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CPD

Procurement Guidance Note

PGN 01/13

(as amended)

INTEGRATING SOCIAL CONSIDERATIONS INTO CONTRACTS

Reissued: 14 September 2016



PROCUREMENT GUIDANCE NOTES

[Northern Ireland Public Procurement Policy \(NIPPP\)](#) was approved by the Northern Ireland Executive in 2002. In approving the policy, the Executive took the decision that legislation was not necessary to ensure that Departments, their Agencies, non-Departmental Public Bodies and Public Corporations complied with the policy. Instead, it considered that compliance could be achieved by means of administrative direction.

Procurement Guidance Notes (PGNs) are the administrative means by which Departments are advised of procurement policy and best practice developments. They apply to those bodies subject to NIPPP and also provide useful guidance for other public sector bodies.

PGNs are developed by the Central Procurement Directorate (CPD), in consultation with the Centres of Procurement Expertise (CoPEs), and are subject to the approval of the Procurement Board.

Once endorsed by the Procurement Board, they are issued to the Departments for implementation and copied to CoPEs to develop, if necessary, underpinning procedures supporting the implementation of this guidance in their particular sector.

PGNs are also published on the [Department of Finance \(DoF\) website](#).

The following PGN was endorsed by the Procurement Board with effect from 8 November 2013 for use by those bodies subject to NIPPP.

Revision History

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Revised to reflect Buy Social: Version 3	14 September 2016

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Definition of Terminology

In the preparation of this guide, the term **contractor/supplier** has been used to denote an organisation that contracts directly with a Department, whether it is a supplier, a service provider or a construction contractor.

The term **Department** has been used to refer to those bodies subject to Northern Ireland Public Procurement Policy including Departments, Non-Departmental Public Bodies and Public Corporations. A full list of such bodies is available in Annex A of [Northern Ireland Public Procurement Policy](#).

1 INTRODUCTION

- 1.1 Public procurement is an important element of the economy in Northern Ireland, with central and local government spending upwards of £3 billion annually on the purchase of supplies, services and construction works. This level of expenditure offers real potential in terms of maximising the economic and social outcomes for communities in NI.
- 1.2 The volume of public procurement and the limits placed by budgetary constraints on direct social intervention have increased the focus on procurement as a vehicle for the promotion of social inclusion.
- 1.3 Depending on their nature, social considerations can be included in the procurement process provided that they are considered at business case stage and relate to the subject matter of the contract or the performance of the contract. The Procurement Regulations¹ provide the legal framework. They specifically mention ways of incorporating social clauses into specifications, contract performance clauses, selection criteria and award criteria.
- 1.4 It is widely acknowledged that public procurement can contribute positively to the delivery of greater equality and social inclusion such as progression into the workforce of people who are long term unemployed and those leaving education, as well as broader sustainability goals.
- 1.5 The Procurement Board has adopted a revised model for the delivery of social clauses called “Buy Social²”. Details of the model can be found at www.buysocialni.org or by contacting the Buy Social team via the advice service at info@buysocialni.org. It will be essential to continually monitor

¹ [The Public Contracts Regulations 2015](#), [The Utilities Contracts Regulations 2016](#) and [The Concession Contracts Regulations](#).

² ‘Buy Social’ is a means of maximising the personal wellbeing, social cohesion and inclusion, and equal opportunities elements of sustainable development, from all public procurement.

the performance of social clauses included in public contracts to assess their impact and benefit.

2 EXECUTIVE'S COMMITMENT ON SOCIAL CONSIDERATIONS IN PUBLIC PROCUREMENT

2.1 The Executive has demonstrated its support for the use of social considerations in public procurement in a number of ways, namely:

- The Programme for Government (PfG) 2011 – 2016 included a commitment to “include social clauses in all public procurement contracts for supplies, services and construction”.
- The approval in March 2011 of a definition of ‘Best Value for Money’ as follows:

‘Best Value for Money’ – ‘the most advantageous combination of cost, quality and sustainability to meet customer requirements’³;

- The approval, in May 2002, of 12 key principles to govern the administration of public procurement. The Executive believes that the principles reflect the statutory obligations related to equality of opportunity and sustainable development and link to the Programme for Government. A key principle – integration – is defined below:

Integration: in line with the statutory duties on equality of opportunity and sustainable development and the Executive’s policy on joined-up government, procurement policy should pay due regard to the Executive’s other economic, social and environmental policies, rather than cut across them.

- In May 2008, the Executive endorsed the guidance for policy makers, commissioners and procurement practitioners entitled [‘Equality of Opportunity & Sustainable Development in Public Sector](#)

³ 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; and sustainability means economic, social and environmental benefits, considered in the business case, in support of the Programme for Government.

[Procurement](#)'. This guidance was produced jointly by the Equality Commission and CPD and was approved by the Procurement Board (see also section 12).

3 PROCUREMENT BOARD DECISIONS

- 3.1 This note contains guidance to support the integration of social considerations and the inclusion of the Buy Social model in particular in procurement. The Procurement Board agreed on 5 November 2015 that the standard approach to be used in the procurement of construction projects above £2m and infrastructure projects above £4m was the Buy Social NI construction model. The model can be found at [Buy Social](#).



- 3.2 This new model has been developed by the Strategic Investment Board and CPD in consultation with Departments, the construction CoPEs and representatives from the local construction industry. It sets a contractual requirement for a quantifiable number of targeted recruitment and training opportunities for 'New Entrant Trainees'⁴ to be provided in government construction contracts. The requirement is to be delivered by the Main Contractor with/without the support of its supply chain. The model includes monitoring arrangements and represents a significant opportunity to drive additional benefits from public procurement and to measure and report on them.
- 3.3 The Procurement Board also agreed that the Buy Social model should be piloted in services contracts with a value exceeding £500,000 with a view

⁴ New Entrant Trainees are usually education leavers or long term unemployed people. The full eligibility can be found in the Buy Social toolkit – see www.buysocialni.org

to a standard approach being agreed in 2016. An approach for supplies contracts may follow.

- 3.4 It is recognised that CoPEs and client procurement teams may welcome initial support to help them implement the new approach. The Buy Social Team within the Strategic Investment Board has a support team who can assist in the design, monitoring and implementation of Buy Social clauses, contact: The Buy Social Team, The Strategic Investment Board, 1 Cromac Avenue, Gasworks Business Park, Belfast BT7 2JA. Email: info@buysocialni.org. Tel. +44 (0)79 1837 5586 or 028 9090 9422

4 HOW TO INTEGRATE SOCIAL CONSIDERATIONS INTO PUBLIC PROCUREMENT

- 4.1 Social considerations can be incorporated into public procurement processes and contracts by the following methods:
- using award criteria linked to the subject matter of the contract; and/or
 - using contract performance clauses linked to the subject matter of the contract.
- 4.2 Award criteria and contract performance clauses shall be considered to be linked to the subject matter where they relate to the works, supplies or services to be provided in any respect and at any stage of their life cycle, including factors involved in:
- the specific process of production, provision or trading of those works, supplies or services; or
 - a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance⁵.

- 4.3 Contract performance clauses set out how the contract must be performed. They identify mandatory requirements that successful bidders must accept and must be delivered when the contract is awarded to them. Contracts must not be awarded to bidders who do not accept contract performance clauses.
- 4.4 The Buy Social model focuses on delivering employment with training and support for new entrant trainees for building contracts with a value above £2m, and infrastructure projects with a value over £4m. There is however, the opportunity for Departments to add their own social or economic goals and extend the inclusion of the Buy Social model to any contract irrespective of value. Departments can consider requirements on a contract by contract basis in as much as those requirements are linked to the subject matter of the contract and are identified at the business case stage of the project.
- 4.5 Departments should note that the definition of Best Value for Money requires sustainability, including social, considerations to be defined in the business case.
- 4.6 If the Department intends to include social considerations in a public procurement process or contract in line with the standard approach agreed by the Procurement Board (see 3.1 and 3.3 above), then these need to be clearly stated in the tender documentation.

⁵ See Regulations 67(5) and 70 of [The Public Contracts Regulations 2015](#). See also Regulation 60 (5) and 86 of [The Utilities Contracts Regulations 2016](#). See also Regulation 36 and 41 of [The Concession Contracts Regulations 2016](#)

- 4.7 It is recommended that Departments seek expert procurement, legal, and social considerations practitioner advice, as early as possible in their deliberations on social considerations. The Buy Social team are available to assist – contact info@buysocialni.org.

5 STRATEGIC DEVELOPMENT AND IDENTIFYING NEEDS

- 5.1 A critical first step is for Departments to identify the needs which must be addressed by the procurement. In identifying the needs, Departments should consider the following non-exhaustive list:

- Departmental responsibilities and policy priorities;
- PfG commitment;
- The Buy Social model;
- the definition of Best Value for Money;
- the key procurement principle of Integration;
- statutory obligations; and
- the requirements of the Procurement Board Strategic Plan.

- 5.2 Best Value for Money and affordability considerations should be assessed as part of the business case. The [Northern Ireland Guide to Expenditure Appraisal and Evaluation \(NIGEAE\)](#) provides DoF's core guidance on the appraisal of projects and development of business cases. For fuller details of the relevant procedures, refer to the [NIGEAE Business Case Guidance](#).

- 5.3 A business case reports on two key stages of decision-making which are required for project appraisal. Para 5.1.3 of NIGEAE (reflecting HM Treasury guidance) states: "A Green Book-style strategic option appraisal conducted in accordance with NIGEAE guidance is required prior to any

assessment of alternative procurement routes, in order that the strategic policy choice and the procurement choice are both explicitly and separately justified at the earliest stages.”

5.4 Where social considerations are to be incorporated these should be identified in the business case. NIGEAE explains how social considerations should be addressed in the course of the initial strategic option appraisal. The opportunity to consider social considerations arises at two main points in the strategic appraisal:

- At the earliest stages, when determining the strategic context, the need for the project, and the project objectives i.e. NIGEAE Steps 1 to 3. For example, social needs and objectives may be framed in terms of providing employment and training opportunities for people that are disadvantaged in the labour market, improving social inclusion, equality, health, transport, and education and providing opportunities for small businesses including social enterprises.
- When assessing the costs and benefits of alternative options. Social impacts will be considered at NIGEAE Step 7 when weighing up non-monetary costs and benefits. This will include assessing how the various options perform against the social objectives set at the beginning of the appraisal; and there is also specific provision for screening for sustainability and equal opportunity impact and, where appropriate, conducting sustainability or equality impact assessments.
- As indicated in the Buy Social Toolkit (www.buysocialni.org) it should not be assumed that the inclusion of social considerations will in all cases add costs. This depends on the specific requirements and in some cases contractors can offset potential costs through use of external funding e.g. for training and targeted recruitment.

- 5.5 It is important to identify the approach to including social considerations in contracts at the earliest possible stage. The Buy Social Toolkit (www.buysocialni.org) and the Buy Social Team in SIB (see Section 13 below) may assist with this. This will ensure that the business case and procurement strategy are developed to maximise the benefits delivered by contracts.

6 SPECIFICATION OF SOCIAL CONSIDERATIONS

- 6.1 Having identified the need which the procurement will address, completed the business case and obtained expenditure approval, Departments should work with a CoPE to agree a specification⁶ for the procurement. This is the appropriate time to begin considering in detail what social clauses to include in the contract, bearing in mind the PfG commitment to “include social clauses in all public procurement contracts for supplies, services and construction”.
- 6.2 Specifications must clearly describe the procurement requirements so that Contractors can decide whether they wish to bid or not. Therefore, the specification impacts on the level of competition. Departments can only evaluate bids against the published award criteria which will be linked to the requirements of the specification. The Procurement Regulations stipulate that specifications must be transparent, and must not reduce competition, nor discriminate.
- 6.3 Social and environmental labels are permitted as part of specification, award criteria or terms and conditions as proof of compliance with a requirement with specific characteristics that are linked to the subject matter of the contract (see para 4.1) e.g. working conditions of the employees producing coffee to be supplied to the authority. However, suppliers must be allowed to offer compliance with equivalent labels or

⁶ Also known as ‘Terms of Reference’, ‘client requirements’; or other similar terminology.

offer other proofs (e.g. technical dossiers) where the label cannot be obtained within the relevant time limits. Labels must also, meet certain conditions such as being based on transparent and non-discriminatory criteria and awarded by a body independent of the supplier applying for the label.

7 SELECTION OF CONTRACTORS

- 7.1 The selection stage of the procurement process focuses on identifying the Contractor's ability to deliver the contract in relation to economic and financial standing and technical knowledge and ability. Contractors failing to demonstrate that they meet these minimum requirements will be excluded.
- 7.2 Previous experience of activities that relate to the delivery of social considerations can in principle be used as a criterion for selection and Contractors' tender submissions scored accordingly. So for example, the experience of managing training and targeting recruitment at long-term unemployed people may demonstrate the management and technical competence to deliver targeted recruitment and training. The Buy Social model makes provision for this and pilots may be developed. Given that the model is relatively new, CPD does not propose to implement scoring, but will keep this under review on a sector by sector basis as a wider range of firms develop expertise in delivery of social considerations. The new monitoring arrangements should allow Contractors to demonstrate a "track record" of delivering Buy Social clauses in future.

8 TENDER EVALUATION AND AWARDING THE CONTRACT

- 8.1 When the Department evaluates the quality of tenders, it must use predetermined award criteria, published in advance, to decide which tender

provides the Most Economically Advantageous Tender (MEAT). This includes price; cost (including life cycle costs); and the best price/quality ratio (= value for money). If the Department has identified social considerations as part of the subject matter of the contract, the Department may include social criteria as part of the award criteria.

8.2 Social award criteria may be applied provided they:

- are linked to the subject matter of the contract (see para 4.2);
- do not confer unrestricted freedom of choice on Departments;
- are set out in the contract notice or tender documentation; and
- comply with the fundamental principles of EU law.

8.3 Where the social considerations are linked to the subject matter of the contract they can be used in the award of the contract. For example, in the Buy Social model a Recruitment and Training Plan can be obtained with the tender and this could be scored as a part of the award process. This Plan can include a breakdown of associated costs that form part of the tender sum. CPD do not intend to routinely use such Plans in the award of contracts but may move towards this after consideration of a piloting process.

8.4 It is possible to use award criteria which aim to meet social requirements of disadvantaged groups of people who will receive/use the works, supplies or services being procured.

8.5 In the case of Commission V. Netherlands (C-368/10) (the Fair-Trade coffee case), which is reflected in The Procurement Regulations⁷ the European Court of Justice clarified the legal position, indicating that award criteria based on social considerations need not concern solely the

⁷ [The Public Contracts Regulations 2015](#), [The Utilities Contracts Regulations 2016](#) and [The Concession Contracts Regulations 2016](#).

persons using or receiving the works supplies or services which are the object of the contract but also “other persons”. In this particular case these other persons included small scale producers involved in the production process. The Court made clear that to be related to the subject matter of the contract an award criterion need not relate to an intrinsic characteristic of the product itself.

- 8.6 The Court also concluded that these award criteria were linked to the subject matter of the contract as they covered only the ingredients supplied for the contract, without any bearing on the general purchasing policy of the tenderers. More generally the Court confirmed the need to ensure compliance with the principles of equal treatment, non-discrimination and transparency at every stage in the procedure for awarding a contract and for clarity and precision in developing the contract specification.
- 8.7 The benefits of this judgment will be further reinforced by Departments following guidance in relation to business cases in order to emphasise the point that social clauses are linked to the subject matter of the contract.
- 8.8 The legal framework for public procurement is complex. It is recommended that Departments seek expert procurement and legal advice as early as possible in their deliberations on the use of social criteria as award criteria.

9 CONTRACT PERFORMANCE CLAUSES

- 9.1 Public contracts must be delivered in accordance with legislation which is applicable, including fair employment and health and safety. Departments may wish contracts to deliver additional social considerations in line with the decision of the Procurement Board in November 2015 and may use contract performance clauses to this end.

- 9.2 The legal framework for public procurement is complex. It is recommended that Departments seek expert procurement and legal advice as early as possible in their deliberations on the use of contract performance clauses.

10 CONTRACT MANAGEMENT

- 10.1 Good contract management ensures that all parties fully meet their specified requirements and performance in line with the terms and conditions of the contract. This will ensure that the benefits identified in the business case are realised. This will involve building an effective working relationship between the Department and the Contractor over the life of a contract. [Procurement Guidance Note 01/12: Contract Management - Procedures and Principles](#) provides details of the processes to be followed to ensure the successful delivery of all contract requirements, including social considerations.
- 10.2 When social considerations have been identified in the contract, then those requirements must be delivered in full. The Project Manager/Contract Manager must ensure that the Contractor's performance is carefully monitored. Poor performance by the Contractor on the delivery of requirements relating to social considerations must be addressed in accordance with the recommendations on poor contractor performance set out in [Procurement Guidance Note 01/12](#).

11 MONITORING ARRANGEMENTS

- 11.1 To ensure they achieve their intended purpose, it is essential to continually monitor those social considerations included in public contracts. This will ensure contractual requirements are delivered and allow for full assessment of their impact and benefit.
- 11.2 In the case of the Buy Social construction model Contractors will be required to report to the client's Project Managers at monthly meetings on

their progress in delivering the requirements of the model. The Project Manager, having satisfied him/herself that the information provided by the Contractor is accurate will populate eTendersNI with summary information recording the Contractor's progress against its targets. Details of the information that should be uploaded to the eTendersNI website are included in the eTendersNI tab of the [Contractor's Sustainability Report](#).

11.3 This information, contained in the eTenders NI portal, will be used to provide a range of reports to Departments, the Procurement Board and CoPEs.

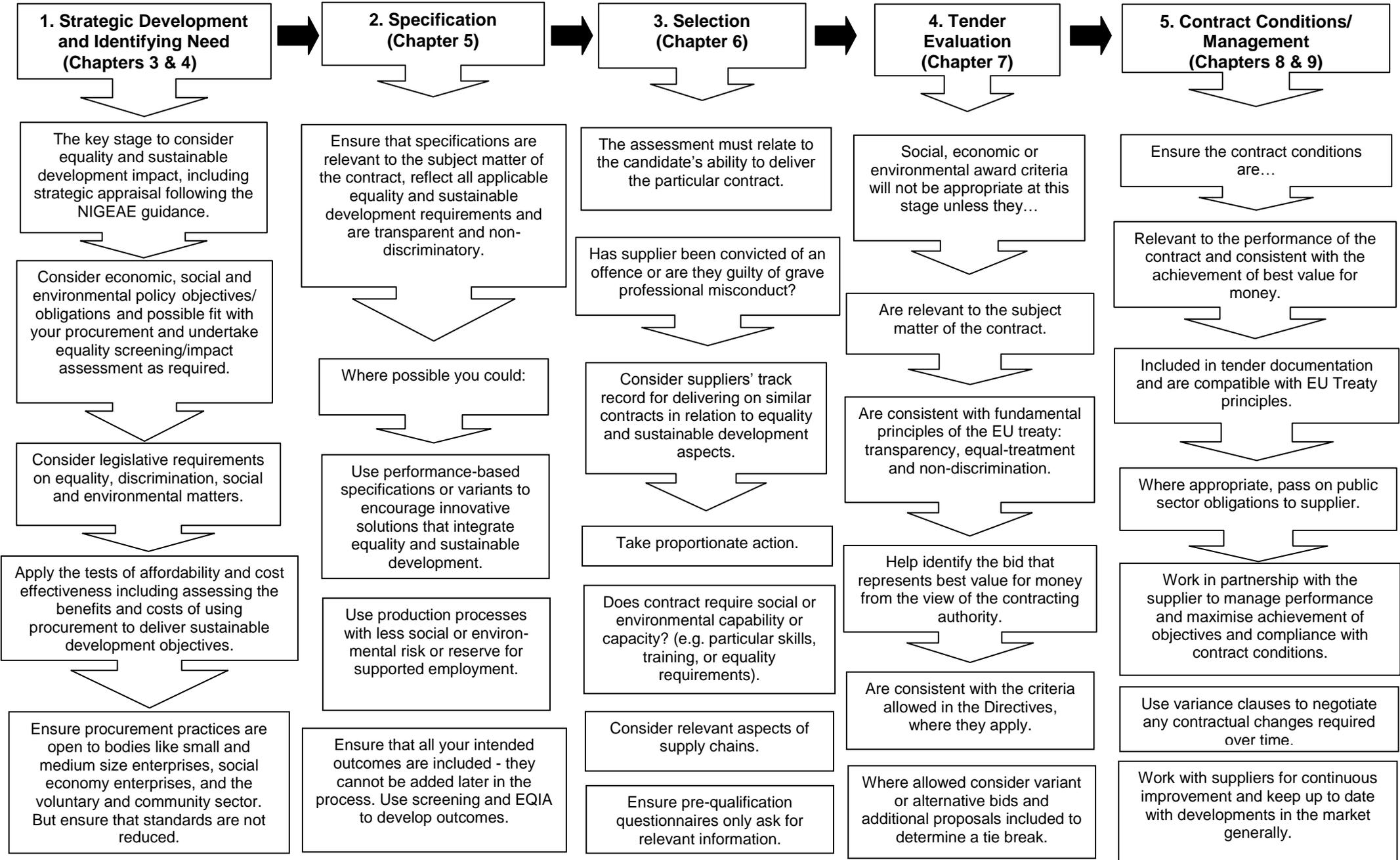
12 WHAT GUIDANCE EXISTS?

12.1 In addition to [NIGEAE](#), there is a range of guidance produced by the Procurement Board which provides guidance and support for Departments and CoPEs wishing to take account of social considerations in public procurement contracts. The principal guidance is entitled "[Equality of Opportunity and Sustainable Development in Public Sector Procurement](#)". It was produced jointly by the Equality Commission and CPD in 2008 and was endorsed by the Procurement Board and the Executive. This guide sets out the approach to be followed by Departments and CoPEs wishing to integrate equality of opportunity and sustainable development (which includes social considerations) into contracts. It should be noted that some parts of the guidance are to be revised in light of recent legal developments and clarification should be sought if there is any doubt. The flow chart on the following page is reproduced from this guide and should be applied where appropriate.

12.2 The Strategic Investment Board and CPD have developed a toolkit '[Buy Social](#)'. This is designed as a practical guide to integrating social considerations into public contracts. It aims to provide organisations with procurement responsibilities with assistance on how they can help generate benefits to society and the economy through their contracts.

12.3 The Buy Social Team within the Strategic Investment Board is available to help Departments develop appropriate social considerations for contracts that are above the threshold values agreed by the Procurement Board. It will also provide training on achieving social considerations and the Buy Social model through procurement.

This table is designed to illustrate how equality and sustainable development issues can be considered at each stage of the procurement process. It should be used in conjunction with the NIGEAE and the relevant chapters of the Procurement Board's guide on Equality of Opportunity and Sustainable Development published in 2008.



13 FURTHER INFORMATION

13.1 Advice on Buy Social NI is available from:

The Buy Social Team

The Strategic Investment Board

1 Cromac Avenue,

Gasworks Business Park,

Belfast, BT7 2JA.

Phone: +44 (0)79 1837 5586 or 028 9090 9422

Email: info@buysocialni.org

Toolkit: www.buysocialNI.org

13.2 Any queries on this PGN should be addressed to:

Procurement Policy Branch

Central Procurement Directorate

2nd Floor East

Clare House

303 Airport Road West

Belfast, BT3 9ED

Phone: 028 9081 6518

Email: procure.policy@dfpni.gov.uk