

Socially Responsible Public Procurement & Bird & Bird

Stuart Cairns

Prague

16-17 August 2017

About Bird & Bird

A truly international firm, organised around our clients.

- A truly international firm with over 1,200 lawyers worldwide
- A global network spanning 29 offices in 19 jurisdictions.
- Leading-edge expertise across a full range of legal services, with a particular focus on technology driven, IP-rich and regulated industries
- Specialists in cross-border and multi-jurisdictional work
- Excellent at managing complex projects across multiple regions with a seamless one-firm approach.



International reach- 29 offices in 18 countries

Europe: Aarhus, Bratislava, Brussels, Budapest, Copenhagen, Düsseldorf, Frankfurt, The Hague, Hamburg, Helsinki, London, Luxembourg, Lyon, Madrid, Milan, Munich, Paris, Prague, Rome, Stockholm and Warsaw.

Middle East & Asia: Abu Dhabi, Beijing, Dubai, Hong Kong, Shanghai, Singapore and Sydney.



Agenda

Day 1

Possibilities of Social Value in Construction Projects.

Day 2

Morning – Direct Payments to Subcontractors (9.00 – 12.00)

Afternoon – Discussion on individual issues raised by participants (13.00 – 16.00).

Detailed Agenda for Day 1

Possibilities of social value in construction projects. Day 1, 9.00-17.00

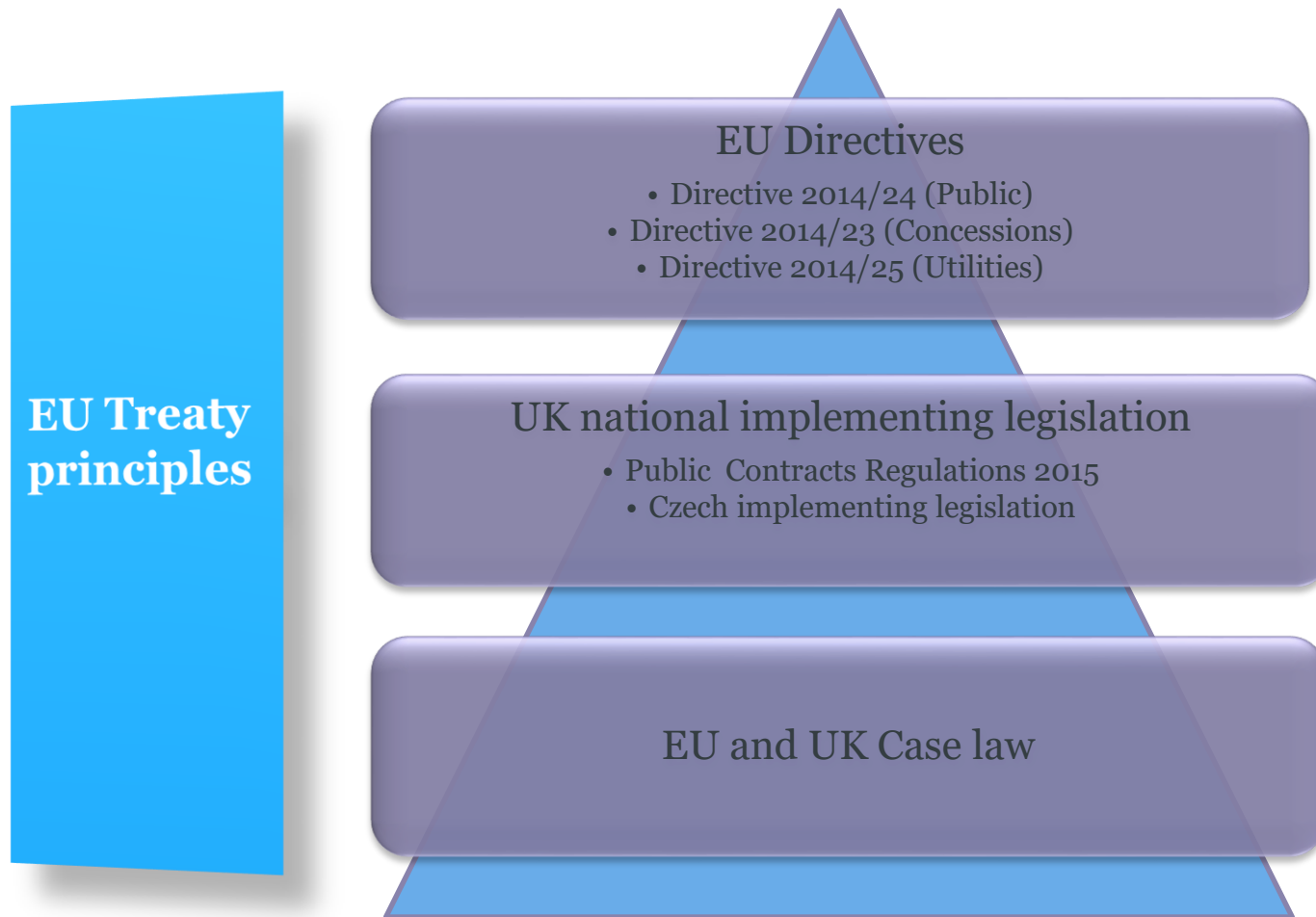
- Legal framework – EU, UK
- Spectrum of social value possibilities in public construction contracts. Among other topics focus on good working conditions, safety at work, fair treatment of subcontractors, incl. codes of conduct and payment policy. Introduction of various possibilities and their impact. Why contractors do it (purpose), what are outcomes and benefits.
- Environmentally friendly solutions and life cycle costs and their reflection in tenders.
- MEAT (most economically advantageous tender) in construction – examples of non-price award criteria allowing focus on quality.
- Examples of public procurements with social value emphasis and their breakdown to tender phases with focus how the social value was stipulated (both simple and complex examples)
- Market consultations including discussions on social responsibility in the tender and other ways of communication with potential suppliers
- Embedding to the Czech legal and economic framework

The Legal Framework

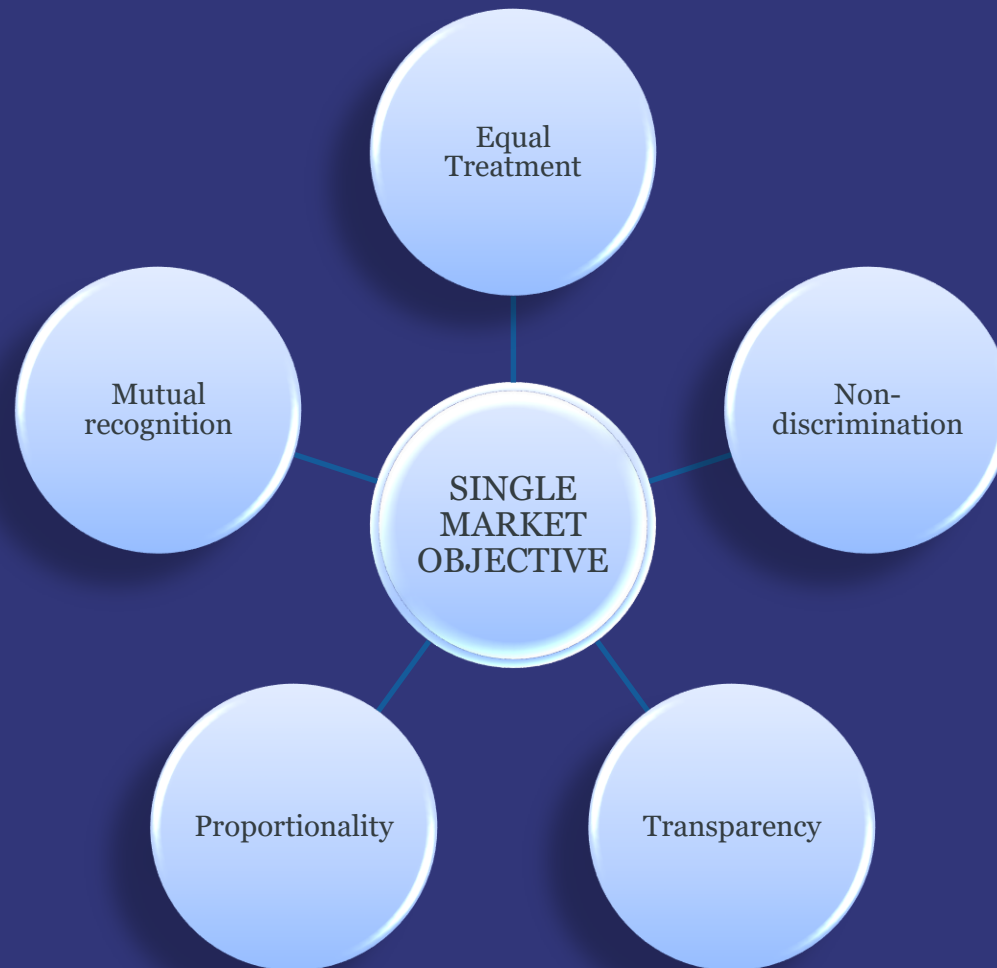
Background to the EU public procurement rules (and why they may not make any commercial sense)

- Aim of the rules is to open up EU public sector purchasing on a pan-European basis – ensuring that companies in each EU Member State have equal opportunity to bid and win contracts
- Achieving value for money is secondary to the objective of achieving equal access and ensuring non-discrimination
- EU Treaty principles are therefore fundamental to the public procurement rules:
 - Equal treatment, non-discrimination, transparency, proportionality, mutual recognition

Background to the EU Procurement Rules – Three Sources of Law



The importance of the Treaty principles



Public Contract Regulations 2015

- England, Wales and Northern Ireland (Scotland have own Regs)
- Deregulate and simplify the rules
- Copy-out approach (UK)
 - The wording of the Directive has been closely followed
 - Czech Republic?
- Catching contracts that fall under the threshold
 - Regulations 110 and 112 (England and Wales)
- Part A and Part B services, the removal of the distinction

Public Contract Regulations 2015 – The Light Touch Regime (LTR)

- Contracts that are of lower interest to cross-border competition
- Includes social, health and education services
- Fewer services in LTR than were in Part B – so some contracts that were subject to the Part B rules will now be subject to the full rules
- A new threshold – €750,000 (£625,050)
- Mandatory requirements?
 - OJEU advertising
 - Contract award notice
 - Transparency and equal treatment
 - Conduct of procurement
 - Reasonable and proportionate time limits

Public Contract Regulations 2015

➤ Advertisement

- 'Call for competition' notice published in the OJEU
- A new 'Prior Information Notice' (PIN)

➤ Pre-Qualification Questionnaires (PQQ)

- Standard PQQ
 - ✓ The supplier, its bidding model, licensing and registration, grounds for mandatory exclusion, grounds for discretionary exclusion, economic and financial standing, technical and professional ability

Public Contract Regulations 2015

➤ SME Friendly?

- Shorter timescales
- Availability of documentation
- "Encouragement" to break into small lots
- Standard form PQQ/ESPD
- Turnover test = 2 x contract value

Public Contract Regulations 2015 – Choice of Procedure



Changes to the procedures

- Time limits shortened
- Greater freedom
- Negotiations not mandatory under fifth procedure
- Clarify, specify and optimise tenders with preferred bidders under fourth procedure
- In situations of urgency, accelerated procedures may be used

Contract award procedures

Procedure	Pros	Cons
Open	<ul style="list-style-type: none"> - Simple - Good for commoditised goods - No negotiation 	<ul style="list-style-type: none"> - Must use a contract notice - Not suitable where a large number of bidders is expected - No negotiation
Restricted	<ul style="list-style-type: none"> - Includes pre-qualification stage - Possible to agree timescales 	<ul style="list-style-type: none"> - No negotiation
Competitive procedure with negotiation	<ul style="list-style-type: none"> - Flexibility - Allows negotiation - Potentially lower risk of challenge - Possible to agree timescales 	<ul style="list-style-type: none"> - Only appropriate for particularly complex projects - Lengthy and resource intensive
Competitive dialogue	<ul style="list-style-type: none"> - Good for complex projects - Flexibility - Allows negotiation - Potentially lower risk of challenge 	<ul style="list-style-type: none"> - Only appropriate for particularly complex projects - Lengthy and resource intensive

Financial Thresholds

- Full procurement rules apply only to contracts which are above the relevant financial thresholds (2016/17):

	Supplies + Services	Works	Social and other Specific Services
Central Government	€135,000 (£106,047)	€5,225,000 (£4,104,394)	€750,000 (£589,148)
Other authorities	€209,000 (£164,176)	€5,225,000 (£4,104,394)	€750,000 (£589,148)
Defence	€418,000 (£328,352)	€5,225,000 (£4,104,394)	N/A

Young Reforms – Part 4 of the PCR

Part 4 of the PCR 2015 contains rules on procurement which follow Lord Young's review in 2013, 'Growing Your Business'

The intention of the Lord Young rules is to reduce the burden on small businesses and help them win more contracts

Lord Young's reforms gives additional rules to be followed for procurement above EU thresholds and a new set of rules for below threshold procurement.



Young Reforms – Part 4 of the PCR

What does it say?

Requirement to advertise contract opportunities and contract awards on Contracts Finder

Unless the value is below £10,000 (for central government) or £25,000 (for all other authorities, including NHS Trusts)

Time limit for publication within 24 hours of the opportunity being advertised elsewhere.

The requirement to advertise is now a legal requirement, rather than Cabinet Office guidance

Abolition of PQQ requirements below EU threshold

Above threshold contracts: Cabinet Office has mandated the use of a standard set of questions. Failure to use the standard questions without justification is reportable

Prompt payment of suppliers

All public contracts will now have to contain wording that provides for all valid, undisputed invoices to be paid by the contracting authority within 30 days.

Certain contracting authorities will be exempt from the rules.

Social Value through the Public Services (Social Value) Act 2012

The Act cemented the importance of contracting authorities providing social value throughout their procurement process

“In these tight economic times it is particularly important that maximum value in public spending is achieved. However currently some commissioners miss opportunities to secure both the best price and meet the wider social, economic and environmental needs of the community. Commissioners and procurers should be taking a value for money approach – not lowest cost – to assessing contracts and the Act complements that approach.”

Cabinet Office Efficiency and Reform Group

An **Act** to require public authorities to have regard to economic, **social** and environmental well-being in connection with public services contracts; and for connected purposes.

Public Procurement - Scotland

"Smart use of procurement can play a key role in building a more prosperous and fairer Scotland by: promoting jobs and growth; encouraging innovation; boosting training, apprenticeship and employment opportunities; and helping businesses, particularly small and medium sized enterprises (SMEs), third sector bodies, and supported businesses to compete effectively for contracts."
'Guidance under the Procurement Reform (Scotland) Act 2014', The Scottish Government

Procurement Reform (Scotland) Act 2014

The Regulations essentially mirror the Articles of the Directive

At the heart of the Act is the concept of social responsibility, including an increased drive to deliver greater community benefits through public procurement.

Public Procurement – Scotland

What are the differences to the rest of the UK?

- Price cannot be used as the sole award criteria in Scotland
- Enforcement mechanisms are different due to Scotland's separate court system
- The Public Contracts Regulations 2015 contain additional miscellaneous provisions not found in the Scottish Regulations, requiring contracting authorities to ensure *every* public contract they are aware of contains provisions to require payment to the contractor and contractor's supply chain to be made within 30 days.
- Contracting authorities with a significant procurement expenditure (regulated procurements equal to or greater than £5m) must prepare a procurement strategy and annual report.
- Contracting authorities with a significant procurement expenditure (regulated procurements equal to or greater than £5m) must prepare a procurement strategy and annual report. The procurement strategy must include a statement on the contracting authority's general policy on, among others, the use of community benefits and payment of a living wage. Statutory guidance on the payment of a living wage has already been published. Part of the procurement strategy must set out how the contracting authority intends to ensure, so far as reasonably practicable, payments to the contractor and down the supply chain are made within 30 days of invoice.

Guidance

- Ref. EU Guide on Buying Social
- UK Guidance
- Any Czech Guides?

Toolkits / Internal Policy Documents

- Demonstrates organisational commitment
- Developing it can help secure buy-in from stakeholders
- Provides a roadmap for commissioners/procurers
- Assists bidders in responding to opportunities

Most Economically Advantageous Tender (MEAT)

- The most economically advantageous tender (MEAT) criterion enables the contracting authority to take account of criteria that reflect qualitative, technical and sustainable aspects of the tender submission as well as price when reaching an award decision.
- As early as possible in the process, preferably when the requirement is advertised in the OJEU, the criteria will be published and advised to the potential tenderers.
- The relative weighting of each criterion used to assess the submissions must be stated or, where this is not possible for objective reasons, they should be stated in descending order of importance.

Most Economically Advantageous Tender (MEAT)

Quite often the award criteria stated in the contract notice and/or the tender documentation will be made up of a number of sub-criteria. These sub-criteria and their weightings should also be notified to the tenderers.

The legislation lists the following criteria (although this list is not exhaustive):

- quality;
- price or cost using a cost-effectiveness approach;
- technical merit;
- aesthetic and functional characteristics;
- accessibility;
- social characteristics;
- environmental characteristics;
- innovative characteristics;
- after-sales service and technical assistance; and
- delivery conditions such as date, process and period.

Most Economically Advantageous Tender (MEAT)

67(5) Award criteria shall be considered to be **linked to the subject-matter** of the public contract **where they relate** to the works, supplies or services to be provided under that contract **in any respect** and **at any stage** of their life cycle, including factors involved in—

(a) the specific process of production, provision or trading of those works, supplies or services, or

(b) a specific process for another stage of their life cycle, even where those factors do not form part of their material substance.

Spectrum of Possibilities

- Good working conditions
- Safety at Work
- Fair treatment of subcontractors
- Codes of conduct
- Payment policy
- Environmental Issues
- Life Cycle costs

Options: minimum requirement, qualitative assessment, contract clauses?

Life-cycle costs

Regulation 68 specifically outlines that life cycle costing can now be used by buyers when cost is the award criterion.

Life-cycle costing is similar to MEAT in that it takes into account a combination of price and quality. The difference is that all aspects of the production process can be considered in the evaluation of the bid.

Buyers may want to consider the following elements in greater detail before making the decision to purchase:

- Various transaction costs, such as taxes, foreign exchange and contracting costs.
- Finance costs (if capital has to be borrowed to pay for the purchase).
- Acquisition costs: costs of delivery, installation and commissioning.
- Operating costs, such as energy, spares, consumables, maintenance and repair
- Costs of storage and other handling, assembly or finishing required.
- Costs of quality (inspection, re-work or rejection, lost sales, compensation of customers)
- End of life costs, such as decommissioning, removal and disposal (minus some negative cost if the asset has sufficient residual value for re-sale).

Life-cycle costs

- When procuring in the construction industry for example, it is recommended by The Office of Government Commerce that higher costs at the design and construction stages should be considered in the interests of achieving significant savings over a building's lifetime.
- Regulation 68 also sets the parameters to ensure that it is fair and to make sure that it doesn't disadvantage certain suppliers. If an authority is to use life cycle costing, the criteria that they are using must be included in the procurement documents and they must also outline what data they are expecting the supplier to provide.
- It may be common once the procurement process is in progress for lifecycle costing to slip down the list of priorities. Calculations therefore need to be incorporated at the start of the process, and not be seen as a last minute fix.

Practical Considerations

- Early consideration
- Stakeholder buy-in
- Market capacity/expertise/interest
- Size/Nature of the Project
- Process – encourage dialogue?
- Ability to evaluate/score
- Minimum Requirements vs Qualitative Assessment
- Market conditions
- Others?

Market Engagement

➤ Preliminary market consultation:

40.—(1) Before commencing a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

(2) For this purpose, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants.

(3) Such advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

➤ Flexibility on Format

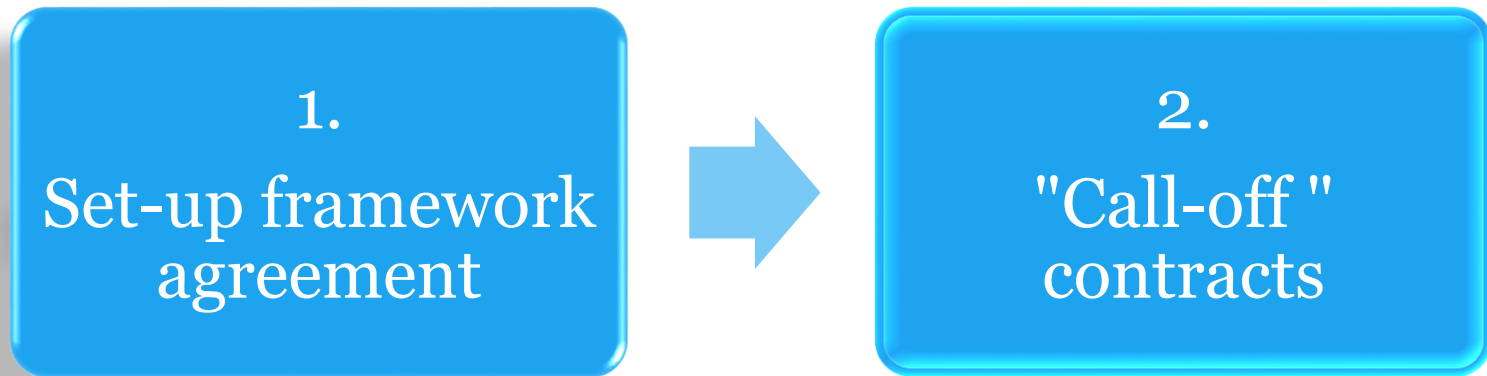
Step through example embedding social issues into each stage of a construction project



Suitability/relevance to other mechanisms

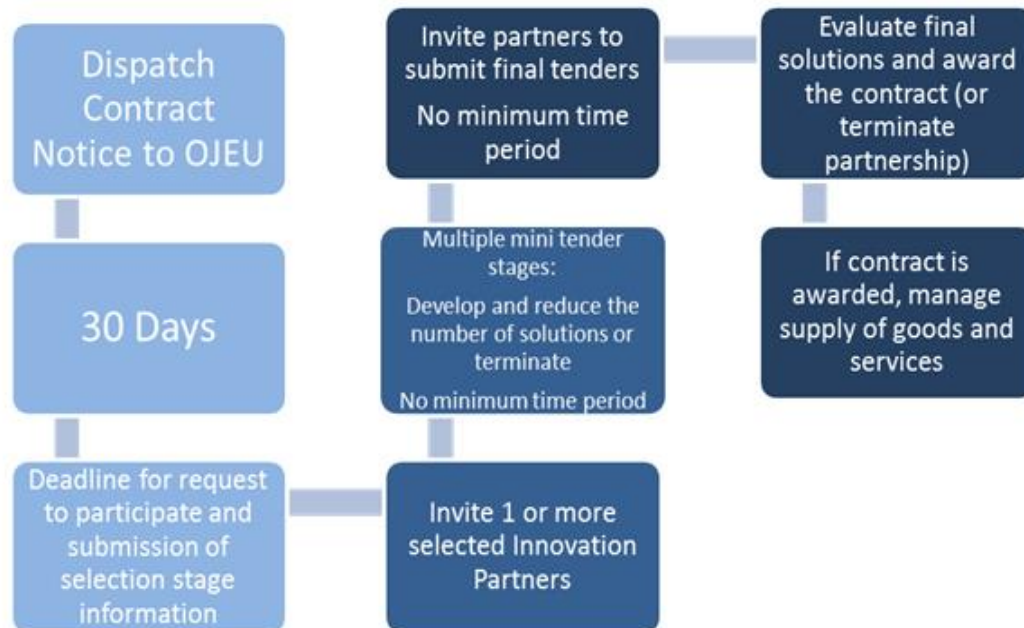
- Framework agreements?
- Dynamic Purchasing Systems?
- Innovation Partnerships?

Framework agreements



- Usually **no obligation** to call-off – could use another framework agreement or could award using a new procedure
- For award of call-off contract the authority must either:
 - Award on exactly the terms of the call-off contract; or
 - If supplementing terms, must use mini-competition inviting those who are '*capable of performing the contract*' to submit written tender, and evaluated on basis of award criteria set out in the framework agreement.

Innovation Partnerships



Dynamic Purchasing Systems

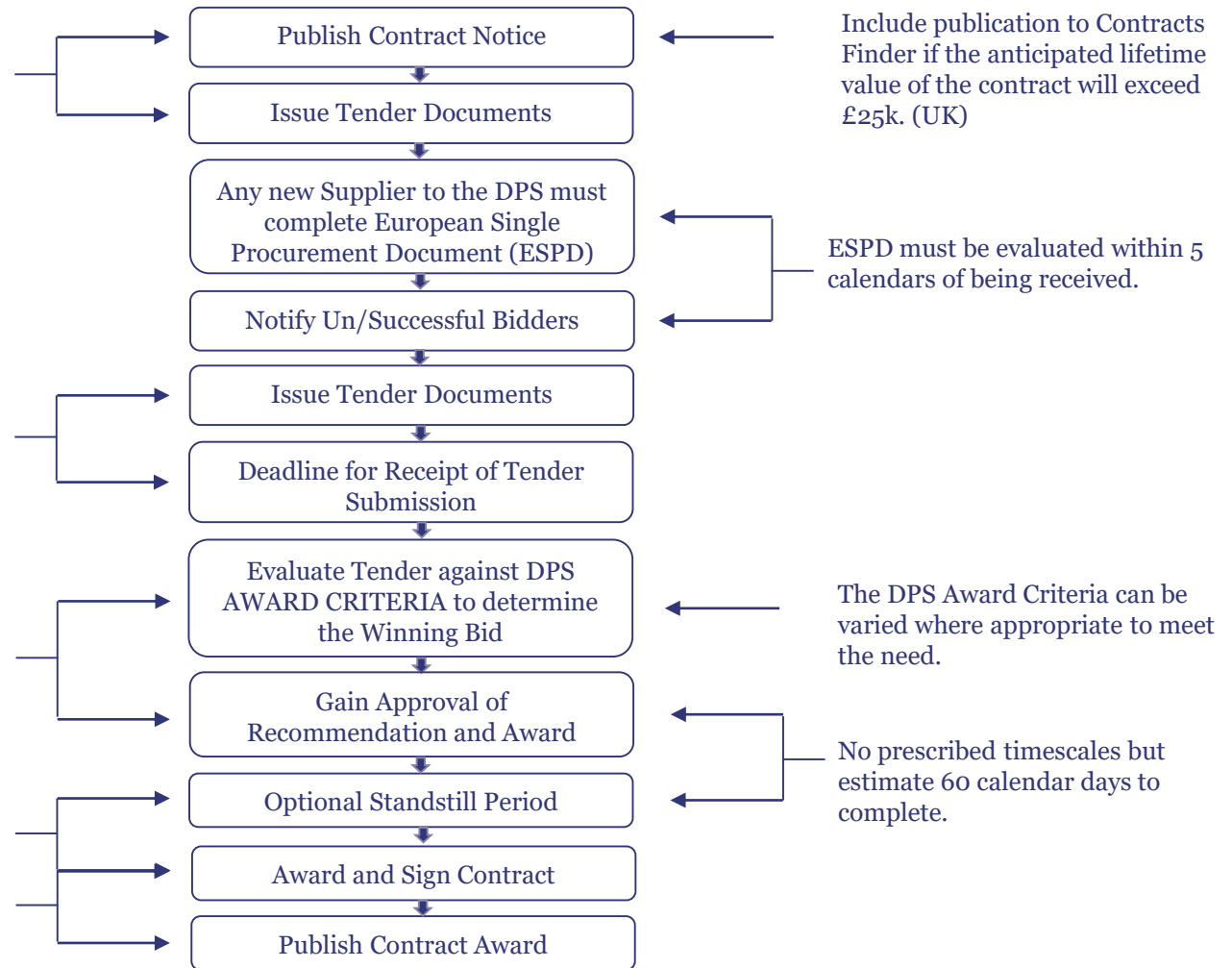
40 calendar days minimum timescales – 30 days for participation requests and 20 days minimum of submission of ITT/Bids.

10 calendar days minimum, 15 calendar days maximum

No prescribed timescales but estimate 10 calendars days to complete

10 calendar days minimum

Publish the award decision/s on Contracts Finder within reasonable timescales.



Social Value - the view from Scape Group

- There have been calls for greater concentration on social value for communities from procurement specialist, Scape (whose framework partners include Balfour Beatty, Kier, Willmott Dixon, Carillion, Wates and Lendlease).
- It believes public sector projects over £10 million should be targeted to deliver at least 20% social value.
- If Scape's approach was implemented on HS2, local supply chains and economies could benefit by up to £11.2bn over the lifetime of the project
- Also, a new 'By Appointment to HM Government' badge for contractors styled on the Royal Warrant as a mark of quality would encourage more SMEs to bid for project

Social Value - a contractor's view

Morgan Sindall

Actions taken in Liverpool

- Exceeding Liverpool County Council targets by changing designs so materials could be sourced locally
- Achieving over 90% local labour in some projects
- Gender equality, 50% female workforce
- Bringing local businesses into the supply chain
- Creating 191 apprenticeships in the Liverpool area

A case study – Croydon Council

Sustaining employment and building skills in the borough

Croydon Council Urban Regeneration Vehicle (CCURV)

Croydon Council provides land and assets and John Laing provides equity working capital and development management services to undertake development projects.

Specific commitments agreed with contractors are ratified by the CCURV Partnership Board and enshrined within contracts:

- Defined percentage of workforce to be on trainee and development programmes;
- A percentage of the work force to be recruited locally;
- Place a defined number of sub-contracts with local businesses;
- Create opportunities for third sector organisations to enter the supply chain;
- Create placements and other vocational opportunities for young people

A case study – Croydon Council

Sustaining employment and building skills in the borough

What has been achieved?

Over £6 million CCURV supply chain contracts have been awarded to Croydon's businesses.

A bespoke programme has been provided by the construction supply chain and Changing Paths to provide training and guaranteed sustainable employment to those leaving prison. This was designed as part of Croydon's response to supporting local communities after the Borough was affected by civic unrest in the summer of 2011.

A Training and Visitor Centre has been provided by CCURV and Sir Robert McAlpine. It overlooks a key CCURV development site and is heavily used by community groups, schools and Croydon College for practical learning opportunities.

A case study – Islington

Building Schools for the Future

What was it?

Islington's Building Schools for the Future (BSF) programme was a £140 million, five year scheme to transform eight of the Borough's ten secondary schools, a special educational needs school and a pupil referral unit into first class learning environments.

What social value was delivered?

The Bidder was required to achieve:

- 50 unskilled workers accessing construction skills training per year;
- 28 learners moving into apprenticeships will be provided;
- 600 unskilled workers to have access to construction skills training over the life of the project per year;
- 15 experienced workers to gain an NVQ;
- 500 up skilled workers gaining a qualification over the life of the project

A case study – Camden Council

Mental Health Day Care Services

What was it?

The council were not meeting the needs of some of the borough's citizens, such as young people and those from minority ethnic groups. It also found it needed to do more to promote the independence and recovery of services users and involve them more directly in the design and delivery of services. The council therefore decided to re-commission the service.

How was social value delivered?

Camden put out to tender, through an open competition, a contract worth £2 million over three years to provide centre-based day support across three of its existing buildings.

Bidders were invited to describe the activities and the outputs they believed would create the outcomes that the commissioner was seeking, as well as how the service would meet wider community level outcomes.

A case study – Camden Council

Mental Health Day Care Services

What social value was delivered?

- Involvement of the wider community through the use of volunteers at the Day Care centres
- Active involvement of service users in the design, delivery and evaluation of services
- Catering supplies locally sourced to ensure a 'local spend'
- Support for recycling and cycling initiatives among service users and staff, thus contributing to Camden's environmental objectives

A case study – Sandwell Hospital

Organisational commitment to delivering more:

- Virtual hospital
- Job brokerage
- Partnering with other local authorities
- Exceeded targets

Day 2 – Morning (PBAs etc)

Treatment of Sub-contractors and Supply Chain

- Insolvency Risk
 - Cashflow issues
 - Squeezing on price
 - Substitution
-
- Test as part of competition (PQQ/Tender)
 - Restrict changes
 - Direct arrangements
 - PBAs

Project Bank Accounts (PBAs)

PBAs allow a member of the construction supply chain to receive payments in five days or less from the due date

The Government Construction Board (GCB) says that PBAs should be used wherever possible and require them to be used to be used to at least Tier 3 on projects and for at least 80% of the work sub-contracted

Single or Dual Authority approach?

Dual – client and lead contractor instruct the bank to distribute amounts to supply chain

Single – just the lead contractor

They cannot alter the amounts or the payees

Project Bank Accounts (PBAs) – are they being used?

- 2011 Government Construction Strategy – set a target of £4 billion of contracts to be awarded using PBAs by the end of 2013-2014. The target was exceeded: £5.2 billion
- Between 2011 and 2015 Highways England spent £10.4b through PBAs. They estimate that they've made a net saving of 1% across its construction contracts thanks to the use of PBAs.
- In Scotland, since October 2016 PBAs have been a tender requirement on all buildings projects over £4m and civil engineering projects over £10m. Main contractors are exempt from setting up a PBA if at least 75% of the works is carried out in-house or by associated firms.

Direct Payments

- Position under the Directive
 - An option given to each Member State to give sub-contractors the right to ask for direct payment (Article 71(3))
 - The option for sub-contractors to be paid directly, without having to make a request
- The UK's consultation before drafting the Regulations
- No reference to direct payments in the Regulations
- Do the payment requirements in Regulation 113 make direct payments less important?

30 day payment requirement

- Payments must be made to contractors within 30 days from the date the invoice is valid and undisputed
- This applies to contractors below the primary contractor and tier 1 sub-contractor relationship
- 30 days applies to every contract in the supply chain, no matter how far removed from the top of the chain
- What if there is no reference to this in a contract? It will be an implied term
- Crown Commercial Services has published guidance on how contractors can comply with the 30 day rule
- Open disclosure – publication of figures

What happens in Northern Ireland?

The Northern Ireland Civil Service have published their prompt payment results for the first 3 months of the 2017-2018 financial year

		April	May	June
OVERALL PERIOD SUMMARY	Total Invoices Paid	14,466	16,044	16,555
	Total Invoices Paid within 10 Days	13,421	14,639	15,168
	% of Invoices paid within 10 Days	92.78%	91.24%	91.62%
	Total Invoices Paid within 30 Days	14,018	15,494	15,966
	% of Invoices paid within 30 Days	96.60%	96.57%	96.44%

How do other jurisdictions deal with direct payments?

France

An obligation upon both private and public sector clients to make direct payments to contractors.

USA

Lead contractors on federal, state and local public sector projects provide bonds to their sub-contractors to guarantee payment

Firms the supply chain can place a charge on the property being worked on. For example, a plasterer can put a charge on their client's property. In practice, clients make direct payments so they don't have a number of charges on their property.

Canada

Does it ever go wrong? An example from the private sector

A.J. Building and Plastering Ltd v Turner, Munday and Dalling
(2013) EWHC 484 (QB)

Rok were engaged by Zurich to carry out repairs on houses they insured.

Rok appointed A.J. Building as a sub-contractor to work on three properties.

Rok became insolvent, without paying A.J. Building.

A.J. Building tried to make a claim against the households for payment of their fees.

The Court said that A.J. Building's contract was with Rok, and they therefore took the risk of Rok's insolvency

But... will the private sector lead the way on direct payments?

Tesco and John Lewis leading the way, both pay their sub-contractors directly

The head of construction at John Lewis said the proposal was prompted by failures in the supply chain causing delays on their projects.

"When payments are late cash flow suffers, disputes increase and people get distracted from the core activity of designing and building"

Day 2 – Afternoon (General Discussion)

Thank you & Bird & Bird

Stuart Cairns

Partner

stuart.cairns@twobirds.com

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.

twobirds.com