activities of suppliers and sub-contractors

Vulnerable and at-risks groups – groups of individuals who, due to existing circumstances, are at increased risk of being subject to human rights abuses and violations

Works – all activities associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or activities such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the works themselves

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NOTES

1 The term public procurement is mainly used in the context of the EU legislation; other systems use other phrases to cover the same concept. For example, in the US, reference is generally made to governmental contracts or public contracts, and the World Trade Organisation relies on the term government procurement.
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