



Public Procurement and Human Rights: A Submission on the Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities.

1. The [Northern Ireland Human Rights Commission](#) (NIHRC) is an A status NHRI of the UK, and currently chairs the [Commonwealth Forum of National Human Rights Institutions](#) (CFNHRI) which has [a focus on business and human rights](#).
2. The NIHRC notes that the Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities does not currently contain reference to public procurement. Consequently, the NIHRC would like to draw to your attention the 2013 report '[Public Procurement and Human Rights](#) in Northern Ireland' from which the majority of the advice below is drawn.

Introduction

3. The UN Guiding Principles on Business and Human Rights (UNGPs) make clear that every state has the duty to protect people against abuses of their human rights by companies or other business actors. A key element of this duty is that public authorities must ensure human rights are respected wherever they enter commercial transactions with businesses, which includes public procurement and contracting out of public services. At the same time, the UNGPs state that all businesses have a responsibility to respect human rights, which applies irrespective of their size, sector or country of operation, and which extends to their business relationships, including the supply chain.¹
4. Taken together, these principles mean that public authorities must look beyond the impact of public procurement on the human rights of people in their home jurisdiction. In purchasing goods and services from suppliers in other countries, public authorities are under a duty to take reasonable measures to ensure they are not implicated in human rights abuses across the supply chain. Further, the government and public authorities must require and support businesses themselves to achieve respect for human rights in practice.

What is Public Procurement?

5. The Northern Ireland Executive defines public procurement as:

'... the process of the acquisition, usually by means of a contractual arrangement after public competition, of goods, services, works and other supplies by the public service.'²
6. General legislation and policy materials that deal with public procurement adopt similar definitions. Accordingly, public procurement can be understood as a broad term that encompasses almost all purchasing by the state – which includes government departments and other public authorities, including district councils. It therefore embraces a wide spectrum, from tenders for multi-billion pound infrastructure and urban development, to the commissioning of essential public services from private providers in the areas of health and social care, to the purchase of everyday items such as staff uniforms, stationery and foodstuffs.

¹ [UN Guiding Principles on Business and Human Rights](#), Guiding Principle 14

² [Northern Ireland Public Procurement Policy, Version 11, Issued: August 2014](#), p11

7. In OECD countries, public procurement contracts account on average for 12% of GDP and is a substantial component of the overall economy.³ Public procurement can be the single most important source of revenue in some sectors, including health and research-related industries, construction and transportation.
8. Given the large sums of public money at stake, a robust and in some areas complex set of legal rules has been developed around public procurement with the aim of ensuring fairness and accountability with regard to the allocation of public contracts. Exactly which rules need to be followed in a given case will depend on a number of factors, including the monetary value of the contract and the type of good or service being purchased.

Public Procurement: Legal Principles

9. Over and above the specific rules that determine how a given purchasing exercise should be conducted, a number of basic legal principles apply to all public procurement.
10. The first of these is freedom of contract. Under the law of contract, the basic starting point, when two parties make a legal agreement for sale of goods or services, is that persons should be free to buy or sell any goods or services, and to make such agreements with parties of their choosing. This applies also when one of the parties is a public authority.
11. Importantly, the scope of freedom of contract has always been restricted in various ways in order to promote a range of other public aims. One such aim is free trade and fair competition. Rules made by the World Trade Organisation (WTO) and in the European Union (EU), amongst others, require participating governments to ensure that contracts for provision of goods and services to public authorities are as accessible to companies outside the state as to those inside, in the interest of promoting trade across borders, and preventing protectionism. This approach, by promoting competition between vendors, is also thought to contribute to efficiency in public procurement i.e. cost effectiveness.⁴
12. A further general principle is that public procurement contracts, and the goods and services they relate to, must comply with the general law in the state or states concerned. Of course, the general law is continually evolving, through the adoption of new legislation, integration into domestic law of international rules, and case law, reflecting evolving public interests and needs, in light of a changing environment locally and globally.
13. Changes in certain areas of the general law will have a high relevance for the conduct of public procurement and design and terms of public procurement contracts. Amongst these are:
 - anti-corruption law;
 - environmental law;
 - health and safety law, and;
 - anti-discrimination law.
14. To this list now needs to be added human rights. It is clear that government and private sector actors have overlapping responsibilities to ensure that human rights are respected in the conduct of public procurement processes, in the terms of public procurement contracts, and throughout the performance of such contracts, i.e. in the production and delivery of the purchased goods and services in question.
15. Some jurisdictions in the United Kingdom have introduced legislation to allow for the consideration of social, environmental, and human rights factors in a procurement process.⁵

³ [OECD iLibrary, Government at a Glance 2015](#)

⁴ [According to the WTO](#), open, transparent, and non-discriminatory procurement is the best tool to achieve 'value for money' because this process optimises competition among suppliers

⁵ The [Public Services \(Social Value\) Act](#) in England and Wales and the [Procurement Reform \(Scotland\) Act 2014](#) in Scotland

Using Public Procurement to Promote Public Policies

16. Separate from the need for public procurement to comply with the general law, sometimes public authorities use purchasing to advance particular public policies and their aims.
17. Such aims can include, for instance, the creation of local employment opportunities, or promoting equal opportunities for groups that have been disadvantaged, such as women, persons with disabilities, or persons from specific ethnic or other minority groups.⁶ Another policy aim that is increasingly pursued by governments and public authorities through public procurement is sustainable development, a trend which has given rise to terms such as “green procurement” and “socially responsible public procurement”.
18. In the past, there was some debate over how far public authorities could go in including social benefit or sustainability clauses in public procurement contracts, without falling foul of their parallel obligations to ensure fair competition and cost effectiveness. Recently the concept of public “value for money” has been interpreted more broadly, with an eye on the hidden costs to the public (sometimes referred to as “externalities”) that low standards in the areas, for instance, of environmental management, equality, and health and safety, incur. Accordingly, it is now broadly accepted that environmental and social criteria can be taken into account in calculating “cost effectiveness” in public procurement.
19. When discussing “public procurement and human rights”, however, it is important to highlight the distinction between the requirement that public procurement respects human rights, which is a matter of legal compliance, and the discretion that public authorities have to prefer bids that advance public policy aims. For example, as noted above, public authorities are entitled, in evaluating different bids for a given contract, to consider each bid’s contribution to achieving specific public policy goals, even if these go beyond existing legal obligations. However, a public authority would not be obliged to exclude a bid for failing to contribute to a specific goal, if it still scored highly on other factors, such as meeting the main contract requirements, and cost.
20. By contrast, any bids received by a public authority that did not comply with the law would need to be excluded from evaluation altogether. Thus, if a health care provider received a bid for a contract to provide elderly care from a private owner of residential homes who lacked the requisite registrations and licences, the trust would be legally prevented from awarding the contract to that provider. Similarly, if the terms of a private company’s bid for a public contract were such that minimum wage requirements, health and safety, and working hours and leave standards would not be met, the public authority’s acceptance of the bid would be precluded.
21. The UNGPs make clear that failing to respect human rights is unlawful under domestic law for public authorities, and that public procurement practice is included in the scope of this obligation. Public authorities do have discretion over the weight they attach to social goals such as sustainability, and voluntary CSR measures, in evaluating bids for public contracts. However, this is not so in relation to human rights, equal opportunities, health and safety standards and other matters where binding standards are addressed to public authorities and businesses by law.

International Human Rights Law

22. International human rights law imposes on states a general obligation to secure enjoyment of the human rights, which extends to “positive obligations”. This means that the state’s duty to guarantee effective enjoyment of human rights goes beyond ensuring that the government itself respects rights. Rather, the state must also take reasonable measures to prevent human rights abuses by third parties, including private sector actors, for example, by enacting laws and securing their effective enforcement, through education, information, monitoring and, where necessary, the deployment of sanctions.⁷

⁶ [C McCrudden, “Using public procurement to achieve social outcomes”, *Natural Resources Forum* 28 \(2004\) 257–267](#)

⁷ See further, [General Comment by the UN Committee on the Rights of the Child Regarding Child Rights and the Business Sector](#), and [Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, Committee on Economic, Social and Cultural Rights](#). Forty-sixth session, Geneva, 2-20 May 2011; Report of the Special Representative of the

23. With regard to socio-economic rights, the nature of the state's duties under international human rights law are slightly different. It is recognised that the state may need to balance competing considerations in the course of development, leading, amongst others, to the principle of progressive realisation of economic, social and cultural rights to the maximum of available resources.⁸ Nonetheless, a minimum core obligation must be guaranteed, satisfying "at the very least, minimum essential levels" of these rights.⁹ For example, the minimum core obligations emanating from the right to health include, inter alia, a duty to ensure access: to health facilities, goods and services on a non-discriminatory basis; to minimum essential food, and to basic shelter, housing and sanitation. Government must further ensure equitable distribution of all health facilities, goods and services, provide essential drugs, and adopt and implement a national public health strategy and plan of action.¹⁰
24. On this basis, it is clear that public authorities in Northern Ireland, for example, have discretion over the approach they take to progressively realising economic and social rights through social benefit clauses. By contrast, public authorities do not have discretion over whether or not they take reasonable steps to prevent human rights abuses associated with public procurement.

UN Guiding Principles on Business and Human Rights

25. The UNGPs afford special attention to the state's role when it acts as a commercial actor. Under the heading, "the state-business nexus", Guiding Principle 6 states:

'States should promote respect for human rights by business enterprises with which they conduct commercial transactions.'¹¹

26. The Commentary to Principle 6 elaborates:

'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.'¹²

27. Contracting out of public services is also specifically addressed by the UNGPs. Guiding Principle 5 provides:

Secretary-General on the issue of human rights and transnational corporations and other business enterprises, State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries

⁸ [UN Committee on Economic, Social and Cultural Rights, General Comment 3: The nature of states parties obligations \(Art. 2, par.1\)](#), 14-12-1990

⁹ [UN Committee on Economic, Social and Cultural Rights, General Comment 3: The nature of states parties obligations \(Art. 2, par.1\)](#), 14-12-1990

¹⁰ For the complete list of minimum core obligations under the right to health, see [UN Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health \(Art. 12\)](#), 11 August 2000, E/C.12/2000/4

¹¹ UN HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the

United Nations "Protect, Respect and Remedy" Framework, [UN Doc. A/HRC/17/31](#) (2011) Principle 6

¹² UN HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, [UN Doc. A/HRC/17/31](#) (2011) Principle 6, Commentary

'States should exercise adequate oversight in order to meet their international human rights obligations when they contract with or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.'¹³

28. The Commentary on Principle 5 provides that:

'States do not relinquish their international human rights obligations when they privatise the delivery of services that may impact upon the enjoyment of human rights. Failure by a State to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail... legal consequences for the state itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.'¹⁴

29. The NIHRC recommends that public procurement is addressed within the Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities.

¹³ UN HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the

United Nations "Protect, Respect and Remedy" Framework, [UN Doc. A/HRC/17/31](#) (2011) Principle 5

¹⁴ UN HRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, [UN Doc. A/HRC/17/31](#) (2011) Principle 5, Commentary