

# Responsible business conduct in government procurement practices



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This concept note was prepared for the session on promoting responsible business conduct (RBC) through public procurement practices at the Roundtable for Policy Makers that took place on 28 June 2017 within the framework of the OECD Global Forum on Responsible Business Conduct. It sets a basis for reflection and discussion on the benefits and challenges of integrating RBC standards in public procurement.

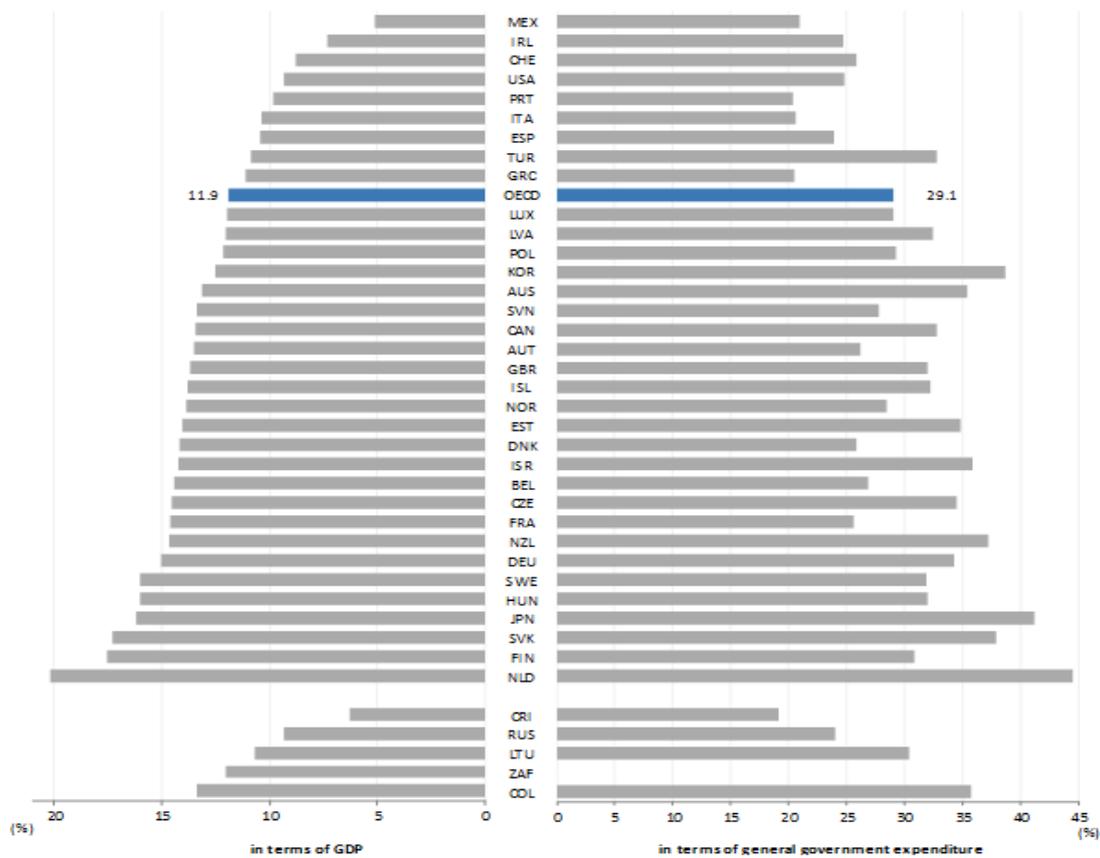
Governments are the largest consumers in the global marketplace through the acquisition of goods, services and works to carry out their functions and to deliver services to citizens.<sup>1</sup> Public procurement accounts for a substantial proportion of taxpayers' money in OECD and Partner countries representing on average 12% of GDP and 29% of the national budget (Figure 1),<sup>2</sup> with two thirds of this expenditure occurring at the sub-national levels. Public procurement has been increasingly used as a policy lever to further government action in many policy areas, ranging from protection of minorities, promoting small and medium-sized enterprises (SMEs), privileging national production, to fostering responsible business conduct (RBC). Recognising this role, the OECD Recommendation on Public Procurement calls on countries to ensure the strategic and holistic use of public procurement.<sup>3</sup>

RBC refers to business contributing positively to economic, environmental and social progress with a view to achieving sustainable development, and avoiding and addressing adverse impacts - whether from their own activities or through a business relationship, in the value chain. The OECD Guidelines for Multinational Enterprises (the Guidelines) are the leading international instrument setting out recommendations by governments to business on what they expect in terms of RBC in areas ranging from labour and human rights to environment and corruption.

Linking public procurement to RBC 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.<sup>4</sup>
- 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.<sup>5</sup>

**Figure 1. Size of public procurement in OECD and partner countries**



Source: OECD (2017), *Government at a Glance 2017*

### International policy frameworks calling for linking public procurement to RBC outcomes

States have widely recognised public procurement as a lever for achieving economic, social, and environmental policy goals. Besides Sustainable Development Goal 12.7 calling for the implementation of sustainable public procurement policies and action plans, a set of political commitments are in place to provide a framework for these practices.

The OECD Recommendation on Procurement calls on Adherents to foster the use of public procurement to support secondary policy objectives, including RBC standards set by the OECD Guidelines for Multinational Enterprises (2011). While the OECD Guidelines are recommendations by governments to business on responsible business conduct, the OECD Policy Framework for Investment (PFI)<sup>6</sup> provides recommendations on how governments can provide an enabling policy framework for RBC. The PFI emphasises the importance of the aligning all policies relevant to RBC and ensuring that RBC standards are observed in the context of the government’s role within the economy, recognising in particular the role of public procurement criteria related to RBC.

The United Nations Guiding Principles on Business and Human Rights specifically address procurement activities, and recommend that “States should promote respect for human rights by business enterprises with which they conduct commercial transactions.”<sup>7</sup> The procurement angle has also been widely taken up in National Action Plans (NAPs) on Business and Human Rights, as well as National Action Plans on Corporate Social Responsibility (CSR) and RBC, for example by Germany, Italy, Switzerland, United Kingdom, and the United States.

For countries of the European Union, the revised European Directive on Public Procurement (Directive 2014/24/EU) encourages EU governments through their national legislations to promote sustainable development through various approaches and tools such as the use of the total life cycle approach to assess the real cost of products, works and services; and the use in the tender documentation of award criteria guaranteeing the respect for environmental and social obligations.<sup>8</sup> This allows awarding (and rejecting) procurement contracts on the basis of social and environmental considerations, which are part of RBC. The importance of doing so was emphasised by the European Council of Foreign affairs in June 2016 encouraging EU Institutions and Member States to address their responsibilities as commercial actors in public procurement and calling on the Commission "to consider what support can be provided to public authorities covered by the revised EU Procurement Directive, through tools and guidance for the implementation of the UN Guiding Principles, the OECD Guidelines and the ILO Tripartite Declaration."<sup>9</sup> In addition, European institutions have made a link with the National Contact Point mechanism, the non-judicial grievance mechanism of the OECD Guidelines, calling for its recommendations to be taken into account in procurement decisions.<sup>10</sup>

In the same vein as the EU Procurement Directive, the WTO Revised Agreement on Government Procurement (GPA) of 2014 introduced new exceptions for environmental and social policy linkages in order to overcome some of the legal challenges associated with restricting procurement awards based on RBC principles.<sup>11</sup> Most recently and in the context of these international developments, the International Organisation for Standardisation (ISO) Directive 20400 released in April 2017, provides guidelines for organisations implementing sustainable procurement in the public and private sector with regards to managing risks, addressing adverse sustainability impacts through due diligence, setting priorities, and exercising positive influence.<sup>12</sup>

### **Evolution of public procurement practices to include RBC considerations**

In the past, tender outcomes have been based primary on the initial cost approach, and that is still the case in many countries. Nevertheless, in recent years, a considerable shift has taken place from a purely initial cost approach to a life cycle approach including environmental and social impacts enhancing value for money. While in the past value for money meant lowest price, now Governments are increasingly concerned with the broader impacts of the goods and services they purchase. However, procurement processes are complex and it can be challenging for policy-makers to reconcile core procurement principles - transparency, economy, openness, fairness and competition - with the pursuit of social and environmental objectives.

In this context, so-called "green" public procurement, whereby authorities seek to procure goods, services and public works with a reduced environmental impact throughout their life-cycle,<sup>13</sup> is particularly advanced. Green procurement provides practical examples and evidence on how to internalise environmental objectives in the procurement process. Almost all OECD countries have developed strategic procurement policies rewarding greening efforts and encouraging innovation, for example, by promoting reduced energy consumption, introducing life-cycle costing analysis or incentivising industrial low-carbon innovations.<sup>14</sup> A number of good practices and lessons learnt can be instrumental for the purpose of the wider RBC agenda. For example, performance based contracting and payment dependent on achieving green solutions have led to significant innovation.<sup>15</sup> Experience also shows that for the success of green procurement it is necessary to educate policy makers and businesses on green procurement as well as monitor processes to create a feedback loop.<sup>16</sup>

More recently, green procurement efforts have been taken up as part of sustainable procurement, which pursues economic, environmental and social objectives. In particular with the adoption of the revised EU procurement Directive, in EU countries sustainable procurement has grown in size, but also in scope – to encompass a wider range of environmental, social and economic issues.<sup>17</sup> Sustainable procurement efforts intersect with and are relevant to the objective of promoting RBC standards. However, sustainable procurement does not per definition address all facets of RBC. Most human rights, labour and environmental related provisions limit responsibilities to the first-tier

contractor or supplier but do not take into account environmental, social and human rights related adverse impacts through supply chains.<sup>18</sup>

## **National policy and legal frameworks enabling RBC in public procurement**

A number of procurement laws, like the ones derived from the EU Directive, allow for some RBC criteria to be included, mostly in relation to labour rights and environmental objectives. For example in Poland, Article 29 of the Public Procurement Law allows for procurement authorities to specify requirements “connected with the implementation of the contract which may include economic, environmental, social, innovation- or employment-related aspects.”<sup>19</sup> In Mexico, Article 26 of the Public Procurement law provides that goods and services contracts should be awarded in accordance with price and quality, but also energy efficiency, responsible use of water, and sustainable use of natural resources.<sup>20</sup> The Federal Acquisition Regulation of the US government prohibits the acquisition of products produced by forced or indentured child labour and also includes provisions on combatting trafficking in persons.<sup>21</sup> However, other parts of RBC, in particular human rights standards are less often addressed in national procurement laws. A 2016 survey on links between public procurement and human rights in 20 jurisdictions found that “most respondents reported that there are no dedicated legal measures that explicitly address the obligations of public authorities to respect human rights in the context of public purchasing in general.”<sup>22</sup>

At the same time, there also exists a difference in national policy and legal frameworks between the mandatory or voluntary implementation of the RBC considerations by contracting authorities impacting their effectiveness, given that contracting authorities are the ones that are ultimately conducting the procurement procedures. National laws and policies may permit, and even call for, including RBC considerations in public procurement, but to be effective, they also have to be adequately reflected in implementation regulations, manuals for procurement, codes of practice, strategies and action plans. This is still work in progress in many countries, but a few examples of where this is already the case can be cited.

For example, public organisations of the Welsh government are expected to sign up to the *Code of Practice on Ethical Employment in Supply Chains*, which provides guidance on preventing poor or unethical employment practices in their own organisation and throughout supply chains.<sup>23</sup> The first objective of the national procurement strategy of Sweden states that “public procurement should be used as a tool for good business” and it explains that procurers have to take into account risks in the supply chain of the contractor in terms of respect for human rights.<sup>24</sup> In May 2017 the London Universities Purchasing Consortium, the University of Greenwich and the Chartered Institute of Procurement published a guide for procurement practitioners on protecting human rights in the supply chain.<sup>25</sup>

In the Netherlands, following the implementation of guidelines on sustainable procurement in 2006, ambitions to further embed RBC in procurement practices have manifested through a nationwide initiative initiated by the Ministry of Infrastructure and Environment to commit national, regional and local governmental bodies to responsible public procurement. The Manifesto on responsible public procurement pushes the involved parties to tackle organizational challenges to allow procurement to contribute to their RBC policy objectives. The tangible outcome of this initiative is that over 100 governmental bodies with a purchasing power of over €60 billion have signed the manifesto and have begun presenting their action plans on how to further integrate RBC in their public procurement organization.<sup>26</sup>

## **National practices integrating RBC in public procurement**

While national legislation on public procurement provides the enabling framework for including RBC standards in procurement, the key challenge is the effective implementation of those standards in all stages of the procurement cycle. Good practices and examples can be drawn in this regard from countries' experience with green and sustainable procurement [which relate most commonly to the “doing good” component of RBC]. There is more limited experience on how to ensure that the

procurement process guarantees that procured goods do not cause adverse impacts on human rights, labour rights and the environment in their supply chains. However, some noteworthy initiatives have taken place, in particular at the regional and municipal levels of government. Only some examples are reflected here.

### *Including RBC in tender documentation*

Tender documentation can take into account RBC standards by for instance using RBC criteria in the pre-qualification and evaluation criteria ensuring the alignment of tender outcomes with RBC standards to participate in the bidding process, as well as in the criteria for awarding the contract.

For example, in Australia, Canada, Finland, Norway, Switzerland, United Kingdom, and the United States, private security companies are required to be members of the International Code of Conduct for Private Security Providers' Association as prerequisite to participating in bidding processes.<sup>27</sup> This Code requires companies to conduct human rights based due diligence as well as to submit themselves to monitoring, assessment of performance, and corrective action for violations.<sup>28</sup>

The City of Madison, Wisconsin, in the United States developed a tender for uniforms that are typically used by fire, metro, police and other municipal operations agencies.<sup>29</sup> The bidding contract includes strict human rights due diligence requirements, including a binding compliance plan to disclose, remedy, and prevent violations in their supply chains. As a cooperative contract,<sup>30</sup> it is open to tens of thousands of public agencies in the U.S.

In the Netherlands, public procurement authorities use a tool called 'Dubocalc' to "assess and monetise environmental impacts of a product/design based on life cycle analysis for infrastructure and public works projects."<sup>31</sup> Essentially, this tool accounts for the adverse impact of CO2 emissions in the entire value chain and life cycle of the tender when calculating the cost of the bid. Companies are incentivised to collaborate with their supply chain to reduce CO2 impacts through a points system that allows for a higher advantage in the tendering process when carbon footprint reduction goals are met.

Some public procurement processes have used OECD tools to clarify the expectations on suppliers to provide risk assessment and mitigation strategies with regard to potential or actual adverse impacts of violations in their supply chain, in particular the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (hereinafter "OECD Minerals Guidance"). For example, in Denmark, suppliers participating in framework agreements established by SKI (Denmark's central purchasing body) are required to carry out due diligence based on the OECD Guidelines for Multinational Enterprises, as well as the OECD Minerals Guidance.<sup>32</sup> Sweden's National Agency for Public Procurement recently launched a tender for mobile phones with award criteria referring to conducting supply chain due diligence to avoid contributing to conflict minerals. Through this process, suppliers who could report due diligence procedures in accordance with the OECD Minerals Guidance received additional points in the evaluation of bids.<sup>33</sup>

### *Monitoring and follow-up*

The OECD Recommendation on Public Procurement emphasises the importance of appropriate impact assessment methodology to measure effectiveness of procurement in achieving RBC objectives.<sup>34</sup> When RBC considerations are part of the procurement process, contracting authorities and other responsible public authorities need to check if the contractor as well as by its sub-contractors comply with them. Under these provisions penalties might be incurred or contracts might be revoked in case of non-compliance. Some governments have developed sophisticated practices with regards to monitoring contractors' compliance with contract provisions, but they generally lack specific guidance for circumstances when negative impacts are discovered as part of the monitoring process.<sup>35</sup>

In the apparel sector, the Sweatfree Purchasing Consortium (SPC) comprises 14 U.S. cities and 3 U.S. states, and seeks to ensure that the government apparel products are made without sweatshop labour.<sup>36</sup>

SPC provides procurement authorities with model a procurement policies and codes of conduct, purchasing guides, labour compliance questionnaires, and online worker complaint forms. Participation in the programme also requires suppliers to be independently monitored for compliance with codes of conduct, showing that they are making credible efforts to address abuses.<sup>37</sup> A similar initiative in Europe, the Clean Clothes Campaign, comprises municipalities from the Netherlands, Belgium, Germany and France.<sup>38</sup> In the United States, several cities, including Los Angeles and San Francisco, require apparel contractors to disclose factory locations and retain the Worker Rights Consortium to produce monitoring reports on compliance with each city's code of conduct.<sup>39</sup>

Following a report by Danwatch that exposed forced labour and hazardous working conditions in the IT supply chains of the Danish State and municipalities, public authorities in Denmark, Sweden and other jurisdictions were forced to re-evaluate public procurement contracts and conduct significant due diligence of their contractors and suppliers, including undergoing third party audits, on-site visits of factories, and on-going reporting back of efforts to address abuses.<sup>40</sup>

In the case of Sweden's municipal level health authorities, the procurement agency sends out questionnaires to suppliers of medical equipment to determine if proper supply chain due diligence practices are in place.<sup>41</sup> It then follows up on these questionnaires asking for audit results and whether a risk mitigation strategy was actually being used. In some cases, the public procurement agency can hire third party auditors to conduct on-site evaluations of suppliers. For services provided in Switzerland, Article 6 of the Ordinance on Public Procurement (OPP) specifies that contracting authorities are entitled to verify a tenderer's compliance with "minimum social standards."<sup>42</sup> For services performed outside Switzerland, the procuring entity is recommended to commission independent external experts to perform an onsite audit where there is a risk of the bidder or one of its key third parties breaching the minimum social standards (including the ILO fundamental Conventions).

### **Considerations for including RBC and supply chain due diligence in public procurement**

While international policy frameworks and national procurement laws enable and some even call for inclusion of RBC standards, more needs to be done to ensure that RBC and in particular supply chain due diligence are taken into account in practice in all areas of public procurement. At the same time, it is possible to identify positive components coming from RBC in the public procurement systems of many OECD countries, though not necessarily named or framed as RBC.

To allow contracting authorities to include RBC standards in public procurement, a coherent domestic policy framework is needed. This is still a challenge in a number of countries.<sup>43</sup> Inter-agency cooperation can be instrumental to foster coherence between the policy framework and the design of tools for procurers to address supply chain risks. Beyond internal collaboration, dialogue with suppliers and relevant stakeholders can serve to better understand the capabilities of businesses, practical challenges with implementing RBC, and how to tailor tenders more appropriately.

Another challenge relates to public officials' lack of technical knowledge on integrating RBC standards in the procurement process.<sup>44</sup> The changing perception of the real cost of a product or service in relation to potential environmental and social impacts requires a change of culture by public procurement officials which are traditionally risk-averse. This means that in order to effectively integrate RBC outcomes in public procurement, besides the technical knowledge and skills required to deal with procurement processes, officials, as well as government auditors should be trained to understand RBC considerations and their potential application to the technical stages of procurement.

In order to foster RBC standards in public procurement, effective monitoring mechanisms are needed to evaluate if "RBC proof" procurement achieves its goals, building the case for a stronger use in the future. Tools to track performance and measure impact are instrumental to make the "business case" for linking RBC and procurement, and as such can change the perception that products and services

which pay due consideration to social and environmental objectives may be more expensive than conventional ones.

Strong sustained leadership and political commitment at the highest level is needed to drive RBC policies forward. Public procurement is subject to many pressures, from cutting costs to meeting the demands of internal users and the public. Sufficient support and available resources are required for sustainable procurement to stay high on the political agenda.

Finally, strengthened international collaboration among public buyers may increase leverage for RBC standards. Socially responsible procurement could be advanced by bringing together practitioners to share learning and best practice, spread tools, exchange information on risks related to certain products and markets and share information on follow-up and monitoring. The OECD could provide a platform for convening practitioners and policy makers.

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## Notes

- <sup>1</sup> This paper has been informed by the discussions that took place in the context of the OECD-EU Conference on Strategic Public Procurement held on 2 June 2017, UICP Espaces Congrès, Paris, organised by the OECD Directorate for Public Governance, [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=9123](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=9123).
- <sup>2</sup> OECD (2017), *Government at a Glance 2017*, OECD Publishing, Paris; A significant portion of public procurement takes place at the sub-national level (state and municipal levels) 62% of the public procurement spending in OECD countries is estimated to be spent at the sub-central level (2015).
- <sup>3</sup> Recommendation of the Council on Public Procurement (2015), [www.oecd.org/gov/public-procurement/recommendation/](http://www.oecd.org/gov/public-procurement/recommendation/).
- <sup>4</sup> Beyond actual legal liabilities, poor business conduct can also result in delays and opportunity costs for governments. Responsible business practices, in addition to avoiding costs, can help to build a positive corporate culture and image. This in turn can influence the retention of employees, help increase productivity as well as boost brand appeal and thus increase market strength. Taking into account the RBC practices of government contractors and their suppliers in the bidding process will also help level the playing field for companies that invest in RBC programs, See also: Dr. Roel Nieuwenkamp, OECD Insights (2015), “[Can Companies Really Do Well By Doing Good? The Business Case for Corporate Responsibility](#)”; ICLEI (2016) *Procura+ Manual*; CIPS (2009) *Sustainable Procurement*.
- <sup>5</sup> Institute of Human Rights and Business (2014) *State of Play Human Rights in the Political Economy of States: Avenues for Application*, p. 56, [www.ihrb.org/pdf/2014-03-18\\_State-of-Play\\_HR-Political-Economy-States.pdf](http://www.ihrb.org/pdf/2014-03-18_State-of-Play_HR-Political-Economy-States.pdf).
- <sup>6</sup> OECD (2015) *Policy Framework for Investment*, Chapter 7 on Enabling RBC, [www.oecd.org/investment/pfi.htm](http://www.oecd.org/investment/pfi.htm); Council of Europe Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, adopted by the Committee of Ministers on 2 March 2016, para. 53; supported by Opinion of the European Union Agency for Fundamental Rights, 10 April 2017, Ensuring effective National Contact Points in all EU Member States.
- <sup>7</sup> United Nations (2011) *United Nations Guiding Principles on Business and Human Rights*, Chapter 1, Section B(6), [www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

8 European Union (2014) European Union Directive on Public Procurement, 2014/24/EU, Article 97,  
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014L0024-20160101>.

9 EU Foreign Affairs Council (2016) Council Conclusion on Business & Human Rights, para.11,  
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10 Council of Europe Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States  
on human rights and business, adopted by the Committee of Ministers on 2 March 2016, para. 53;  
supported by Opinion of the European Union Agency for Fundamental Rights, 10 April 2017, Ensuring  
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11 World Trade Organisation (2014) Revised Agreement on Government Procurement,  
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13 European Commission (2008) *Communication from the Commission to the European Parliament, the  
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14 OECD (2017), *Government at a Glance 2017*, [www.oecd.org/gov/govata glance.htm](http://www.oecd.org/gov/govata glance.htm)

15 OECD (2016), *Going green: best practices for sustainable procurement*,  
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16 *Ibid.*

17 European Sustainable Procurement Network (2016), *Procura+ Guide to implementing sustainable  
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18 International Learning Lab on Public Procurement and Human Rights (2016) *Public Procurement and  
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19 Poland (2004, amended 2016) *Public Procurement Law*, Article 29, para. 4,  
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20 Mexico (2014) *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público (Law on  
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21 [www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf](http://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf).

22 International Learning Lab on Public Procurement and Human Rights (2016) *Public Procurement and  
Human Rights: A Survey of Twenty Jurisdictions*, p. 28, [www.hrprocurementlab.org/wp-content/  
uploads/2016/06/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf](http://www.hrprocurementlab.org/wp-content/uploads/2016/06/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf).

23 All public sector organisations whose functions are Welsh devolved, including the Welsh Government,  
the National Procurement Service, Universities, and the National Health Service, as well as all private  
business in receipt of Welsh public funds or part of the public procurement process, are expected to  
sign up to the Code and commit to its recommendations. Other public or private organisations based in  
Wales but not part of the aforementioned groups are encouraged to sign up to the Code.  
Recommendations include setting up a written policy, producing annual reports on how risks are  
addressed, and ensuring that the organisation’s suppliers also sign up to the Code of Practice.

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25 <http://static.uk-plc.net/library/london-universities-purchasing-consortium/documents/knowledge-lupc--protecting-human-rights-in-the-supply-chain.pdf>

26 [www.pianoo.nl/themas/maatschappelijk-verantwoord-inkopen-mvi-duurzaam-inkopen/ontwikkelingen-mvi/manifest-maatschappelijk-verantwoord-inkopen](http://www.pianoo.nl/themas/maatschappelijk-verantwoord-inkopen-mvi-duurzaam-inkopen/ontwikkelingen-mvi/manifest-maatschappelijk-verantwoord-inkopen)

27 International Code of Conduct for Private Security Providers' Association, Frequently Asked Questions, [www.icoca.ch/en/en/mandate/faq](http://www.icoca.ch/en/en/mandate/faq).

28 International Code of Conduct for Private Security Providers' Association (2016) Reporting, Monitoring and Assessing Performance (Article 12), [www.icoca.ch/en/monitoring](http://www.icoca.ch/en/monitoring).

29 City of Madison, Uniform Management Program Cooperative Contract, [http://buysweatfree.org/uniform\\_management\\_program](http://buysweatfree.org/uniform_management_program).

30 A cooperative contract is “a form of intergovernmental cooperative purchasing in which an entity will be extended the same pricing and terms of a contract entered into by another entity.” See The Institute for Public Procurement (2013) “Cooperative Procurement Great Value (Great Confusion),” [www.nigp.org/docs/default-source/New-Site/position-papers/150105\\_cooperative-purchasing-position-paper\\_complete\\_updated.pdf?sfvrsn=2](http://www.nigp.org/docs/default-source/New-Site/position-papers/150105_cooperative-purchasing-position-paper_complete_updated.pdf?sfvrsn=2).

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