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PGN 01/07
(as amended)

Grant and Procurement

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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 Departments, their Agencies, Non-Departmental Public Bodies and Public Corporations comply 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, PGNs are issued to the Departments for implementation and copied to CoPEs who, if necessary, develop underpinning procedures supporting the implementation of the guidance in their particular sector. PGNs are published on the [Department of Finance website](#).

This PGN was endorsed by the Procurement Board with effect from 9 March 2007 for use by those bodies subject to NIPPP.

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GLOSSARY

A Body Governed by Public Law	<p>Any body:</p> <ul style="list-style-type: none"> (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) having legal personality; and (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.
Conditions of Grant	Requirements with which Intermediary Funders and/or Grant Recipients must comply to receive grant.
Contracting Authority	The State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law. These include North-South Bodies and the National Lottery Funding bodies.
Department	A Northern Ireland Government department.
Economic Operator	Any person or entity or group of such persons and/or entities which offers the execution of works, the supply of products or the provision of services on the market.
Grant	Funding or value provided by a Public Body to another body for an agreed purpose. A contribution given by a government or other organisation for a particular purpose.
Grant Recipient	A body/person funded (partly or wholly) by grant for an agreed purpose (and which is not an Intermediary Funder).
Intermediary Funder	A Public Body which receives grant funds and passes these funds to other bodies.
Private Sector Organisation / Private Body	A non-public organisation. An individual, partnership, commercial firm or a social, voluntary or charitable body or organisation which may or may not be 'for-profit'.

Public Body	A body the accounts of which are required to be examined and certified by, or are open to the inspection of, the Comptroller and Auditor General for Northern Ireland by virtue of an agreement or by virtue of any statutory provision.
Public Procurement	The acquisition of goods, services or works by means of a public contract.
Reserved Contract	<i>Contracting Authorities</i> may reserve to qualifying organisations the right to participate in procedures for awarding a contract.
Sponsor Department	A department that gives a grant directly or through an Intermediary Funder. Where funding is provided by more than one department, the Sponsor Department is the one providing the largest proportion of grant-funding.
Subsidised Contracts (works & related services contracts only)	Where a private body (not subject to public law) procures a contract for works and/or construction-related services which is subsidised by a <i>Contracting Authority</i> . The Public Contracts Regulations apply when a contract is both above EU threshold value and a <i>Contracting Authority</i> subsidises it by more than 50% of its estimated value.
Voluntary & Community Sector Organisation	A non-public organisation (i.e. a Private Sector Organisation) which principally reinvests its surpluses to further social, environmental or cultural objectives. Bodies include: charities; social, voluntary or community institutions; mutual organisations; and other 'not-for-profit' bodies.

LIST OF ABBREVIATIONS

ALB	Arm's-Length Body
CoPE	Centre of Procurement Expertise
CPD	Central Procurement Directorate
NDPB	Non-Departmental Public Body
NI	Northern Ireland
NIPPP	Northern Ireland Public Procurement Policy
OJEU	Official Journal of the European Union
PSO	Private Sector Organisation
TFEU	Treaty on the Functioning of the European Union (see paragraph 3.2.5)
VCSO	Voluntary & Community Sector Organisation

1 GENERAL

1.1 Background

1.1.1 It is important to recognise that grant and other financial arrangements can be an efficient way of commissioning goods, works and services from public bodies, third sector organisations and private bodies. The imperative in commissioning is to secure *Best Value for Money* (BVfM) for the public purse not to promote a particular approach.

1.1.2 Where grants and other financial arrangements are used it is important that Departments are aware of the wider legal and policy issues that may impact upon these arrangements, particularly if they are potentially used for public procurement.

1.2 Purpose

1.2.1 There are several types of financial arrangement available to Departments that wish to fund the provision of goods, services or works. Each arrangement has its merits and should be used according to the particular circumstance. These include:

- **Grant** - a contribution given by a government or other organisation for a particular purpose;
- **Grant-in-aid** – a contribution given by a government or other organisation for the ongoing running of an organisation or function;
- **Loans** – loans made at commercial terms or less than commercial terms for a particular purpose. For example, Financial Transactions Capital or the UK Guarantee Scheme;
- **State aid** - public funding favouring a particular company or sector; and
- **Public procurement** – acquisition of goods, services or works by means of a public contract.

- 1.2.2 Many questions relating to grant tend to concern the circumstances in which the financial arrangement amounts to or is used for a public procurement. This is a matter of EU law, so the fact that there is a statutory power to make grants relating to a particular objective does not negate the need to consider the issues in this Note. A fundamental principle is that it is the character of the arrangement that is important, not what it is called. It should be noted that both types of arrangement can comprise a competitive element.
- 1.2.3 A grant paid either directly or through an Intermediary Funder may be used for a public procurement. Such payments can be called 'grants' but this does not remove the need to comply with procurement law and policy where applicable.
- 1.2.4 Generally where procurement is being carried out, and where appropriate, the EU encourages 'pre-market' engagement. Before commencing a procurement procedure, *Contracting Authorities* may conduct market consultations with independent experts or authorities or from market participants. Advice received 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. Further guidance will be available in the forthcoming Procurement Guidance Note on Innovation.
- 1.2.5 In summary this Note starts by providing advice on identifying whether a particular financial transaction is to be regarded as a grant or a procurement. Where the transaction is regarded as a grant, it goes on to set out the responsibilities of Sponsor Departments if that grant is in turn to be used for procurement by the recipient. It confirms that the overriding accountability for the conditions of grant always resides with the Sponsor Department; advises on how procurement law may apply to organisations in receipt of grant even though they are not Public Bodies; and details the obligations on Sponsor Departments to ensure grant recipients comply with the relevant requirements of public procurement law and policy.

PART A – IDENTIFYING WHEN GRANT IS USED FOR PUBLIC PROCUREMENT

2 IDENTIFYING WHEN A GRANT IS USED FOR PUBLIC PROCUREMENT

2.1 Identifying when a Grant is used for Public Procurement

- 2.1.1 It is impossible for guidance to cover every nuance, and bodies to which this guidance applies should seek legal advice where there is any doubt about the nature of the transaction. But some general principles can be set down about the characteristics about one and the other. It is important that commissioners and practitioners do not pre-determine a financial transaction to be a grant or a procurement without first carefully considering the specific characteristics of the arrangement. In any event, where a public body is outsourcing one of its own functions, which it has a duty to provide, a procurement is required to which public procurement legislation and policy will apply.
- 2.1.2 The [Treaty on the Functioning of the European Union \(consolidated 2012\)](#) (TFEU), the [EU Procurement Directive \(2014\)](#) and the [UK Public Contracts Regulations \(2015\)](#) set out the legal framework and procedures that apply when *Contracting Authorities* seek to acquire goods, works and services. Some public bodies that are utilities are also subject to the [EU Utilities Directive \(2014\)](#) and the [UK Utilities Contracts Regulations \(2016\)](#) and should consider any additional requirements these regulations place on them.
- 2.1.3 The legal definition of public procurement appears in Regulation 2 of the Public Contracts Regulations 2015: “*the acquisition by means of a public contract of works, supplies or services by one or more Contracting Authorities from economic operators chosen by those Contracting Authorities, whether or not the works, supplies or services are intended for a public purpose*”.

- 2.1.4 'Public contracts' are in turn defined in the Regulations as "*contracts for pecuniary interest concluded in writing between one or more economic operators and one or more Contracting Authorities and having as their object the execution of works, the supply of products or the provision of services*".
- 2.1.5 However, Directive 2014/24/EU on which the UK Public Contract Regulations 2015 are based also contains in its initial recitals (which can be used in guiding interpretation of the law) a recognition that : *'the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall within the scope of the public procurement rules.'*
- 2.1.6 The nature of the legal and contractual relationships created is thus central to the notion of procurement. It is not that a grant does not create legal obligations, but these are typically obligations to ensure the grant is spent in accordance with its conditions. Spending the grant on anything else would be a breach of trust. Any surplus funds are subject to the same restrictions unless the terms of the grant say otherwise. Typically, a grant situation arises where **a Department believes that certain tasks done by others are valuable, and the Department will support this activity by making a contribution to the cost, but where the nature of the legal relationship created is to spend the money in accordance with the grant or return it, rather than to carry out specific tasks.**
- 2.1.7 On the other hand, a contract where the terms of the financial arrangement can be enforced, and specific performance of the obligations demanded, or 'damages' liable for non-delivery, will almost inevitably be regarded as a procurement. A typical procurement situation is one where **a Department has a specific objective to obtain a particular works or service provision, and commissions the performance of that service, covering or making a contribution to the cost, and puts a contract in place to require that the specific service is performed.**

2.1.8 It is acknowledged that in many circumstances it will be clear whether a financial arrangement is a procurement or not. However, there may be circumstances where it will not be clear and Departments and Agencies should take legal advice in these instances and adopt a risk-based approach. Amongst the risk aspects to be considered are:

- a) the value of the arrangement. Below the [EU thresholds](#), even if the arrangement were to be adjudged a procurement, the only legal obligations are, where there is deemed a cross-border interest, to apply the TFEU principles, namely proportionality, mutual recognition, transparency, non-discrimination and equal treatment. The need to demonstrate *Best Value for Money*, of course, is always present;
- b) market characteristics. If after testing the market there is only one source of a specialist service, the BVfM arguments for the competitive aspects of procurement are lessened in favour of robust negotiation with the body concerned;
- c) whether the service needs to be undertaken within a specific time period. Where a service is critical, there will be a stronger desire to put legal obligations to deliver on the recipient of the funds; and
- d) the legal status of the recipient. There is some indication that the European Commission regards financial arrangements with registered charities as more likely to be grants, but this is simply a risk assessment criterion; it does not absolve Departments and Agencies of the need to consider the other issues in this Note.

2.2 Key Principles

Two key principles need to be considered when determining whether a grant is used for procurement or not. Meeting either principle may indicate procurement.

Principle 1 – Can grant monies be returned without penalty?

2.2.1 Can the Grant Recipient, having agreed to provide the goods, works or service, change its mind at any time and simply hand the grant money

(which may include interest) back without incurring liability in 'damages'?
If so, the arrangement is more in the character of a grant.

Principle 2 – Level of prescription

- 2.2.2 Where Principle 1 is not explicit in any conditions of grant, a low level of prescription of outputs will tend to point to the non-application of procurement law: the public body has not specified the services or works required so cannot be procuring them.
- 2.2.3 In a recent case considered by the European Commission, where the conclusion was that the transaction had the characteristics of a grant, the Commission pointed to the “non-detailed nature of the requirements / obligations laid down by the agreement”. In other words, the more prescriptive is a specification about the services, volumes and timescales to be delivered, the more likely a financial arrangement is to be counted as procurement. An arrangement is more likely to be a grant where the specification describes wider outcomes or the types of activity the funding is intended to cover, while leaving more choice for the recipient organisation to prioritise.

2.3 Examples of Grant Provision

- 2.3.1 The question of when a grant is used for procurement and when it is not is a complex question to which there is no definitive answer. To help departments understand the issues concerned, examples of each type are provided below.

**EXAMPLES OF GRANT PROVISION THAT
DO NOT HAVE THE CHARACTERISTICS OF PUBLIC PROCUREMENT**

1) Scheme to insulate houses:

A department administers a grant scheme to assist the public to insulate their houses. The department does not require householders to insulate their houses but provides a grant to contribute to the cost if they do so in accordance with the contractual terms and standards (ie grant conditions) set down by the department. These are that:

- a) Funding is only provided if a house occupied as a private dwelling is insulated in accordance with detailed specified standards.
- b) Recovery of all grant paid (which may include interest) occurs if insulation is not provided or if it is not in accordance with the specified standards.

This is not procurement because there is no obligation on the recipients to insulate their houses.

2) Provision of support to voluntary groups wishing to set up charitable organisations:

A department provides a grant to a registered charity to support the formation of a voluntary group. The department has no obligation to provide support to the formation of the voluntary group and, even though it considers such activity benefits the public, it will not 'demand' its provision by the Grant Recipient.

The department has not detailed the exact nature of the support that should be provided to the voluntary groups. The grant is subject to the following contractual terms (i.e. conditions):

- a) Grant money is only to be used to pay for supporting the formation of the voluntary group;
- b) The charity must meet its obligations under charity law; and
- c) Recovery of grant paid (which may include interest) occurs if any of the grant is used for purposes other than providing support to the formation of the voluntary group.

This is not a procurement because there is no legal obligation on the recipients and the requirements are not defined enough to be legally enforced.

How would this become a procurement?

A similar scenario to the above example with different conditions may, however, be a procurement. If the department defines its requirements sufficiently to make them enforceable and requires the charity to provide them (or be in breach of contract) the

transaction would have the characteristics of a procurement.

EXAMPLES OF GRANT PROVISION THAT HAVE THE CHARACTERISTICS OF PUBLIC PROCUREMENT

1) Health Advisory Service (fixed term):

A Health Authority wishes to improve services to assist communities in identifying and preventing communicable diseases. The Authority sets out criteria for the service it wishes to fund. It advertises for 'applications of interest', and carries out an open and transparent process to decide which proposal is the best use of the available funding. The activities may possibly be provided using a *Reserved Contract* (see paragraph 3.2.3) The Letter of Offer contains contractual terms (i.e. conditions) requiring the activity to be delivered over a set period. Once the Grant Recipient accepts the grant, it is 'required' to deliver the services. This use of grant-funding is therefore for procurement of a service which is 'required' to be delivered.

This is a procurement because the Health Authority has a duty to prevent communicable diseases and the Grant Recipient could be liable to 'damages' to the Health Authority if they fail to deliver the services it agreed to.

How would this grant avoid becoming a procurement?

A similar scenario to the above example with different conditions may, however, not be a procurement. If the Health Authority discharges its duty to prevent communicable diseases by other means and does not place an obligation on the Grant Recipient to deliver the service (but only to return the grant and interest) this would then not have the characteristics of a procurement, especially if the grant recipient had more discretion in what to measures to deliver to prevent the spread of disease.

2) The Provision of Sports Facilities in Deprived Areas:

A department wishes to improve sports facilities in deprived areas. It provides grants to a local sports clubs to construct flood lit playing 3G pitches to competition standards. The ground must be owned by the club and be located within an area classified as economically deprived according to set published criteria. The cost of constructing a competition standard flood lit 3G pitch is approximately £4.5 million. A grant of sixty percent of the cost of constructing a pitch is available to sports clubs in areas classified as deprived. The grant conditions set no specification of the pitch other than it meets the standards of a recognised sports body (e.g. RFU, IFA or GAA). The sports clubs are Private Bodies (Voluntary and Community sector or for profit). This is a procurement because it is a subsidised contract (more than 50%) over the EU threshold value (£4.1million) and to which the Public Contracts Regulations apply. Refer to [Regulation 13 of the Public Contracts Regulations 2015](#).

How would this grant avoid becoming a procurement that is subject to the Public Contracts Regulations?

A similar scenario to the above example with different conditions may, however, not attract the Regulations. If the value of the works was below the EU threshold or the grant rate was less than 50% this would no longer be a subsidised contract and therefore not a procurement that is subject to the Regulations.

2.4 Demonstrating ‘Best Value for Money’ where Procurement Legislation and Policy do not Apply

- 2.4.1 In grant-giving situations where procurement legislation and policy do not apply, *Best Value for Money* (BVfM) can still be demonstrated by a competitive / bidding process based either on activities or outcomes. BVfM may, however, also be shown by other means. [Northern Ireland Guide to Expenditure Appraisal and Evaluation](#) (NIGEAE) provides guidance on delivering maximum benefit from expenditure.

PART B – GRANT USED FOR PROCUREMENT

3 LEGAL AND POLICY REQUIREMENTS

3.1 Loans and State Aid

Loans

- 3.1.1 There may be occasions when a Sponsor Department provides a loan or part-loan, directly or through an Intermediary Funder, to a private body. A recent example of this is the Financial Transactions Capital scheme. This is a Government loan or equity investment provided to a private body to stimulate private sector investment. The Financial Transactions Capital scheme loan is over and above the Government's investment from its normal capital Departmental Expenditure Limit (DEL) budget.
- 3.1.2 Loans may be pure commercial transactions if they are at commercial rates of interest and require commercial levels of loan security. They may, however, provide a subsidy (benefit) to the loan recipient in providing lower rates of interest or lower levels of loan security than are commercially available. In this case, the subsidy may be part of a public procurement contract. Sponsor Departments must ensure advice is sought from a CoPE. In some instances, the CoPE may direct the department to the Departmental Solicitors Office regarding the application of public procurement law and policy in accordance with this guide. In some cases, part of a loan may not require repayment. In such instances the part of the loan that does not require repayment would become a grant and may be for procurement.
- 3.1.3 Departments must be aware that loans may form part of a public procurement. For example, if a loan is made to a private body to have a building constructed to a *Contracting Authorities* requirements, that arrangement may amount to a public works contract and one which is subject to the [UK Public Contracts Regulations 2015](#) (above EU threshold values) or to TFEU principles (below EU threshold values).

State Aid

3.1.4 Any public funding favouring a particular company or sector could be subject to the EU rules and, in certain circumstances, require notification to the European Commission. This can be the case:

- (a) where a body may receive grant for its own core costs and may also submit tenders for other public procurements; or
- (b) in the public sector where a body is involved in commercial activities.

However, in some cases state aid rules do not apply, for example where the total level of state aid from all sources is less than €200,000 in a rolling three year period.

3.1.5 When considering whether a grant (or loan, guarantee, tax benefit, national lottery or EU funding) could amount to State Aid, and where the grant (or loan) is for procurement, the department must still ensure advice is sought from a CoPE on the procurement aspects.

3.1.6 It is recommended that initial contact on questions regarding State Aid should be made with the Department for the Economy (DfE), State Aid Unit. DfE has a State Aid central awareness generation, co-ordination and advisory role in NI [except in agricultural and transport matters where the Department of Agriculture, Environment and Rural Affairs (DAERA) and the Department for Infrastructure (DfI) take the respective leads].

3.1.7 The department should also refer to the [UK Government State Aid website](#) and to [Annex 4.9 of the Managing Public Money Northern Ireland \(MPMNI\)](#) document. The State Aid website has an overview of the state aid rules and a guide to assessing whether a measure is affected by the rules. There is also a 'manual' on the website which provides more in-depth guidance on individual types of aid and

processes. Where required departments may seek advice from the Departmental Solicitors Office.

Competition Law

3.1.8 UK competition law derives from the EU Treaty and is applied through the Competition Act 1998 and the Enterprise Act 2002. Together these prohibit business agreements that prevent, restrict or distort competition in trade in the UK and EU

3.1.9 Organisations whatever their legal status, size or sector, need to be aware of EU and UK competition law as failure to comply with it can have very serious consequences. The [Competition and Markets Authority](#) is the enforcement body for competition law.

3.1.10 Examples of the types of arrangements which are generally prohibited include:

- Agreements which directly or indirectly fix purchase or selling prices or any other trading conditions (for example, discounts or rebates). (Government price-setting in the social interest, such as minimum wage legislation, is an exception.)
- Agreements which limit or control production, markets, technical development or investment (for example, setting quotas or levels of output);
- Agreements which share markets or sources of supply; and
- Agreements which apply dissimilar conditions to similar transactions, placing other trading parties at a disadvantage.

3.1.11 Whether an arrangement is anti-competitive is assessed on the basis of its objective, or its effect on competition, rather than its wording or form.

3.2 Procurement Legal Framework

- 3.2.1 Where a grant provision is not for public procurement, as set out in Part A (Chapter 2) of this guide, it will not be subject to the guidance in this section (3.2) except for paragraph 3.2.6.
- 3.2.2 The primary purpose of the EU procurement legislation is to open up the public procurement market to competition, ensuring goods and services move freely within the EU and ensuring equality of treatment of suppliers through open and transparent processes.

Public contracts within the scope of the EU Directives / UK Public Contracts Regulations

- 3.2.3 The EU Procurement Directives set out the legal framework and procedures for public procurement. They apply when *Contracting Authorities* seek to acquire goods, works or services with estimated contract values above set thresholds. Public bodies that are utilities are also subject to the [EU Utilities Directive](#) and should consider any additional requirements this Directive places on them. Concessions let by *Contracting Authorities* and utilities are subject to the [EU Concessions Directive](#) which sets out requirements for these contracts.
- 3.2.4 For social and other specific services, *Contracting Authorities* may reserve to qualifying organisations the right to participate in procedures for the award of *reserved* public contracts. Regulations 20 (disabled or disadvantaged persons) and 77 (mutual organisations) provide further information on *Reserved Contracts*. Departments should encourage the use of *Reserved Contracts* where appropriate.
- 3.2.5 The Directives have been transposed into national law in the UK through the [UK Public Contracts Regulations 2015](#), the [UK Utilities Contracts Regulations 2016](#) and the [UK Concession Contracts Regulations 2016](#).

Public contracts outside the scope of the EU Directives / UK Public Contracts Regulations

3.2.6 In Northern Ireland, public contracts with estimated values below the [EU threshold values](#) are not subject to the [UK Public Contracts Regulations 2015](#). The UK Public Contracts Regulations requirements for below threshold value contracts, as set out in Part 4 of the Regulations, do not apply to Northern Ireland. However, where there is cross border interest, such below threshold value contracts must still meet the TFEU principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality. For such procurements some degree of advertising, appropriate to the scale of the contract, is likely to be necessary to demonstrate transparency.

Other legal frameworks

3.2.7 Departments should consider other legal frameworks and guidance when procuring goods, works or services and allocating grant-funding. Consideration may also need to be given to legislation hierarchies, and updating local legislation, if there are conflicts between different legislations.

3.3 Procurement Policy Framework

3.3.1 Where a grant provision is not used for public procurement, as set out in Part A (Chapter 2) of this guide, it will not be subject to the guidance in this section (3.3) except for paragraph 3.3.10.

3.3.2 In May 2002 the Northern Ireland Executive approved the [Northern Ireland Public Procurement Policy](#) (NIPPP) for Departments, their Agencies, Non-Departmental Public Bodies (NDPBs) and Public Corporations. Procurement Guidance Notes are the administrative means which advise Northern Ireland public sector bodies of public procurement policy and best practice.

Bodies to which NIPPP applies

3.3.3 Annex A of NIPPP lists the Public Bodies to which the policy applies. NIPPP and the current list of Public Bodies is available on [DoF's website](#).

'Best Value for Money' (BVfM)

3.3.4 The primary objective of NIPPP is to achieve 'Best Value for Money' for the taxpayer. This is crucial to the wider objective of using resources effectively in the delivery of public services. The concept of BVfM is defined as "*the most advantageous combination of cost, quality and sustainability to meet customer requirements*".

Procurement through a Centre of Procurement Expertise (CoPE)

3.3.5 The procedures established within the public sector to deliver public procurement include the use of CoPEs. Public procurement policy dictates Departments, their Agencies, NDPBs and public corporations carry out their procurement activities by means of documented Service Level Agreements with a CoPE. Advice from a CoPE on grant-funded procurements is normally provided to the Sponsor Department and/or Intermediary Funders not directly to Grant Recipients.

All construction-related procurements

3.3.6 Construction procurement is a distinct area of procurement, with specialist requirements and forms of contract. Sponsor Departments can obtain suitable advice on procurement and technical requirements to be included in the conditions of grant from a construction CoPE. The construction procurement policy framework for those bodies and projects subject to it is set out in [Procurement Guidance Note 06/10: Construction Procurement Policy Framework](#).

All non-construction procurements

- 3.3.7 For non-construction contracts with estimated values above [EU thresholds](#) Sponsor Departments can obtain suitable procurement requirements to be included in the conditions of grant from a CoPE .

Procurement control limits (PCLs)

- 3.3.8 The procurement control limits (PCLs) recommended in [PGN 04/12: Procurement Control Limits](#) provide the optimum level of input required to ensure the transaction cost of procuring is efficient, whilst maintaining a sufficient level of competition to achieve BVfM.

Decision-Making Audit Trail

- 3.3.9 Sponsor Departments and ALBs (where involved) must ensure that a clear audit trail is maintained to support the authorisation of the Grant Recipient proceeding with procurement decisions. This should include clear audit trails of robust procedures and documents relating to all procurements and should be proportionate to the value and reputational risks involved.

Sponsor Departments and ALBs (where involved) must ensure that robust processes exist within grant recipient bodies to manage any potential conflicts of interest.

Retaining Procurement Documentation

- 3.3.10 Grant Recipients must retain all documentation relating to procurements, competitions and payments for these projects. The documents must be made available to the Sponsor Department. Such records must be securely retained in line with the department's disposal schedule or any longer period as required by an EU funded procurement.

Other policy frameworks

- 3.3.11 Departments should consider other policy frameworks and guidance when procuring goods, works/projects/programmes or services and

allocating grant-funding. Links to some of the main frameworks/policies are given below:

- [Managing Public Money Northern Ireland](#); MPMNI recognises that public sector organisations should normally acquire goods and services through fair and open competition, having regard to the twelve guiding principles which govern the administration of public procurement in Northern Ireland.
- [Northern Ireland Practical Guide to Expenditure Appraisal and Evaluation](#) (NIGEAE); and
- Gateway Reviews – A Risk Potential Assessment (RPA) is required for all projects over £500k. Formal Gateway Reviews are required where the RPA identifies the project as medium or high risk or where the value of the project is greater than £20 million. A project value is determined taking account of all capital and revenue expenditure as well as public monies. [Procurement Guidance Note 01/09: Best Practice in Programme/Project Management](#) provides further detail.

3.4 The Public Accounts Committee (PAC) Recommendations (2013) - Construction Works with Grant Value above £500k

3.4.1 This Section (3.4) does not apply when grant is being provided as follows:

- To encourage either indigenous or internationally mobile investments in economic development projects. In such cases, InvestNI will apply appropriate controls.
- To housing associations as procurement by housing associations is currently being reviewed.
- Grant is provided by the Department for Communities (DfC) to Higher Education Institutions. In such cases, DfC will apply appropriate controls.

3.4.2 The guidance in this Section should be applied when the grant value of construction works exceeds £500k. Departments may decide to set a

lower value depending on the balance of risks and nature of the procurements within their sector.

- 3.4.3 For projects with grant values below this, a proportionate approach should be taken dependent on the risks and value of the works. Works values must not be split or disaggregated in order to circumvent this control limit.

Construction CoPE Advice and Key Decisions

- 3.4.4 Departments and their Arm's-Length Bodies (ALBs) are required to seek appropriate written advice from a construction CoPE, before permitting a Grant Recipient to proceed with the procurement of a capital construction project. All key procurement decisions (including the award of the contract) must be authorised by the Sponsor Department, in consultation with a construction CoPE. This is to ensure that procurement guidelines have been met and that the contract delivers *Best Value for Money*. Non-construction CoPEs should seek appropriate advice from a construction CoPE for construction-related elements of a procurement.

Cost and Programme Estimates

- 3.4.5 A construction CoPE must be involved at an early stage in these projects to assist with the outline business case and to review cost and programme estimates. These estimates will typically take consideration of the following:
- chosen procurement route;
 - project brief;
 - scope of the project;
 - specification; and
 - any known risks.

This is to ensure that cost and time estimates included in the business case are realistic and robust.

Decision-Making Audit Trail

3.4.6 See paragraph 3.3.8.

Retaining Procurement Documentation

3.4.7 See paragraph 3.3.9.

3.5 Grant (used for procurement) Categories and the Application of UK Public Contracts Regulations and NI Public Procurement Policy

3.5.1 The following paragraphs list the different categories of grant which is used for procurement. They describe the extent to which TFEU principles, the [UK Public Contracts Regulations 2015](#) and NIPPP apply to each. Grant used for procurement is categorised by Grant Recipient (not by Intermediary Funder). The extent to which departments must comply with each depends on:

- the Grant Recipient category;
- whether the contract value is above or below the relevant EU threshold;
- whether the grant rate is 50% or less; and
- whether, if for works, the grant-funding value is above £500k.

Table 1 of Annex A summarises the application of procurement legislation and policy to each category of grant that is used for procurement and which is funded by NI Government departments.

LEGAL REQUIREMENTS (see Table 1 of Annex A)

CATEGORY A - GRANT USED FOR PROCUREMENT TO A PUBLIC BODY SUBJECT TO NIPPP

In NI, a Public Body (a *Contracting Authority*) is subject to the [UK Public Contracts Regulations 2015](#) where the estimated contract value (not the value of the grant) exceeds the relevant EU threshold. Where the estimated contract value is less than the relevant EU threshold, and where there is deemed to be cross-border interest, the Public Body is subject to the TFEU principles and obligations. Both scenarios of estimated contract value are regardless of the percentage grant rate.

CATEGORY B - GRANT USED FOR PROCUREMENT TO A PUBLIC BODY NOT SUBJECT TO NIPPP

In NI, a Public Body (a *Contracting Authority*) is subject to the [UK Public Contracts Regulations 2015](#) where the estimated contract value (not the value of the grant) exceeds the relevant EU threshold. Where the estimated contract value is less than the relevant EU threshold, and where there is deemed to be cross-border interest, the Public Body is subject to the TFEU principles and obligations. Both scenarios of estimated contract value are regardless of the percentage grant rate.

Grants for procurement to **North-South Bodies** are also within this grant category. As *Contracting Authorities*, North-South Bodies are required to comply with the EU Procurement Directives and, where there is deemed to be cross-border interest, the TFEU principles.

CATEGORY C – GRANT USED FOR PROCUREMENT TO A PRIVATE BODY SUBJECT TO PUBLIC LAW

In NI, a Private Body governed by public law is subject to the [UK Public Contracts Regulations 2015](#) where the estimated contract value (not the value of the grant) exceeds the relevant EU threshold. Where the estimated contract value is less than the relevant EU threshold, and where there is deemed to be cross-border interest, the Private Body is subject to the TFEU principles and obligations. Both scenarios of estimated contract value are regardless of the percentage grant rate.

CATEGORY D - GRANT USED FOR PROCUREMENT TO A PRIVATE BODY NOT SUBJECT TO PUBLIC LAW

For works and/or construction-related services, where a Sponsor Department provides a grant either directly or through an Intermediary Funder to a Private Body which is not governed by public law and where both the estimated contract value (not the value of the grant) exceeds the relevant EU threshold and where the grant rate exceeds 50%, then the contract is deemed to be 'subsidised' and is subject to the [UK Public Contracts Regulations 2015](#). In this situation the Sponsor Department is statutorily obliged to ensure compliance with the Regulations. Where a Grant Recipient fails to comply with the Regulations, the Sponsor Department should ensure it is entitled to recovery of the funding, including interest, from the Grant Recipient.

For all other procurements regardless of grant rate, estimated value, no legal requirements apply.

POLICY REQUIREMENTS (see Table 1 of Annex A)

CATEGORY A - GRANT USED FOR PROCUREMENT TO A PUBLIC BODY SUBJECT TO NIPPP

Public Bodies subject to NIPPP are listed in [Annex A of NI Public Procurement Policy](#) .

These bodies are subject to NIPPP for all procurements regardless of the estimated contract value or the percentage grant rate.

CATEGORY B - GRANT USED FOR PROCUREMENT TO A PUBLIC BODY NOT SUBJECT TO NIPPP

Public Bodies which are listed in [Annex A of NI Public Procurement Policy](#) are subject to NIPPP. Other Public Bodies are not normally subject to NIPPP.

Where a Public Body is not subject to NIPPP and is to receive grant which is to be used for procurement from the NI Government, either directly from a Sponsor Department or through an Intermediary Funder, the following applies:

1. Where the grant rate exceeds 50%, and regardless of the contract value, to obtain BVfM, the Sponsor Department must ensure the Grant Recipient, through the conditions of its grant, complies with all aspects of NIPPP. In some sectors, application of certain aspects of NIPPP may not be practical or possible. In such situations and if after consultation with a CoPE (where applicable), it is decided not to apply aspects of NIPPP, the Sponsor Department must ensure the reasons are adequately recorded.
2. Where the grant rate is 50% or less, and regardless of the contract value, the Sponsor Department and Intermediary Funder (where involved) should ensure, through the conditions of grant, such elements of NIPPP are applied to ensure BVfM. The elements applied should be proportionate considering the percentage grant rate, scale of grant, complexity of the procurement and the capability of the Grant Recipient. The Sponsor Department must ensure the reasons for not applying elements of NIPPP are adequately recorded.

Grants to **North-South Bodies** which are used for procurement are also within this category. **North-South Bodies** have individual Financial Memoranda which set out the procurement conditions attached to providing grant by their Sponsor Department.

Application of NIPPP will depend on the geographical location of the goods/works/services being funded.

CATEGORY C - GRANT USED FOR PROCUREMENT TO A PRIVATE BODY SUBJECT TO PUBLIC LAW

Where a Private Body is governed by public law and is to receive grant which is to be used for procurement from the NI Government, either directly from a Sponsor Department or through an Intermediary Funder, the following applies:

1. Where the grant rate exceeds 50%, and regardless of the contract value, to obtain BVfM, the Sponsor Department must ensure the Grant Recipient, through the conditions of its grant, complies with all aspects of NIPPP. In some sectors, application of certain aspects of NIPPP may not be practical or possible. In such situations and if after consultation with a CoPE (where applicable), it is decided not to apply aspects of NIPPP, the Sponsor Department must ensure the reasons are adequately recorded.
2. Where the grant rate is 50% or less, and regardless of the contract value, the Sponsor Department and Intermediary Funder (where involved) should ensure, through the conditions of grant, such elements of NIPPP are applied to ensure BVfM. The elements applied should be proportionate considering the percentage grant rate, scale of grant, complexity of the procurement and the capability of the Grant Recipient. The Sponsor Department must ensure the reasons for not applying aspects of NIPPP are adequately recorded.

CATEGORY D - GRANT USED FOR PROCUREMENT TO A PRIVATE BODY NOT SUBJECT TO PUBLIC LAW

Regardless of grant rate and contract value, the Sponsor Department and Intermediary Funder (where involved) should ensure, through the conditions of grant, such elements of NIPPP are applied to ensure BVfM. The elements applied should be proportionate considering the percentage grant rate, scale of grant, complexity of the procurement and the capability of the Grant Recipient. The Sponsor Department must ensure the reasons for not applying aspects of NIPPP are adequately recorded.

Sponsor Department must ensure that it is entitled to recover the grant-funding including interest from the Grant Recipient where it fails to comply with the specified aspects of NIPPP. Where a Grant Recipient fails to comply with the specified aspects of NIPPP the Sponsor Department should consider recovery of all, or a proportion, of the grant.

4 CONDITIONS OF GRANT WHERE GRANT IS USED FOR PROCUREMENT

4.1 Conditions of Grant which is used for procurement

- 4.1.1 It is important that Sponsor Departments and Intermediary Funders have appropriate mechanisms in place to ensure that Grant Recipients comply with the appropriate public procurement legislation and policy requirements, where applicable.
- 4.1.2 Where a Sponsor Department or Intermediary Funder provides grant whether its used for procurement or not, the contractual terms (i.e. conditions) attached to the grant must be set out in writing either in a Letter of Offer or Relationship Document, for example, a Management Statement/Financial Memorandum (MS/FM).
- 4.1.3 Where grant is used for procurement, and taking into account the level of funding and the grant category, the Sponsor Department and Intermediary Funder (where involved) must ensure the appropriate public procurement legislation and policy requirements are included in the Grant Recipient's conditions of grant as well as how the financial arrangement can be enforced.
- 4.1.4 Thereafter, the supplier's contract conditions should include a definition of the obligations required and any liabilities ('damages') for non-delivery.

5 ROLES AND RESPONSIBILITIES WHERE GRANT IS USED FOR PROCUREMENT

5.1 Roles and Responsibilities

5.1.1 All bodies involved in the grant process have a role to play. They have a responsibility to ensure best practice procurement procedures are adhered to and that all legal and administrative requirements are fulfilled. In this context attention is drawn to [Managing Public Money Northern Ireland Annex A.5.1](#).

5.2 Centres of Procurement Expertise (CoPE)

The NI Executive has determined that Departments, their Agencies, NDPBs and Public Corporations should carry out their procurement activities by means of documented Service Level Agreements with CPD or a relevant CoPE. A CoPE can provide Sponsor Departments with advice and guidance on procurement.

5.3 Contracting Authority

5.3.1 In NI, *Contracting Authorities* are subject to compliance with the [UK Public Contracts Regulations 2015](#) where the contract value of any goods, works or service exceeds the EU thresholds.

5.4 Sponsor Departments

5.4.1 Sponsor Departments retain overriding accountability for grants. They must have appropriate mechanisms in place to ensure that grant money is being spent in accordance with legal and policy requirements as well as with grant conditions. This includes the ability to 'drill down' on grants provided, to evidence how they have been spent. See also paragraph 3.3.8 (audit trails) and paragraph 3.3.9 (document retention). For construction works with grant values over £500k, Sponsor Departments should ensure compliance with the Public Accounts Committee recommendations published in 2013 (see **Section 3.4**).

5.4.2 Sponsor Departments need to ensure there are mechanisms in place to recognise when a grant is used for public procurement. They should also ensure mechanisms are in place to recognise when a Grant Recipient is a *Contracting Authority* or is undertaking a *Subsidised Contract* as defined in the [UK Public Contracts Regulations 2015](#).

Sponsor Departments may seek advice on these matters from a CoPE. In some instances, the CoPE may direct the department to the Departmental Solicitors Office.

5.4.3 Departments are responsible and accountable for achieving BVfM in procurement. They must ensure all procurement complies with obligations under UK legislation, EU procurement requirements and other international agreements. Departmental Accounting Officers are responsible for the efficient and effective use of resources. Finance Directors are responsible for ensuring all staff understand and carry out procurement strategies, procedures and responsibilities and that BVfM is achieved by the Department.

5.4.4 Sponsor Departments should ensure awareness that a body or group of individuals appointed to act together to meet needs in the general interest who:

- do not have a commercial or industrial character; and
- are funded wholly or mainly by another *Contracting Authority*,

is itself a *Contracting Authority* and subject to compliance with the [UK Public Contracts Regulations 2015](#) and TFEU principles.

5.4.5 When determining the percentage grant rate, funding or part-funding from the National Lottery Funds must be taken into account. The organisations providing National Lottery grants are *Contracting Authorities*.

5.4.6 In applying the guidance it will be for Sponsor Departments to ensure particular grants that are used for procurement are correctly categorised. Documents detailing the conditions of grant must, where appropriate,

reflect subsequent procurement requirements. However, it is accepted that some interpretation of the procurement policy and rules will be required and such support may be obtained from a CoPE.

- 5.4.7 Sponsor Departments and Intermediary Funders (where involved) must ensure Grant Recipients comply with legal and policy requirements, maintain clear audit trails of robust decision-making and ensure all appropriate procurement documentation is retained. Procedures should be proportionate to the amount of funding and reputational risk involved.
- 5.4.8 In general, where a Sponsor Department or Intermediary Funder provides a grant for works or associated services with estimated values above [EU thresholds](#) and with grant rates exceeding 50%, the conditions of grant must ensure the Grant Recipient complies with the applicable aspects of public procurement law as set out in the [UK Public Contracts Regulations 2015](#).
- 5.4.9 The Procurement Board endorsed NIPPP which is considered best practice public procurement in Northern Ireland. Departments must apply the principles of NIPPP (in proportion to the amount of funding) through conditions of grant to ensure BVfM. In some sectors application of certain individual aspects of NIPPP may not be practical or possible. In such situations and if after consultation with a CoPE (where applicable), it is decided not to apply aspects of NIPPP, the Sponsor Department must ensure the reasons are adequately recorded.
- 5.4.10 Sponsor Departments must have appropriate mechanisms in place to ensure recipients meet the eligibility criteria for the grant where they exist.

5.5 Intermediary Funders

- 5.5.1 Intermediary Funders must ensure grant conditions imposed by Sponsor Departments on them and on Grant Recipients are complied with. This should include full compliance with any guidance on procurement.

5.5.2 Intermediary Funders must have appropriate mechanisms in place to ensure recipients meet any eligibility criteria for grant. They must also have appropriate mechanisms in place to ensure that grant money is being spent in accordance with legal and policy requirements as well as with grant conditions. This includes the ability to 'drill down' on grants provided, to evidence how they have been spent.

5.6 Grant Recipients

5.6.1 Grant Recipients must ensure they meet the eligibility criteria for the grant where they exist. They must also ensure those funds received from grant providers are used appropriately and in accordance with the contractual terms (i.e. conditions) of the grant. This assurance should include full compliance with any guidance on procurement and advice on standard terms and conditions for contracts. Recipients must seek guidance and advice from the Sponsor Department or the Intermediary Funder in advance of any grant-funding to construction projects with estimated grant values above £500k (see **Section 3.4**). They should also maintain a clear audit trail of robust decision-making and retain all appropriate procurement documentation (see paragraphs 3.3.8 and 3.3.9).

6 FURTHER INFORMATION

Enquiries relating to this guide can be sent to:

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ANNEX A: GRANT (used for procurement) CATEGORIES

Table 1 summarises, by category of grant which is used for procurement, the extent to which the [Treaty on the Functioning of the European Union](#) (TFEU), the [UK Public Contracts Regulations 2015](#) and NIPPP apply to procurements financed by NI Government departments. See **Section 3.5** of this guide for full details.

Table 1 – Grant (for procurement) Categories

Procurement Legislation & Policy to be applied by departments to the different categories of Grant Recipients						
			Category A	Category B	Category C	Category D
	Grant Rate [#] (% of estimated contract value)	Total value (use total estimated contract value)	Public Body - listed in NIPPP Annex A eg. NIHE or NIWater	Public Body - not listed in NIPPP Annex A eg. District Council	Private Body/VCSO - subject to public law eg. housing association	Private Body/VCSO - not subject to public law eg. research and development firm
Legal Requirements	Above 50%	Above EU Threshold (£)	UK Public Contracts Regulations 2015			UK Public Contracts Regulations (construction & related services only)
		Below EU Threshold (£)	TFEU Principles			–
	50% or less	Above EU Threshold (£)	UK Public Contracts Regulations 2015			–
		Below EU Threshold (£)	TFEU Principles			–
Policy Requirements	Above 50%	Above or Below EU Threshold (£)	Full NIPPP compliance	Full NIPPP compliance (unless good reasons to deviate*)		Selected elements or principles of NIPPP should be applied*
	50% or less	Above or Below EU Threshold (£)	Full NIPPP compliance	Selected elements or principles of NIPPP should be applied*		
<p>* Deviations from NIPPP to be agreed by Sponsor Department and rationale recorded in writing.</p> <p># When determining the percentage grant rate, funding or part-funding from the National Lottery Funds must be taken into account. The organisations providing National Lottery grants are <i>Contracting Authorities</i>.</p>						
NOTE: Construction works with grant values over £500k regardless of grant rate must comply with Section 3.4 .						

ANNEX B: OTHER CONSIDERATIONS WHEN GRANT-GIVING

Sponsor Departments should consider the following issues when giving grant whether it is used for procurement or not:

- Appropriate ongoing training for grant-funding practitioners;
- Payments by results / evaluation / measureable objectives / benchmarking (Govt funder database);
- Pre-market engagement with sector and scheme co-designs;
- Competition law whether a competitive grant process or a procurement process;
- Grant-making is also covered by administrative law – the branch of law which governs the actions of public bodies and the exercise of their public functions – *NAO Commissioning Toolkit*, and
- Where grant-giving for works, Grant Recipients who are then employers must ensure competency of design teams (including CDMCs / Principal Designers) and construction teams in accordance with the Construction (Design and Management) Regulations (Northern Ireland) 2016.

ANNEX C: ASSURANCES FROM GRANT RECIPIENTS

Procurement issues on which a Sponsor Department and/or an Intermediary Funder may wish to seek assurance from funded bodies, taking into account the level of funding involved, are:

- Do we have a clear view of the relative procurement capabilities of the bodies we support?
- Are grant aided bodies collaborating to get better deals from suppliers? Has the grant aided body considered using central government procurement frameworks, where appropriate?
- Are procurement decisions based on *Best Value for Money* rather than lowest price? Has a whole life approach (including quality) been used to achieve *Best Value for Money* and not just price alone?
- Is the customer need/requirement clear; and how this can be best delivered (make or buy sourcing decisions)?
- Is the chosen supplier providing the *Best Value for Money*?:
 - are they technically and commercially capable of offering an acceptable quality of service?
 - are they financially sound and likely to remain so?
 - are they an organisation with whom the grant aided body would be able to have a good working relationship?
- Has the grant aided body focused on the whole of the required service, not just the technical aspects?
- Has the grant aided body kept sight of the business objectives throughout the procurement?
- Is there a good leadership and accountability for the success of the project in contributing to the business change? (Is there anyone carrying out the Senior Responsible Owner/Project Owner role?)
- Is there effective communication and interaction with provider and other stakeholders? Does this include a good understanding of the implication of the provider's plans for implementation?
- Have realistic estimates of resources required, timescales and likely benefits to be achieved been made?

- Will the relationship with the provider(s) best meet the delivery of the need?
- Are there clear and robust roles and responsibilities on both client and provider sides, supported by strong project and contract management skills?
- Has the grant aided body negotiated with suppliers to achieve the optimum balance of risks, costs, and benefits?