



A Guide to...

Developing Social, Environmental and Sustainability Procurement Strategies



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A Guide to Developing Green and Social Procurement Strategies

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A Guide to Developing Green and Social Procurement Strategies

Environmental & Social Requirements

“In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs – defined in the specifications of the contract – of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.”

GREEN PROCUREMENT: THE ESSENTIALS

What is the connection between public purchasing and the environment?

Public authorities are major consumers in Europe, spending some 16% of the EU's Gross Domestic Product (which is a sum equivalent to half the GDP of Germany). By using their purchasing power to opt for goods and services that also respect the environment they can make an important contribution towards sustainable development.

Green public procurement covers areas such as the purchase of energy efficient computers and buildings, office equipment made of environmentally sustainable timber, recyclable paper, electric cars, environmentally friendly public transport, organic food in canteens, electricity stemming from renewable energy sources and air conditioning systems complying with state-of-the-art environmental solutions.

Green purchasing is also about setting an example and influencing the marketplace. By promoting green procurement, public authorities can provide industry with real incentives for developing green technologies. In some product, works and service sectors the impact can be particularly significant, as public purchasers command a large share of the market (in computers, energy efficient buildings, public transport, and so on).

Finally, if you consider the life-cycle costs of a contract, green public procurement allows you to save money and protect the environment at the same time. By purchasing wisely, you can save materials and energy, reduce waste and pollution, and encourage sustainable patterns of behaviour.

This guidance is designed to help public authorities launch a green purchasing policy successfully. It explains the possibilities offered by European Community law in a practical way, and looks at simple and effective solutions that can be used in public procurement procedure. It also gives many practical examples of green purchasing by public authorities across the EU.

This guidance, abridged from the European Commission's handbook on environmental public procurement, 'Buying Green', is of use not only to public authorities, but also suppliers, service providers and contractors – particularly the smaller companies – to understand and meet the environmental purchasing requirements imposed on them.

The full handbook is available on the EUROPA website (<http://europa.eu.int/comm/environment/gpp/>).

GREEN PUBLIC PROCUREMENT IS A STEP-BY-STEP PROCESS

- 1 Consider which products, services or works are the most suitable on the basis both of their environmental impact and of other factors, like the information you have, what is on the market, the technologies available, costs and visibility.
- 2 Identify your needs and express them appropriately. Choose a green title to communicate your policy to the outside world, ensuring optimum transparency for potential suppliers or service providers, and for the citizens you are serving.
- 3 Draw up clear and precise technical specifications, using environmental factors where possible (pass/fail conditions):
 - look for examples of environmental characteristics in databases/eco-labels
 - build upon the 'best practices' of other contracting authorities; use networking as a way of obtaining and spreading information
 - take a scientifically sound 'life-cycle costing approach'; do not shift environmental impacts from one stage of the life cycle to another
 - use performance-based or functional specifications to encourage innovative green offers
 - consider environmental performances, such as the use of raw materials, sustainable production methods (where relevant for the end product or service), energy efficiency, renewable energies, emissions, waste, 'recyclability', dangerous chemicals, etc
 - if you are uncertain about the actual existence, price or quality of green products or services, ask for green variants.
- 4 Establish selection criteria on the basis of the exhaustive list of criteria mentioned in the public procurement directives. Where appropriate include environmental criteria to prove technical capacity to perform the contract. Tell potential suppliers, service providers or contractors that they can use environmental management schemes and declarations to prove compliance with the criteria.
- 5 Establish award criteria: where the criterion of the 'economically most advantageous tender' is chosen, insert relevant environmental criteria either as a benchmark to compare green offers with each other (in case the technical specifications define the contract as being green), or as a way of introducing an environmental element (in case the technical specifications define the contract in a 'neutral' way) and giving it a certain weighting. Consider the life-cycle costing!
- 6 Use contract performance clauses as a way of setting relevant extra environmental conditions in addition to the green contract. Where possible, insist on environmentally friendly transport methods.

WARNING: Always make sure that everything you ask of potential bidders and their offers relates to the subject matter of the contract.

Green purchasing strategies

In principle, it should be fairly easy for all public authorities to take the political decision to buy green. Indeed, they should be encouraged to do this as it will not only benefit the environment but also the contracting authority by improving its public image. In fact, a green purchasing policy does not normally require any structural changes by the contracting authority.

However, putting the policy into practice will first require some strategic planning: organising appropriate training for purchasing staff, ensuring access to environmental information, and setting priorities when choosing the contracts most suitable for 'greening'. Once this is in place, contracting authorities will then be able to proceed with the proper organisation of a green public procurement procedure.

Assessing training needs and ensuring access to environmental information

The staff making the purchases should be given the legal, financial and environmental knowledge they need to decide to what extent and where environmental factors can best be introduced into the procurement procedure, whether they are set at the right level to get best value for money and whether they match the environmental priorities of the contracting authority.

It is important to communicate a green purchasing policy to a wide range of stakeholders, including present and future suppliers, service providers or contractors, so that they can take account of the new requirements. Cooperation between purchasing authorities is another way of increasing access to environmental expertise and know-how and of communicating the policy to the outside world.

Setting general priorities for greening your procurement

Adopt a step-by-step approach. Start with a small range of products and services where the environmental impact is clear or where greener alternatives are easily available and not more expensive (eg recycled paper, energy-efficient office equipment). Alternatively, start by ensuring that contract specifications do not have a negative impact on the environment (eg by excluding the use of recycled components).

Consider environmental impact. Select those products (ie vehicle fleet) or services (ie cleaning services) which have a high impact on the environment.

Focus on one or more environmental problems, such as climate change or waste. Introduce general requirements on energy efficiency or recyclability.

Consider availability and cost of environmentally superior alternatives. Are there green(er) products on the market, will they meet your requirements and can you afford them?

Consider availability of data. Can you find the scientific and environmental data you need to set criteria for this product? How complicated will it be to decide what you want technically, and to express it in a call for tender?

Look for visibility. How visible will the green policy be to public and staff? Will they realise that an effort is being made to improve environmental performance? High-profile changes like the type of vehicles used by an authority, or introducing organic food in a school canteen, can help build awareness of the policy and link it to other environmental projects.

Consider the potential for technological development. If green purchasing can target products and services at an early stage in their development and marketing, this may be more successful than trying to change the environmental characteristics of mature sectors.

Adopt a scientifically sound life-cycle approach. Avoid shifting environmental impact from one phase of the life-cycle of a product to another. Look for relevant information in underlying specifications

of eco-labels or in websites and databases aimed at informing consumers.

Organising public procurement

Public purchasers have a stricter obligation than private purchasers to get the best value for money and to be fair in procurement procedures. Best value for money can include environmental considerations. Being fair means providing equal opportunities and guaranteeing transparency.

The preparatory stage is crucial. Thorough analysis and planning is essential before launching a tender if environmental goals are to be achieved.

It is particularly important to analyse exactly what it is you need, before deciding on a solution.

Defining the requirements of the contract

When defining the subject matter of a contract, contracting authorities have great freedom to choose what they wish to procure. This allows ample scope for including environmental considerations, provided that this is done without distorting the market, ie by limiting or hindering access to it.

Market analysis can provide essential information about the environmental options available and about general commercial rates and conditions.

The underlying technical specifications of eco-labels may prove very useful for the drafting of technical specifications; however tenderers are not required to have registered under any eco-label scheme.

Certain materials and environmental production methods may be specified, if relevant.

Selecting suppliers, service providers or contractors

It is possible to exclude companies that have acted against environmental legislation or regulations if this is affecting their professional conduct.

In the technical capacity criteria, the past experience of a company and the professional qualifications of its personnel offer good opportunities for including green considerations.

In order to check whether tenderers can perform the environmental management measures prescribed by the contract, contracting authorities may ask them to demonstrate their technical capacity to do so.

Environmental management systems can serve as a (non-exclusive) means of proof for that technical capacity.

Setting requirements to comply with any particular environmental management system is not allowed.

Awarding the contract

It is possible to apply environmental award criteria, provided those criteria:

- (a) are linked to the subject-matter of the contract
- (b) do not confer unrestricted freedom of choice on the contracting authority
- (c) are expressly mentioned in the contract notice and tender documents
- (d) comply with the fundamental principles of EU law.

Adopting a 'life-cycle costing' approach reveals the true costs of a contract. The use of this approach in preparation of the award criteria will improve both the environmental performance and the financial position.

Total cost of ownership and minimised life-cycle cost (LCC) criteria are widely used in many private and public procurement bodies. As a consequence of this, LCC analysis and guidelines are available that can facilitate the task of developing specifications for defining requirements in the tendering and contracting process.

Contract performance clauses

Contract clauses can be used to include environmental considerations at the performance stage.

The contracting authority can specify the way the goods are to be supplied and even the method of transport.

The contractor is obliged to respect all the performance clauses in the contract. Contract performance clauses are used to specify how a contract must be carried out. It is recognised that environmental considerations can be included in contract performance clauses, provided they are published in the contract notice or the specifications and comply with Community law.

SOCIAL PROCUREMENT: THE ESSENTIALS

In their communication in 1998 the European Commission stated that there is a range of possibilities under the existing Community legal framework for integrating social considerations into public procurement. The Commission considers it possible to integrate various social considerations into public procurement in the best way possible and in this way contribute to sustainable development – a concept which combines economic growth, social progress and respect for the environment.

Public procurement policy is one of the components of Internal Market policy. In this respect, the public procurement Directives aim to guarantee “the attainment of free movement of goods” and “the attainment of freedom of establishment and freedom to provide services in respect of public works contracts”.

Attainment of these objectives necessitates coordination of public procurement procedures in order to ensure effective competition and non-discrimination in respect of such procedures and optimal allocation of public money through the choice of the best tender.

The Commission accepts that contracting authorities must be allowed to obtain best value for money while complying with certain rules, especially as regards selection of candidates in accordance with objective requirements and award of contracts solely on the basis of price or of the most economically advantageous tender based on a set of objective criteria.

There is no reason why internal market policy can be pursued while at the same time integrating pursuit of other objectives, including social policy objectives.

Social policy has played a central role in building Europe's economic strength, through the development of a unique social model. Economic progress and social cohesion, and a high level of protection and improvement of the quality of the environment, are complementary pillars of sustainable development and are at the heart of the process of European integration. Raising living standards, promoting a high level of employment and social protection, improving living and working conditions and promoting quality of life are goals of the European Union.

The Social Policy Agenda adopted at the Nice European Council in December 2000 forms part of the integrated European approach that aims to achieve the economic and social renewal outlined by the Lisbon European Council in March 2000. Specifically, it seeks to ensure the positive and dynamic interaction of economic, employment and social policies, and to forge a political agreement that mobilises all key players to work jointly towards the new strategic goal.

The Public Procurement Directives

The public procurement Directives currently in force contain no specific provision on the pursuit of social policy goals within the framework of public procurement procedures. The Commission nevertheless considers that current Community public procurement law offers a range of possibilities which, if properly pursued, should make it possible to attain desired objectives.

Social considerations

The expression ‘social considerations’ used in this Communication covers a very wide range of issues and fields. It can mean measures to ensure compliance with fundamental rights, with the principle of equality of treatment and non-discrimination (for example, between men and women), with national legislation on social affairs, and with Community directives applicable in the social field.

The expression ‘social considerations’ also covers the concepts of preferential clauses (for example, for the reintegration of disadvantaged persons or of unemployed persons, and positive actions or positive discrimination, in particular with a view to combating unemployment and social exclusion).

This Guide aims to identify the possibilities under existing Community law applicable to public procurement for taking social considerations into account in the best way in public procurement. The Communication examines the different phases of a procurement procedure and sets out, for each phase, whether and to what extent social considerations can be taken into account.

It should be noted that, in any event, interpretation of Community law is ultimately the role of the European Court of Justice.

If it were considered that the current public procurement regime does not offer sufficient possibilities for taking social considerations into account, modification of the public procurement Directives would be necessary.

It should be noted that, in the proposals for modification of the public procurement Directives adopted by the Commission on 10 May 2000, specific mention is made of the possibility to use contractual conditions regarding execution of a contract that have as their goal the promotion of employment of disadvantaged or excluded persons, or the combating of unemployment.

Social issues and defining the subject-matter of the contract

The first occasion for taking social considerations into account in respect of a public procurement contract is the phase just before the public procurement Directives will be applicable: the actual choice of the subject-matter of the contract or, to put it more simply “*what do I, public authority, wish to construct or purchase?*”

At this stage, contracting authorities have a great deal of scope for taking social considerations into account and choosing a product or service that corresponds to their social objectives. How far this will actually be done depends to a great extent on the awareness and knowledge of the contracting authority.

As the Commission states in its Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, the possibilities for taking account of environmental considerations vary from one type of contract to another. This is also true as regards the possibilities for taking account of social considerations.

Public contracts for works and services, in respect of which it is possible to lay down the manner in which the contract is to be performed, provide the best opportunity for a contracting authority to take account of social concerns. In the case of supply contracts, apart from the basic choice of the subject-matter of the contract (“*what shall I purchase?*”), the possibilities to take social considerations into account are more limited.

A contracting authority can, for example, choose to buy goods or services which meet the specific needs of a given category of person, such as the socially disadvantaged or excluded. In this context, it should be noted that service contracts which have a social objective relate in most cases to services within the meaning of Annex IB of Directive 92/50/EEC or Annex XVIB of Directive 93/38/EEC and are thus not subject to the detailed procedural rules of the directives, and in particular the rules on selection and award.

If different solutions exist which would meet the needs of a contracting authority, the contracting authority is free to define contractually what it considers as corresponding best to its social concerns in the subject-matter of the contract, and it may also use variants in this respect.

Observing the principles of the Community

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 and, in particular, the principles regarding free movement of goods and the freedom to provide services laid down in Articles 28 to 30 (ex 30 to 36), and 43 to 55 (ex 52 to 66) of the EC Treaty.

This implies that the subject-matter of a public contract may not be defined in such a way that it has as its aim, or that it results in, a reservation of access to the contract for domestic companies to the detriment of tenderers from other Member States.

Existing Community legislation, and national legislation that is compatible with Community law, on social or other matters may well also limit or influence the freedom of choice of the contracting authority.

In general, any contracting authority is free, when defining the goods or services it intends to buy, to choose to buy goods, services or works which correspond to its concerns as regards social policy including through the use of variants, provided that such choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States.

In any event, the fact that a contract is intended for a 'social' use, (for example, construction of a school, a hospital or a retirement home), is of no particular relevance to the application of the public procurement Directives, since such contracts must be awarded according to the rules of such Directives, if they fall within their scope. The choice of subject-matter of the contract made by a contracting authority is initially reflected in the technical specifications.

Technical specifications

The public procurement Directives contain a set of provisions regarding technical rules. According to these provisions, the technical specifications that have to be met by the supplies, services or works must be indicated in the general documents or in the contract documents for each contract.

Under the public procurement Directives, contracting authorities can use technical specifications that define the subject-matter of the purchase or service more precisely, provided that they comply with the rules set out in the Directives, and that they do not eliminate or favour a given tenderer.

In the above-mentioned Communication, the Commission states that the provisions of the public procurement Directives on technical specifications apply without prejudice to legally binding national technical rules that are compatible with Community law. These national rules can include, among others, requirements concerning product safety, public health and hygiene or access for the disabled to certain buildings or public transport (for example, accessibility standards on the width of corridors and doors, adapted toilets, access ramps), or access to certain products or services (for example, in the field of information technology).

Thus, for public works contracts, for example, contracting authorities may be subject to the provisions of Directive 92/57/EEC on health and safety on construction sites. Directive 92/57/EEC contains rules on the technical organisation of construction sites. In practice, it can lead to technical requirements relating to a given contract being included in the contract documents, whose aim is to ensure the safety and health of workers and others on the construction site. Such requirements can

include measures to avoid accidents at work, such as sign-posting, conditions for storage of dangerous products or plans of routes for the passage of equipment.

In addition to such specifications, which incorporate regulations in the social field, technical specifications with a social connotation exist which serve to characterise in an objective way a product or service.

Contracting authorities may, among other things, require that products be manufactured using a specific production process, provided that this characterises the product in relation to other competing products, and in such a way as to meet the needs of the contracting authority.

Moreover, contracting authorities may take account of variants. Variants allow contracting authorities to choose the option which best meets their needs in financial and social terms, while fulfilling the minimum conditions set out in the contract documents. Variants may, for example, concern different technical solutions concerning the ergonomic characteristics of a product, or be intended to ensure access for disabled persons to given equipment or services, including tools and services provided 'online' or electronically.

Selection of candidates or tenderers

The Directives essentially contain two sets of rules on selection. On the one hand, the Directives contain an exhaustive list of cases in which the personal situation of a candidate or tenderer may lead to its exclusion from a procurement procedure. These cases essentially concern bankruptcy, conviction of an offence, grave professional misconduct or non-payment of statutory contributions. The causes of exclusion are interpreted strictly. However, application of these provisions on exclusion remains optional for contracting authorities.

On the other hand, the Directives provide that the suitability of tenderers or candidates to participate in a procurement procedure or to submit a tender must be assessed on the basis of criteria relating to their economic, financial or technical capacity. The Directives set out exhaustive and mandatory qualitative selection criteria, which can be used to justify the choice of candidates or tenderers.

Selection criteria different from those set out in the Directives would thus not comply with the current Directives.

In the Beentjes case, the Court found that a condition regarding the employing of long-term unemployed persons had no relation to the checking of tenderers' suitability on the basis of their economic and financial standing and their technical knowledge and ability (ground 28 of the judgment). The Commission notes in this respect that contracting authorities can include a condition relating to the employment of long-term unemployed when setting conditions relating to the execution of a contract.

With regard to economic and financial standing, the Directives set out a number of references which can be provided to prove the good standing of candidates or tenderers in respect of a given contract. This list of references is not exhaustive.

However, any other reference required by the contracting authority must be necessary, from an objective point of view, to prove the economic and financial standing of the tenderers as regards a specific contract. In view of the references which may currently be required in order to assess the economic and financial standing of tenderers, it is not possible for social considerations to be included in such references.

As regards proof of technical capacity, the Directives permit social considerations to be taken into account to a certain extent. The possibilities for taking social considerations into account under the directives are set out below.

The Directives specify that the information required as evidence of an operator's financial and economic standing and its technical capability must be confined to the subject-matter of the contract.

In the 'utilities' sectors, the contracting authorities' discretion in this respect is wider, due to the fact that Article 31(1) of Directive 93/38/EEC requires only that 'objective rules and criteria' be used, which are laid down in advance and made available to interested candidates or tenderers.

Exclusion of candidates or tenderers for non-compliance with social legislation

In its 1998 Communication, the Commission reiterated the fact that the public procurement directives currently in force contain provisions that permit the exclusion, at the selection stage, of candidates or tenderers who *"breach national social legislation, including those relevant to the promotion of equality of opportunities"*.

The public procurement Directives permit the exclusion of a tenderer who *"has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority"*.

The public procurement Directives also permit the exclusion of a tenderer who *"has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata"* or who *"has been guilty of grave professional misconduct proved by any means which the contracting authorities can justify"*.

A tenderer who has been convicted by a judgment that has the force of res judicata for failure to comply with national legislation concerning, for example, the prohibition of clandestine employment, may be excluded from a public procurement procedure in accordance with the provisions mentioned above.

In addition, the public procurement Directives permit contracting authorities in Member States that have provided for this possibility in their national legislation, to exclude from a public procurement procedure any candidate or tenderer who has not respected the provisions of such legislation.

Circumstances can thus be envisaged in which tenderers who have not complied with social legislation can be excluded from public procurement procedures, where such non-compliance is deemed to constitute grave professional misconduct or an offense having a bearing on its professional conduct. These exclusion clauses can also include, for example, non-compliance with provisions on equality of treatment, or on health and safety, or with provisions in favour of certain categories of persons. A contracting authority may, for example, exclude a tenderer from its Member State who has not introduced an equal opportunities policy as required by the national legislation of the Member State where the contracting authority is established, provided that non-compliance with such legislation constitutes grave misconduct in the Member State in question. Grave professional misconduct is a concept that is not yet defined by European legislation or case law. It is thus for the Member States to define this concept in their national legislation and to determine whether non-compliance with certain social obligations constitutes grave professional misconduct.

Taking social considerations into account when verifying the technical capability of candidates or tenderers

The public procurement Directives lay down the means by which the technical capability of a candidate or tenderer can be demonstrated. The Directives contain an exhaustive list of references or evidence that candidates or tenderers can be required to provide in order to demonstrate their technical capability in view of the nature, quantity and purpose of the contract in question. Hence, each particular requirement laid down by the contracting authority with regard to the technical capability of the candidate or tenderer must be based on one of the references listed in the Directives.

The purpose of the selection phase is to identify those tenderers who are considered by the contracting authority to be capable of executing

a given contract. Requirements must, therefore, have a direct link to the subject-matter of the contract in question. At this stage of selection, a contracting authority can require references concerning tenderers' experience and know-how. It may, for example, verify the composition and management of the personnel of the enterprise, its technical equipment and its quality control system, in order to ensure that it has the capability, in terms of staff qualifications and resources, to properly perform the contract.

If a contract requires specific know-how in the 'social' field, specific experience may be used as a criterion as regards technical capability and knowledge in proving the suitability of candidates.

The references permitted by the public procurement Directives allow account to be taken of the 'social capacity' of the undertaking (sometimes also known as 'social responsibility') only if this demonstrates the technical capability, within the meaning set out above, of the undertaking to perform a given contract.

Award of the contract

Once the candidates or tenderers have been selected, contracting authorities enter the phase of evaluation of tenders, leading to the award of the contract. Selection of candidates or tenderers and the award of a contract are two distinct operations that are governed by separate rules. For the award of public procurement contracts, the public procurement Directives permit the use of two different criteria, namely the lowest price and the most economically advantageous tender.

When a contract is to be awarded to the most economically advantageous tender, the public procurement Directives require the contracting authority to indicate in the contract documents or in the contract notice the award criteria it will apply, where possible in descending order of importance. As a result, the contracting authority is required to state all the criteria it intends to use when evaluating tenders, and is required, at the time of evaluation of tenders, not to use criteria other than those set out in the contract notice or contract documents.

The criterion of the most economically advantageous tender

The public procurement Directives list, by way of example, a number of criteria that the contracting authorities can use as a basis to identify which tender would be the most advantageous from an economic point of view. Other criteria may also be applied.

As a general rule, the public procurement Directives impose two conditions with regard to criteria used for determining the most economically advantageous tender. First, the principle of non-discrimination has to be observed. Second, the criteria used should generate an economic advantage for the contracting authority. The European Court of Justice has confirmed that the aim of the public procurement Directives is to avoid the risk of preference being given to national tenderers or candidates whenever a contract is awarded by contracting authorities, and to avoid the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations that are not economic in nature.

The common factor shared by all criteria used for evaluation of offers is that they must, like the criteria cited as examples, all concern the nature of the work which is the subject-matter of the contract or the manner in which it is carried out. They must permit the contracting authority to compare tenders in an objective way in order to determine which tender best meets its needs in respect of a given contract. An award criterion must allow the intrinsic qualities of a product or service to be assessed. Award criteria must therefore be linked to the subject-matter of the contract or the manner in which it is performed.

Social criteria are not included among the various criteria given as examples in the public procurement directives. However, if the term 'social criterion' is construed as a criterion that makes it possible to

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evaluate, for example, the quality of a service intended for a given category of disadvantaged persons, such a criterion may legitimately be used if it assists in the choice of the most economically advantageous tender within the meaning of the Directives.

The use of quotas to reserve contracts for a given category of supplier or the use of price preferences would, however, be incompatible with the current public procurement Directives. This would also be the case for criteria relating to whether tenderers employ a certain category of person or have set up a programme for the promotion of equal opportunities, as they would be considered criteria which are unrelated to the subject-matter of a given contract or to the manner in which the contract is executed. Such criteria, which do not assist in the choice of the most economically advantageous tender, are not permitted under the public procurement Directives, given the objective of the Directives, which is to allow the intrinsic qualities of a product or service to be assessed. Moreover, such criteria would be considered incompatible with the commitments entered into by the Member States under the Agreement on Government Procurement concluded under the auspices of the WTO.

Criteria involving social considerations may be used to determine the most economically advantageous tender where they provide an economic advantage for the contracting authority which is linked to the product or service which is the subject-matter of the contract.

The question arises whether the concept of 'most economically advantageous tender' implies that each individual award criterion has to provide an economic advantage which directly benefits the contracting authority, or if it is sufficient that each individual criterion has to be measurable in economic terms, without the requirement that it directly provides an economic advantage for the contracting authority in the given contract.

This question was put to the European Court of Justice in case C-513/99. The judgment in this case is expected by the end of 2001. This judgment, which concerns a question relating to the environment, could be applied by analogy to provide elements for a response as regards use of social considerations. Both in its Green Paper and in the above-mentioned Communication on public procurement, the Commission clearly favoured the first interpretation.

The Commission notes that contracting authorities have the possibility to set certain conditions for the execution of a contract and that, at that stage, they can take account of certain social objectives.

'Additional criterion'

This concept was first developed by the European Court of Justice. The concept was first mentioned in the Beentjes case, where the Court held that a criterion relating to the employment of long-term unemployed persons was not relevant either to the checking of a candidate's economic and financial suitability or of the candidate's technical knowledge and ability, or to the award criteria listed in the relevant directive. The Court also held that this criterion was nevertheless compatible with the public procurement Directives if it complied with all relevant principles of Community law.

In Case C-225/98, the Court of Justice held that contracting authorities can base the award of a contract on a condition related to the combating of 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 tenders. This condition was regarded by the Member State in question as an additional, non-determining criterion and was considered only after tenders were compared from a purely economic point of view. Finally, the Court of Justice stated that the application of the award criterion regarding combating unemployment 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 might also be the case for other conditions in the social field.

Abnormally low tenders

Under the current public procurement Directives, where contracting authorities consider a tender to be abnormally low, their only obligation is to ask for an explanation from the tenderer before being able to reject the tender. The contracting authority must verify the content of the tender in question, and can reject it if it appears to be unreliable, although it is not required by the Directives to do so. In Member States that have adopted legislation to this effect, contracting authorities can nevertheless be required to reject abnormally low tenders where this is due, for example, to non-compliance with employment or labour law rules.

The public procurement Directives list, by way of example, certain elements that the contracting authority can take into account such as the economy of the manufacturing process, technical solutions and exceptionally favourable conditions available to the tenderer. Elements relating to non-compliance with rules on safety or employment can, under the current public procurement directives, be taken into consideration to reject an abnormally low tender. In keeping with the general approach of the directives, the practical rules regarding such verification are governed by national law, it being understood that such rules must permit the tenderer to present its position.

Execution of a contract

One way to encourage the pursuit of social objectives is in the application of contractual clauses or of conditions for execution of the contract, provided that they are implemented in compliance with Community law and, in particular, that it does not discriminate directly or indirectly against tenderers from other Member States.

Contracting authorities can impose contractual clauses relating to the manner in which a contract will be executed. The execution phase of public procurement contracts is not currently regulated by the public procurement Directives.

However, the clauses or conditions regarding execution of the contract must comply with Community law and, in particular, not discriminate directly or indirectly against non-national tenderers.

In addition, such clauses or conditions must be implemented in compliance with all the procedural rules in the Directives, and in particular with the rules on advertising of tenders. They should not be (disguised) technical specifications. They should not have any bearing on the assessment of the suitability of tenderers on the basis of their economic, financial and technical capacity, or on the award criteria. Indeed, *"the contract condition should be independent of the assessment of the bidders' capacity to carry out the work or of award criteria"*.

Transparency must also be ensured by mentioning such conditions in the contract notice, so they are known to all candidates or tenderers.

Finally, a public procurement contract should, in any event, be executed in compliance with all applicable rules, including those in the social and health fields.

Contract conditions are obligations which must be accepted by the successful tenderer and which relate to the performance of the contract. It is therefore sufficient, in principle, for tenderers to undertake, when submitting their bids, to meet such conditions if the contract is awarded to them. A bid from a tenderer who has not accepted such conditions would not comply with the contract documents and could not therefore be accepted. However, the contract conditions need not be met at the time of submitting the tender.

Contracting authorities have a wide range of possibilities for determining the contractual clauses on social considerations.

Listed below are some examples of additional specific conditions which a contracting authority might impose on the successful tenderer while complying

with the requirements set out above, and which allow social objectives to be taken into account:

- the obligation to recruit unemployed persons, and in particular long-term unemployed persons, or to set up training programmes for the unemployed or for young people during the performance of the contract;
- the obligation to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity;
- the obligation to comply with the substance of the provisions of the ILO core conventions during the execution of the contract, in so far as these provisions have not already been implemented in national law;
- the obligation to recruit, for the execution of the contract, a number of disabled persons over and above what is laid down by the national legislation in the Member State where the contract is executed or in the Member State of the successful tenderer.

It should be noted that it would appear more difficult to envisage contractual clauses relating to the manner in which supply contracts are executed, since the imposition of clauses requiring changes to the organisation, structure or policy of an undertaking established on the territory of another Member State might be considered discriminatory or to constitute an unjustified restriction of trade.

Contracts not covered by the Directives

The public procurement Directives apply only to certain public procurement contracts, and in particular those whose value equals or exceeds the relevant threshold set out in the directives.

Under Community law, it is for Member States to decide whether public procurement contracts not covered by the Community directives should be subject to national rules.

Member States are also free, within the limits laid down by Community law, to decide whether public procurement contracts not covered by the directives may – or must – be used to pursue objectives other than the objective of ‘best value for money’ pursued by the public procurement Directives.

Without prejudice to national legislation in the field, contracting authorities remain free, in respect of such contracts, to define and apply, in their procurement procedures, selection and award criteria of a social nature, provided that they comply with the general rules and principles of the EC Treaty. This implies, among other things, an appropriate degree of transparency and compliance with the principle of equality of treatment of tenderers.

Practices that reserve contracts to certain categories of persons, for example to disabled persons (‘sheltered workshops’) or to the unemployed, are permitted. Such practices must not, however, constitute direct or indirect discrimination as regards tenderers from other Member States, or constitute an unjustified restriction on trade. Thus, reservation of a contract for national tenderers would be contrary to the rules and general principles of the EC Treaty. However, where, for example, contracts are also open to sheltered workshops from other Member States, this should not in principle be discriminatory. In such cases, award of the contract should be made in accordance, among other things, with the principles of equality of treatment of tenderers and of transparency.

Annex IB services

Contracting authorities have a certain freedom not only as regards contracts not covered by the Directives, but also as regards the services listed in Annex IB to Directive 92/50/EEC and Annex XVIB to Directive 93/38/EEC, which cover most services of a ‘social’ nature (for example, health and social services). Such contracts are subject only to the provisions of the public procurement directives on technical specifications and advertising (award notice). The detailed rules in the

Directives on selection of candidates and award of contracts do not apply to contracts for such services. However, procurement in respect of such service contracts remains subject to national law and to the rules and principles of the EC Treaty, as outlined above.

Social provisions

From the outset, it must be reiterated that, even if the public procurement Directives do not contain a specific provision to this effect, all Community, international and national regulations, rules and provisions, which are applicable in the social field shall apply fully during the performance of a public procurement contract following award of the contract. Where necessary, they should be stated in the contract notice or contract documents.

The public procurement Directives already permit contracting authorities to identify, or for them to be obliged by a Member State to identify, in the contract documents the national competent authority or authorities from whom tenderers may obtain relevant information on obligations regarding safety and working conditions which are applicable at the place where the works are carried out or on the sites where the services are provided.

These obligations include respect of national rules deriving from Community Directives in the social field. Of particular relevance in the context of public procurement are the Directives on the health and safety of workers and the Directives on the ‘transfer of undertakings’ and the ‘posting of workers’, as well as recent Directives on equality of treatment.

Such obligations may also derive from certain Conventions of the International Labour Organisation (ILO). As regards core labour standards recognised at international level, the fundamental principles and rights at the workplace defined by the International Labour Organisation of course apply in their entirety to the Member States.

Bids from tenderers who have not taken account of obligations on employment protection provisions and working conditions identified by the contracting authority in the contract documents cannot be considered as complying with the contract documents. Moreover, where tenderers have not taken sufficient account of these obligations in their tenders, their tenders might be considered as abnormally low and, in some cases, might be rejected for this reason.

Questions have frequently been asked about the interpretation and application of certain rules or regulations of a social nature which must be complied with in respect of public procurement contracts and which might seem difficult to identify in the context of public procurement, and particularly during execution of the contract.

Particularly frequent are questions on the application of labour law and the protection of working conditions in respect of workers posted by an undertaking in order to provide a service in another Member State, as particular account has to be taken of such conditions when tenderers are drawing up their bids. Another matter on which questions are frequently posed in respect of public procurement concerns cases where a successful tenderer takes over some or all of the employees of the organisation previously holding the contract.

Moreover, understanding the extent of relevant obligations in the social field may play an important role in dealing with and verifying tenders which are suspected of being abnormally low.

The Commission explains in this Communication the scope of Community provisions that are of particular relevance in answering such questions.

Determining the working conditions applicable

In the case of national, international and Community standards and rules that must be applied in the social field, a distinction must be made between situations of a cross-border nature and other situations (which can, in principle, be considered purely national).

In 'national' situations, the contracting authorities, tenderers and contractors must comply, as a minimum standard, with all obligations relating to employment protection conditions and working conditions, including those deriving from collective and individual rights, that arise from applicable labour legislation, case law and/or collective agreements, provided that they are compatible with Community legislation and the rules and general principles of Community law, and in particular the principles of equal treatment and non-discrimination.

In 'cross-border' situations, requirements justified by overriding reasons in the general interest that are in force in the host country (the catalogue of such rules was put on a Community basis by Directive 96/71/EC), must, among others, be complied with by service providers, in the respect of the principle of equal treatment.

In both situations, provisions more favourable to workers may, however, also be applied (and must then also be complied with), provided that they are compatible with Community law.

Guidance based on European Commission handbook on environmental public procurement, *Buying Green* and their Communication on taking social issues into consideration in procurement.

The above is based on guidance issued by the European Commission.

SECTION 2

UK Sustainable Procurement Group Report and Recommendations Part 2 (2003)

The scope for sustainable public procurement

- 2.1 Until recently, procurement and sustainable development policies have proceeded along parallel tracks. Outside audiences however increasingly see Government procurement as a barometer of its commitment to sustainable development. The early focus was on environmental issues in procurement – green procurement. Social issues such as labour considerations, social exclusion and equal opportunities, have been emerging during the last few years both domestically and at EC level. However, these have been addressed on a case-by-case basis, reflecting that, unlike environmental issues, there is no single lead department for all social issues and the procurement angle in each case can be very different.
- 2.2 This section outlines overarching procurement and sustainable development policy and progress with developing green and social procurement. It then draws some initial conclusions regarding inertia amongst procurement practitioners.

Procurement policy

- 2.3 The Government's longstanding procurement policy is that all public procurement of goods and services, including works is to be based on value for money, with due regard to propriety and regularity. Procurement processes are furthermore governed by the EC procurement directives and the Treaty principles of transparency, non discrimination and competitive procurement on which they are based.

Sustainable development policy

- 2.4 The Government's sustainable development strategy is also well established.

A Better Quality of Life states that sustainable development means achieving four key objectives at the same time:

- Social progress which meets the needs of everyone
- Protection of the environment
- Prudent use of natural resources
- Maintenance of high and stable levels of economic growth and employment

The 15 headline indicators established in the strategy give meaning to the overarching objectives and a means of measuring progress. They provide a clear steer as to priority issues for the UK to address.

Green Procurement

Existing drivers for action

- 2.5 *There are several types of driver which have acted on Government policy towards green procurement:*

- At international level – policy recommendations and advice from OECD, UNEP, etc; and most recently in the implementation plan agreed at WSSD.
- At EU level – encouragement in framework policy documents (Sustainable Development Strategy, Sixth Environmental Action Programme) and specific instruments (regulations on EMAS and the EU ecolabelling scheme).
- At UK level – campaigning (and 'shaming' tactics) by NGOs; lobbying by potential suppliers seeking recognition for their green performance or product standards; and exhortation from various stakeholders for Government to take a procurement 'leadership role' in support of the policies it advocates others to follow.

- 2.6 These have had varying influence in practice on the conduct of procurement activities – NGO campaigning has probably had the most impact. However, in most cases the Government has been in reactive mode to these 'pressures'. It has rarely sought to seek proactive links between its sustainable development objectives and the opportunity to influence standards through the use of its own purchasing power.

The legal scope for action

- 2.7 A great deal of work has been done over last few years to clarify the scope to incorporate environmental considerations under the EC derived public procurement rules. In simple terms, environmental impacts of the production, use and disposal of products, or delivery of services, may all be taken into account in the procurement process. However, the principles of free trade and competition cannot be compromised at any stage in the process, which for example, prevents transport distances from becoming an explicit selection or award criteria.
- 2.8 In July 2001 a Commission Interpretive Communication further clarified these provisions in relation to the existing directives. There are also some proposed amendments to the directives themselves to make legislation clearer, for example regarding use of ecolabels and production processes in specifications, but there is no intention to change the substance of the directives or the principles on which they are based. The Group has concluded that there is currently no need to change the law in this area. There is sufficient scope to pursue environmental objectives in public contracts under the current directives.
- 2.9 The critical issue under green procurement for the UK, and other Member states, is that we are not using the full scope available under the policy and legal framework to reflect the environmental objectives of sustainable development through Government procurement.

Value for money

- 2.10 The real difficulty is how value for money – which is the cornerstone of both the Government's own procurement policy and the EC rules – is being interpreted by Departments and procurers. In particular there is confusion about the legitimate definitions of the 'value' side of the equation, especially where the value is not directly experienced as a financial saving for the budget holder parting with the money.

2.11 At the simplest level this effect is demonstrated by the lack of evidence that public sector authorities are routinely making purchasing decisions and consistently awarding contracts on the basis of whole life costs (which will often factor in green issues such as energy efficiency and disposal options). This is despite the fact that value for money is defined as “*the optimum combination of whole life cost and quality that meets the users need*”.

There are likely to be many reasons for this, but the Group believes that the key issues are:

- A continuing confusion between value for money and lowest price.
 - Accounting procedures preventing budget holders from benefiting from the use of whole life costs and therefore offering no incentive to ‘invest to save’. For example, individual budget holders may not be ‘billed’ for their energy costs separately and therefore gain no financial saving from using energy efficient products.
 - Decentralising procurement responsibilities has many advantages but in terms of green procurement has resulted in too much being required of individual buyers in terms of product analysis and development of specifications. Frequently buyers will not have the necessary time, knowledge or expertise to carry out comprehensive whole life costing exercises, and indeed it may not be cost-effective for them to do so for relatively low value purchases.
 - Tax incentives available to the private sector to encourage green purchasing, for example for conversion of vehicles to LPG and powershift grants, are not available to the public sector.
- 2.12 However the Group has concluded that more thorough use of whole life costing would of itself lead to the purchase of more sustainable products without any change in policy. One of the key tools to make this happen in practice will be to encourage use of centrally conducted whole life costing, procurement and cataloguing services so that the work is done ‘once only’ for Government.
- 2.13 In addition to these practical issues, there is a higher level consideration that value for money will normally be understood as value for the procuring Department as an operating unit. Historically this has meant that ‘value’ excluded ‘value in furthering policy objectives’ or even ‘value in preserving reputation’. This view is partly based on fact in that, at the award stage, environmental and other criteria must provide a benefit to the contracting authority. But this is only part of the story. It is at the business case and specification stages that wider issues – including those which provide value for money in the wider sense – should be considered and incorporated as appropriate. This is where we can align sustainability and procurement objectives. Indeed, the Government’s policy on procurement of green electricity has provided a clear steer on this by acknowledging that if a premium is paid for this, value for money has nevertheless been achieved because there is value in realigning the market to meet emission targets. This is an objective that would otherwise have to be met in a different, more expensive or less effective way. In the case of timber procurement the issues relate more to the value of Government’s reputation.
- 2.14 However such policies should not be developed lightly. There is need for a rigorous risk-based approach which where possible quantifies these non-operational additions to value, which verifies the likely costs, and verifies the likelihood of real positive impact. In most cases where procurement is involved this demands a relatively sophisticated analysis of the markets and suppliers involved and the likely reaction of the market to change in policy.

2.15 This analysis should be done once – at the inception of the policy. It is important that individual buyers are then clear that they do not have to ‘argue the case’ again at the point of individual buying decisions. Nevertheless it is unrealistic to imagine a future in which an effective green procurement policy can be achieved by a series of individual product-related edicts. These may, however, act as indicators of intent, and will be particularly important for high-profile issues such as energy and timber.

2.16 The main task for UK Government is rather to embed green procurement successfully across the board. To do so there will need to be a stronger steer at Ministerial and senior management level, and a much better understanding right across the procurement community of value for money and sustainable development and how to incorporate them both into every day purchasing and major contracts.

2.17 No single action will achieve green procurement overnight. It will require tools, information and a culture change throughout the procurement community as well as leadership from Ministers and senior officials. The majority of the recommendations in this report address these issues. The group has identified the joint HMT/Defra statement on environmental issues in purchasing as a key document. Revision and reissue of this document should be an immediate priority. It should contain a clear commitment to incorporation of the Government’s sustainable development objectives into procurement activities and a clear explanation of how this should be done within the procurement rules and value for money policy.

Social procurement

2.18 Consideration of social issues in procurement is less advanced in practice than environmental considerations, but is moving rapidly up the agenda, particularly amongst NGOs.

2.19 It is clear to the Group that the scope to incorporate social issues in the tendering and award stages of the procurement process is less than the scope to incorporate green issues – this is largely because many social issues do not relate directly to the subject of the contract. Tensions between EU and Government policy objectives relating to social aspects of sustainability and free trade and open competition, may be revealed in public procurement activities, but it may not be possible to resolve all of them in procurement terms. Some may ultimately have to be dealt with in other ways, such as changed policies, laws or international agreements.

2.20 However, the scope to consider social issues even now is far from negligible. In particular there is considerable scope for influence at other stages of the procurement process. For example, active encouragement of interest and bids from local suppliers, SMEs and social enterprises is a legitimate tool. Once a contract is placed, supplier development and contract management processes can bring legitimate pressure for improvement in sustainable practices.

2.21 The Group also noted that it is not yet clear in complex supply chains where the highest social impacts actually take place.

2.22 Revision and reissue of the HMT/Defra joint note on environmental issues in purchasing will not be able to cover social issues to the same level of detail as green issues, as more research is needed. However, it should include a clear explanation of the current position on incorporation of social issues into procurement processes.

Comparison with other countries

2.23 The UK has some specific green procurement commitments, for example on timber, renewable energy and recycled paper. The timber commitment in particular is an ambitious and challenging

commitment which goes beyond that made by other countries. The UK also has a well established sustainable development strategy A better quality of life to drive forward the sustainable development agenda across the UK. However there has been no clear commitment to green government procurement more broadly as has been the case in some other countries. The UK Government's guidance based approach has not sufficiently encouraged green procurement. For that reason the UK is probably behind others on the activities needed to embed sustainable development objectives throughout procurement.

2.24 A recent international survey of National Green Procurement Policies by the International Council for Local Environmental Initiatives The World Buys Green highlighted the activities of a number of leading governments on green procurement. Amongst Member states, Denmark and the Netherlands both have clear commitments to green purchasing. However, they have both experienced some difficulties in embedding the commitment comprehensively across Government procurement activity. Development of tools to support dissemination of up to date information on products remains a priority and both countries are exploring the potential for web based approaches.

2.25 Internationally, Japan appears to have one of the most comprehensive approaches to Green Procurement. It has a Green Purchasing Network at national level which both conducts

purchasing and provides advice to consumers, companies and government organisations. It promotes the ideas and practices of green purchasing, draws up purchasing guidelines for each type of product, publishes environmental Data Books on various products, holds seminars and study meeting and awards commendations to organisations that have shown remarkable performance in implementing green purchasing. Canada, the USA and Austria have also put in place formal requirements for green public procurement.

2.26 There is likely to be much that the UK could learn from early leaders to ensure it now develops a successful approach to green purchasing across the board.

In particular, success factors to follow are:

- A clear policy commitment.
- Clear guidance and management systems.
- Detailed information on green products and effective dissemination.
- Positive engagement with partners in the supply chain.
- Setting and measuring the achievement of targets and performance indicators for sustainable development.

This Guidance is prepared by BIP Solutions' PASS service.

The information contained herein is believed to be correct but should not be relied upon without legal advice on the facts of a given case.

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