

CON·STRUCT

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SOCIAL PROCUREMENT: FROM ORIGIN TO IMPLEMENTATION

For anyone involved with purchasing within a local government organization, talk of social procurement has unlikely gone unheard. It is a growing topic of discussion and interest, and we are seeing more and more communities embracing it and organizations taking steps to implement it into their purchasing policies. This article touches on the evolution of procurement that has led to the introduction of social impact purchasing, and discusses the approach that local governments may take to establish the practice within their own organization.

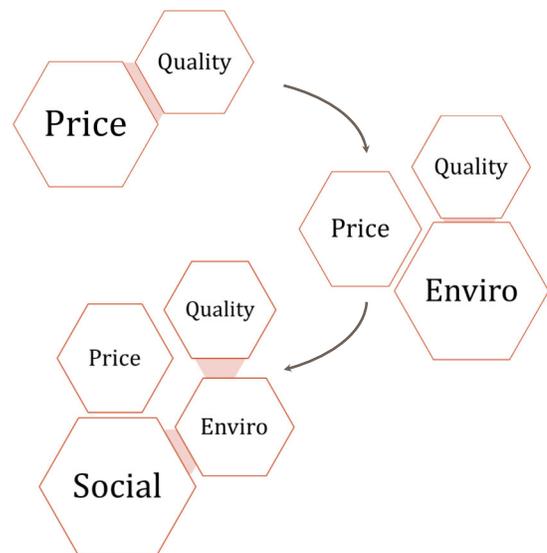
What is it?

Social procurement refers to the practice of leveraging public spending on goods and services to generate positive social outcomes. Every year, millions of dollars are spent on operational and capital spending by BC municipalities. Consider the impact on each of their communities if local governments were able to harness even a small proportion of this value in the form of social improvements.

Procurement in the traditional sense that most are accustomed to largely involves the exchange of economic value as local governments acquire goods and services and the vendors acquire revenue. As awareness within society has grown on the potential negative impacts of purchasing decisions, other factors have filtered into the decision-making process. For example, environmental conscientious has evolved from an extremist notion in the 1960s to a global mainstream concern today. This concern for the environment has also evolved and, in turn, influenced the purchasing decisions made by local governments. Where once this may have meant the consideration of a vendor's use of recycled paper products, it may today involve the consideration of such impactful benefits as the use of sustainable building products in construction, or carbon offsetting/GHG reduction in delivery services. It is common nowadays to see public sector facilities procurement include mini-

mum requirements for energy efficiency.

The growth of social impact procurement marks yet another progression in the evolution of procurement practices. As a result, social value offered through a purchase is now considered by many organizations alongside the economic and environmental values proffered.



Where do we start?

For local governments that are considering the adoption of social procurement practices, taking a methodical and principled approach to developing a practice tailored to your community's needs may be the preferred approach. Implementing social procurement because it is in vogue by adopting "off-the-shelf" practices may not garner the commitment needed for long-term success.

To that end, local governments will want to firstly consider the

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overarching objectives they wish to achieve by implementing social procurement within their organization's purchasing practices. For one community this may mean the promotion of social well-being of its vulnerable groups, while for another it may mean the growth of supply chain diversity. The objectives that are identified will ultimately translate into factors that are considered as part of the procurement evaluation process. For example, and depending on your organization's objectives, an RFP may identify social value outcomes to be considered, such as:

- **Training & Employment** – consideration to vendors that target recruitment and training programs
- **Supply Chain Diversity** – consideration to vendors that may have traditionally been overlooked, such as social enterprises
- **Inclusion** – consideration to vendors that provide opportunities to under-represented or new entrants to the field, such as women, First Nations, immigrants
- **Social well-being** – consideration to vendors that support living-wage benchmarks

How do we implement?

Once the objectives have been defined, the task will be to establish policy and procedures to further the objectives. This may involve reviewing and updating an organization's existing procurement policy or developing a new policy in the case of organizations that do not currently have a policy.

Policy development may take some time as your organization's intentions are gathered, synthesised and documented. It should be a considered reflection of your organization's intentions rather than a "wish list", as the latter may be challenging to sustain.

The procedures are intended to support your organization's chances of successfully integrating new policy into practice by providing procedural details. A well-crafted set of procedures will provide tools for staff to conduct purchases consistently and in compliance with the policy.

Once the framework comprising the policy and procedures has been established, ensure your procurement template documents are appropriately updated (or new ones developed) so that social value is expressly included in the evaluation criteria. Furthermore, the procurement document(s) should expressly

set out the process to be undertaken in evaluating such factors – are social value considerations to be scored? Will they be weighted? Start the task with those documents used for your organizations' most commonly used procurement processes, such as RFPs and tenders. In connection with this, consider impacts to your standard form agreements to ensure your organizations can legally compel vendors to deliver on the social benefits promised. In conjunction with this process, ensure that accessible training is provided to key members of staff, particularly for those directly responsible for conducting procurement processes, undertaking evaluations and authorizing purchases.

While opportunities may seem to abound for local governments to incorporate social value considerations, the heavy hand of the law must always be kept in mind. Free trade agreements prohibit discriminatory procurement practices (with limited exceptions for contracting with non-profit suppliers) beyond minimum financial thresholds.¹ Purchasing above such values requires that open and competitive procurement be conducted. For example, your organization may be limited in its ability to specify local workforce preferences or to sole source from social enterprises, depending on the value of the purchase. Further, local governments cannot act beyond their legislative powers. Therefore, the objectives that are defined must fall within the purposes of a local government to provide for the good government, stewardship of public assets, and economic, social and environmental well-being of its community, or to provide for matters that benefit the community.

Anatomy of a treaty dispute

The dispute provisions of the various treaties applicable in BC are similar. Under the dispute provisions, a panel determines if the treaty has been breached and renders a binding decision that is public. If there is a failure to abide by the ruling, the panelists reconvene in a public hearing to determine if there was non-compliance and, if so, render a monetary award or retaliatory measures equivalent in economic effect. The award can be up to \$5 million and the award is enforceable as if an order of the court.

Over the last 30 years, there has been an evolution in procurement ideology and practices. Mainstream practices have moved from a focus on price versus quality, to consideration of the environment, and now social outcomes are widely being pursued. We have clearly moved beyond the “whys” and “buts” of social procurement, and are now working through the details of the “hows”.

¹ For local governments under NWPTA and TILMA, limits are \$75K for goods, \$75K for services, \$200 for construction. Note that construction design services fall under the limit for “services”, not “construction”.

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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Sonia is a founding partner of Civic Legal LLP, and practises in the areas of procurement, construction and land development, with a particular focus on tendering law, procurement fairness, construction contracting and use of standard form construction contracts. Sonia routinely provides advise on structuring and administering public tenders and competitive RFPs, managing contractor performance and lien issues and securing land tenure.

She practised as a professional engineer for 10 years and worked on civil and geotechnical design and construction projects in British Columbia and abroad. She provides legal advice with practical insight by drawing upon her unique professional understanding of construction and engineering projects.

Sonia keeps a watchful eye on technological disruptions to the construction industry, and how these may impact the traditional relationships between parties, such as with the use of BIM technology and smart contracts.



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Adrienne brings over 24 years of legal experience in litigation and dispute resolution in the areas of local government, construction, public procurement professional liability, and insurance. Adrienne has advised and represented clients in relation to a variety matters, including municipal powers, duties, jurisdiction and procedural requirements, judicial reviews and constitutional challenges, builders’ lien, delay claims and other construction disputes, environmental, regulatory, procurement, administrative hearing processes, tax sales, remedial action orders, bylaw challenges, contract claims, FOIPPA and privacy issues, insurance, risk management and expropriation. Adrienne is one of only a handful of lawyers in B.C. with experience in the Expropriation Inquiry process. Adrienne worked with the MI-ABC for 21 years, both as outside counsel, and for 8 years in-house as Senior Staff Lawyer. Adrienne has extensive experience at all levels of Court in British Columbia, administrative tribunals, mediations and arbitrations.