

THE MOST ECONOMICALLY ADVANTAGEOUS TENDER

The common factor shared by all criteria used for the evaluation of tenders is that they must concern the nature of the work to be carried out or the manner in which it is conducted. The criteria applied should give the contracting authority discretion to compare objectively the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed, by way of example, in the Directives.

The objective of this assessment is to establish which tender best fulfils the needs of the contracting authority. Therefore the function of the award criteria is to assess the intrinsic quality of the tenders. This implies that the award criteria have to be linked to the subject matter of the contract.

Environmental considerations are not explicitly mentioned in the current public procurement legislation; nevertheless the article on award criteria has to be interpreted in such a way that environmental considerations can result in the definition of specific award criteria. The 'environmental soundness' of a product, without further specification, is, as such, not measurable and does not necessarily have an economic advantage for the contracting authority. However, contracting authorities could take into account the environmental soundness of products or services, for example the consumption of natural resources, by 'translating' this environmental objective into specific, product-related and economically measurable criteria by requiring a rate of energy consumption. In most cases, such criteria relate to the quality or performance of the product or the execution of works or services (ie quality or technical merit as mentioned amongst the award criteria). Hence, environmental aspects relating to a product or service would be considered on an equal footing with the functional and aesthetic characteristics of goods or services, criteria that are explicitly listed in the public procurement Directives, in terms of assessment of what is economically measurable.

Environmental elements can serve to identify the most economically advantageous tender in cases where these elements imply an economic advantage for the purchasing entity attributable to the product or service which is the object of the procurement.

The question rises whether the concept of 'economically most advantageous tender' implies that each individual award criterion has to have an economic advantage which directly benefits the contracting authority, or that each individual award criterion has to be measurable in economic terms, without the requirement of directly bringing an economic advantage for the contracting authority in the contract at stake. This question has been put to the European Court of Justice in case C-513/99.

Both in the Green Paper and in the Communication on public procurement the Commission has clearly taken a position in favour of the first interpretation.

THE POSSIBILITY OF TAKING INTO CONSIDERATION ALL COSTS INCURRED DURING THE WHOLE LIFE CYCLE OF A PRODUCT

Life cycle costing is the taking into account of all costs incurred during the production, consumption/use and disposal of a product or service (cradle to grave approach).

The price paid by a contracting authority to purchase a product reflects and takes account of those costs incurred in the phases which are already completed (normally design, materials and production; sometimes also testing and transport) and should therefore not be taken into consideration a second time in the award process. On the contrary, all costs occurring after the purchase of the product, which will be borne by the contracting authority and will thus affect directly the economic aspects of the product, may be taken into account.

Costs incurred during the life cycle of a product and which will be borne by the contracting authority may be taken into account for the assessment of the most economically advantageous tender.

The Directives explicitly mention as possible award criteria running costs and cost-effectiveness. Such costs might include direct running costs (energy, water and other resources used during the lifetime of the product); spending to save (for example investing in higher levels of insulation to save energy and thus money in the future); as well as the costs of maintenance or recycling of the product. In evaluating tenders, a purchasing organisation can also take account of costs of treatment of waste or recycling.

THE POSSIBILITY OF TAKING INTO ACCOUNT EXTERNALITIES

Externalities are damages or benefits which are not paid for by the polluter or beneficiary under normal market conditions. They are defined as: "The costs and benefits which arise when the social or economic activities of one group of people have an impact on another, and when the first group fail to fully account for their impact."

External costs and benefits are opposed to 'traditional' costs and benefits such as operating costs or income from sales. The characteristic of the latter costs is that they are paid for with a price determined by the market.

As a general rule, externalities are not borne by the purchaser of a product or service, but by society as a whole and therefore do not qualify as award criteria as defined above. The Commission notes in this respect that contracting authorities retain the possibility to define the subject matter of a contract or impose conditions relating to the execution of the contract and to integrate at these stages of the tender procedure their environmental preferences linked to eventual occurrence of external costs.

Only in specific cases, for instance where external costs are due to the execution of the contract and at the same time borne directly by the purchaser of the product or service in question, could these costs be taken into account.

In such cases, contracting authorities should be careful not to introduce systems that lead to preferences or disguised discrimination. Up till now, there has not existed a harmonised system for the qualification and economic evaluation of externalities. However, work is being undertaken in the EU aiming to coordinate the methodologies of economic evaluation of external costs in the field of transport which could, in time, remove risks of discrimination involved in adopting this approach.



Environmental Issues in Purchasing

EUROPEAN COMMISSION INTERPRETATIVE COMMUNICATION ON THE COMMUNITY LAW APPLICABLE TO PUBLIC PROCUREMENT AND THE POSSIBILITIES FOR INTEGRATING ENVIRONMENTAL CONSIDERATIONS INTO PUBLIC PROCUREMENT

PART ONE

INTRODUCTION

The objective of this document is to examine and clarify the possibilities offered by the existing public procurement regime in order to enable the optimum consideration of environmental protection in public procurement. The document will follow the different phases of a contract award procedure and examine at each stage how environmental concerns may be taken into consideration.

For a specific category of works contracts, Community law imposes an obligation to make, previous to the decision to have the works executed, an environmental impact assessment. This obligation, which originates in environmental legislation and not the public procurement Directives, influences the choice of the purchasing entity. The obligation for the competent authorities to take into account the results of the environmental impact assessment, in the decision whether or not to give authorisation or consent for development, tends to lead to more environmentally sound requirements for the execution of the works.

As to **service contracts**, the nature of these contracts also implies the possibility of prescribing a mode of performing. Contracting authorities could, for example, prescribe a specific method of building cleaning, using only those products that are least harmful to the environment. They could further prescribe that, for instance, public transport services be conducted by use of electric buses. They could further prescribe the method for the collection of household waste.

Supply contracts relate, generally, to the purchase of final or end products. Therefore, apart from the basic and essential choice of the subject matter of the contract ("what shall I purchase?"), the possibilities of taking into account environmental considerations in addition to this choice are not as extensive as for works and service contracts. Environmental awareness will influence this choice.

If different possibilities exist for fulfilling their needs, contracting authorities are free to define the subject matter of the contract in the way that they consider to be the most environmentally sound, even through the use of variants (see below).

This freedom is, however, not entirely unlimited. A contracting authority, as a public body, has to observe the general rules and principles of Community law. More precisely, these are the principles regarding the free movement of goods and services as laid down in

DEFINITION OF THE SUBJECT MATTER OF THE CONTRACT

The first occasion for taking into account environmental considerations relative to a public contract is the phase just before the public procurement Directives become applicable: the actual choice of the subject matter of the contract or, to simplify the question, "what do I, the public authority, wish to construct or purchase?" At this stage, purchasing authorities have a wide opportunity to take into account environmental considerations and choose an environmentally sound product or service. How far this will effectively be done depends to a great extent on the awareness and knowledge of the purchasing entity.

It should be emphasised that existing environmental or other legislation, either Community legislation or national legislation compatible with Community law, may well limit or influence this freedom of choice.

The possibilities for taking into account environmental considerations differ according to the different types of contract.

Works contracts: Purchasing entities are entitled to define their requirements for the execution of the works. This offers a number of possibilities for taking into account environmental considerations, through, for instance, requirements relating to energy and water use or waste management on and around the construction site.

Articles 28 to 30 (formerly 30 to 36) and 43 to 55 (formerly 52 to 66) of the EC Treaty.

This implies that the subject matter of a public contract may not be defined with the objective or the result that access to the contract is limited to domestic companies to the detriment of tenderers from other Member States.

Contracting authorities are free to define the subject matter of the contract, or alternative definitions of the subject matter through the use of variants, in the way that they consider to be the most environmentally sound, provided this choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States.

The question of whether a measure is compatible with Community law depends on a case-by-case assessment. As announced in the Communication from the Commission to the European Parliament and the Council on the Single Market and the Environment, the Commission will produce a handbook on the application of Articles 28 to 30 of the Treaty.

The rules set out above are applicable to all public contracts, irrespective of whether they fall within or without the scope of application of the public procurement Directives.

CONTRACTS COVERED BY THE PUBLIC PROCUREMENT DIRECTIVES

All public procurement Directives contain the rule that the way contracting authorities define technical specifications is “without prejudice to the legally binding national technical rules”. This implies that, on condition that this legislation is compatible with Community law, national legislation may, for instance, prohibit the use of specific substances which national authorities consider harmful for the environment, or may oblige the observance of a specific minimum level of environmental performance. Contracting authorities are, of course, bound to observe such legislation.

Contracting authorities are free to define on specific points that they require a higher level of environmental protection than that laid down in legislation or in standards, on condition that the level required does not limit access to the contract and lead to discrimination to the detriment of potential tenderers.

The concept of ‘technical specification’ includes the possibility of prescribing the basic or primary materials to be used, if this contributes to the characteristics of the product or service in such a manner that it fulfils the use for which it is intended by the contracting authority. As long as these prescriptions observe Community law and are, in particular, non-discriminatory, contracting authorities may prescribe for a specific contract the materials which are to be used. This could include, for instance, that for a specific contract the window frames of an administrative building are made of wood or a requirement for recycled glass or other recycled materials.

The definition of technical specifications in the Directives does not explicitly refer to production processes. However, provided that this does not restrict the market to certain undertakings, the use of a specific production process may be required by contracting authorities if this helps to specify the performance characteristics (visible or invisible) of the product or service. The production process covers all requirements and aspects related to the manufacturing of the product which contribute to the characterising of the products, without the latter necessarily being visible in the end product.

This implies that the product differs from identical products in terms of its manufacture or appearance (whether the differences are visible or not) because an environmentally sound production process has been used, eg organically grown foodstuffs, or ‘green’ electricity. Contracting authorities must be careful that the prescription of a specific production process is not discriminatory.

Requirements which do not relate to production itself, like the way the firm is run, on the contrary, are not technical specifications and therefore cannot be made mandatory.

THE POSSIBILITY OF REFERRING TO ECO-LABELS

Eco-labels certify products that are deemed to be more environmentally sound than similar products in the same product group. The labels are awarded on a voluntary basis to products fulfilling specific criteria and they aim to inform consumers about environmentally sound products.

In the absence of mandatory references, or where a higher level of environmental protection is required than that laid down in standards or legislation, contracting authorities can define the technical specifications related to the environmental performances in line with eco-label criteria and may indicate that products having these eco-label certificates are deemed to comply with the technical prescriptions of the contract documents.

Contracting authorities have to be careful not to limit the means of proof only to eco-label certificates. They should also accept other means of proof, like test reports. This is of particular relevance in the case of national and private eco-labels, to ensure that the specification and the means of assessing conformity with the specification would not result in the reservation of the contract to national/local companies. (See also Article 8 of Directive 93/36/EEC.)

THE POSSIBILITY OF USING VARIANTS

Products and services that are less damaging for the environment can be, generally speaking, more expensive than other products and services. When defining the subject matter of a contract, contracting authorities have to find a balance between their financial considerations, on the one hand, and their objectives of greening their purchases, on the other.

The use of variants enables contracting authorities to assess which option best meets both of these requirements.

When using this possibility, contracting authorities first produce a standard definition for the subject matter of the contract that lays down their minimum requirements. In addition to this standard definition, contracting authorities can define one or more variants, laying down alternative definitions of the subject matter; for instance a higher environmental performance or the use of a specific production process which was not a requirement in the standard definition.

SELECTION OF THE CANDIDATES

The rules laid down in the public procurement Directives consist of three different types.

The first set of rules concerns the grounds that justify a candidate’s **exclusion from participating** in a public contract. These relate, eg, to bankruptcy, conviction for offences, grave professional misconduct, and non-payment of social security contributions or taxes.

The second set of rules concerns the candidate’s **financial and economic standing**. These rules do not offer possibilities to take into account environmental considerations.

The third set of rules concerns the candidate’s **technical capacity**. These rules enable, to a certain extent, environmental considerations to be taken into account, by defining, eg, a minimum level of equipment or facilities guaranteeing the correct execution of the contract. The Directives specify that the information required for evidence of the operator’s financial and economic standing as well as for technical capacity must be confined to the subject matter of the contract. The possibilities contained in these rules are set out below.

REQUIREMENTS RELATING TO THE TECHNICAL CAPACITY OF THE CANDIDATES

The objective of the selection phase is to identify those candidates which are considered by the contracting authority to be capable of executing the contract in the best way. Therefore, the different requirements must have a direct link to the subject matter or the execution of the contract at stake.

Among the references listed exhaustively by the public procurement Directives, the following could in specific cases relate to environmental aspects:

- a statement of the tools, plant and technical equipment available to the candidate for executing the contract;
- a description of the supplier’s technical facilities, its measures for ensuring quality and its study and research facilities; and
- a statement of the technicians or technical bodies which the candidate can call upon for executing the contract, whether or not they belong to the firm, especially those responsible for quality control.

THE POSSIBILITY OF REQUIRING SPECIFIC (ENVIRONMENTAL) EXPERIENCE

If the contract needs specific know-how in the environmental field, specific experience is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of candidates and may therefore be required (eg the construction of a waste treatment plant).

THE POSSIBILITY OF REQUIRING SUPPLIERS TO OPERATE AN ENVIRONMENTAL MANAGEMENT SCHEME

The aim of the European Environmental Management Scheme (EMAS) is to promote continuous environmental performance improvements re activities, products and services by committing organisations to evaluate and manage their significant environmental impacts.

The implementation of EMAS requires the following of several steps. The environmental review is the initial step which allows organisations to evaluate their environmental situation and therefore to build up the appropriate management system to lead to better environmental performance through clear environmental objectives. Regular environmental audits provide the means to check that the environmental management system works and to follow the progress of the organisation towards better environmental performance.

Amongst these steps, registration in the scheme requires that the organisation adopts an environmental policy containing, in particular, the following key commitments:

- compliance with all relevant environmental legislation;
- prevention of pollution; and
- achieving continuous improvements in environmental performance.

As part of EMAS, all participating countries have created verification mechanisms by which compliance to EMAS is verified and information validated by independent verifiers who are accredited by competent bodies. This validation leads to requests for registration which are granted by the competent accreditation bodies designated by the Member State.

The lists of registered organisations from the EU Member States plus the EEA countries is regularly communicated to the Commission and a complete list is available from Commission services.

The contents of the environmental programmes and environmental management schemes may differ from company to company and organisation to organisation because they are ‘tailor-made’. This is why it is not possible to give a general answer to the question whether or not EMAS as such can be qualified as one of the possible references relative to the technical capacity of a company or organisation which are listed exhaustively in the public procurement Directives. The question of whether or not a specific environmental management and audit scheme can be qualified as one of these references depends on the contents of the specific system.

It is, however, important to underline that common to all environmental management and audit schemes is that the company or organisation fulfils a number of minimum criteria and that all such systems represent a high level of environmental performance and management.

In order to be relevant as a means of proof of technical capacity, the system should have an impact on the quality of the supply or the capacity of a company (for example its equipment and technicians) to execute a contract with environmental requirements (for example a works contract for which the contractor has to deal with waste on the construction site).

Therefore, whenever elements of a company’s or organisation’s environmental programme and management scheme could be regarded as one or more of the references that could be required for establishing a company’s technical capacity, EMAS registration could serve as a means of proof.

In such cases, Article 11 (2) of the EMAS Regulation states that: “In order to encourage the organisation’s participation in EMAS the Commission and other institutions of the Community as well as other public authorities at national level should consider, without prejudice to Community law, how registration under EMAS may be taken into account when setting criteria for their procurement policies.” Contracting authorities could explicitly mention in their contract documents or the tender notice that whenever companies have an environmental management and audit system which covers the requirements as to technical capacity, this system will be accepted as a sufficient means of proof. At the same time, contracting authorities may not exclude other means by accepting only an EMAS registration as means of proof: any other certificate (eg ISO 14001) or any other means of proof should also be accepted.

AWARD OF THE CONTRACT

The public procurement Directives contain two options for the award of contracts: either the lowest price or the ‘most economically advantageous tender’. The aim of this second option is to help the contracting authorities obtain the best value for money.

In order to define which tender should be considered the most economically advantageous, the contracting authority has to indicate beforehand which criteria will be decisive and will be applied. These different criteria should be mentioned either in the contract notice or in the contract documents, where possible in descending order of importance.