

PRODUCER RESPONSIBILITY INITIATIVE FOR PACKAGING WASTE

23 Purchasers should buy recycled products in support of this initiative wherever they provide vfm. The initiative is designed to put an increased share of responsibility on suppliers to make productive use of the materials in their products (and the packaging around them) once they have served their original purpose. The aim is to reduce packaging, and create markets for recycled materials by making greater use of them in packaging and products.

RECEIPT FROM SALES

24 Departments may enter into contracts with companies which reuse or recycle waste, provided they follow Government rules on the treatment of receipts.

(GUIDANCE ISSUED BY OGC)

CONTRACTS NOT COVERED BY THE PUBLIC PROCUREMENT DIRECTIVES

For contracts not covered by the public procurement Directives, the detailed rules stemming from the Directives.

Indeed Community law leaves it to the Member States to decide whether or not public procurement not covered by the Community Directives should be subject to national procurement rules.

Within the limits set by the Treaty and Community law, Member States are free to adopt their national legislation. It will therefore depend on the national legislation whether public procurement may, or even shall, be used to fulfil objectives other than the "best value for money" objective of the public procurement Directives.

When defining the subject matter of such a contract, a broad range of requirements and conditions may be imposed, even if these conditions and requirements may probably not have a direct link to the subject matter of the contract. Of course these requirements and conditions must observe the rules of the Treaty and principles flowing from the Treaty. Thus, the Court of Justice has held that inclusion of clauses referring to national standards or a specific origin in an invitation to tender may cause economic operators who produce products equivalent to products certified as complying with the national standard to refrain from tendering. If measures impose on the national of one Member State more rigorous rules, or put him in law or in fact in an unfavourable position compared with the national of the Member State imposing the measure, these measures could infringe the Treaty rules on free movement of goods and services.

As regards the qualification of candidates, purchasing authorities are free to impose requirements and define conditions that go beyond what is possible under the public procurement Directives. The criteria need not be limited to the financial and economic situation of a candidate, or to his technical capacity. Of course, the requirements for qualification have to be compatible with Community law and Community law principles, notably the rules and principles relating to the free provision of services, such as non-discrimination and mutual recognition.

As regards the evaluation of tenders, award criteria may be defined freely by a purchasing authority, as long as the Treaty rules and

Community law principles are observed, and the criteria remain objective, transparent and non-discriminatory.

The question of whether the Treaty rules or the principles of Community law are observed depends on a case-by-case assessment.

Remember, public contracts not covered by the public procurement Directives are subject to the rules and principles of the Treaty. Here, it depends on national law whether contracting authorities have further possibilities for "green purchasing".

ADDITIONAL CRITERIA

This concept has been developed by the case law of the European Court of Justice.

The concept was first set out in case 31/87, where the Court held that such criteria (the employment of long-term unemployed persons) have neither a relationship to the checking of a candidate's economic and financial suitability and the candidate's technical knowledge and ability, nor a connection with the award criteria as listed in article 9 of the Directive. The Court held further that these criteria are nevertheless compatible with the Directives on public procurement if they comply with all relevant principles of Community law.

In case C-225/98 the European Court of Justice held that awarding authorities could apply a condition relating to the campaign against unemployment, provided that this condition was in line with all the fundamental principles of Community law, but only where the said authorities had to consider two or more economically equivalent bids. Such a condition could be applied as an accessory criterion once the bids had been compared from a purely economic point of view. As regards the criterion relating to the campaign against unemployment the Court made it clear that it must not have any direct or indirect impact on those submitting bids from other Member States of the Community and must be explicitly mentioned in the contract notice so that potential contractors were able to ascertain that such a condition existed.

This could be equally applicable to conditions relating to environmental protection or performance.

EXECUTION OF THE CONTRACT

Contracting authorities have the option of defining (detailed) contract clauses relating to the mode of execution of a contract. Contract clauses may not be (disguised) technical specifications, selection criteria or award criteria. They relate merely to the execution of the contract itself. This means that all applicants, should they eventually be awarded the contract, must be in a position to execute these clauses. As a matter of transparency, they should be announced in advance to all applicants.

The public procurement Directives do not cover contract clauses. As such, contract clauses must observe the general Treaty rules and principles, notably the principle of non-discrimination.

Contracting authorities have a broad range of possibilities open to them for defining contract clauses having as their object the protection of the environment.



Environmental Issues in Purchasing

UK GOVERNMENT GUIDANCE

PART TWO

INTRODUCTION

1 The purpose of the following is to provide guidance to government departments, including their Executive Agencies and NDPBs, on environmental issues in purchasing. It has been produced jointly by HM Treasury and the former Department of the Environment, Transport and the Regions (DETR).

UK POLICY

PROCUREMENT POLICY

- 2 All public procurement of goods and services, including works, is to be based on value for money (vfm), having due regard to propriety and regularity. Vfm in procurement is defined as "the optimum combination of whole life cost and quality (or fitness for purpose) to meet the customer's requirement". The policy is set out in guidelines which are available on the OGC website: <http://www.ogc.gov.uk>
- 3 The emphasis on whole life costs means that departments are required to take account of all aspects of cost, including running and disposal costs, as well as the initial purchase price. The reference to "quality to meet the customer's requirement" enables departments to specify what they need to meet their own operational and policy objectives while contributing to the Government's objectives on environmental matters. Departments must, of course, satisfy themselves that specifications are justifiable in terms of need, cost-effectiveness and affordability.

ENVIRONMENTAL POLICY

- 4 The 1990 White Paper "This Common Inheritance" committed each department to have a strategy in place for greening their operations. This should be adapted, to meet each department's circumstances, from the Government's model framework for greening operations which was approved by Green Ministers in

May 1998 – a copy of which is available on the following website: www.environment.detr.gov.uk/greening/gghome.htm

Among the model's key aims are:

- conserving energy, water, wood, paper and other resources, particularly those which are scarce or non-renewable – while still providing a safe and comfortable working environment;
- reducing waste through reuse and recycling and by using refurbished and recycled products and materials where such alternatives are available;
- monitoring discharges and emissions to air, land and water to assess what action is necessary to reduce pollution or the risk of pollution;
- phasing out ozone-depleting substances and minimising the release of greenhouse gases, volatile organic compounds, vehicle emissions and other substances damaging to health and the environment;
- encouraging manufacturers, suppliers and contractors through specifications to develop environmentally preferable goods and services at competitive prices;
- ensuring that any products derived from wildlife such as timber, plants and leather goods are from sustainable sources, and complying with EU and international trading rules such as CITES (the Convention in International Trade in Endangered Species);
- working with contractors to improve environmental performance where this is relevant to the contract and to the achievement of value for money; and

ENVIRONMENTALLY SENSITIVE PROCUREMENT

- 5 Drawing up specifications based on these criteria can contribute significantly to the achievement of Government targets for reducing the environmental impact of its activities. Although the aim must be to achieve value for money, not to further other policy aims, it should not be overlooked that legitimate requirements laid

down by government purchasers can have an influence in assisting the development and use of goods and services which are less harmful to the environment.

THE EC PROCUREMENT RULES

6 Public contracting authorities are required to comply with the EU procurement Directives and the UK Regulations which implement them. These apply to most contracts whose estimated value equals or exceeds specified thresholds. The thresholds are reviewed at least every two years and are notified to departments separately.

They are also required to comply with the Treaty of Rome (for example, on the free movement of goods and services and non-discrimination on grounds of nationality).

The main ways in which these rules affect environmental considerations within the procurement process are:

- specifications – contracting authorities are free under the rules to specify their requirements in green terms. For example, departments may specify that a product should be made out of materials which are or could be recycled or that particular materials, such as ozone-depleting substances, should not be used in the product. This is subject to the general rule that specifications must be drawn up in a manner which does not discriminate against products or providers from other Member States and which is, where applicable, consistent with the provisions in the Directives on technical specifications and the use of standards.
- selection of tenderers – the Regulations set out detailed criteria for the selection of tenderers based on evidence of their personal position, their economic and financial standing, their technical capacity and, for services, also their ability. The nature of the evidence that may be requested with regard to technical capacity is exhaustive, so evidence on other factors may not be taken into account. In particular, questions about providers' general policies (eg on environmental issues) are not permitted. Purchasers are allowed to reject candidates who have been convicted of a criminal offence or who have committed an act of grave misconduct in the course of their business where they consider rejection to be justified. This may include infringement of environmental legislation/regulations. However, care should be taken to ensure that decisions to reject providers are proportionate to the offence and that the provider is given an opportunity to describe any steps they might have taken to prevent recurrence. Care should also be taken to ensure that providers are treated equally.
- award of contract, only two criteria are permitted, either various criteria including whole life costs for determining which offer is "the most economically advantageous" to the purchaser (ie best value for money) or "lowest price" alone.
- contract conditions – as a matter of Community law, purchasers can attach conditions to the award of contracts provided these conditions are compatible with the Treaty of Rome. In brief, this means that the conditions must be equally capable of being met by providers in all Member States. However, the UK's domestic policy of not using procurement to achieve other policy ends limits the extent to which departments may have recourse to "contract compliance" – as the imposition of contractual conditions is commonly known. An example of an acceptable contract condition might be: "While working on the department's premises the contractor will comply as far as possible with the department's green strategy."

SPECIFYING REQUIREMENTS

7 The procurement process will normally start with the definition of the business need by the end user. From this a user requirement or specification will be drawn up.

In preparing the specification the end user should decide the extent to which it should cover environmental requirements taking account of:

- the Government's environmental policies and the department's own strategy for greening its operations;
- the resources available to the department;
- the requirement to achieve value for money (see paragraph 12 below); and
- the EC procurement Directives and the Treaty, as appropriate.

PROCURING GOODS AND SERVICES

8 The departmental purchaser's role is to respond to the end user's needs in the normal way.

The purchaser will need:

- to be fully aware of the department's environmental strategy;
- to be able to challenge a specification to ensure that full account is taken of the purchaser's knowledge of the market and professional skills and experience;
- to ensure that where the EU procurement Directives apply, they are followed appropriately – eg in framing the specification, in selecting tenders and in awarding contracts; and
- to ensure that the requirements of the Treaty of Rome are complied with.

ACCOUNTABILITY

9 The Accounting Officer is accountable to Parliament through the Public Accounts Committee for a department's decisions on purchasing and the expenditure arising from them, and will need to be able to demonstrate that value for money has been obtained. The minister in charge of each department is also accountable to Parliament for the department's strategy for greening government operations, including taking account of environmental factors in purchasing. (In practice, a department's Green Minister, where different, will normally answer on these matters.)

VALUE FOR MONEY

10 Examples of the factors which need to be considered in assessing whole life costs include:

- running costs such as the energy or water consumed by the product over its lifetime;
- indirect costs, eg less energy-efficient IT equipment will produce more heat causing the plant in air-conditioned buildings to work harder to remove it, so adding to the electricity bill;
- administrative costs, eg the use of a more expensive product which is less harmful to the environment may reduce the time spent by staff in complying with the Control of Substances Hazardous to Health (COSHH) Regulations;
- investing to save revenue costs ("spend to save" measures), eg specifying higher levels of insulation where the extra expenditure can be recouped from lower energy costs;
- not generally insisting on new items when refurbished parts or products could be used;
- recyclability, eg purchasers can create markets for their own waste such as paper, toner cartridges etc by buying products containing recycled materials; furthermore, a recycled product, eg a refurbished toner cartridge, may cost less than a new one. Purchasers should, however, look to waste reduction and reuse as well as recycling (see paragraph 21);

- the cost of disposal arrangements, eg it may be worth paying a premium to a supplier giving an undertaking to remove the product or a hazardous substance at the end of its useful life.

11 Departments should also consider risk factors, for example:

- the advantages of reducing their risks under COSHH and the Duty of Care on Waste Management (under section 4 of the Environment Protection Act 1990), eg by choosing benign rather than hazardous materials;
- the risk of investing in redundant plant and equipment as increasingly stringent environmental standards are imposed through EU and UK legislation, allied with increasingly vigilant enforcement.

12 Buying green may often cost less, taking proper account of factors such as these. However, cases may arise where the specification of a particular environmental requirement results in higher costs which will not be offset by savings over the longer term. Departments are accountable for their expenditure and, therefore, will need to determine whether the extra cost is justified. The justification may be that ministers have decided collectively as a matter of policy that the Government should not buy a particular substance or material on the grounds that it is harmful to the environment. Otherwise, it will be for the purchasing department to judge whether the premium is justified after taking into account the department's own policy statement on greening operations. In formulating such requirements it will, of course, be necessary to strike a proper balance between the costs of the requirement to the taxpayer and the environmental benefits. However, that is a matter of prudent financial management generally rather than specifically one of procurement policy.

13 At the tender evaluation stage the costs and benefits of the competing bids should be evaluated in the normal way to establish which of the bids meeting the specification offers the best value for money. The contract should be awarded accordingly.

14 Departments should not seek to use their purchasing power as a means of pursuing wider environmental ends (ie those outside the scope of the contract). For example, while a department is free to specify paper made out of recycled materials, it should not limit its field of selection to providers who only supply recycled paper. The unwarranted rejection of suppliers capable of meeting the specification could lead to both a loss of value for money and a breach of the EU rules.

15 The award of contracts should not be made subject to criteria or conditions of an environmental nature which are not directly relevant to the product or service which is being procured. However, departments will need to ensure that they discharge their statutory obligations – for example under the "Duty of Care" (see paragraph 22 below).

OTHER ISSUES

SUBSTANTIATING ENVIRONMENTAL CLAIMS

16 Purchasers should be wary of unsubstantiated claims and environmental marks which have no formal recognition.

Some typical phrases are:

- "environmentally friendly" – meaningless if unexplained
- "comes from managed forests" – virtually all forests used for paper-making are managed, but some are managed in ways that are strongly criticised by environmentalists
- "kinder to wildlife" – again, meaningless if unexplained

Further guidance on these issues is given in the Government's "Green Claims Code".

ENVIRONMENTAL MANAGEMENT SCHEMES

17 Formal standards for environmental management systems are now in place which assure purchasers that suppliers are operating to control their environmental impacts. Companies can obtain

certification for their environmental management systems under ISO 14001 or the Eco-Management and Audit Scheme (EMAS). More information on both schemes but particularly on ISO 14001 is given in DETR's guide to "Implementing Environmental Management Systems in Government".

18 EMAS and ISO 14001 are voluntary schemes promoted by the Government. However, it is not the Government's policy to require its suppliers to comply with them as a condition of selection to tender or award of contract as such a condition could lead to higher prices by restricting those eligible to compete for orders and contracts and could conflict with the EU rules on selecting providers. It is, however, permissible to ask suppliers to provide evidence that they are able to operate an environmental management scheme where it is relevant to the contract, eg for the provision of facilities management services in an organisation accredited to or seeking accreditation to ISO 14001.

LIFE CYCLE ASSESSMENT AND ECO-LABELLING

19 Few organisations can afford to conduct detailed life cycle (or whole life) assessments on all their products because of the technical expertise and resources required to produce meaningful results. This is where the EU eco-labelling scheme can help. It provides rigorous standards for certain product groups which are based on a full analysis of life cycle impacts and agreed at European level. However, the scheme is voluntary and therefore it does not follow that eco-labelled products necessarily perform better in environmental terms than non-eco-labelled products. Accordingly, invitations to tender and contract documents should not require products to carry the label or any other non-mandatory label. However, the eco-label criteria may be used to identify environmentally preferable products and to improve the specification for products and services.

ENERGY LABELLING SCHEMES

20 Purchasers who wish to identify products in the most energy-efficient categories should use the European Union's mandatory energy labelling scheme.

WASTE MINIMISATION STRATEGY

21 The aim of the strategy, set out in the Government's consultation paper "Less waste more value", is to reduce the amount of waste produced. Failing that, value should be recovered from the waste and only if that is not an efficient solution should the waste be disposed of by means which minimise risk to the environment and to human health.

The options for waste management are ranked by merit of their relative benefits:

- reduce;
- reuse;
- recover (ie recycling, composting and energy recovery); and
- dispose.

Purchasers should focus their attention on the top of the hierarchy when making their purchasing decisions. For example, which products are likely to cause the least waste? Which can be reused? Or, which can be recycled? Making the right decision – taking into account vfm – can help departments meet their targets for reducing waste.

DUTY OF CARE – WASTE DISPOSAL

22 Departments are reminded of their responsibilities under Section 34 of Part II of the Environment Protection Act 1990, which places a Duty of Care on anyone who produces or holds controlled waste.