Driving change through public procurement: A toolkit on human rights for policy makers and public buyers (Road-testing version)

The objective of this Toolkit is to enable public procurement policy makers, buyers and contract managers, at central and local levels, to implement and enforce requirements that actual and potential suppliers respect human rights throughout their value chains.

The public procurement cycle often consists of procurement planning, the procurement process, and contract management. This Toolkit will highlight how requirements that actual and potential 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 requirements can be integrated into the large majority of procurement exercises.

Given variations between national public procurement regimes, this Toolkit outlines a general approach applicable across different legal and market contexts. However, there are likely to be national laws and policies relating to public procurement which may limit some of the general approaches outlined in this toolkit or allow for, and/or demand, more advanced approaches. Therefore, it is important to tailor the approaches outlined in the toolkit to align with national laws and policies.

This Toolkit lays out a range of approaches, from simple to advanced and from easily implementable to demanding (in terms of capacity, knowledge, and budget) and should be tailored to the national context depending on what can realistically be achieved.

This Toolkit is structured as follows:
A – Introduction
B – Guidance for procurement policy actors
C – Guidance for individual procurement practitioners

Chapters B and C can be read independently of each other. Therefore, if you are interested in practical ways to incorporate human rights in to procurement exercises, you could move straight from the Introduction to Chapter C.
Road-testing version – specific points to consider when reading

- Would it be more useful if this Toolkit were split into 2 companion volumes – Book One for Public Procurement Practitioners and Book Two for the lawyers, policy makers and planners?
- Are there any other good-practice examples we can highlight?
- Are the terms used in this toolkit relevant/accurate for your procurement context? Would it be helpful to include a glossary of key terms?

Deadline for feedback: **Monday 13 January 2020**

Please email: Daniel Morris  [damo@humanrights.dk](mailto:damo@humanrights.dk)
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November 2019

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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 as a means of realising sustainable development. Including requirements within public procurement that actual and potential suppliers respect human rights can help prevent human rights abuses from occurring, including modern slavery, child labour, human trafficking, excessive working hours, and unsafe working conditions, from occurring within state value chains.

INFOGRAPHIC – map of human rights abuses in state value chains

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 government. Investigations by the Danish 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. Furthermore, in 2012, order forms and designs for clothing carrying US military insignia were found in the smouldering remains of a clothing factory in Bangladesh in which 112 people were killed by a fire, in a building with no fire exit.

Including requirements that suppliers respect human rights can also be used as a means to realise the rights of vulnerable and at-risks groups by favouring them, or businesses which support them, in public procurement exercises.

INFOGRAPHIC – map of good practice

Public procurement is used in practice to support the rehabilitation of former prisoners (Uruguay), and the participation of women (Chile), persons with disabilities (Colombia), indigenous peoples (Canada), and veterans (USA) in business, for example. In South Africa public procurement has become a means of addressing the economic effects of the apartheid.²

Public procurement is a substantial component of the overall economy and gives states a great opportunity to influence global value chains in a positive or negative way. It represents an opportunity for states to use their leverage to encourage the uptake of sustainable business practice and responsible business conduct by the private sector.³ Indeed, requirements within public procurement that actual and potential suppliers respect human rights are already seen as a strong reason by suppliers to adopt measures to respect human rights.⁴ 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 exercise leverage over suppliers responsible for human rights abuses.⁵

INFOGRAPHIC – Public Procurement contribution to the global economy

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”.⁶ Public procurement accounts for 15-20% of global gross domestic product (GDP) across Organisation for Economic Co-operation and Development (OECD) States, public contracts account for 12% of GDP on average, World Trade Organisation (WTO) General Procurement Agreements commitments represent around €1.3 trillion in

What are value chains?
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.
business opportunities worldwide, and in 2016 globally public procurement contracts were estimated to total €2 trillion.
A1. The reason to act
There are several reasons to include requirements within public procurement that actual and potential 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. In addition, the state has an obligation to promote human rights and support actual and potential suppliers in meeting the business responsibility to respect human rights. Introducing requirements within public procurement that suppliers respect human rights is a recognised method of meeting these obligations.

Addressing risks and realising opportunities
The greatest risk arising from not exercising human rights due diligence is that harm comes to an individual. However, there are other risks associated with human rights abuses that public buyers and suppliers must consider, including legal, financial, political, and reputational risks. These risks can be large and are often interlinked, and include for example, the risk of cancelling contracts, re-running procurement exercises, and missing contractual deadlines.

When addressed, some legal, financial, political, and reputational risks can also be considered opportunities. This is especially true in relation to reputation; a supplier which takes steps to respect human rights can be viewed in an improved light by potential customers and investors. It is also relevant for a state and its public procurement bodies as a strong reputation on human rights can not only improve a state’s ‘brand’ but may also help a public procurement body attract employees who value human rights.

Leading by example
Public procurement provides an opportunity for states to lead by example and implement requirements that actual and potential suppliers respect human rights throughout their value chains. 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 address the risk of human rights abuses occurring in the state’s value chain. It provides an opportunity for states to realise their policy ambitions in practice by, for example, developing an inclusive labour market programme and integrating vulnerable and at-risk groups into the labour market, such as women or persons with disabilities.

Creating a level playing field
Requirements that actual and potential suppliers respect human rights when supplying goods and services to a state creates a level playing field for suppliers. Suppliers abusing human rights, by, for example, demanding excessive working hours or by not paying the minimum wage to deliver goods and services to governments quicker and more cheaply may gain an unfair competitive advantage over suppliers which respect human rights. Some suppliers are moving ahead with measures to respect human rights, yet when these measures are not recognised or valued in public procurement exercises it may create a dampening effect and hold back suppliers in proactively adopting further measures. States should create a level playing field to ensure that all suppliers play by the same rules and that measures taken by suppliers to respect human rights are valued to create a race to the top 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 human rights;
- Enjoyed by everyone equally, irrespective of nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status.

Human rights are set out in international and regional conventions, treaties and declarations. There are nine ‘core’ human rights treaties which articulate 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 additional ‘core’ human rights treaties expand on several rights including those of women, children, persons with disabilities, migrant workers and expand on the prohibition of racial discrimination, torture and enforced disappearances. The International Labour Organization (ILO) also has eight ‘fundamental’ conventions which articulate labour and workers’ rights.

International human rights instruments become binding on states when they sign and ratify them. When ratifying them, a state commits itself to taking the rights contained within an instrument and incorporate them at the national level.

A state’s human rights obligations are applicable to all public bodies procuring goods and services, from government departments to local councils, from 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 Public Procurement and Human Rights in Northern Ireland 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, noting 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.”

Some of the most widely used requirements within public procurement to ensure actual and potential suppliers respect human rights address:

- Child labour;
- Forced labour and modern slavery;
- Human trafficking;
- Excessive working hours and low wages;
- Freedom of association (for example, joining unions);
• Unsafe working conditions.

In September 2018, the UK along with Australia, Canada, New Zealand and the 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”.

Human rights requirements within public procurement have also been used to promote the rights of:
• Persons with disabilities;
• Women and children;
• Former prisoners;
• 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:

“According to the latest survey conducted by the National Disability Service, 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 further adopted a programme to promote the economic participation of businesses led by women in the public market to contribute to gender equality and address the structural disadvantages faced by women in the labour market in Chile.

The UN Guiding Principles on Business and Human Rights (UNGPs) detail the state duty to promote awareness off and 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. The UNGPs were endorsed by the 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 draw their authority from pre-existing international human rights laws and explicitly affirm that the state duty to protect against adverse human rights impacts by third parties extends to situations where a commercial “nexus” exists between public actors and businesses, such as when government bodies purchase goods and services through public procurement.

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’. The UNGPs state that:

“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.13

A3. Human rights due diligence
Human rights due diligence is a process laid out in the UNGPs to help business prevent human rights abuses from occurring. The responsibility for businesses of all sizes to undertake human rights due diligence has been reinforced by UN bodies, the OECD, among others,14 and some states are developing laws and policies to implement these obligations, including the French Corporate Duty of Vigilance Law and the Dutch Child Labour Due Diligence Law.

Human rights due diligence is 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. 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.

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 OECD have also produced ‘Due Diligence Guidance for Responsible Business Conduct’. 
Requirements within public procurement that suppliers respect human rights is a means for a public procurement body to manage risk through their own human rights due diligence process. Such requirements also incentivise suppliers to manage risk through their own human rights due diligence processes. The table below explores examples of what this could look like in practice.

<table>
<thead>
<tr>
<th>Policy commitment</th>
<th>Procurement agencies could:</th>
<th>Public procurement exercises and contracts could:</th>
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<tr>
<td>This step involves developing and publishing a human rights policy commitment, whether as an individual policy or as a chapter within pre-existing policies.</td>
<td>• Develop an internal policy commitment on human rights or integrate human rights policy objectives within existing policies; • Share their human rights policy commitment with all relevant stakeholders (including staff and suppliers) and explain how this will work in practice; • Encourage de-centralised procurement bodies to adopt a policy commitment to human rights.</td>
<td>• 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.</td>
</tr>
<tr>
<td>Risk assessment/assessment of impacts</td>
<td>• Undertake a mapping exercise of state value chains, beginning with the higher tiers, but moving in to lower tiers as the process is repeated;</td>
<td>• 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</td>
</tr>
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occurring within operations and value chains.

| | • Train and support staff to understand and carry out human rights risk 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 to product categories and upcoming tenders. | will impact how extensive such requirements can be;  
| • Require suppliers to identify and assess human rights risks;  
| • The procurement agency 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. |

### Acting upon the findings of the risk 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. |

### Tracking and monitoring

This step requires tracking and monitoring the effectiveness of the measures taken to address the identified risks.

| | • Ensure an effective internal grievance mechanism is in place;  
| • 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. | • 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. |

### 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

| | • 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, | • Require suppliers to publish information such as a human rights policy, an action plan to address human rights risks, or details about their internal grievance mechanism;  
| • Require suppliers to share their human rights policy with their own suppliers;  
| • Require suppliers to share their internal grievance mechanism with their own suppliers; |
| languages and with understandable terminology), in accordance with national laws on transparency and accountability. | 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 report their actions to the procurement body on a regular basis;  
• Require that suppliers commit to support their suppliers;  
• Design measures or requirements which are applicable regardless of the size of the supplier. |

In the EU, a public procurement agency can only include requirements for suppliers that are linked to the subject matter of the procurement. For example, it is not possible to require that a supplier applies certain employment terms and conditions for employees who are not performing services in relation to the relevant contract. (see section B1.3 on Public procurement instruments for more information).

This Toolkit explores what human rights due diligence measures mean in a public procurement context in greater detail in subsequent chapters.
B. Guidance for procurement policy makers

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

- Explain the legal basis for states to include requirements within public procurement that actual and potential suppliers respect human rights;
- Explain how to frame human rights as a policy objective;
- Identify what system-wide planning is necessary to include requirements that actual and potential suppliers respect human rights.

B1. Legal and policy procurement frameworks and human rights

There is a legal basis to include requirements within public procurement that actual and potential suppliers respect human rights. International, supranational/regional, and national laws require governments to protect and respect human rights. Besides, governments have legal obligations and policy commitments to sustainable development transparency, corruption, and accountability.

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

B1.1 Human rights instruments

The UN 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.¹⁵

The UNGPs were endorsed by the 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,¹⁶ numerous national governments,¹⁷ a range of international and regional organisations (including the OECD and 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.¹⁸ Accordingly, it can be said that governments’ obligations to protect human rights extend to protecting human rights within their value chains.¹⁹

The UNGPs draw their authority from pre-existing international human rights laws, explicitly affirm that the state duty to protect against adverse human rights impacts by third parties extends to situations where a commercial “nexus” exists between public actors and businesses, such as when government bodies purchase goods and services through public procurement.²⁰ 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.”²¹

The UNGPs elaborate on existing legal obligations under international law and note that states should require, where appropriate, state-owned or controlled enterprises to exercise human rights due diligence.²² In addition, they clarify that this duty extends to situations where governments enter into commercial relationships, including through public procurement.²³ 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.

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

The UNGPs detail that States must ensure ‘policy coherence’, in other words, alignment with human rights obligations of standards and policies across all governmental departments, agencies, and other state-based institutions that shape business practices, 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, they have a responsibility to respect human rights and the state has a duty to implement laws, policies, and guidance to ensure that businesses meet their responsibility to respect human rights. The UNGPs identify that this responsibility applies “to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure”. The responsibility may cover all suppliers regardless of size, but measures to meet this responsibility should be cognisant of the varying capacities and resources of a multi-national enterprise in comparison to an SME.

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. According to www.globalnaps.org as of October 2019, of the 23 states with NAPs, 22 have included a specific focus on public procurement.

Recent policy developments on public procurement and human rights
Recently a range of bodies have developed recommendations and guidelines on public procurement and human rights. The Organisation for Economic Co-operation and Development (OECD) produced the OECD Guidelines for Multinational Enterprises which are a set of recommendations addressed by states adhering to the OECD Declaration on International Investment and Multinational Enterprises to multinational enterprises operating in or from these states on responsible business conduct. They address topics including human rights, employment and industrial relations, environment, combating bribery, and science and technology. A concept note from the OECD highlights that utilising 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.
- Governments expect business to behave responsibly, and should lead by example. Adopting RBC principles in the procurement process, such as supply chain due diligence, creates a better environment to deliver better outcomes.
- A growing body of evidence indicates that RBC pays off for business, and these benefits, such as reduced costs, higher quality products, and more efficient supply chains, also apply to governments.
• Governments have a national interest to encourage other countries to integrate RBC considerations into their public procurement processes in order 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 as highlighted in the US Trafficking In Persons Report of June 2019, which states that “[r]ight now 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 with the aim “to provide a practical tool to assist OSCE participating States and Partners for Co-operation in implementing concrete measures to prevent trafficking in human beings in supply chains. The publication highlights how States can implement legislation and policies that promote transparency to ensure that public supply chains are free from trafficked labour; and 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, whereas other states need to pass national laws to implement human rights conventions. International standards set a minimum benchmark and states can go beyond these and implement increased human rights protections of their own design. It is therefore important to identify how national human rights protections should be interpreted as addressing public procurement activities.

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 and European 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.

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.

The role of business in achieving Goal 8 on decent work and economic growth, Goal 9 on industry, innovation and infrastructure and Goal 12 on responsible consumption and production is evident but participation and change by business is needed to fulfil the vast majority of the goals and targets.
Consequently, a vast number of business associations and individual businesses have embraced the SDGs, and various platforms and initiatives have emerged to harness the power of business in realising the SDGs. Today, the 2030 Agenda is a leading narrative about the role of business in society.

The transformative potential of public procurement as a driver for human rights and sustainable production and consumption is highlighted in the 2030 Agenda for Sustainable Development (2030 Agenda) under SDG 12.7 which 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 to not only 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 measures 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. 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. 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. 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).

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.”
In addition to 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.\textsuperscript{34}

| Including requirements within public procurement that actual and potential 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. \textit{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 \textit{ISO 26000 on Social Responsibility} and is guidance rather than a certifiable standard, but 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.

\subsection*{B1.3 Public procurement instruments}

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

\textbf{International}

\textit{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.

The \textit{World Trade Organization (WTO) Agreement on Government Procurement} (1994) is a pluri-lateral agreement within the framework of the WTO. 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.
A revised text was adopted in 2012 which allows for technical specifications which “promote the conservation of natural resources or protect the environment” and highlights that evaluation criteria may include “environmental characteristics”.

Supranational/ regional

**The European Union framework**

There are several basic principles governing the public procurement tender procedure which contracting authorities must observe as a framework “code of conduct” for all tender processes.

As a general principle for the EU public procurement law, Article 18(1) of Directive 2014/24/EU stipulates a principle of equal treatment, which ensures that all tenderers in public procurements are subject to the same conditions for submission and evaluation of tenders and all tenderers are treated equally. This means, inter alia, that all tenderers must get access to the same information at the same time so that no single supplier gains any advantage or suffers losses due to unequal conditions.

The provision in Article 18(1) also 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.

Article 18(1) stipulates a principle of transparency, which means that all information provided in the procurement must be open, accessible and predictable for all tenderers, to ensure openness and publicity in all stages of the tender process. Further, the principle of transparency entails that decision-making in a public procurement must be rules-based, i.e. in accordance with the rules and criteria set forth and published by the contracting authority.

In addition to the principles above, EU directives on public procurement also set out important basic principles regarding mutual recognition and non-discrimination. The principle of mutual recognition implies that any report, certificate or similar issued by the authorities of any member state shall also be valid in all other EU and EEA states. The principle of non-discrimination entails that contracting authorities are prohibited from discriminating against suppliers due to their nationality, for instance through citizenship or country of operations.

Article 18(2) specifies the basic principles for including social requirements (including human rights protections) in public procurements. The article 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.

National
At the state level there are likely to be 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 their human rights obligations, providing that measures to do so respect other laws relating to procurement.

The Belgium Public Procurement Act of 2017 requires that suppliers and sub-contractors comply with environmental, social and labour laws, and allows for failure to do so to 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 and can introduce minimum standards as technical specifications applicable across the lifecycle of the goods and services, including the recycling stage.

United States rules on procurement and human rights
The rules for procurement by United States federal agencies are contained in the Federal Acquisition Regulation (FAR). The FAR consolidates public laws adopted by Congress, Executive Orders issued by the President, and treaties that have the force of law in the United States. 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. The most extensive supplement is the Defense Federal Acquisition Regulation Supplement.

The federal procurement framework in the United States does address 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, in an effort to prevent human trafficking in contracted work both domestically and internationally. 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 United States with an estimated value exceeding USD $500,000 are required to maintain a compliance plan that is certified annually.

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. 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 or the District of Columbia.

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, and contractors are required to pay all employees in the United States the prevailing wages and benefits for the locality in
which the work is performed. State and local governments within the United States have implemented additional regulations on human rights (e.g. the California Transparency in the Supply Chains Act 2010 (SB657)).

Sub-national
For some states, such as federal states or states with regions which can legislate, there may be laws at a sub-national level which address public procurement. These sub-national laws can exist where there are no national laws and if there is national law, these local laws can be more advanced.

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 £5 million or more (excluding VAT) to develop and review a procurement strategy annually before the start of the next financial year. Each procurement strategy should be proportionate to the size and spend of the organisation. However, there are some fundamental principles which will apply in each case. In general terms, the procurement strategy should demonstrate how the organisation’s approach to procurement supports delivery of its broader aims and objectives. 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.
B2. Human rights as a policy objective
There is not a one-size fits all approach to including requirements within public procurement that actual and potential suppliers respect human rights. Human rights requirements can be framed within a current policy objective or developed as a standalone policy objective.

The EU has adopted several directives to allow public authorities in members 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.” The landmark 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.43

Lowest cost, best value for money, or sustainable procurement?
Ensuring best value for money is gradually becoming a well-established policy objective in public procurement around the world, from the previous position of the cheapest price. Buying on the basis of the cheapest price alone has been the cause of human rights abuses in certain sectors, including fast fashion, and highlighted 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.

Central to the concept of best value for money is an understanding that public funds should be used to achieve the best results to meet requirements. In the past this often meant looking for the lowest price. In recent years value for money has evolved to include several other considerations, including human rights, the environment and sustainability.

With the introduction of the 2030 Agenda in 2015, there has been an increasing focus on SDG 12.7 on sustainable public procurement, with more states 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.

Colombia 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.”

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
Select one or all human rights?
There are a lot of current examples of policy objectives to promote the inclusion of human rights within public procurement from around the world. These originate from a variety of sources including national legislation and policy to decisions by ministers and local municipalities. In practice these policy objectives often address specific human rights issues rather than addressing all human rights.

A policy position on human rights can be broad and address the risk of violations and abuses of all human rights. However, if it is not possible to simultaneously address the risk of all human rights abuses and violations, a policy should be tailored to prioritise addressing the most severe risks of human rights abuses and violations. This should be based on a risk assessment to be revisited on a regular basis (see Section C1.1 and the Human Rights Impact Assessment Guidance and Toolbox).

The UK adopted the Modern Slavery Act 2015. Crown Commercial Service have 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.

Human rights as a primary or secondary policy objective?
The OECD provides that:
“Primary procurement objective refers to delivering goods and services necessary to accomplish government mission in a timely, economical and efficient manner.”

“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.”

However, there is a tension in treating human rights as a secondary policy objective given the state obligation to protect human rights. In any case, human rights should not be presented as an optional extra or a ‘nice to have’ objective. This can be achieved by framing human rights within existing primary objectives, such as best value for money, most economically advantageous tender, or supply chain risk management.

The Belgium 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).

Empowering vulnerable and at-risk groups
The core focus of including requirements within public procurement that actual and potential 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 vulnerable and at-risks
groups by favouring them, or businesses which support, employ, or are owned by them, in public procurement exercises. A decision to favour a particular group should be based on a risk assessment (see Section C1.1 and the Human Rights Impact Assessment Guidance and Toolbox) and focus should be placed on realising the rights of the most vulnerable and at-risk persons.

South Africa has developed Broad-Based Black Economic Empowerment to redress inequalities of the Apartheid. One form of implementation is through public procurement legislation which grants preferential treatment to black owned businesses. The approach is nuanced by sector and size of business and is based on a verification scheme which businesses can voluntarily choose to adopt to increase their score in public procurement tender processes.

The United States 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 five percent of all federal contracting dollars to small disadvantaged businesses each year;
- at least three percent of all federal prime contracting dollars to HUBZone-certified small businesses each year;
- at least five percent of all federal contracting dollars to women-owned small businesses each year;
- at least three percent 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 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.

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%.
B3. System-wide planning
It is important for policy makers and planners to develop a systematic approach to including requirements within public procurement that actual and potential suppliers respect human rights. This is essential to maximise impact and efficiency and support front-line staff in implementing human rights protections within public procurement.

This section is structured around these issues:
B3.1 Increasing leverage
B3.2 Coherence across government
B3.3 Engaging stakeholders
B3.4 Supporting procurement personnel
B3.5 Supporting suppliers and market dialogue
B3.6 Continuous evaluation and learning
B3.7 Resources
B3.8 Remedy

B3.1 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 procurement, leverage can be exerted by a state procurement agency over its actual and potential suppliers, and likewise by a supplier to its suppliers and sub-contractors.49

Individual procurement exercises may not have the leverage needed to influence actual and potential suppliers in a government buyer’s value chain. Grouping procurement exercises together to make them larger, in collaboration with other public procurers, or through framework contracts, can increase purchasing power and promote common standards for suppliers. When public buyers adopt common standards, this increases the incentive for suppliers to meet them and avoids creating a range of different requirements.

A prerequisite for collaboration between public procurers, both collaborations between public procurers within the same state and collaborations across borders, is mutual recognition of other public buyers’ policies, provided that they set equivalent standards. 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 contracting authorities may not have the necessary resources to develop relevant criteria and can instead “piggy-back” on authorities that already have done so. This also minimises the risk of suppliers not
answering the call for tender because they simply do not see the added benefit of adapting to requirements in contracts with a relatively low value.

**Framework agreements**

Many procurement bodies operate framework agreements where a procurement body establishes an agreement with a supplier or a range of suppliers that allows the procurement body to place orders 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. In some jurisdictions framework agreements are established for voluntarily use by state bodies, self-governing institutions, and local government institutions (e.g. cities and regions). Framework agreements are a good way to increase leverage and influence a supplier base.

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The City of Madison, Wisconsin, 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 United States. Each agency has the opportunity to join in the bid, which helps agencies with limited resources to join a bid for tender where the ground work of setting the requirements has already been done.

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**Electronics Watch** is an affiliate-based organisation, engaging with contracting authorities 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, and platforms to engage with the sector. This model allows Electronics Watch to coordinate sector engagement for all affiliates making the leverage towards the sector much stronger.

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**Collective monitoring and information sharing**

Value chain mapping and risk assessment, third part audits and enabling continuous learning from these actions is greatly strengthened through collaboration. Many contracting authorities purchase largely the same goods and services, which might result in a lot of duplication if each one of these contracting authorities needs to conduct the same risk assessments and audit the same production sights. Instead, contracting authorities should find ways of sharing information gained by conducting for example risk assessments and audits, as well as consider allocating responsibilities between themselves.

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The Swedish central purchasing body SKL Kommentus, in addition to entering into framework agreement for municipalities and counties, 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.

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**B3.2 Ensuring coherence in implementation**

The structure of most public bodies means that those in charge of procurement policy and practice are likely to be in a different structure than the experts on human rights, or on other areas related to procurement such as sustainability and the environment. It is therefore important to ensure cohesion between state bodies when including requirements within public procurement that suppliers respect
human rights to ensure clear responsibilities and lines of accountability. This includes horizontal coherence between different central bodies and different local bodies, but also vertical coherence between bodies at central and local levels. Ensuring coherence can begin with joint trainings, dialogue and engagement at various levels during the policy design and training design phases, and the distribution of key contact directories. To oversee the inclusion of requirements that suppliers respect human rights a working group with members drawn from relevant government bodies can be established.

The Dutch government procures around €73.3 billion worth of work, services and supplies every year, with the bulk of public procurement occurring at the local level. The Dutch government, together with regional and local authorities, wants to stimulate the market for sustainable products and established a mechanism called PIANOo. This 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 responsibility for the procurement of goods and the responsibility for contract management often sits 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.

Many public procurers or suppliers will 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 may have well codified environmental requirements for their procurement, and suppliers may have a quality control audit regime in place to minimise defects in their production process for all clients. It is beneficial, where possible, to minimise redundancies across reporting systems, and leverage the existing infrastructure, training, and management systems to make compliance with new human rights performance monitoring easier. Integrating human rights performance monitoring into existing structures has the dual benefits of minimising 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?). More advanced and effective human rights requirements need 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?). This requires systems, including e-procurement platforms, which allow human rights indicators and analysis to be incorporated in the procurement process, and provides clearly defined space for public buyers to exercise their judgment and make decisions based on qualitative data. This comes with challenges as some procurement systems, including e-procurement software, can limit the ability for public buyers to exercise their own judgment as means to combat corruption, for example. More advanced requirements also require higher levels of human rights knowledge among staff, which requires training and funding to deliver such training.

B3.3 Engaging stakeholders
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. It is important to engage stakeholders in the design of systems which affect them. In a procurement context it is possible to see both internal and external stakeholders:
**Internal stakeholders**
This includes staff who will be working with the design and implementation requirements that suppliers respect human rights, as well as those who may be impacted. This may include staff from different parts of the government, including different departments or ministries (for example, justice or human rights), different levels of the state (for example, regional and local government), staff from oversight entities as well as important stakeholders from other branches of government (for instance, legislative and judicial).

**External stakeholders**
This includes potential suppliers, supplier associations, workers, worker organisations, human rights advocates and other interested civil society actors, as well as communities which have been impacted, or are potentially impacted by human rights abuses in the state’s value chain. To ensure active participation, external stakeholders will need to be informed of the process to include requirements that actual and potential suppliers respect human rights and be provided with opportunities to share their opinions. This can be achieved, for example, through dialogues, workshops, consultation exercises and receiving written submissions.

In many states public procurement and human rights issues will be new to many stakeholders, both inside and outside of the government. Where this is the case, stakeholders may require information or capacity-building, such as training, to allow them to participate effectively and contribute meaningfully to the formulation of effective requirements that suppliers respect human rights.

The City of London has a **social value panel** which represents a range of rights holders. The panel is presented with proposals from the procurement team on requirements that suppliers respect human rights within procurement processes 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.

**B3.4 Supporting procurement personnel**
The UNGPs highlight that “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.”

This is important for public procurers, 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. Failure to ensure this might pose a risk of suppliers requesting a judicial review of the procurement process if they feel that they have been unlawfully treated in a public procurement process. If a procurement body has
codes of conduct, performance monitoring, checklists, and evaluation systems in place, for example, human rights considerations should be integrated into them.

Consequently, information, training and support through tools and guidance is vital to help staff comprehend new concepts and requirements when including requirements that actual and potential suppliers respect human rights, gain clarity of expectations, ensure their buy-in to implementation, and mitigate the risk of judicial review. In many cases, some form of online training will likely prove to be the most cost-efficient option for larger workforces. Ideally, the tools and resources would be integrated into existing training systems, so that updated training can be provided to staff as needed, along the same channels they are used to referencing in their work.

The Scottish government has developed a range of public procurement tools including:
- A Flexible Framework Assessment Tool which helps public buyers determine and implement relevant actions that will 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, health and safety.

In the United States, 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 better 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) www.responsiblesourcingtool.org includes an in-depth examination of eleven key sectors and 43 commodities at risk for human trafficking or trafficking-related practices. RST also 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 subcontractor 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. The United States Office of Management and Budget released the Anti-Trafficking Risk Management Best Practices & Mitigation Considerations Memorandum in 2019 which describes best practices, resources, and risk mitigation techniques that government contracting officers can use to help contractors effectively meet their responsibilities under the Federal Acquisition Regulation.
The London Universities Purchasing Consortium, University of Greenwich, and Chartered Institute of Procurement and Supply has produced *Protecting human rights in the supply chain, A guide for public procurement practitioners*.

The 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 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 systems and databases to effectively incorporate this new work stream of including requirements that actual and potential suppliers respect human rights within their day-to-day job. If possible, building this support into existing procurement infrastructure may present the most cost-effective option, but will still entail the not-insignificant costs of adapting and adjusting large information technology systems for new applications.

Practitioners often express concerns on the practical implications of including requirements that suppliers respect human rights in staff capacity. However, there are some simple approaches which can address these concerns:

**Begin with pilot projects**
Implement human rights requirements in a limited controlled pilot projects can be a good way to test an approach before rolling it out more broadly or across different sectors and ensuring that systems and process, knowledge and capacity are in place (See Section C1.1 on Human rights risk identification and assessment on which procurements to select for a pilot project).

**Updating systems and procedures**
Systems and procedures need to be in place to allow staff to work with requirements that actual and potential suppliers respect human rights. One of the greatest needs is that IT systems allow for, and support, staff in this regard. This may require introducing new elements to e-procurement software and developing clear processes on how to use this.

**Adopting internal policies with guidance and training**
Clear internal policies can provide clarity and help manage expectations on what can be achieved and what is required of staff. This can be accompanied by training and capacity building to ensure that staff have the skills, knowledge, and confidence to implement and enforce requirements that suppliers respect human rights.

**Adopting a risk analysis approach**
To maximise staff capacity a procurement body can adopt a systemic approach to risk analysis based on human rights risk and on the size of the procurement exercise. This can include establishing categories based on thresholds of risk or financial size of the procurement exercise which then dictate what types of practical human rights requirements should be included at different stages of a procurement process to address the identified risk. Each category can have a pre-selected list of human rights requirements, appropriate to geography, sector, type of risk, as templates. Such an approach can also include measures.
on how to address risks which arise during the contractual period, whether through alleged violations, or, for example, through contractually mandated audits.

Establishing a knowledge database

A knowledge database can act as a compendium of good practice to effectively share good practice among staff, ensure a coherent approach which is not overly burdensome, and avoid knowledge disappearing when a key staff member leaves. A key use of such a database would be to record a pre-selected list of human rights requirements to address the identified risk. Another key use would be to provide a compendium of relevant external sources of information, and internal contacts.

Copying other approaches

Copying or adopting relevant elements of a successful approach from elsewhere can work; a lot of current approaches have drawn from what public buyers, in states like Sweden, have shared. In Sweden, the National Agency for Public Procurement (Sw: Upphandlingsmyndigheten) provides a free of charge sustainable procurement criteria library with template requirements of various levels, including in requirements relating to social sustainability.

B3.5 Supporting suppliers and market dialogue

Including requirements within public procurement that actual and potential suppliers respect human rights aims to raise the standards of suppliers and does not aim to exclude or limit supplier access to public procurement contracts. To ensure that suppliers can improve and meet human rights requirements the UNGPs highlight that states should provide effective guidance to business enterprises on how to respect human rights and establish measures to implement human rights due diligence. This can include tools and guidance, training, and dialogue. The market testing stage provides an opportunity to engage potential suppliers to see what type of support they require.

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. Guidance and support can be tailored to meet the differing needs of suppliers throughout the supply chains (for example, lower tiers in the value chain may include more SMEs which have different needs to multi-national enterprises).

Support for suppliers should also reflect how demanding the requirements are on the suppliers and their sub-contractors. Some sectors and some businesses, such as SMEs may require more support than others.

Suppliers often express concerns on the implications of including requirements that actual and potential suppliers respect human rights for their business. Some of these concerns can be addressed by:

Investing in the market testing stage

This allows a procurement body to understand the current level of understanding and implementation of requirements that actual and potential suppliers respect human rights, listen to supplier’s and identify where support can be provided, and highlight to the market what will be expected of them.

Providing practical guidance and training

Guidance and training for suppliers and potential suppliers with practical examples on what is required can be crucial to ensuring that requirements that suppliers respect human rights become real on the ground. A special focus on SMEs may be required.

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 (the OECD MNE Guidelines and the UNGPs). The RBC team use International Responsible Business Conduct Agreements which are partnerships between businesses, NGOs, trade unions, and governments, to stimulate business 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 but provides an understanding of how to manage suppliers. Furthermore, public purchasers in Denmark can find information produced by a coalition of state actors on the responsible buyer. In 2019, the Danish OECD National Contact Point and the Danish Institute for Human Rights produced a report highlighting how municipalities and other public purchasers can act with respect for and respect for human rights in public procurement.

B3.6 Continuous evaluation and learning
Continuous evaluation and learning is a critical concept. The challenges to human rights compliance in the global value chains of most public buyers and high tier suppliers are widespread and can change depending on many factors including labour migration patterns and legislation and policy developments. Moreover, identifying and abating a single abuse or structural concern does not necessarily prevent a recurrence or the emergence of other human rights issues. Therefore, it is vital that monitoring and control systems are continuously activated, rechecking compliance, and that they evolve and improve to achieve better results over time. In effect, the work of monitoring, evaluating, learning and updating should never conclude. However, suppliers can differ immensely and what can be achieved with large multi-national suppliers in South America may differ vastly from what can be achieved with smaller suppliers in the Middle East. As such it is important to recognise that measures to achieve better results over time are relative and should be tailored to the context.

Electronics Watch supported the Swedish County Councils 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.” (Electronics Watch, Public Procurement and Human Rights Due Diligence to Achieve Respect for Labour Rights Standards in Electronics Factories: A Case Study of the Swedish County Councils and the Dell Computer Corporation)

B3.7 Resources
It is a simple reality that the level of resources allocated to designing and implementing requirements within public procurement that suppliers respect human rights will directly impact their effectiveness. Some elements can be automated (for example, through check-lists style approaches), but implementing and enforcing effective requirements human rights requirements cannot solely rely on quantitative measurements and working with qualitative measurements will require input and oversight by staff who have a level of expertise and training in human rights. There are clear costs associated with training staff, and additional costs to updating systems and processes and support suppliers, for example.

Identifying sufficient resources can be a challenge for public procurement bodies which often have their budgets set by other state or government bodies. However, undertaking a process to introduce requirements within public procurement that actual and potential suppliers respect human rights without sufficient resources carries its own legal, economic, and reputational risks.
The Swedish county council model has three full time staff and a budget of 5 million Swedish krona per annum (£470,000). This budget covers the three full time staff and follow-up activities such as audits. The budget is provided by the 21 county councils which contribute 50 Swedish cents per inhabitant. There are eight regional co-ordinators and a contact person at each of the 21 county councils with the budget provided by the county councils within a region. The Stockholm region has decided to employ a full-time person as regional coordinator, whereas others have provided certain 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.

There is a large range of good practice examples in other procurement systems, and in other areas of public procurement relating to sustainability and the environment, which can be taken and adapted with relative ease, which can help reduce costs.

The City of London have taken the publicly available Swedish country council Code of Conduct and are tailoring to the UK context by including in relevant UK legislation, such as the Modern Slavery Act. The City of London will then share this with the other London boroughs to utilise. With all suppliers using a single code it should maximise leverage and increase their ability to effectively improve requirements that businesses respect human rights within their value chain.

B3.8 Remedy

Human rights impacts can occur at different stages of the value chain, and public purchasing bodies should consider establishing an internal grievance mechanism to provide remedy to victims, in line with the UNGPs.

<table>
<thead>
<tr>
<th>Advantages of an internal grievance mechanism</th>
<th>Limitations of an internal grievance mechanism</th>
</tr>
</thead>
<tbody>
<tr>
<td>It can provide a direct route to remedy for victims without requiring them to engage in more formal and costly judicial remedy processes;</td>
<td>It may require legislation or policy to establish a mandate for the mechanism;</td>
</tr>
<tr>
<td>It provides an early warning system so that human rights abuses can be addressed early and prevent ongoing or escalating abuses;</td>
<td>An effective internal grievance mechanism requires resources and dedicated staff capacity;</td>
</tr>
<tr>
<td>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.</td>
<td>It is unlikely that workers at lower tiers of the state’s value chain will have knowledge of the existence of the public procurement body, let alone its grievance mechanism.</td>
</tr>
</tbody>
</table>

Grievance mechanisms should be open to employees, suppliers, sub-contractors and open to individuals and communities impacted by actual or potential human rights abuses in the procurement bodies’, supplier’s, and sub-contractor’s operations. Internal grievance mechanisms should not prevent victims from accessing traditional state-based legal remedies. Remedies can include access to relevant information, public disclosure of the truth, cessation of any on-going abuse or violation, guarantees of non-repetition,
adequate, effective and prompt reparation including compensation, rehabilitation, an apology, public memorials, and disciplinary actions or punishment against those responsible.

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) has 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 a number of languages used in the region.

In 2019 the International Olympic Committee has subsequently developed an Olympic Games Guide on Sustainable Sourcing highlighting the importance of grievance mechanisms and that they align with the UNGPs.55
C. Guidance for procurement practitioners
This section is primarily designed for public procurers and contract managers undertaking procurement exercises. 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 and provide examples of how this has been done in practice;
- Highlight the advantages and limitations 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:

C1 Pre-tender planning
C2 The procurement process - Pre-award measures
C3 The procurement process - Post-award measures
C4 Contract Management

Public procurement consists of three stages; procurement planning, the procurement process, and contract management. 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, to buying common goods such as stationery, furniture, and foodstuffs.

C1. Pre-tender planning
Pre-tender planning is integral for human rights requirements to be included at the subsequent stages of a procurement process and should be prioritised at the outset.

This section is structured around three components of pre-tender planning needed to include requirements that suppliers respect human rights effectively:

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
The first step in including requirements that actual and potential suppliers respect human rights within public procurement exercises is to identify and assess the risks of negative human rights impacts occurring in your 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 your value chain, it is necessary to undertake research into whether there are historical or ongoing abuses of human rights related to the goods and services to be procured. This requires knowing your value chain to identify the relevant risks which come from operating or having value chains in specific geographic regions, countries, sectors, or specific businesses. Certain risks are common to sectors or to geographic regions. This often means that these risks are likely to have been highlighted previously by others, for example, purchasing garments in South East Asia brings particular risks that have been well documented including child labour, modern slavery and poor labour conditions.

### Risks and impacts

The terms ‘risks’ and potential ‘impacts’ largely overlap and 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 rather than risks to individuals. The human rights understanding of actual and potential impacts or risks is centred on an individual as the rights-holder.

A risk assessment can be done through desk research or it can involve an in-depth analysis through field research, dependant on resources and capacity. It is necessary to consider a wide spectrum of risks in the procurement planning stage, as other areas could also have an impact on human rights, such as the environmental and corruption.

A risk assessment should take the following in to account:

- Be based on international human rights standards and address all rights;
- Be an ongoing process, which can be started at the beginning of a procurement process;
- Focus on actual and potential adverse human rights risks;
- Identify the human rights risks in your own activities and in your value chain of your suppliers and
- Consider the aggregative or cumulative effect of activities of multiple business operations in the same area;
- Focus on the human rights risks to individuals rather than risks to the procuring body. Such individuals can include the end user (especially where services are being provided), the contractor’s staff (i.e. the first tier of the value chain for the procurement authority), and workers are further tiers down the value chain;
- Look at risk across the full lifecycle of goods and services, including the raw materials production stages, the manufacturing stages, the transport stages, the delivery stages, and the end-of-life disposal stages;
- Involve meaningful consultation with potentially affected groups and other relevant stakeholders as appropriate to the size of the procurement process;
- Be gender-sensitive and pay particular attention to any human rights impacts on individuals from groups that may be at heightened risk of vulnerability or marginalisation;
- Consider the interrelated risks to the environment.

A range of practical tools and guidance exist to help identify risk and undertake a risk assessment, such as:

- The Difi [High Risk List](#)
- The CSR [Risk Check](#) tool
- The Children’s Rights and Business [Atlas](#)
- The [Responsible Sourcing Tool](#)
- Human Rights and Business Dilemmas Forum
- [The Business and Human Rights Resource Centre](#) contain up to date information which can inform risk assessments
- The Swedish National Agency for Public Procurement sustainable procurement criteria library
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 their procurement processes focusing on risks to three specific groups; end users, the contractor’s staff, and staff in a potential contractor’s sector/ previous identified historical issues.

A risk assessment can be done for specific procurement exercises or for groups of similar procurements. Some procurement bodies pool resources and undertake joint risk assessments with other public procurement bodies. It is possible to utilise the information from risk assessment undertaken by others, although human rights risks can alter over time.

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 as resources 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 created equal and there is no list of priority of human rights. The purpose of establishing risk severity is therefore not to establish which risks need to be addressed, but to determine the order of priority in which the identified risks should be addressed if they cannot be addressed simultaneously.68

Severity is determined by the scope (number of people affected), scale (seriousness of the impact) and irremediability (any limits to restore the individual impacted to at least the same as, or equivalent to, her or his situation before the adverse impact occurred). However, severity is not an absolute concept, it involves professional judgment, dialogue, consideration of the interrelatedness of impacts and long-term consequences. The severity and type of risks will dictate what human rights requirements to mitigate the risk should and can be incorporated across the procurement lifecycle.

There are indicators that can flag to an authority that there might be more severe risks involved, such as:

- 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, including reports on states, sectors and specific businesses or where known issues exist where the greatest risks in the value chain typically occur?
- Does the labour typically used to produce or deliver the goods or service leave people at a heightened risk of human rights abuses occurring? For example, is there manual labour, mass production, home production, use of hourly, unorganised, unskilled or seasonal labour?
- Does the nature of any activity throughout the value chain to produce, deliver, or dispose of the goods or services create a heightened risk of human rights abuses occurring for those working in the value chain, end users and/or the public? For example, will workers come in to contact with harmful chemicals in the production and/or disposal of a product (e.g. building materials like asbestos)? Will workers have to transport goods through conflict zones on dangerous roads? Are toxic chemicals used in value chain which could escape and harm people?
- Do the goods or services carry an inherent risk? For example, are security guards employed who carry (fire)arms? Is a product environmentally damaging? Is people’s sensitive personal data gathered and stored?69

A public buyer should be cognisant that onerous demands and requirements placed on suppliers by the public buyer can increase the risk of human rights abuses occurring in the state’s value chain. This can
include, for example, contractual requirements for a supplier to be flexible and to produce higher quantities in shorter timeframes at short notice. These factors should form part of a risk assessment.

The 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. It identifies a range of high risk characteristics for modern slavery based on industry type, nature of workforce, supplier location, context in which the supplier operates, commodity type, business/supply chain model.

Procurement exercises which include higher risks of human rights abuses occurring will require more immediate attention and resources to prevent abuses occurring. The size of the procurement exercise (in terms of budget) is also relevant as larger procurement exercises provide larger leverage to influence the market. As such, grouping procurement exercises increases the overall spend and means more effective requirements that suppliers respect human rights can be included. It is possible to create a system of categories based on the risk of human rights abuses occurring and on the size of the procurement exercise.

<table>
<thead>
<tr>
<th>Category</th>
<th>Low human rights risk</th>
<th>Medium human rights risk</th>
<th>High human rights risk</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low spend</td>
<td>Category A</td>
<td>Category B</td>
<td>Category C</td>
</tr>
<tr>
<td>Medium</td>
<td>Category B</td>
<td>Category C</td>
<td>Category D</td>
</tr>
<tr>
<td>High Spend</td>
<td>Category C</td>
<td>Category D</td>
<td>Category E</td>
</tr>
</tbody>
</table>

(a simplified example)

Procurement exercises which fall in to higher categories will require the inclusion of stronger human rights requirements than lower categories. A database with standard clauses on human rights requirements can be developed. These standard clauses can be developed in-house or copied from good practice of other procurement bodies. The clauses should be tailored to each procurement exercise and selected to effectively address the identified human rights risks identified. They could, for example, be discretionary for some categories and mandatory for others. The geography and sector (which already forms part of the human rights risk assessment), and the market maturity will also need to be considered when tailoring the standard clause to the procurement exercise (e.g. requiring suppliers to be a signatory of the Bangladesh accord may not be relevant to suppliers from Latin America). The database of standard clauses can be saved centrally so that procurers can easily search and find clauses to ‘plug and play’ or tailor to the procurement.

Establishing categories and creating a ‘knowledge database’ of standard clauses on human rights requirements allows procurers to share good practice, ensures a coherent approach which is not overly burdensome, and avoids knowledge disappearing when a key employee leaves.

The Scottish government has developed a Prioritisation Tool which helps public buyers identify relevant economic, environmental and social considerations, focusing on identifying and assessing risk and opportunities, categories, and spend. In addition, they have created a Sustainability Test which helps public buyers embed relevant and proportionate sustainability requirements in the development of contracts and frameworks. These were updated in September 2018 to ensure they take account of human rights considerations including the UN Guiding Principles and human trafficking and exploitation.

In Sweden the municipal districts and regions have come to an agreement where each one is responsible for undertaking human rights due diligence exercises in relation to certain goods and services procured.
(for example, medical supplies). The municipal districts and regions then share their results and findings amongst each other.

In 2010, Sweden’s City of Malmö conducted a risk analysis, segmenting spending 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.

C1.2 Market testing and engagement

Market testing is an important process to hear the market’s reaction to the inclusion of requirements that actual and potential suppliers respect human rights. It is a necessary step for public buyers to gain an understanding of the maturity and progress of the supplier base and see what can be achieved immediately, and what will take more time. Setting the bar too high may result in a situation where no suppliers answer the call for tender or commit to something they cannot or will not deliver. On the other hand, setting the bar too low by requiring basic measures all suppliers in a sector already have may not stimulate the market effectively or create a level playing field. It is crucial that these types of engagements do not effectively limit competition.

Early engagement with suppliers is important in cases for example when a procurement will involve new and previously untested requirements for a supplier. It is also important when requirements might involve significant changes to business operations of the suppliers, or when there might be uncertainty as to how to comply with the requirements.

Advantages of market testing and early engagement include:

- Ensuring human rights requirements are shaped to align with relevant sectors, markets, and geographies;
- Gauging the market’s reaction and designing human rights requirements which are effective but sensitive to the market’s concerns at the outset;
- Using the market’s knowledge to identify common or increased human rights risks in a sector or geography that should be addressed;
- Early identification of human rights risks for the public procurement body which could affect the procurement process at a later stage;
- Communicating to suppliers a clear position on the importance of human rights to the procurement body and giving actual and potential suppliers advanced notice of what will be expected in the future.

Limitations of market testing and early engagement include:

- Market testing can provide engagement with first tier and higher tier suppliers, but often does not engage with lower tier suppliers, especially those abroad;
- Some suppliers may be reluctant to see more advanced human rights requirements, so it is important to be prepared and informed so that reluctant suppliers do not have an undue influence on future requirements.

Questions to be addressed through market testing and engagement include:

☐ Is the market ready and capable to deliver what is required? – Do the potential suppliers have the capacity and understanding of the issues to deliver on the requirements?
Road-testing version

☐ How many providers can provide what is required; will the procurement be sufficiently competitive? – It is important that the requirements do not implicitly single out, or unfairly impact specific suppliers or groups suppliers (for example SMEs).

☐ 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?

☐ Are there any potential risks to the proposed approach? – Could the requirements be too far-reaching or irrelevant?

☐ Could the proposed approach be used as an incentive for future development of the supplier base and progressive realisation of human rights requirements? – 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 requirement? – Are there many 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 from the public buyer would be required/desirable to suppliers to meet human rights requirement? – What form should the support take? – Are there any specific areas support should focus on, for example, SMEs?

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 a dialogue as well as the use of questionnaires.

It is important to maintain impartiality and conduct the activities transparently in order not to in anyway seem to favour specific suppliers.

The Stockholm County Council 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, the County Council presented the goals of the procurement and identified risks that the proposed requirements were aimed to address. Participants then had the opportunity to comment on the proposal, as well as sign up for a second round of hearings where the Country Council would meet with individual suppliers. Sometimes it can be sensitive to discuss these issues in front of competitors. During the hearings, the suppliers provided insight on which of the requirements were relevant or not, if the requirements were perceived as too far-reaching, and what kind of verification would be reasonable to require from suppliers. After the second round of hearings, the Country Council modified the requirements to some extent before publishing the final call for tender. By involving the supplier base at an early stage, and giving them the opportunity to shape the requirements, the County Council limited the risk of suppliers challenging the requirements through judicial review.

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 procurement, leverage can be exerted by a state over its actual and potential suppliers, and likewise by a supplier to its actual and potential sub-contractors.
Individual procurement exercises may not have the leverage needed to influence a supplier base. Grouping procurement exercises together to make them larger, possibly in collaboration with other procurers, can create substantial purchasing power and common standards for suppliers to meet.

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 contracting authorities may not have the necessary resources to develop relevant criteria and can instead join authorities that already have done so. This also minimises the risk of suppliers not answering the call for tender because they simply do not see the added benefit of adapting to requirements in contracts with a relatively low value.

The City of Madison, Wisconsin, in consultation with the Sweatfree Purchasing Consortium, 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 United States. Each agency has the opportunity to join in the bid, which helps agencies with limited resources to “piggy-back” on a bid for tender where the ground work of setting the requirements has already been done.

The Swedish central purchasing body SKL Kommentus provides a service for 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.
C2. The procurement process - Pre-award measures
A procurement process can generally be divided into a pre-award and post-award stage. It is important to distinguish between these as the ability to include requirements that businesses respect human rights, and the form they take, vary for the two stages.

<table>
<thead>
<tr>
<th>Advantages of pre-award measures include:</th>
<th>Limitations of pre-award measures include:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Pre-award measures enable public buyers to engage with actual and potential suppliers on human rights issues at an early stage and enable the public buyer to assess how mature the market is in implementing the business responsibility to respect human rights;</td>
<td>• If the market is not mature in implementing the business responsibility to respect human rights, onerous pre-selection requirements can prevent potential suppliers from bidding and thus competition can be limited;</td>
</tr>
<tr>
<td>• They communicate how a procurement body values human rights and indicates to potential suppliers the expectation that suppliers respect human rights;</td>
<td>• Pre-award measures generally require a high commitment and capacity from the procurement body to assess all potential suppliers on their measures to respect human rights in a short period, with limited information.</td>
</tr>
<tr>
<td>• They increase the likelihood of excluding potential suppliers which do not meet the human rights standards expected by the public buyer;</td>
<td></td>
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<tr>
<td>• In mature markets where the implementation of the business responsibility to respect human rights is strong, it can ensure a level playing field at the outset and reward potential suppliers which have implemented, or are implementing, human rights due diligence measures.</td>
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</table>

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
Excluding potential suppliers from participating in public procurement exercises prevents potential suppliers from tendering due to previous or ongoing 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 which do not meet legal requirements or have, or continue to be, involved in human rights abuses. The UNGPs note that:

“There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.”

Excluding potential suppliers from participating in public procurement exercises can have serious consequences, especially for businesses which exclusively, or to large extent, supply public buyers. It is an
action which should not be used lightly. Since excluding a potential supplier will have serious economic consequences for the supplier in question, public buyers applying discretionary exclusion criteria should be prepared for the possibility of a potential supplier requesting a judicial review of the procurement.\(^{63}\)

Applying grounds for exclusion can, however, send a clear message to the market on procurement body’s standards and values and clearly highlights to the market what is not tolerated and is an effective way of rewarding suppliers which are committed to respecting human rights at an early stage of the procurement process.

Exclusion grounds are either mandatory (a potential supplier must be excluded from tendering) or discretionary (a potential supplier may be excluded from tendering), depending on the law or policy which provides for the grounds. If a public procurement body chooses to apply a discretionary exclusion ground it must be applied throughout that particular procurement. 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 consist of, for example, the severance of 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, the establishment of a grievance mechanisms accessible to staff, suppliers, and those impacted by the supplier’s operations. Contracting entities are not allowed to exclude supplier which have carries out sufficient self-cleaning measures.

Article 57(1) of Directive 2014/24/EU contains mandatory grounds for exclusion such as a supplier being convicted for participating in a criminal organization, corruption, trafficking, or breach of obligations relating to tax payments. Further, voluntary 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”, which may include misconduct relating to human rights.

An important distinction between this and the mandatory grounds for exclusion is that in the case of the latter a conviction by final decision is needed, whereas the former only requires that the public authority demonstrates “by any appropriate means” that a violation has occurred. Subject to rules in national law concerning level of proof, this could for example be demonstrated through information gathered in previous procurements, as well as reports from NGOs and expert organizations, provided that such type of evidence can be deemed sufficient in each individual case. It should be noted that the contracting authorities carry the burden of proof for circumstances required for exclusion of suppliers and that such decision may be subject to legal review.

It is important to note in this context that not all illegal actions and/or previous misconduct should be viewed as grounds for exclusion. The gravity of an earlier misconduct must be assessed in connection with general principles of public procurement, including the principle of proportionality.

In Scotland, statutory guidance has been published under the Procurement Reform (Scotland) Act 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
Technical specifications are used to define the characteristics of the goods or services to be procured. Such characteristics may also refer 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, for example by drafting the requirements that mirror a specific supplier’s processes or requiring a specific labelling standard when equivalent versions exist. Technical specifications can be open (performance and function) or descriptive (standard and detail).

Open specifications detail what should be achieved without being overly prescriptive on the means of achieving the desired outcome, for example, a requirement could be that all stone is guaranteed to have no child labour the supplier’s quarries. This allows for greater flexibility for suppliers to provide suitable solutions and to apply new innovations. The challenge in introducing human rights requirements as open specifications is that there will inevitably be a wide variety of approaches, and the public buyer will have to assess and compare tenders in a fair and transparent manner, which will take expertise and capacity to achieve.

Descriptive specifications generally reflect current market capabilities and provide detailed solutions or processes that the potential suppliers need to fulfil. Descriptive specifications to include human rights requirements are referring to standards, labels, or certifications, which provides an objective and transparent means of evaluation. The use of environmental labels and certifications is quite common and can guide provisions on human rights labelling and certificates. However, the market is not as mature when it comes to human rights/social certification schemes compared to environmental. Including requirements based on labelling or certification as technical specifications therefore requires an in-depth knowledge of the availability and quality of different labels or certifications and what aspects of ethical trade they focus on, for example corporate practices (for example, SA8000 Standard and BSCI audit certificate) or product certification (for example, Fair Trade labelling). An analysis of available and relevant labels or certificates should thus be included in the market testing and engagement stage.

The Sustainability Compass provides information on how to implement sustainability into all stages of the procurement process and contains a searchable database on labels and certifications for important product groups.

The EU Directives set up conditions for when a contracting authority may refer to a specific label in Article 43. These are:

a) 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;

b) the label requirements are based on objectively verifiable and non-discriminatory criteria;

c) 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;

d) 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.

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 the any such label if there is not sufficient time for the supplier to attain the label before the tender deadline (final paragraph of Article 43(1) in Directive 2014/24/EU).

C2.3 Selection criteria
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 to score points; potential suppliers must meet the criteria to be considered in a procurement. 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 should be designed to ensure there is no distortion in competitive balance for potential suppliers. Selection criteria can be used in many tenders, but may be limited in certain circumstances, including open tenders in the EU.

For the procurement of rubber gloves in Sweden, selection 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 conducted by third parties in accordance with current and relevant audit standards and methods such as SA8000, SMETA IV-Pillar methodology, BSCI 2.0 or third-party audit methodology which is equivalent. The audit shall not be more than two (2) years old.

How demanding selection criteria are will depend on the maturity of the market. It is important to adapt the criteria to the relevant sector to ensure that suppliers can comply with the requirements. Selection criteria should in general focus on accepted and recognised industry and sector standards and practices. This prevents the requirements from being discriminatory or from skewing the competition in an unlawful way.

Article 58 of Directive 2014/24/EU sets up clear requirements when applying selection criteria. Such criteria may relate to one of the following:
- suitability to pursue the professional activity (e.g. having the right authorization or to be members of a particular organization in order to be able to perform the contract);
- economic and financial standing (e.g. minimum yearly turnover or professional risk indemnity insurance);
- technical and professional ability (e.g. possess the necessary human and technical resources and experience to perform the contract).

Human rights considerations can be based on c) technical and professional ability. Selection criteria can for example require suppliers to demonstrate that they have the necessary expertise or past performance to evaluate human rights risks and conduct audits, sufficient human resources to monitor their supply chain or refer to a specific policy commitment.

C2.4 Contract award criteria
Contract award criteria are often (but not always) a list of weighted criteria which produce an overall score. They focus on the bid rather than the bidder, and unlike selection criteria they are not mandatory criteria which must be met, but the more which are met results in a higher score. The criteria often reflect the
economic (lowest price), environmental, and social (which includes human rights considerations) elements a procurer must balance. For award criteria to be effective, the weight given to them needs to be substantial enough to impact the final award decision. Award criteria can be used to reward bids which can demonstrate robust and effective measures relating to the respect of human rights in connection with performance under the contract in question, as well as pushing the sector forward by incentivising certain practices, without excluding any suppliers.

It is desirable to base contract award criteria linked to human rights on widely accepted international instruments, such as the UNGPs and/or other relevant instruments (see Section B1.1) so that the criteria are clear to international bidders. Contract award criteria can, for example, be used to weight the due diligence procedures a supplier will have in place to oversee the delivery of the goods or service (see Section A2 for more information) and award points depending on how comprehensive the procedures are. Furthermore, award criteria that give the contracting authority unrestricted freedom of choice may run contrary to transparency and accountability requirements (and are not in compliance with EU procurement law). Therefore, suppliers must be informed before submitting tenders what weight will apply to each criterion and what needs to be demonstrated to get a specific point. Contracting authorities have a margin of appreciation in evaluating and weighting the different tenders but should provide sufficient and clear information regarding what the evaluation will be based on and what means of proof potential suppliers should provide. As a result of the general principle of proportionality, only criteria linked to the subject matter of the contract may be used as contract award criteria.

Contract award criteria could also promote best practice and focus on complex issues which might be too far reaching to set as mandatory requirements through technical specifications or selection criteria. For example, awarding suppliers who can demonstrate that the goods or services covered by the contract to be produced by workers who earn a certain living wage when working under the contract, basing the awarded points on the disclosure of lower tiers of the value chain relating to the contract. However, criteria should be designed to be measurable and possible for the supplier to prove. Labelling and certifications can be used as award criteria (see Section 2.2 for more information on labelling and certifications).

According to Article 67 of Directive 2014/24/EU, 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 the basis of 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 to satisfactorily account for the low level of the price.

The City of Madison, Wisconsin, 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 had 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. Moreover, the disclosure statement also required information on base hourly wages, benefits paid, average working hours and overtime policy, for disclosed facilities and factories. Besides these requirements, the winning tenderer would also work with the City of Madison and the Sweatfree Purchasing Consortium to implement a compliance program that includes worker education, a grievance process, responsible purchasing practices, and prevention measures to address health and safety conditions in high-risk areas.
In 2010 Stockholm County Council 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 for 84 SEK and they would win the contract). The initial methodology initially only included environmental criteria but were widened to include human rights criteria in 2018, and some examples include:

- 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 of the sub-contractors disclosed and mitigation plans implemented;
- If the supplier could demonstrate that worker participation is ensured and encouraged, for example through worker committees and continuous dialogue 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, the suppliers were awarded a certain level of price reduction. This approach has been since applied to 9 procurement exercises related to information and technology.

C2.5 Notice to suppliers
The aim of providing notice to suppliers at the pre-award stage is 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. There is a general lack of statutory requirements on public procurers to notify potential contractors when a contract presents a significant risk of human rights abuses. However, they can be useful means of requiring a supplier to take account of a particular risk.

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. Article 18(1) does however require contracting authorities to adhere to the principles of equal treatment and transparency. This means that all tenderers must get access to the same information at the same time so that no single supplier gains any advantage or suffers losses due to unequal conditions, and that all information provided in the procurement must be open, accessible and predictable for all tenderers, to ensure openness and publicity in all stages of the tender process. Even though contracting authorities are not required to notify potential contractors of human rights risks, all requirements in any stage of the procurement process must be clearly communicated to potential contractors and included in the procurement documents, which implicitly indicates the prevalence of risks.

The United States 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. Concerning human trafficking, in 2015, the United States Department of State provided support to Verité to conduct research and compile a report on Strengthening Protections Against Trafficking in Persons in Federal and Corporate Supply Chains, 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 Verité led study are now available in the Responsible Sourcing Tool, an online risk assessment tool, which also contains additional information on 43 commodities and 10 comprehensive risk-management tools; and tailored tools for the seafood sector and for the food and beverage sector. 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 particular 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.

<table>
<thead>
<tr>
<th>Advantages of post-award measures include:</th>
<th>Limitations of post-award measures include:</th>
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<tr>
<td>• Fewer resources are required in assessing contracted suppliers in comparison to assessing all potential suppliers at the pre-award stage;</td>
<td>• If using only post-award measures, contracting authorities 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;</td>
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<td>• Suppliers can develop measures that meet the human rights requirements over a mandated period, which can provide a transition to higher standards;</td>
<td>• 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;</td>
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<td>• The contracting authority has the entire period of the term of the contract to evaluate compliance with human rights requirements included as post-award measures. It takes time to investigate, monitor and remedy human rights abuses — there is often limited time at the front end of most procurement process when public buyers are under pressure to deliver essential products for public functions;</td>
<td>• Enforcing post-award measures (i.e. contract performance clauses) requires an investment in monitoring suppliers;</td>
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<td>• 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;</td>
<td>• Once a contract has been awarded, leverage may decrease as the procurement body is contractually bound to the supplier; if contractual human rights requirements are not implemented, the contracting authority can either require corrective actions or take other non-compliance measures including termination of contract. Termination could leave the contracting authority without a supplier of essential products or services and require a new procurement, which brings additional costs;</td>
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<td>• 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.</td>
<td>• 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.</td>
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The section is structured around the following primary issue areas:

**B3.1 Conditions for performance of contracts**

**B3.2 Subcontracting**

Mandatory minimum requirements in the form of pre-selection criteria can be coupled with more challenging post-award measures detailed in the award criteria. By including human rights considerations in both these stages of the procurement, the contracting authority can both ensure a minimum level playing field and reward suppliers which have already adopted human rights protections.
C3.1 Conditions for performance of contracts

Requirements included in public procurement through conditions for performance of contracts (or contract performance clauses) take effect after the contract is awarded and are evaluated during the term of the contract. It is each supplier’s responsibility to ensure that they will be able to adhere to the provided conditions once the contract is awarded. Suppliers must meet contract performances clauses as detailed in the contract. A breach of such requirements may therefore lead to, penalties or other non-compliance measures such as termination of contract, for example (see Section C4.4).

Contracting authorities need to consider that they should be able to monitor and evaluate the performance of suppliers in accordance with the contract performance clauses. This does not mean that every single supplier and every single contract must be evaluated (evaluation needs to be prioritised based on the severity of potential and actual risks – see Section C1.1) but the requirements must be monitorable.

If there is no way of determining whether certain requirements can be met, then such requirements should not be included as contract performance clauses. There are clear capacity considerations in this regard especially considering that qualitative indicators, which require staff with human rights knowledge and relevant training, are necessary to supplement quantitative indicators. However, it is possible to place elements of the monitoring duty on the supplier. This could include requiring supplier self-reporting where the supplier is contractually obligated to describe risks and measures they have taken to address risks. It could also include provisions mandating the supplier works with an external body to assess their risks and measures taken, which is provided to the public buyer. The procurement body can follow up on the self-reporting or the external assessment if it deems it necessary by, for example, requesting a more detailed explanation on the highest risks or where measures taken do not seem adequate. However, it is important to consider what information suppliers may be prevented from easily sharing, such as previous audits results, through other contractual obligations. Self-reporting should occur in conjunction with other forms of monitoring and should not stand alone.

Conditions for performance of contracts can take many forms, for example, requiring the supplier to:

- demonstrate that certain polices or procedures relating to human rights and the subject matter of the contract are in place;
- continuously disclose the performance of sub-contractors working under the contract in question to the contracting authority;
- disclose incident and remediation reports on labour issues, discrimination, harassment, issues with regulators etc.;
- conduct audits and implement capacity building actions such as worker education.

According to Article 70 of Directive 2014/24/EU conditions for performance of a contract 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.

Labelling and certifications can also be used as conditions for performance of contracts. The same applies in relation to referring to labels and/or certifications in the form technical specifications (see Section 2.2).

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 identifies what is required from 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 chain as defined in the code of conduct and verified by an independent (third) party within 6 months of awarding the contract.” This is done “using audit reports verified by a third party of the sites where the purchased workwear is produced. 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

**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).” This is done through the risk/audit report (required under Transparency) which “indicates what actions are needed to comply with the signed code of conduct. The direct supplier must submit an annual action plan to the purchaser within 3 months after the submission of the risk and/or audit report. This report contains actions of both the direct supplier and the suppliers in the chain needed to meet the social requirements in the specifications.”

**Leadership**

The supplier are recommended (not required) to continuously improve their performance which is 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 focussed on continuous improvement of the social risks in the chain for more than 2 years.”

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The Swedish County Councils have adopted a joint code of conduct for all 21 county councils. The contract performance clauses included in procurements of high-risk goods and services are based on the requirements of the code. The supplier who is awarded the contract shall be able to demonstrate the following at the time of the contract entering into force:

- 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;
- Implemented procedures for disseminating the commitment within the organisation and the supply chain;
- Appointed a member of the management team who is responsible for adherence to the code;
- Implemented due diligence procedures to identify and mitigate potential and actual adverse impacts;
- Implemented monitoring procedures;
- Implemented procedures for corrective actions and remedy.

The 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 on a yearly basis during the term of the contract. This report 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, such as health and safety, worker representation and collective bargaining, and working hours;
- Information on whether or not 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 violations of worker’s rights such as forced labour and child labour is 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 contract performance clauses as a means of assessing compliance with the Electronics Watch Code of Labour Standards. The obligations include factors such as:
• 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 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 names and addresses of the factories where the 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.68

C3.2 Sub-contracting
Value chains can be immense; Unilever has highlighted that their “value chain includes approximately 76,000 suppliers around the world, with sales in more than 190 countries … We employ 172,000 people in our operations but many millions play a role in our value chain.” 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, the risk of human rights abuses, including some of the most severe human rights abuses, can occur at lower tiers in the value chain from the supplier who has been awarded a contract. Designing requirements that sub-contractors respect human rights is key to addressing the risk of human rights abuses occurring at lower stages of the value chain and being directly linked to the buyer.

In Sweden, contracting authorities are under certain circumstances obliged to require that sub-contractors “directly involved” in carrying out the works or services covered by the contract apply certain minimum levels of social standard.

The UNGPs state that 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”, where “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".

Requirements that flow down the value chain and apply to sub-contractors can, for example, be achieved by transparency requirements in the form of disclosure of the different tiers of the value chain, depending on the maturity of the sector in knowing their value chain. Contracting authorities can ask suppliers to indicate in their tenders any share of the contract they may intend to subcontract to third parties and any proposed sub-contractors. By providing this information, contracting authorities can focus their monitoring efforts where it is most essential by, for example, conducting audits at relevant stages of the value chain, or requiring that suppliers provide compliance performance information and annual certifications (See Section C4.1 on Supplier performance monitoring).

The UNGPs highlight that businesses with large value chains may have difficulties in requiring that all their suppliers conduct human rights due diligence. If this is the case then 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”.

Changes in the sub-contracting value chain can significantly alter the risks initially identified. Therefore, a requirement for the supplier to immediately inform the public buyer of such a replacement (and possibly with the requirement of approval of the sub-contractor) can be introduced into the contract. In addition, the supplier can be required to report if a replacement changes the identified risks and to report how they will manage changes to the risk landscape (see Section C4.2 on Supplier reporting).

| Article 71(6) of 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). 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). Moreover, public authorities are also provided with the option of requiring a contractor to replace sub-contractors that the contracting authority has found to be in breach of any grounds for exclusion. 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. |

| Electronics Watch includes specific requirements relating to the performance of sub-contractors that the main contractor needs to comply with as part of the conditions for performing the contract. These conditions focus on collaborating with the contracting authority and Electronics Watch in case a sub-contractor is found in breach of the code. The collaboration includes obtaining 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) which sets out what is expected of 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 trafficking 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.
C4. Contract Management
This section focuses on monitoring and reporting during the contract management stage of the procurement. Monitoring and reporting are an essential element of accountability and ensure that the requirements within public procurement that actual and potential suppliers respect human rights are being implemented.

Contract management measures can also be considered as post-award measures, as they are applicable after the award of a contract, however section looks beyond the requirements themselves and focuses on monitoring and reporting elements.

The responsibility to ensure these requirements are respected lies primarily with the supplier. However, it is advisable for the public procurement body to monitor suppliers as part of their own human rights due diligence and risk-management processes.

Neither selection nor award measures can create a risk management system effective enough to ensure human rights are fully respected throughout the value chain (assuming the value chain, or elements of it, are known), even in factories which are audited. It is therefore important to include contract management measures to engage with suppliers throughout the life of the contract and at a stage when risks of human rights abuses may become realities. A contract management period can often be lengthy and provides a strong opportunity to bring about a change in the thinking and behaviour of suppliers as well in their actions.

The responsibility for the procurement of goods and the responsibility for contract management are often 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 manager has the capacity and knowledge to ensure that the human rights requirements are met and provide feedback to the procurement officer to improve future human rights requirements.

The section is structured around these issues:
C4.1 Supplier performance monitoring
C4.2 Supplier reporting
C4.3 Remedy
C4.4 Enforcement and termination of contacts

C4.1 Supplier performance monitoring
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 to exercise due diligence and seek to ensure that human rights, sustainability and other requirements are being met. Suppliers can impose requirements on their sub-contractors at lower tiers, for similar reasons. These two levels of performance monitoring are distinct but are discussed in tandem since most of the relevant concepts and practices overlap.

Some suppliers, regardless of how advanced their human rights due diligence procedures are, may agree to contract performance clauses. Monitoring is therefore essential to ensure that due diligence procedures are in place.

Value chain mapping and risk assessment
Monitoring and evaluating a complex value chain requires, at a minimum, a basic understanding of the tiers and linkages in that chain. Most large suppliers have at least a basic map of their value chain. In public
procurement, it is vital that, as a first step in monitoring and evaluation, contracting authorities develop an awareness of their suppliers and sub-contractors, mapping this chain in as much detail as possible. Suppliers, in turn, should undertake a detailed mapping of their own suppliers and sub-contractors as a first step in their due diligence and performance monitoring process, if they have not already done so. Having an accurate sense of subordinate tiers will enable proper planning for implementation and allow suppliers to more effectively report up to the public buyer, where required.

In most sectors, the details of value chain mapping may become less clear further down the value chain. It is also likely that suppliers will prefer not to disclose the level of detail they may have on their subcontracting (often considering it to be commercially sensitive) or may have extensive limitations in their own understanding beyond a particular tier. These challenges need to be considered when monitoring suppliers and when setting requirements for supplier compliance.

Once a value chain is mapped, it is important to implement a system to assess risk and identify areas where higher degrees of monitoring will have to take place. This can be accomplished in several ways, ranging from desk research about the dynamics of particular geographies, sectors, and labour migration corridors, to self-assessment questionnaires, to worker or community interviews or surveys, and to third party audits. It is vital that the process of identifying risk and applying additional monitoring to areas of concern be a continuous one, informed and improved over time by continuous evaluation. (See more on risk identification and assessment in Section C1.1).

In Sweden, the country’s 21 county councils conduct approximately €13 billion in purchasing annually and have implemented a collective model to leverage their procurement power and mitigate harms. The county councils have identified eight high-risk categories of goods (pharmaceuticals, foodstuff, surgical instruments, surgical gloves, IT, textiles, dressings, medical technology) and divided the monitoring and evaluation process for each category among the different regions. By doing so, the county councils can pool their buying power and share results. The Swedish county council example shows how local authorities can band together to aggregate their procurement policy impact and achieve economies of scale. Their chosen policy design also illustrates a continuous evaluation and learning structure that has proven successful in identifying and remediating human rights violations in the supply chain.

**Audits and reviews**

Audits can take several forms and can be, for example:

- Desktop-based assessment of documentation shared by the supplier (often seen in reviews of pay and employment conditions of service providers), on-site inspections of facilities of the supplier of sub-contractors, or a combination of the approaches;
- A checklist comparison between practice and a recognised standard (for example, SA8000) or code of conduct, or a more general audit on supplier’s approach with parameters established by the public buyer;
- Conducted by third party specialists providing an outcome report. The public buyer can enter a dialogue with the supplier about how to address any identified issues in the outcome report and require that the supplier adopts a correction action plan;
- Conducted by the public buyer alone or jointly with an external auditor. This approach allows for better mutual dialogue, can increase the authority’s influence over the supplier, and focuses on the supplier’s ability to prevent negative human rights impact and less on a checklist exercise;
- Conducted jointly by public buyers, which, in addition to being resource-saving, can help increase the authorities’ ability to influence the supplier.
In Sweden, “SKL Kommentus”, owned by Swedish municipalities and the County Council, conduct audits through what is known as the “Hållbarhetskollen”. This is done by “Hållbarhetskollen” selecting 2-3 areas within its 11 priority product areas for an actual audit (either as an office audit or as a production site audit). All customers (i.e. the municipalities) then have access to these audits.

Audits are not unique to the human rights field and exist to monitor compliance in similar fields including the environment. However, human rights audits often necessitate the evaluation of qualitative indicators which can make it more challenging than financial and environmental audits which are often based on quantitative indicators. It is important to ensure coherence between auditing requirements and consider grouping auditing requirements together to reduce costs and avoid overlapping requirements. Audits should not stand alone and one of the growing alternatives/ supplements is worker driven monitoring, where worker-centred investigations can identify problems which may not be identified in a social audit.71

Although much has been written about the limitations of the auditing model, it remains a primary vehicle to undertake performance monitoring.

<table>
<thead>
<tr>
<th>Advantages of the audit model include:</th>
<th>Limitations of the audit model include:</th>
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<tbody>
<tr>
<td>• There is existing market infrastructure to undertake audits;</td>
<td>• A full audit is resource heavy, and there is a tendency to under-resource the audit operation, leading to insufficient capacity to execute it well;</td>
</tr>
<tr>
<td>• They are easily understood and accepted by suppliers at all tiers, due to widespread prevalence in value chains;</td>
<td>• There is often a structural mismatch between the limitations in time and expertise available during short on-site inspections and the continuous, specialised, and changing character of the issues being monitored;</td>
</tr>
<tr>
<td>• They have the potential to identify some risks, violations and abuses, and potential concerns.</td>
<td>• Audits provide a snapshot view and there is a misperception that performing well on an audit is sufficient evidence of due diligence. There is potential failure to identify human rights abuses, even in worksites audited with on-site inspections;</td>
</tr>
<tr>
<td></td>
<td>• Audits often lack robust engagement with workers to learn their perspectives;</td>
</tr>
<tr>
<td></td>
<td>• Many audits are largely paper-based information gathering exercises, with little ability to contextualise and identify root causes, including issues that are not visible at the work location;</td>
</tr>
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<td></td>
<td>• Suppliers may be trained or mandated to provide generic or stock answers;</td>
</tr>
<tr>
<td></td>
<td>• There can be a lack of follow-up to investigate whether policies and plans are implemented in practice, and the supplier’s answers reflect the reality on the ground;</td>
</tr>
<tr>
<td></td>
<td>• Suppliers may be required to undertake several audits and develop “audit fatigue” and do not commit fully to the process.</td>
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</table>
Some of these limitations can be mitigated against through the selection of audit type, allocating sufficient resources, and adopting measures to augment the audit process. Robust worker interviews which can take place outside the presence of management, in the worker’s language, and during paid working hours, is one way to shore up some of the deficiencies in the traditional audit model. There is an increasing amount of electronic applications which are designed to collect workers’ opinions, although they do come with their own challenges related to practicalities (such as lack of internet or smart phone access) and to human rights (such as privacy and data gathering). Such electronic applications can provide for one-off engagements but can also provide a longer-term view and information on whether a supplier’s measures to address issues have proven successful. Engagement and collaborations with local civil society, experts and monitors can also increase sources of information that contracting authorities base their decisions on.

The timing of an 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, since delivery has occurred. It is also difficult to follow up on an audit if the contract is soon to expire and the contractual relationship ends.

The Swiss procurement system includes decent work requirements associated with core ILO standards for goods produced outside the country and employs external audits as a monitoring mechanism.

An example of such a broader approach is the collaboration between the City of Madison and Sweatfree Purchasing Consortium in apparel procurements includes 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.

Worker’s voice
Including feedback from workers is a vital part of a robust audit process. This is because workers have unique visibility into, and understanding of, the operations in their workplaces and are the ones directly impacted. More broadly, the value workers can bring to value chain monitoring and evaluation should not be underestimated. In addition, it is important to engage and empower workers in monitoring, evaluation and reporting because of their inherent value and dignity. The rights to organise and to decent work are enshrined in international law and engaging workers and affording them the dignity of a real seat at the evaluation and monitoring table can help realise these rights.

Electronics Watch has implemented a worker-driven monitoring methodology, engaging with workers in manufacturing countries through monitoring partners located near worker’s communities. The monitoring partners are independent labour rights experts that have or work to develop relationships of trust with workers. By being on the ground the monitoring partners can quickly respond when workers report a problem. This approach allows for affiliate contracting authorities to have a continuous and easier access to workers.

The NGO Issara Institute’ 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.
Integration into existing systems
Many public procurers and suppliers will already have codes of conduct, performance monitoring, and evaluation systems in place; buyers may have well codified environmental procurement requirements, for example, and suppliers may have a quality control audit regime in place to minimise defects in their production process for all clients. It is beneficial to leverage the existing infrastructure, training, and management systems to make compliance with new human rights performance monitoring easier. Integrating human rights performance monitoring into existing structures has the dual benefits of minimising costs, and minimising supplier and sub-contractor burdens, thereby contributing to greater overall efficiencies.

Supplier dialogue
Start-up meetings provide contract managers with an opportunity to engage the supplier on goals, risks and expectations, and how they intend to comply with the contractual human rights requirements. These 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 (public or private). A start-up meeting can be beneficial for contracts which fall into the higher risk categories and for contracts with a one-off delivery as a start-up meeting may provide the only opportunity to constructively engage with the supplier.

For a contract manager, getting to know a supplier’s situation and challenges through an ongoing dialogue increases the possibility of preventing and rectifying issues early and gives the authority an opportunity to increase its influence. An ongoing dialogue which provides an opportunity to openly discuss practical measures on how a supplier can respect human rights can be especially beneficial to SMEs. Mutual dialogue allows the supplier to share their 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 their sub-contractors, to impose unreasonable overtime requirements.

C4.2 Supplier reporting
By “reporting” we refer to the element of a monitoring and evaluation system that interfaces back with the higher tiers of supply, or with the public buyer, providing information or certifying compliance with policies and procedures. In this section, we are primarily concerned with the level of reporting that public buyers should require but will also address what higher tier suppliers may require of lower tier sub-contractors.

There are a wide range of choices available to public buyers and suppliers in terms of what precisely to require for reporting, and how to set up systems and structures to collect reports. Options include reporting on key performance indicators on 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 create additional liability for non-compliance. A full exploration of the types of reporting available to public policy designers lies outside the scope of this toolkit. Instead, we will present an overview of some key areas for consideration in the policy design process.

A key consideration when designing supplier reporting requirements is whether suppliers can legally share information (for example, on the lower tiers of the value chain or on their compliance performance indicators) with the public buyer and, if so, with what expectation of confidentiality to protect confidential business practices. Conversely, the public buyer could choose to require that all information, or substantial elements of the information, be made public in the interests of transparency and accountability.

A complication arises where contractors are unable to share, for example, audit results or other information that sub-contractors control, through legislative (for example, anti-monopoly/ anti-trust
legislation) or contractual obligations. When designing monitoring and reporting requirements, public authorities need to consider potential limitations in the type of information their contractors can obtain and share with third parties. Legislative limitations depend on the jurisdiction but understanding the scope of contractual limitations can form an important element of the market testing stage.

Another key consideration is collecting and storing reports. These reports can contain confidential information so secure storage is important. These 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 colleagues when designing new human rights requirements or providing comparisons when assessing other suppliers.

**Tiers of reporting**
Public buyers must address the question of how many tiers down their value chains they can reasonably expect to exert influence, and therefore require reporting of compliance and other information. Engaging with the 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.

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. This opacity and complexity will vary from sector to sector and will depend on the geographies and labour migration corridors 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 can take the shape of reporting on Key Performance Indicators or can be more qualitative in nature, in the form of worker interviews or broader audit reporting. There is a need to gather sufficiently detailed data on compliance performance to assess effectiveness, target areas of risk, mitigate adverse impacts and continuously evaluate, learn and improve requirements that suppliers respect human rights 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 procurement regimes require suppliers, or some 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 in themselves performance monitoring or reporting *per se* (though they should certainly include these elements), but the requirement to develop a plan, and potentially 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 that is present in a particular contract; complex value chains require more robust compliance plans than simple direct service contracts.

**Annual Certification**
One form 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 either actual compliance or the implementation of robust compliance plans and monitoring or
control mechanisms. For instance, in the United States anti-trafficking procurement regime, suppliers who are required to create compliance plans are also required to 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

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.

<table>
<thead>
<tr>
<th>Advantages in requiring suppliers to provide access to an operational-level grievance mechanism includes:</th>
<th>Limitations in requiring suppliers to provide access to an operational-level grievance mechanism includes:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• It can provide a direct route to remedy for victims without requiring them to engage in more formal and costly judicial remedy processes;</td>
<td>• An internal operational-level grievance mechanism requires resources and staff capacity, and staff knowledge to operate;</td>
</tr>
<tr>
<td>• It provides an early warning system so that human rights abuses can be addressed early and prevent ongoing or escalating abuses;</td>
<td>• Providing access to external grievance mechanism depends on whether effective mechanisms exist in the sector, geography etc., in question;</td>
</tr>
<tr>
<td>• 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.</td>
<td>• It is unlikely that workers at lower tiers of the value chain will have knowledge of the grievance mechanism.</td>
</tr>
</tbody>
</table>

Requirements for suppliers to establish or demonstrate effective operational-level grievance mechanisms need to be included at early stages of the procurement and clearly communicated to suppliers 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 participating in the design and execution of supplier grievance mechanisms, by for example acting as an oversight body or mediator or providing information and access to their own grievance mechanism for parties who do not accept the outcome of a supplier’s operational-level grievance mechanism. This approach can strengthen the legitimacy of a grievance mechanism and can give the public buyer better access to information regarding risks in their supply 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 procurement body has its own grievance mechanism, this can be opened to suppliers to use, which can support SMEs without the capacity to establish their own grievance mechanism. 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 supplier who bids for the public contract. As with many other requirements relating to human rights, it is therefore important to design these requirements in a way that is tailored to the specific procurement and enables the requirements to flow down to the necessary stages of the value chain. However, in practice there may be limited circumstances where you can legally oblige sub-contractors to establish operational-level grievance mechanisms. In contrast, utilising leverage can be a more practical and effective means to achieve this with sub-contractors at lower tiers of the value chain.

The effectiveness criteria should be considered when designing requirements in public procurements focused on grievance mechanisms. By referring to the UNGPs and these effectiveness criteria the public buyer ensures 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.

The UNGPs detail what criteria an operational-level grievance mechanisms must have to be effective. The UN is undertaking an Accountability and Remedy Project which will articulate in detail how businesses should provide access to remedy. It will publish a final report end of Q2 2020.

C4.4 Enforcement and termination of contracts

For human rights considerations to be enforceable and effective, contracting authorities need to have a range of sanctions at their disposal for non-compliance. The option to termination 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/ supplier. Stopping work and suspending the contract/ 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. Public buyers should 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 could be:

- when a supplier is unwilling to implement corrective actions, and is thereby not complying with the 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 due to the fact that 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.
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.


OECD, *Responsible business conduct in government procurement practices*, June 2017

European Commission, *International Public Procurement (website)*


As well as customary international law


See the UN Guiding Principles

UN Guiding Principle 15


Guiding Principles 4 and 6


Guiding Principle 1

Guiding Principle 3
Guiding Principle 8. Guiding Principle 6 also provides that “States should promote respect for human rights by business enterprises with which they conduct commercial transactions,” and indicates this can be done “including through the terms of contracts.”

Guiding Principles, Commentary
Guiding Principles 10
Guiding Principles, General Principles
Northern Ireland Human Rights Commission, Public Procurement and Human Rights in Northern Ireland, November 2013

UN Global Compact and International Chamber of Commerce, Scaling up Sustainability Collaboration: Contributions of business associations and sector initiatives to sustainable development, September 2015. See, for example, the statement of the Business and industry major group at the HLPF 2016: “The business community embraces the UN’s 2030 Agenda for Sustainable Development with the 17 Sustainable Development Goals (SDGs) at its core, and is committed to partner on its successful implementation”. According to a 2017 PriceWaterhouseCoopers study 71% of businesses say they were already planning how they will contribute to the implementation of the SDGs.


Daniel Morris, Elin Wrzoncki and Signe Andreasen Lysgaard, Responsible Business Conduct as a Cornerstone of the 2030 Agenda – A Look at the Implications, A Discussion Paper, Danish Institute for Human Rights, 2019

PWC, Study on “Strategic use of public procurement in promoting green, social and innovation policies”, Final Report, DG GROW European Commission; Olga Martin-Ortega and Claire Methven O’Brien, Advancing Respect for Labour Rights Globally through Public Procurement, Politics and Governance (ISSN: 2183–2463) 2017, Volume 5, Issue 4, Pages 69–79

Indeed, the 2030 Agenda and its 17 Sustainable Development Goals (SDGs) clearly state that they “seek to realize the human rights of all”

G7, Leaders’ Declaration G7 Summit 7-8 June 2015, Schloss Elmau, Germany; OECD, Responsible business conduct in government procurement practices, June 2017; OECD, OECD Guidelines for Multinational Enterprises, 2011 Edition; OECD, Ministerial Communiqué on Responsible Business Conduct, 26 June 2014; OECD, Public Procurement for Sustainable and Inclusive Growth, Enabling reform through evidence and peer reviews (date unknown); ILO, Agenda of the 105th Session of the International Labour Conference, April 22, 2016; OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Supply Chains, February 2018

See U.S. General Services Administration, Department of Defense, National Aeronautics and Space Administration, Federal Acquisition Regulation, 2019. Also see Robert Stumberg, Anita Ramasaya, Meg Roggensack, Turning a Blind Eye? Respecting Human Rights in Government Purchasing, September 2014 which identified gaps in United States procurement rules and developed a menu of reforms that are specific to the apparel sector


The anti-trafficking in persons Federal Acquisition Regulation (FAR) rule on combatting trafficking in persons was issued to implement Executive Order 13627, “Strengthening Protections Against Trafficking in Persons in Federal Contracts,” and Title XVII of the National Defense Authorization Act for fiscal year 2013, “Ending Trafficking in Government Contracting.”

Note V at Subpart 22.15, (Prohibition of Acquisition of Products Produced by Forced or Indentured Labor), which implements the Child Labor Exec. Order No. 13126, 64 Fed. Reg. 32383 (June 12, 1999) (“Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor”) 38 41 C.F.R. § 50–201.603(b). While the CFR provides Dec. 8, 1960 as the date on which the current regulation was finalized and posted in the Federal Register that is merely the date of the most recent revision of the exemption. The exemption has existed, in some form, since the very first regulations ever promulgated under the Act. See 1 Fed. Reg. 1405.
Road-testing version


43 Claire Methven O’Brien, Nicole Vander Muelen, and Amol Mehra, Public Procurement and Human Rights: A Survey of Twenty Jurisdictions, International Learning Lab on Public Procurement and Human Rights, July 2016; and European Commission, Public Procurement (website)


45 Organisation for Economic Co-operation and Development, Public Procurement Toolbox, Terminology (website)


47 The Association of Flemish Cities and Municipalities and the City of Ghent, Toolkit, Socially Responsible Workwear, A guide for public purchasers, April 2018

48 Scottish Government, Public sector procurement, Sustainable procurement duty (website)

49 Shift, Using Leverage in Business Relationships to Reduce Human Rights Risks, November 2013


52 Guiding Principle 3


54 Shift, Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights, Shift Workshop Report No. 5, May 2014

55 Also see Institute for Human Rights and Business and Caux Round Table Japan, Sustainable Sourcing, Grievance Mechanisms, and Human Rights at Mega-Sporting Events - Japan Meeting Report, March 2018 for more information on grievance mechanisms at mega sporting events

56 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.

57 Northern Ireland Department of Finance, Procurement Guidance Note PGN 03/18, Human Rights in Public Procurement, 19 December 2018


60 Katharine Early, The Joint Ethical Trading Initiatives’ Guide to buying responsibly, Dansk Initiativ for Etisk Handel (DIEH) (Danish Ethical Trading Initiative), Ethical Trading Initiative (UK), Initiativ for Etisk Handel (IEH) (Ethical Trading Initiative Norway), 2017

61 Claire Methven O’Brien, Business and Human Rights, A handbook for legal practitioners, Council of Europe, November 2018
See Guiding Principle 19


Article 18(2) refers inter alia to the ILO Core conventions.


U.S. General Services Administration, Department of Defense, National Aeronautics and Space Administration, Federal Acquisition Regulation, 2019, at 22.1503 (Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor).

The Association of Flemish Cities and Municipalities and the City of Ghent, Toolbox, Socially Responsible Workwear, A guide for public purchasers, April 2018

Electronics Watch, Electronics Watch Contract Conditions for Supply Contracts, March 2019

Clean Clothes Campaign et al, Follow the Thread, The Need for Supply Chain Transparency in the Garment and Footwear Industry, April 2017

Commentary to Guiding Principle 17

See Worker-Driven Social Responsibility Network, Comparison of Critical Elements of WSR vs. CSR and MSIs, 21 April 2019; Electronics Watch, Worker-Driven Monitoring (website); and the work undertaken by Worker Rights Consortium

Shift, Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights, Shift Workshop Report No. 5, May 2014

See Guiding Principle 20