

# Buying Social

A Guide to Taking Account of Social Considerations in Public Procurement



Social Europe



European Commission

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## A Guide to Taking Account of Social Considerations in Public Procurement

**European Commission**

Directorate-General for Employment, Social Affairs and Equal Opportunities

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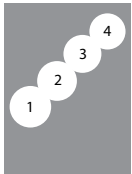
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# Introduction

Socially responsible public procurement (SRPP) is about setting an example and influencing the market-place. By promoting SRPP, public authorities can give companies real incentives to develop socially responsible management. By purchasing wisely, public authorities can promote employment opportunities, decent work, social inclusion, accessibility, design for all, ethical trade, and seek to achieve wider compliance with social standards. For some products, works and services, the impact can be particularly significant, as public purchasers command a large share of the market (e.g. in construction, business services, IT and so on). In general, public authorities are major consumers in Europe, spending some 17% of the EU's gross domestic product (a sum equivalent to half the GDP of Germany). Therefore, by using their purchasing power to opt for goods and services that also deliver good social outcomes, they can make a major contribution to sustainable development.

The legal basis for public procurement in the European Union is provided by Directives 2004/17/EC<sup>(1)</sup> and 2004/18/EC<sup>(2)</sup> (the 'Procurement Directives')<sup>(3)</sup>, which offer scope for taking account of social considerations, provided in particular they are linked to the subject-matter of the contract<sup>(4)</sup> and are proportionate to its requirements and as long as the principles of value for money and equal access for all EU suppliers are observed.

This subject has been developed over the years by Court of Justice of the European Union (CJEU) case-law, by a European Commission Communication in 2001<sup>(5)</sup> and by a study published by the Commission in 2003 on diversity and equality in public procurement ([http://ec.europa.eu/employment\\_social/fundamental\\_rights/public/arc\\_en.htm#Leaflets](http://ec.europa.eu/employment_social/fundamental_rights/public/arc_en.htm#Leaflets)).

The purpose of this Guide is (a) to raise contracting authorities' awareness of the potential benefits of SRPP and (b) to explain in a practical way the opportunities offered by the existing EU legal framework for public authorities to take into account social considerations in their public procurement, thus paying attention not only to price but also to the best value for money. When drafting this Guide, the Commission widely consulted public authorities in the Member States and many other interested parties and stakeholders.

This Guide has been produced chiefly for public authorities, but also in the hope that it will inspire private-sector purchasers too.

For practical reasons, this Guide follows the procurement procedure step by step.

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<sup>(1)</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (hereafter the '**Directive 2004/17/EC**').

<sup>(2)</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (hereafter the '**Directive 2004/18/EC**').

<sup>(3)</sup> The Procurement Directives are based on the principles of the Treaty and "in particular the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency". The provisions of the Procurement Directives should be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty (see Recital 2 of Directive 2004/18/EC and Recital 9 of Directive 2004/17/EC).

<sup>(4)</sup> Or, alternatively, with performance of the contract, in cases where social considerations are included in the contract performance clauses.

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<sup>(5)</sup> COM(2001) 566 on the EU law applicable to public procurement and the possibilities for integrating social considerations into public procurement.





# I. Buying social: key issues

## 1. Socially responsible public procurement (SRPP): a definition

1.1 'SRPP' means procurement operations that take into account one or more of the following social considerations: employment opportunities, decent work, compliance with social and labour rights, social inclusion (including persons with disabilities), equal opportunities, accessibility design for all, taking account of sustainability criteria, including ethical trade issues<sup>(6)</sup> and wider voluntary compliance with corporate social responsibility (CSR), while observing the principles enshrined in the Treaty for the European Union (TFEU) and the Procurement Directives. SRPP can be a powerful tool both for advancing sustainable development and for achieving the EU's (and Member States') social objectives. SRPP covers a wide spectrum of social considerations, which may be taken into account by contracting authorities at the appropriate stage of the procurement procedure. Social considerations can be combined with green considerations in an integrated approach to sustainability in public procurement<sup>(7)</sup>.

1.2 To support their social policies, contracting authorities have many ways of taking account of social considerations in public procurement. A **non-exhaustive list of examples** of social considerations potentially relevant to public procurement, **subject to compliance with the Procurement Directives and the fundamental principles of the TFEU, is set out below. However, many**

**social considerations, depending on their nature, can be included only at certain stages of the procurement procedure<sup>(8)</sup>. In addition, contracting authorities should decide case by case which social considerations are relevant to their procurement, depending on the subject-matter of their contract and on their objectives.** The following social considerations could be relevant for procurement:

- Promoting 'employment opportunities', for example:
  - promotion of youth employment;
  - promotion of gender balance<sup>(9)</sup> (e.g. work/life balance, fighting against sectoral and occupational segregation, etc.);
  - promotion of employment opportunities for the long-term unemployed and for older workers;
  - diversity policies and employment opportunities for persons from disadvantaged groups (e.g. migrant workers, ethnic minorities, religious minorities, people with low educational attainment, etc.);
  - promotion of employment opportunities for people with disabilities, including through inclusive and accessible work environments.
- Promoting 'decent work'<sup>(10)</sup>:

This universally endorsed concept is based on the conviction that people have the right to productive employment in conditions of freedom, equity, security and human dignity. Four equally important and interdependent items make up the Decent Work Agenda: the right to productive and freely chosen work, fundamental principles and

<sup>(6)</sup> For further details, see Section 4 of Chapter IV ('Social labels and the implications for ethical trade').

<sup>(7)</sup> As regards green considerations in public procurement, see Commission Communication COM(2008) 400/2 'Public procurement for a better environment' ([http://ec.europa.eu/environment/gpp/pdf/com\\_2008\\_400.pdf](http://ec.europa.eu/environment/gpp/pdf/com_2008_400.pdf)) and the Commission services' document 'Buying Green — Handbook on Green Public Procurement' ([http://ec.europa.eu/environment/gpp/guideline\\_en.htm](http://ec.europa.eu/environment/gpp/guideline_en.htm)). However, the Handbook on Green Public Procurement was published in 2004 and does not take into account the developments in EU law since then.

<sup>(8)</sup> For example, social considerations regarding labour conditions are generally more appropriate to be included in the contract performance clauses, as in general they do not qualify as technical specifications or selection criteria, within the meaning of the Procurement Directives. On the other hand, it is generally more appropriate to include accessibility considerations in the technical specifications.

<sup>(9)</sup> The concept of gender balance covers not only the under-representation of women in certain sectors, but also the under-representation of men in "feminised" sectors such as childcare and basic school education.

<sup>(10)</sup> European Commission, COM(2006) 249 of 24 May 2006, p. 2: 'Combining economic competitiveness and social justice in this way is at the heart of the European model of development. Playing an active part in promoting decent work forms an integral part of the European Social Agenda and of the EU's efforts to promote its values and share its experience and its model of integrated economic and social development'. See also the renewed commitment to the decent work agenda in the Commission Staff Working Document 'Report on the EU contribution to the promotion of decent work in the world', SEC(2008) 2184, based on COM(2008) 412 final.



rights at work, employment providing a decent income and social protection and social dialogue. Gender equality and non-discrimination are considered cross-cutting issues on the Decent Work Agenda. In the context of SRPP, a number of issues can play an important role, such as:

- compliance with core labour standards<sup>(1)</sup>;
  - decent pay;
  - occupational health and safety;
  - social dialogue;
  - access to training;
  - gender equality and non-discrimination;
  - access to basic social protection.
- Promoting compliance with '*social and labour rights*', such as:
    - compliance with national laws and collective agreements that comply with EU law;
    - compliance with the principle of equal treatment between women and men, including the

principle of equal pay for work of equal value, and promotion of gender equality;

- compliance with occupational health and safety laws;
  - fighting discrimination on other grounds (age, disability, race, religion and belief, sexual orientation, etc.) and creating equal opportunities.
- Supporting '*social inclusion*' and promoting social economy organisations, such as:
    - equal access to procurement opportunities for firms owned by or employing persons from ethnic/minority groups - cooperatives, social enterprises and non-profit organisations, for example;
    - promoting supportive employment for persons with disabilities, including on the open labour market.

<sup>(1)</sup> ILO core labour standards ban forced labour (Conventions 29 and 105) and child labour (Conventions 138 and 182) and establish the right to freedom of association and collective bargaining (Conventions 87 and 98) and to non-discrimination in terms of employment and occupation (Conventions 100 and 111). The legal bases for the Core Labour Standards are the eight above-mentioned core ILO Conventions that have been ratified by all 27 EU Member States.

- Promoting ‘accessibility and design for all’<sup>(12)</sup>, such as:
  - mandatory provisions in technical specifications to secure access for persons with disabilities to, for example, public services, public buildings, public transport, public information and ICT goods and services, including web-based applications. The key issue is to buy goods and services that are accessible to all.
- Taking into account ‘ethical trade’<sup>(13)</sup> issues, such as:
  - the possibility, under certain conditions<sup>(14)</sup>, to take into account ethical trade issues in tender specifications and conditions of contracts.
- Seeking to achieve wider voluntary commitment to ‘corporate social responsibility’ (CSR), i.e. companies acting voluntarily and going beyond the law to pursue environmental and social objectives in their daily business, such as:
  - working with contractors to enhance commitment to CSR values.
- Protecting against *human rights* abuse and encouraging respect for human rights.
- Promoting ‘SMEs’ in so far as they can be connected with the considerations set out above:
  - provisions giving SMEs greater access to public procurement by reducing the cost and/or burden of participating in SRPP opportunities. This can be achieved, for example, by ensuring,

- where possible, that the size of the contract is not an obstacle in itself to participation by SMEs, by giving sufficient time to prepare bids, by ensuring payment on time, by setting proportionate qualification and economic requirements, etc.;
- equal opportunities by making subcontracting opportunities more visible.

The status of these social policy objectives differs markedly both in EU law and in different Member States. For example, in some sectors there are mandatory provisions regarding accessibility that go beyond the requirements of EU law in some Member States, but not in others.

## 2. The potential benefits of SRPP

### 2.1. Assisting compliance with social and labour law, including related national and international policy commitments/agendas

SRPP can contribute to enhancing compliance with national or international commitments to social development goals, as there is growing concern in many countries that traditional mechanisms for encouraging social justice and social cohesion are not adequate. SRPP can illustrate how social and economic considerations can be mutually reinforcing.

### 2.2. Stimulating socially conscious markets

SRPP can contribute to developing a market in socially beneficial products by expanding existing markets or creating new markets for goods and services that support achievement of social objectives and serve as a model for other consumers by offering them standards and information. Indeed, social public procurement can help create a level playing field in Europe and economies of scale. Market innovation can be stimulated, as can competition at European level, through for example, purchasing information technologies that are accessible for persons with disabilities, which will bring better and more affordable such products onto the market.

<sup>(12)</sup> The UN Convention on Rights of Persons with Disabilities recognises accessibility as one of the general principles enshrined in Article 3 (the “Convention”). Furthermore, Article 9 of the Convention sets out the obligations of States Parties to ensure access to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. Furthermore, the Convention also calls for measures to implement ‘universal design’. In Europe this concept is often known as ‘design for all’. The Convention has been signed by a significant number of UN members (including the European Community and all the Member States) and is currently being ratified by the signatories. In August 2008 the Commission submitted two proposals for Council decisions to conclude the UN Convention and its Optional Protocol. On 26 November 2009 the Council adopted a Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities: <http://register.consilium.europa.eu/pdf/en/09/st15/st15540.en09.pdf>.

<sup>(13)</sup> Taking ethical trade considerations into account in public procurement was addressed in Communication COM(2009) 215 of 5 May 2009 ‘Contributing to sustainable development: The role of *Fair Trade* and non-governmental trade-related sustainability assurance schemes’.

<sup>(14)</sup> For these conditions, see Chapter IVA on ‘Defining the Requirements of the Contract’, in particular Section 4 (‘Social labels and the implications for ethical trade’).

### 2.3. Demonstrating socially responsive governance

SRPP can contribute to enhancing compliance with community values and needs, as it responds to the growing public demand for governments to be socially responsible in their actions. For instance, by making sure that a social service contract takes into account the needs of all the users (such as including persons with disabilities or persons from different ethnic backgrounds), a contracting authority can meet the needs of the diverse community it serves.

### 2.4. Stimulating integration

Public intervention is sometimes desirable to encourage integration of significant groups in society (for example, people with disabilities, small businesses, women or minorities) in key market activities in order for an effective market to develop.

### 2.5. Ensuring more effective public expenditure

The volume of public procurement and the limits placed on direct social intervention by budgetary stringency could make procurement an attractive area for promoting social inclusion.

## 3. SRPP and the EU social model

3.1 One of the major benefits of SRPP, as already seen, is that it can be used by public authorities to further the European social model. The European social model is a vision of society that combines sustainable economic growth with improved living and working conditions. This has been seen to involve creation of a successful economy in which a particular set of social standards are progressively achieved: good-quality jobs, equal opportunities,

non-discrimination, social protection for all, social inclusion, social dialogue, high-quality industrial relations and involvement of individuals in the decisions that affect them. These standards are not only intrinsically important but are also crucial factors in promoting best value for money and innovation.

3.2 Social standards have come to play a central role in building Europe's economic strength, by developing what has been described by EU institutions as a 'unique social model'<sup>(15)</sup>. Economic progress and social cohesion have come to be regarded as complementary pillars of sustainable development and are both at the heart of the process of European integration.

3.3 There has been increasing emphasis in the EU on social rights and equality, particularly in the workplace. As sustainable development moved beyond environmental issues into social issues, social standards were increasingly identified as one factor in the growing movement for corporate social responsibility. Taking gender equality as an example, at both European and national levels gender equality has become increasingly 'mainstreamed', meaning that the gender perspective has been progressively integrated into every stage of institutional policies, processes and practices, from design to implementation, monitoring or evaluation.

## 4. The legal and policy approach to SRPP in the EU

### 4.1. Developing the social dimension of EU policies and legislation

Over the last twenty years, the EU has developed its social dimension to a significant degree, embodied in 2008 by the renewed Social Agenda<sup>(16)</sup>. The important thing about these developments is that SRPP can now increasingly further policy at EU level, including its

<sup>(15)</sup> See, for example, the preface to the Communication on the Social Policy Agenda.

<sup>(16)</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Renewed social agenda: Opportunities, access and solidarity in 21st century Europe', COM(2008) 412 final of 2 July 2008.

interaction with international policy. In some areas the EU has adopted legislation notably on gender equality and non-discrimination on grounds of race, age, sexual orientation, disability and religious and other beliefs, and also on health and safety at work, working time, working conditions and information and consultation. Based on a number of provisions in the TFEU, there is now extensive EU legislation dealing with equal treatment, as well as Community level promotion of working conditions. In addition to legislation, the EU is also developing its social dimension by other means, such as by promoting social dialogue, the open method of coordination for employment, social protection and social inclusion policies, along with financial support from the European Social Fund. Further raising of social standards is a key objective of the EU in several respects, particularly where social standards are also fundamental rights.

In addition, at different times over the last few years, some social partner organizations have produced handbooks for organizations and public authorities on awarding contracts in specific sectors (catering, cleaning, private security and textiles), based on the legal framework applicable at the time of writing<sup>(17)</sup>. These sectoral handbooks are the result of independent work by social partners within the European social dialogue process and they highlight the importance of technical guidance on the use of SRPP in those specific sectors. The EU legal framework has evolved in the mean time and more comprehensive and up-to-date guidance is now needed in order to make sure that procurement practice fully complies with the current EU public procurement law. That is the aim of this Guide.



#### 4.2. The legal and policy approach to SRPP in the EU

The European Commission developed a strategy for clarification of the scope of SRPP. In its interpretative Communication of 15th October 2001, the European Commission set out the possibilities offered by Community law to integrate social considerations into public procurement procedures.<sup>(18)</sup> The aim of this Communication was 'to clarify the range of possibilities under the existing Community legal framework for integrating social considerations into public procurement. It seeks in particular to provide a dynamic and positive interaction between economic, social and employment policies, which mutually reinforce one another.' Both before and after publication of the Communication, the CJEU further clarified those possibilities in a series of landmark cases<sup>(19)</sup>.

<sup>(17)</sup> Catering: 'Guide to most economically advantageous offering in contract catering' (2006); Cleaning: 'Selecting best value — A manual for organisations awarding contracts for cleaning services' (2004); Private security: 'Selecting best value — A manual for organisations awarding contracts for private guarding services' (1999); Textiles: 'Public procurement awarding guide for the clothing-textile sector' (2005).

<sup>(18)</sup> Interpretative Communication of the Commission on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Social Considerations into Public Procurement, COM (2001) 566 final, 15.10.2001.

<sup>(19)</sup> For example, CJEU judgments of 17 September 2002 in case C-513/99 (Concordia Bus) and of 4 December 2003 in case C-448/01 (Wienstrom).

The Procurement Directives adopted on 31 March 2004 consolidated the legal framework. They specifically mention ways of incorporating social considerations into technical specifications, selection criteria, award criteria and contract performance clauses. A new provision regarding workshops for workers with disabilities was introduced.

The Procurement Directives do not apply to all public contracts. Some contracting authorities have adopted SRPP policies that specifically apply to contracts that are not covered by the Procurement Directives (such as contracts below the thresholds for application of the Directives) or are only partly covered (such as contracts for services that exceed the thresholds for application of the Procurement Directives listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC).

This Guide focuses on taking account of social considerations in public contracts that are fully covered by the Procurement Directives. It does not address in detail the TFEU rules applicable to inclusion of social considerations in contracts that are not covered or are only partly covered by the Procurement Directives (such as those mentioned in the previous paragraph).

However, it should be added that, in the case of such contracts, contracting authorities remain free (without prejudice to the national legislation in the field) to take considerations of a social nature into account (or not) in their procurement procedures, provided they comply with the general rules and principles of TFEU. Indeed, CJEU case-law has confirmed that the internal market rules in **TFEU also apply to contracts falling outside the scope of the Procurement Directives**<sup>(20)</sup>. The

CJEU has ruled that the TFEU principles of equal treatment and transparency, free movement of goods, freedom of establishment and freedom to provide services also apply to contracts under the thresholds set in the Procurement Directives.

Consequently, social considerations that are legally acceptable in procurement contracts fully covered by the Procurement Directives may, *a fortiori*, be included in procurement contracts not covered or only partly covered by the Directives.

#### 4.3. Social services of general economic interest

This Guide does not specifically address the legal issues related to procurement of social services of general economic interest.

In November 2007 the Commission adopted a Communication on services of general interest, including social services of general interest<sup>(21)</sup>, which highlights the importance of taking into account tailor-made qualitative criteria in the delivery of social services. It aims to provide practical guidance on application of the EU rules to these services. The Communication was accompanied by two Staff Working Papers replying to a series of questions relating to application of the rules on State aid and on public procurement to services of general interest<sup>(22)</sup>. Most of these questions were gathered during broad consultations in 2006-2007 on social services. To follow up the Communication, an interactive information service (IIS) was also set up in January 2008 to provide answers to other questions from citizens, public authorities and service-providers regarding application of the EU rules<sup>(23)</sup>.

<sup>(20)</sup> See, for example, the CJEU judgment of 7 December 2000 in case C-324/98 (Teleaustria).

<sup>(21)</sup> See Communication on 'Services of general interest, including social services of general interest: a new European commitment': COM(2007) 725 final of 20 November 2007.

<sup>(22)</sup> [http://ec.europa.eu/services\\_general\\_interest/faq\\_en.htm](http://ec.europa.eu/services_general_interest/faq_en.htm)  
The Staff Working Paper regarding application of public procurement rules to social services of general interest contains useful guidance about the application of public procurement rules to social services of general interest.

<sup>(23)</sup> [http://ec.europa.eu/services\\_general\\_interest/registration/form\\_en.html](http://ec.europa.eu/services_general_interest/registration/form_en.html)

#### 4.4. Small and medium-sized enterprises<sup>(24)</sup>

Several issues need to be taken into consideration when it comes to SMEs (whether profit or not-for-profit). One particularly important issue relates to the potential burdens<sup>(25)</sup> that adopting SRPP approaches could place on SMEs directly (if they are the main contractors) or indirectly (if they are subcontractors to whom SRPP obligations have been transferred by the main contractor). Public authorities contemplat-

ing introducing SRPP should be aware of these direct and indirect costs and should take them into account when deciding how or whether to incorporate social considerations<sup>(26)</sup> into their procurement operations. Contracting authorities also need to be aware that introduction of SRPP is unlikely to affect every SME in the same way. Some may be more able than others to reap the benefits of SRPP and seize opportunities to compete on the social standards aspects of the contract.



<sup>(24)</sup> SMEs have been defined at EU level by Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises: [http://ec.europa.eu/enterprise/enterprise\\_policy/sme\\_definition/index\\_en.htm](http://ec.europa.eu/enterprise/enterprise_policy/sme_definition/index_en.htm)

<sup>(25)</sup> For practical guidelines on how to make public procurement practices more friendly and accessible for small and medium-sized enterprises (SMEs) in general, see Commission Staff Working Document SEC(2008) 2193 'Code of best practices facilitating access by SMEs to public procurement contracts' available at: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/sme\\_code\\_of\\_best\\_practices\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/sme_code_of_best_practices_en.pdf)

<sup>(26)</sup> Which must, of course, be linked to the subject-matter of the contract (or with performance of the contract, in cases where they are included in the contract performance clauses).





# II. An organisational strategy for buying social

Public authorities that wish to achieve social objectives via SRPP will need to establish a strategy for implementing SRPP, focusing on their specific objectives.

## 1. Setting the objectives of socially responsible public procurement

Organisational strategies for SRPP may reflect the national, regional and/or local social priorities<sup>(27)</sup> and at the same time explicitly acknowledge the role that procurement plays in contributing to achieving them.

### Example:

**France:** A 'Stratégie nationale du développement durable' was launched in 2003, followed by a 'Plan national d'action pour des achats publics durables' in 2007. The French government has engaged in major consultations with the social partners — the 'Grenelle de l'environnement' and 'Grenelle de l'insertion' — covering different measures with an impact on social integration, including public procurement. The aim is to build around the central idea of the 'État exemplaire', i.e. the State, and more generally all public entities, are expected to show the way forward to sustainable development.

## 2. Providing high-level political commitment and leadership for SRPP

Leadership is one of the keys to success for any SRPP strategy. This involves identifying the management structure and the (human and financial) resources necessary to carry out SRPP. SRPP needs leadership from the very top of the organisation and calls for political commitment and leadership through the management structures.

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

### Example:

**UK:** The Gender Duty imposed on public authorities came into force in April 2007 under the Equality Act (2006). This is a new legal tool with the potential to deliver significant progress on gender equality in the public sector, with some impact on the private sector too via their procurement.

The public-sector gender duty includes the requirement to ensure compliance with the Equal Pay Law. Gender equality schemes place an obligation on public authorities to adopt objectives that address the causes of the gender pay gap and consider ways of dealing with them, e.g. by changing recruitment methods, introducing flexible working and conducting equal pay reviews.

The gender duty has triggered initiatives in many parts of the public sector and reaches out to the terms of employment applied by private-sector contractors. To this end, procurement guidelines have been drafted to encourage the public sector to promote good practice on diversity and equal pay among contractors. Guidance on promoting gender equality in public-sector procurement was published in February 2006. This set out various positive measures public authorities should take to comply with the requirements of the gender duty in procurement functions. A code of practice for this Gender Equality Duty was published in 2007.

<sup>(27)</sup> Obviously, this does not mean that contracting authorities could give preference to local, regional or national products in order to favour the local labour market.

### 3. Measuring the risks and prioritising organisational spend categories to enhance social outcomes

Contracting authorities need to assess the social risks and impact of their purchasing activity and supply chain. This helps to focus their efforts on the most important spend categories and on those which can contribute to achieving their social targets.

Here are a few suggestions contracting authorities should consider when prioritising their approach to SRPP:

- Adopt a step-by-step approach. Start with a small range of products and services with a clear social impact or where socially responsible alternatives are easily available and not more expensive. For example, select products (e.g. vehicles) or services (e.g. cleaning) that have a high proportion of vulnerable workers (from ethnic minorities, persons with disabilities, etc.) or of female workers.
- Also start by making sure that contract specifications have no negative impact on social conditions (e.g. by assessing the impact of privatising delivery of services on vulnerable groups) or by reserving suitable procurement for sheltered workshops or sheltered employment programmes<sup>(28)</sup>, taking into account their current production capacity.
- Focus initially on one or more social problems, such as fair wages or health and safety.
- Consider the availability and cost of socially superior alternatives and make sure they are in line with the applicable public procurement rules and principles. Are there more socially responsible ways of achieving the aims of the procurement strategy than the contracting authority has adopted? Will they meet the contracting authority's requirements and can it afford them? Consider what extra costs (if any) inclusion of social considerations could add and the potential effects of restricting competition.
- Consider the availability of data. Can the contracting authority find the social data it needs to establish a more socially responsible procurement strategy? How complicated will it be to decide what the contracting authority wants technically and to express it in a call for tenders?
- Consider the capacity of the contracting authority to put into action a workable, effective and efficient programme of action regarding SRPP.
- Consider alternative ways of delivering the social policy in question. Is delivering this social policy (partly) through public procurement an appropriate use of resources or is there a more effective way to deliver this policy, using other tools at the disposal of the contracting authority?
- Seek visibility. How visible will the socially responsible policy be to the public and to the staff? High-profile changes, like switching to sustainably produced/ethical trade coffee in the cafeteria, can help raise awareness of the policy and link it to other social projects.
- Consider the potential for future development. Socially responsible purchasing targeting services at an early stage of their development and marketing could be more successful than trying to change the social characteristics of mature sectors.

#### Example:

**Sweden:** To facilitate access to public procurement opportunities for SMEs, social-economy and voluntary organisations who work with socially disadvantaged groups, the Swedish Social Insurance Agency sometimes includes participation by these groups in its initial study on procurement, in order to take fuller account of their specific problems when drafting the tender documents.

To identify the risk of non-compliance with social standards, the Agency analyses the risks at the beginning of procurement. For example, in the case of procurement of cleaning services, the risk of non-compliance with legislation on working conditions is regarded as high.

<sup>(28)</sup> Based on Article 19 of Directive 2004/18/EC and Article 28 of Directive 2004/17/EC.



#### Examples:

**France:** The municipality of Angers designated an internal focal point (specialised legal advisor) for eco-responsible procurement in 2005, in charge of developing socially responsible public procurement practices with the objective of making them fully established practice in the procurement operations of the municipality. The advisor provided in-house training on sustainable procurement. Awareness-raising and tutoring was offered on both the technical and legal sides at the time of identifying needs, of preparing and launching the tender and of analysing and evaluating the offers received, in close cooperation with enterprises. As regards the social aspects, the municipality of Angers generally considers public works and services to be priority sectors, in particular construction of buildings, public roads and public parks and gardens.

**UK:** The Sustainable Procurement Task Force (SPTF) dealing with both social and environmental issues was set up in May 2005 and published its Action Plan in June 2006. The Action Plan presented the business case for sustainable procurement, recommended action across six broad areas and provided two tools that can help organisations to make progress: the Prioritisation Methodology and the Flexible Framework. The Prioritisation Methodology is a risk-based approach that helps organisations focus their efforts and resources appropriately. Instead of using just expenditure data, the method allows organisations to take account of the environmental and socio-economic risk, the potential that they have to influence suppliers and the actual scope to improve sustainability. The Flexible Framework is designed to help organisations understand the steps needed at organisational and process level to improve procurement practice and make sustainable procurement happen.

Putting an SRPP policy into practice will thus require strategic planning, i.e. setting priorities when choosing the contracts most suitable for SRPP. Some

contracting authorities have chosen to adopt a coordinated and holistic approach to integrating social considerations.

#### 4. Raising awareness of SRPP and involving key stakeholders

SRPP is of interest to a wide range of stakeholders, who need to be involved in the process of developing an SRPP approach in order to gain confidence in it and to build up commitment to achieving its objectives. Key stakeholders in SRPP include central, regional and local governments, potential suppliers or contractors, civil society, employers' organisations and trade unions. Workshops, seminars and conferences should be organised to gather views on the approach to SRPP. They should be organised at vari-

ous stages of the development process, i.e. at the very start of the process when ideas are formulated, during drafting of the approach and towards the end when a final draft can be made available.

Finally, effective communication about the benefits of SRPP, good practice and success stories also play a key role in making progress. It is very important that all these stakeholders understand the nature of the challenge and their role. Better results will be achieved by means of an imaginative and committed partnership between purchasers and contractors.

##### Examples:

**Sweden:** The regional administration for South-West Sweden holds pre-bid meetings open to all potential bidders to explain any 'design-for-all' requirements included in the technical specifications.

**UK:** To come up with recommendations on how public-sector procurement in the UK could engage better with SMEs, HM Treasury and the Department for Business Enterprise and Regulatory Reform launched an on-line consultation on key questions exploring the barriers to SMEs bidding for contracts. The consultation was made available on a website and invited responses from procurers, stakeholder groups and suppliers. Subsequently, to implement the resulting recommendations, a stakeholder group has been established which keeps in regular contact with the project teams responsible for implementation and can provide comments on the approach to be taken.

Cooperation between purchasing authorities is another way of increasing access to social expertise and know-how and of communicating the policy to the outside world.

##### Example:

**Denmark:** SRPP is one of the topics covered in the market analysis carried out by National Procurement Ltd before each call for tenders. The organisation runs training programmes and workshops for all suppliers. It tries to make the tender documentation as simple as possible so that SMEs also have the resources to submit a bid. Framework contracts are often split into several lots (e.g. on a geographical basis), without infringing the thresholds set by the Procurement Directives<sup>(1)</sup>, in order to give suppliers a chance to submit a bid.

<sup>(1)</sup> Article 9(3) of Directive 2004/18/EC and Article 16(2) of Directive 2004/17/EC.

## 5. Implementing the SRPP strategy

The SRPP strategy will need to give details of how SRPP will be implemented and of the steps which need to be taken to make progress. The strategy will need to take into consideration factors such as:

- the legal and regulatory framework;
- the institutional framework;
- the management structure;
- the availability of professional capacity and resources;
- a differentiated approach by sector, taking into account the particular characteristics of each field;
- the involvement of stakeholders.

As for how to implement the strategy, details will need to be given of responsibilities, targets with a realistic timescale for achieving them, the management structure for implementing them, the professional and financial resources needed, and measures to monitor and report on progress.

The steps that need to be taken could include setting up a social procurement task force, designing an action plan, including SRPP in policies and procedures, or developing simplified guidelines for budget-holders and procurement officers at all levels.

Capacity-building could involve training programmes for executives, managers and staff. It might also involve sharing good practice, making available the skills to implement SRPP, including SRPP skills in candidates' selection criteria, and making information on SRPP initiatives available at EU and/or government level.

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

## 6. Measuring effective implementation

Measuring effective implementation of the SRPP strategy and its outcome involves setting up internal and external controls, which should assess outcomes against stated targets and standards of performance.

Internal measures need to be linked to existing reporting systems, which will have to be adapted in order to take into consideration SRPP objectives. They also need to be linked to internal audit procedures and could incorporate sanctions for non-compliance with SRPP objectives.

External measures should include independent auditing of SRPP performance. They could also include benchmarking against past performance or the performance of other organisations.

The outcome of audits of SRPP performance should be made available to the general public and should contribute to reviewing and updating policies, objectives and procedures for SRPP.

## 7. Overview of the procurement process

In taking account of the social considerations in public procurement, it is suggested that procurers act in relation to two main issues:

- getting the best value for money;
- acting fairly.

*Best value for money:* Contracting authorities are responsible for obtaining the best value for taxpayers' money for everything they procure. Best value for money does not necessarily mean accepting only the cheapest offer. It means the contracting authority has to secure the best deal within the parameters it sets. Best value for money could be defined as the optimum combination of whole-life cost and quality to meet the end-user's requirements. Value for money may also include social considerations.



*Acting fairly:* Acting fairly means following the principles of the internal market, which form the basis for the Procurement Directives and the national legislation based on them. The most important of these is the principle of equal treatment, which dictates that all competitors should have an equal opportunity to compete for the contract. To ensure this level playing field, the principle of transparency must also be applied.

- Examples of provisions applying the principle of equal treatment in the Procurement Directives are the time limits set for receipt of tenders and requests for participation, the common rules on technical specifications and the ban on discrimination against contractors from other Member States.
- Examples of application of the principle of transparency can be found in the different provisions on publication of notices and the obligation for contracting authorities to inform the tenderers concerned why their tenders were rejected.

### 7.1. The importance of legal advice

EC procurement rules stipulate how to handle the procurement process to safeguard the principles of fairness, non-discrimination and transparency. These rules permit taking account of sustainability and equal opportunity under certain conditions. Early expert legal advice on establishment of an SRPP action plan is likely to save difficulties later.

### 7.2. Preparing the procurement procedure

The preparatory stage of any procurement procedure is crucial, as each stage builds on those that have gone before. Therefore, before starting a tendering procedure, the contracting authority should set aside enough time to define the subject-matter of the contract and the means to be used to achieve the end result. The preparatory stage is also the best opportunity to identify which social considerations are relevant and appropriate to be taken into account in that particular procedure.

## 8. Stages of the procurement procedure and approaches to SRPP

Following the logic of this process, there are now at least four basic approaches to how social issues are currently addressed in public procurement.

The *first* arises when the purchaser decides to include social criteria in the subject matter of the contract itself and/or in the technical specifications that must be met by successful contractors in a way that includes social criteria<sup>(29)</sup>. One example is specifying that computer equipment must comply with certain accessibility criteria.

In the *second* approach, bidders are prohibited, under certain conditions<sup>(30)</sup>, from obtaining government contracts if they have been found guilty of previous wrongdoing in order to prevent public bodies contracting with bidders who have failed to achieve a particular standard of social behaviour.

The *third* approach attempts to persuade tenderers to commit to certain social standards and takes account of their success in doing so when it comes to awarding

<sup>(29)</sup> The conditions under which social considerations can be taken into account in the subject-matter of the contract and/or the technical specifications are explained later in the sections 'Defining the subject-matter' and 'Defining the requirements of the contract'.

<sup>(30)</sup> The conditions under which contracting authorities may (or, in some cases, are under an obligation to) exclude a tenderer from the procurement procedure are explained later in the section 'Exclusion criteria'.

the contract. One form which this can take in practice is where the public body takes certain social issues into account in the award criteria<sup>(31)</sup>.

The *fourth* approach focuses on the stage after the contract has been awarded. It requires whoever is awarded the contract to comply with certain conditions when carrying out the contract once it has been

awarded<sup>(32)</sup>. This model requires all contractors to sign up to the same requirement, although there is no assessment of the ability of the contractor to comply with certain conditions.

These four basic approaches are not necessarily alternatives, but are frequently combined in the same public procurement procedure.

### Example:

**Spain:** The Basque Country Government has issued an 'instruction' on incorporation of social, environmental and other public policy criteria in public procurement by its administration. This lays down which social and environmental criteria must be taken into account in all public procurement in the region and how.

*Main goal of the instruction:* To take account of social and environmental considerations (both of which are part of the sustainability approach) along with other aspects related to other public policies in public procurement by the administration and public entities in the Basque Country.

*Assessment and monitoring:* The Basque government departments for employment, social inclusion, social affairs and the environment periodically assess performance in contracting. The assessment includes the wording of the specifications, how they are applied in the award process and performance of the contract.

*Technical specifications:* The instruction recommends incorporating Accessibility and Design for All requirements in the technical specifications.

*Award criteria:* Whenever there is more than one award criterion, these criteria have to include that the products and services must be well-suited for people with disabilities (whenever this adaptation is above the legal mandatory minimum). Whenever disadvantaged groups are amongst the beneficiaries of the services defined in the subject-matter of the contract, the characteristics related to the fulfilment of their social needs will be included in the award criteria.

*Contract performance clauses:* The Instruction calls for the contract to include special performance clauses: environmental, social and related to other public policies. The aims of the special contract performance clauses are to protect the environment, health and safety, to promote employment of disadvantaged groups, to remove gender inequality from the labour market and to fight unemployment.

*Examples of contract performance clauses in the Basque Country:*

1. Labour inclusion of unemployed people that are difficult to employ: For this purpose, the instruction states that the staff performing the contract must include a set percentage of disadvantaged persons, such as unemployed people, people with disabilities, long-term unemployed women over 30, victims of household violence, persons with mental illness, unemployed single parents, immigrants unemployed for at least six months, long-term unemployed (more than one year) and unemployed young persons.
2. Employment quality and basic labour rights: The contractor must guarantee compliance with the ILO Core Labour Standards during performance of the contract in relation to the workers who make the products (the subject-matter of the contract) along the supply chain.
3. Health and safety in performance of contracts for building works and services.

<sup>(31)</sup> The conditions under which social considerations can be taken into account as an award criterion are explained later in the section 'Awarding the contract'.

<sup>(32)</sup> The conditions under which social considerations can be taken into account in the contract performance clauses are explained later in the section 'Contract performance'.

### **Strategic development and prioritisation of SRPP initiatives — IN A NUTSHELL**

Identify national and local priorities relevant to SRPP.

Review organisations' procurement strategy and identify how SRPP links to overarching objectives and approaches. Identify how SRPP can help achieve these objectives and deliver value for money for the organisation.

Provide high-level political commitment and leadership for SRPP.

Identify the products and services the contracting authority procures that pose the greatest social risk and/or have the greatest capacity to enhance the social outcome.

Develop objectives and an action plan to address social issues in procurement.

Raise awareness of SRPP among stakeholders.

Ensure that procurement practices are open to bodies like small and medium-sized enterprises, social economy enterprises and the voluntary and community sector, whatever legal form they take.



# III. Identifying the needs and planning procurement

## 1. The importance of assessing actual needs

One crucial step that the contracting authority needs to take at this preparatory stage, even before defining the subject of the contract, is to assess its actual needs.

For example, the contracting authority might have decided that it needs to disseminate information to the public. Whenever possible, this should include a more socially inclusive solution, such as dissemination of information in accessible formats that can also be used by members of the public with disabilities.

This is the stage at which the public sector can best identify the social standards that procurement can help deliver. It requires those involved on the 'client side', from policy-makers to practitioners, to:

- actively seek out opportunities to promote social standards;
- ensure that the opportunities are linked to the subject-matter of the contract and are cost-effective;
- focus on the outcomes required;
- build in flexibility to accommodate changing requirements over the life of the project<sup>(33)</sup>;

- identify the needs of all categories of users of the services, works or supplies to be procured.

Therefore, in order to be effective, the contracting authority should consider its needs in a functional manner, so as not to exclude any social effects.

## 2. Defining the subject-matter

Once the contracting authority has assessed its needs, it can determine more easily the subject-matter of the contract. The **'subject matter' of a contract is about the product, service or work the contracting authority wants to procure**. When defining the subject-matter of a contract, contracting authorities have great freedom to choose what they wish to procure, including goods or services that meet social standards, provided such social standards are linked to the actual supplies, services or works to be purchased (which form the subject-matter of the contract).

Accessibility, for example, is often incorporated as a feature of the goods or services being purchased. Such purchases should be made without distorting the market, i.e. without limiting or hindering access to it. The process of determining what the subject-matter of the contract is will generally result in a basic description of the product, service or work, but can also take the form of a performance-based definition.

### Examples:

Accessibility standards for persons with disabilities can be part of the subject-matter of a works contract for building a school, as they can be part of the description of the works the contracting authority wants to buy and linked to them.

- On the other hand, the labour conditions of the workers building the school cannot be part of the subject-matter of the contract, as they are not linked to the object of the contract, but only to the way in which the procurement contract will be performed. However, requirements relating to labour conditions could be included, under certain circumstances<sup>(\*)</sup>, in the contract performance clauses.
- In contracts for services, the contracting authority can specify in the subject-matter that the services provided must meet the needs of all categories of users, including the socially disadvantaged or excluded.

(\*) All contract performance clauses, including those relating to labour conditions need in particular to be linked with the execution of the contract and, for transparency reasons, to be published in advance in the tender notice. For further details, see the section 'Rules governing contract performance clauses'.

<sup>(33)</sup> Provided such changes to the initial conditions of the procurement contract were envisaged in the initial tender contract or are justified by one of the circumstances listed in the Procurement Directives (in particular, Articles 31 and 61 of Directive 2004/18/EC relating to the award of additional supplies, services or works) and comply with any additional national rules that may exist on this issue.





On the other hand, aspects that are not linked to the actual supplies, works or services the contracting authorities want to buy cannot be included in the subject-matter of the contract.

In principle, the contracting authority **is free to define the subject of the contract in any way that meets its needs**. Public procurement legislation is concerned not so much with what contracting authorities buy, but mainly with how they buy it. For that reason, neither of the Procurement Directives restricts the subject-matter of contracts as such.

However, **freedom to define the contract is not unlimited**. In some cases the choice of a specific product, service or work could distort the level playing-field in public procurement for companies throughout the EU. **There have to be some safeguards**. These safeguards lie, first of all, in the fact that the provisions of the TFEU on non-discrimination, freedom to provide services and free movement of goods apply in all cases and, therefore, also to public procurement contracts under the thresholds set in the Procurement Directives

or to certain aspects of contracts which are not explicitly covered by these Directives.

In practice, this means that in all cases the contracting authority has to ensure that the contract will not affect access to its national market by other EU operators or operators from countries with equivalent rights<sup>(34)</sup>. For contracts covered by the Procurement Directives, the principle of non-discrimination goes beyond nationality and requires strict equality of treatment between all candidates/tenderers in respect to all aspects of the procedure.

A second safeguard, considered in the next chapter, is that, in accordance with the public procurement rules, the technical specifications used to define the contract must not be worded in a discriminatory way and must be linked to the subject-matter of the contract.

In addition, existing EU legislation and national legislation that is compatible with EU law on social or other matters could well also limit or influence the freedom of choice over the subject-matter of the contract.

<sup>(34)</sup> For example, operators from countries that are bound by the WTO Government Procurement Agreement.

### 3. Increasing access to procurement opportunities

#### 3.1. Improving access to procurement opportunities

However, some classes of tenderers may find it more difficult than others to gain access to the public procurement market (e.g. SMEs). Purchasers may address these difficulties, but are not permitted to prefer specific classes of tenderers. EU law permits positive action by purchasers, but not positive discrimination<sup>(35)</sup>.

Instead, the purpose is to guarantee a level playing field, so that purchasers offer under-represented businesses the same opportunities to compete for public contracts as other qualified suppliers. In this way, competition can be encouraged, drawing more companies into the tendering process. Various measures can be taken, within these limits:

- encouraging large organisations to address supplier diversity on a voluntary basis by providing equal opportunities to diverse suppliers as subcontractors and by promoting equality and diversity<sup>(36)</sup>;
- stimulating participation by diverse suppliers by publishing a forward plan for major procurement activities, identifying large contracts that are due to be put out to tender over the next 12 months;
- organising ‘meet the buyer’ events open to all potential candidates in order to increase their awareness of the contracting authority’s needs and policy priorities and thus improve the transparency and accessibility of the procurement process;
- developing business support programmes to improve the capacity of small and diverse suppliers and to provide guidance on the public procurement process.

#### What’s not permitted — examples

- With the exception of the special provisions relating to sheltered workshops<sup>(\*)</sup> and sheltered employment programmes, purchasers are not permitted to reserve performance of contracts for particular classes of firm, as that would breach the equal treatment requirements of EU law.

In the field of social services, however, it is possible, in exceptional cases when certain specific conditions are met, to reserve performance of certain contracts for non-profit operators<sup>(\*\*)</sup>. This requires the existence of a national law regulating this particular activity and providing for restricted access to certain services for the benefit of non-profit operators. Nevertheless, any such national law would constitute a restriction of Articles 49 and 56 of the TFEU on freedom of establishment and the free movement of services and would have to be justified case by case. On the basis of the case-law of the CJEU, such a restriction could be justified, in particular, if it is necessary and proportionate for attainment of certain social objectives pursued by the national social welfare system.

- The contracting authority cannot limit competition to bidders that already have an office within a certain geographical area, but the contract performance clauses may require the successful bidder to open a branch or office in a certain area, if this is justified for the purposes of successful performance of the contract (for instance, for coordinating a complex building contract on site).

(\*) Which, due to their characteristics, might not be able to obtain contracts under normal conditions of competition (see Chapter III, Section 3.2, “Set-asides for sheltered workshops”).

(\*\*) See judgment of the Court of 17 June 1997 in case C-70/95 (Sodemare) [1997] ECR I-3395. See also the answer to question 2.7 in the Commission Staff Working Document ‘Frequently asked questions concerning application of public procurement rules to social services of general interest’, available at: [//ec.europa.eu/services\\_general\\_interest/docs/sec\\_2007\\_1514\\_en.pdf](http://ec.europa.eu/services_general_interest/docs/sec_2007_1514_en.pdf).

<sup>(35)</sup> With the exception provided for in Article 28 of Directive 2004/17/EC and Article 19 of Directive 2004/18/EC which allow, under certain conditions, contracts to be reserved for sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes.

<sup>(36)</sup> However, given that positive discrimination is not permitted, contracting authorities cannot favour, at the award stage, tenderers that use a specific class of supplier or subcontractor (e.g. SMEs). Similarly, contracting authorities cannot require, in the contract performance clauses, that a certain percentage of the contractors’ suppliers or subcontractors be SMEs or other specific classes.



### Examples:

**UK:** The Greater London Authority (GLA) has adopted a policy of promoting greater diversity amongst its suppliers from the private sector. The purpose is to 'level the playing field', so that 'we offer under-represented businesses the same opportunities to compete for GLA group contracts as other qualified suppliers<sup>(\*)</sup>'. The GLA draws a distinction between positive action (which it adopts) and positive discrimination (which it rejects). The GLA Group has embarked on a review of its procurement procedures to remove barriers to SMEs and diverse suppliers competing for its contracts. Procurement procedures have been developed for large contracts to address supplier diversity by providing equal opportunities to diverse suppliers as subcontractors and by promoting equality and diversity. The GLA Group regularly monitors its expenditure with SMEs and other diverse businesses to identify trends and provide further input for activities to improve its procurement procedures.

A review of procurement procedures to identify the potential for SMEs to bid for contracts has commenced and existing suppliers have been asked for feedback on the GLA's procurement procedures to help identify action to make them more accessible.

In addition, via the London Development Agency (LDA), the GLA Group is actively linking its procurement procedures to business support programmes which improve the capability of small and diverse suppliers to bid for public-sector contracts. This process can improve businesses' chances of winning GLA Group contracts and give the GLA Group a more competitive base of suppliers bidding for work.

**Ireland:** The aim of InterTrade Ireland's Go-Tender Programme was 'to create cross-border business opportunities for SMEs in the all-island public procurement market through the provision of carefully targeted regional workshops'. The objectives of the Programme were to increase awareness amongst suppliers, particularly regarding cross-border contracts and to create cross-border opportunities for SMEs on the all-island public procurement market, provide knowledge for SMEs regarding the public-sector market throughout the island, develop the skills required to win public-sector work in both remits, and provide experienced one-to-one support in the process of bidding for work. Over the last three years presentations were made at 30 workshops attended by over 400 SME suppliers. Many of these suppliers went on to compete successfully for public-sector contracts in Ireland, Northern Ireland and across Europe.

(\*) ITC-ILO 'Study on the incorporation of social considerations in public procurement in the EU', 21 July 2008.

- Subdividing contracts into lots clearly facilitates access by SMEs, both quantitatively (the size may correspond better to the production capacity of SMEs) and qualitatively (the content of the lots may correspond more closely to the specialities of SMEs). This is possible, provided contracts are not subdivided with the aim of avoiding application of the Procurement Directives<sup>(37)</sup>.



### Example:

**France:** In order to attract the widest possible competition, the general rule is to award contracts in the form of separate lots. However, contracting authorities are free to award global contracts if they consider that subdivision into lots would restrict competition or risk making performance of the contract technically difficult or expensive, or if the contracting authority is not in a position to coordinate performance of the contract.

<sup>(37)</sup> Article 9(3) and (5) of Directive 2004/18/EC and Article 17(2) and (6) of Directive 2004/17/EC.

### 3.2. Set-asides for sheltered workshops

The Procurement Directives<sup>(38)</sup> include, however, an explicit provision permitting Member States 'to reserve the right to participate in award procedures for public contracts' for sheltered workshops or 'provide for such contracts to be performed in the context of sheltered employment programmes'.

The explanation is that 'sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition<sup>(39)</sup>'. Consequently, it is appropriate to allow Member States to grant preferences to enable such workshops to exist without having to compete with other economic operators.

Under the above-mentioned provisions of the Procurement Directives, such reservation is allowed only under certain conditions:

- any such reservation must be initiated by Member States by means of legislation and may not be adopted *ad hoc* by public bodies, in the absence of national legislation permitting such reservation;
- at least 50 % of the employees of such sheltered workshops or sheltered employment programmes must be persons with disabilities;
- given the nature and seriousness of their disabilities, the employees concerned cannot carry out occupations under normal conditions.

Where Member States avail themselves of these provisions, the contract notice must mention it and the scope of the preferences must be included in the prior information notices (PIN) and contract notices<sup>(40)</sup>.

#### Examples:

**Germany:** The Federal Decree of 10 May 2005 on contracts for workshops for the disabled requires Federal procurement agencies to reserve part of their budget for contracts which can be awarded to workshops for workers with disabilities. This might even involve large supply and services contracts. Participation is limited to workshops for workers with disabilities<sup>(\*)</sup>. Nevertheless, these workshops have to compete in the award procedures and submit economically sound tenders. Moreover, contracting authorities have to meet the general transparency requirements of the Procurement Order. Many municipalities appear to have a procurement policy in favour of workers with disabilities. These workshops are often partly or fully owned by the municipalities which award the contracts.

**France:** Article L323-1 of the French *Code du travail* (Labour Code) requires private and public employers (with more than 25 employees) to give at least 6 % of their jobs to disabled persons. Under Article L323-8 of the Code, employers, in particular procurement agencies, can partly fulfil this obligation by awarding contracts to companies supporting work for persons with disabilities. In the context of public procurement, this will consist of reserving certain contracts for entities where more than 50 % of the staff employed are disabled persons in accordance with Article 19 of Directive 2004/18.

(\*) The conditions under which contracting authorities may reserve contracts for workshops with disabilities are set out in Article 19 of Directive 2004/18/EC and Article 28 of Directive 2004/17/EC.

<sup>(38)</sup> Article 28 of Directive 2004/17/EC and Article 19 of Directive 2004/18/EC refer to 'sheltered workshops' and 'sheltered employment programmes' where most of the employees concerned are handicapped persons'. Such entities may be known by different names in different Member States. It is to be noted that Article 28 of Directive 2004/17/EC and Article 19 of Directive 2004/18/EC cover **all similar entities (no matter what they are called)** provided (a) at least 50% of the staff employed are disabled persons and (b) they comply with the other conditions set by the above-mentioned articles.

<sup>(39)</sup> Recital 28 of Directive 2004/18/EC and recital 39 of Directive 2004/17/EC.

<sup>(40)</sup> Directive 2004/18/EC, Annex VII and Directive 2004/17/EC, Annex XIII: PIN and contract notices must indicate, where appropriate, 'whether the public contract is restricted to sheltered workshops or whether its execution is restricted to the framework of protected job programmes'.



### **Identifying the needs and planning procurement — IN A NUTSHELL**

In individual procurement procedures:

Identify the contracting authority's needs and express them appropriately.

Consider how, and to what extent, possible social policy objectives or obligations fit in with this procurement.

Apply the affordability and cost-effectiveness tests, including assessing the benefits and costs of using procurement to deliver social objectives.

Identify the subject-matter of the contract and to what extent the social objectives should or can be specified as part of the subject-matter of the contract.

Improve access to procurement opportunities by levelling the playing field, so that suppliers from under-represented businesses have the same opportunities to compete for public contracts as other qualified suppliers (provided this does not lead to 'positive discrimination').

Consider how best to communicate the contracting authority's policy to the outside world, ensuring optimum transparency for potential suppliers or service-providers and for the citizens the contracting authority is serving.

# IV. The contract

## A. Defining the requirements of the contract

### 1. Drawing up the technical specifications

Once the contracting authority has defined the subject of the contract, it has to translate this into detailed measurable technical specifications that can be applied directly in a public procurement procedure.

Technical specifications therefore have three functions:

- They describe the procurement requirements so that companies can decide whether they are interested. In this way, they determine the level of competition.
- They provide measurable requirements against which tenders can be evaluated.
- They constitute minimum compliance criteria. If they are not clear and correct, they will inevitably lead to unsuitable offers. Offers not complying with the technical specifications need to be rejected.

Under EU public procurement rules, the contracting authority can only evaluate or compare bidders' proposals against requirements in the technical specifications. Similarly, the contracting authority can only assess bidders' competence to deliver what is mentioned in the specifications. The specifications are issued early in the tendering process, which is why authorities have to get their requirements right first time.

Technical specifications must be **linked to the subject-matter of the contract**. Requirements that bear no relation to the product or the service itself, such as a requirement relating to the way in which an undertaking is managed, are not technical specifications within the meaning of the Procurement Directives. Thus requirements regarding, for instance, recruitment of staff from certain groups (disabled persons, women, etc.) would not qualify as technical specifications. Nor can a label relating to the 'social capacity' of an undertaking be considered a 'technical specification' within the meaning of the Procurement Directives.

In addition, the Procurement Directives stipulate that technical specifications must **not reduce competition**<sup>(41)</sup>, must be **transparent**<sup>(42)</sup> and must **not discriminate** against possible contractors from outside the Member State of the contracting authority<sup>(43)</sup>.

#### What's permitted — some examples

- Requiring, in a contract for works, measures to avoid accidents at work and specific conditions for storage of dangerous products in order to safeguard the health and safety of workers.
- Requiring compliance with certain ergonomic characteristics for products in order to ensure access for all categories of users, including disabled people<sup>(\*)</sup>.

#### What's not permitted — some examples

- Requiring an outsourced contact centre delivering online and telephone support (which could legitimately be provided from any location) to be located in a particular town.
- Issuing specifications for a housing management contract but then selecting bidders on the basis that they might also be able to purchase the houses in future, if the authority were to decide to privatise the housing.

(\*) See Article 23 of Directive 2004/18/EC and Article 34 of Directive 2004/17/EC.

<sup>(41)</sup> Article 23(2) of Directive 2004/18/EC.

<sup>(42)</sup> Article 23(1) of Directive 2004/18/EC.

<sup>(43)</sup> Article 23(3) of Directive 2004/18/EC.

## 2. Using performance-based or functional specifications

The Procurement Directives explicitly allow contracting authorities to choose between specifications based on technical standards or on performance/functional requirements<sup>(44)</sup>. A performance-based/functional approach usually allows greater scope for market creativity and, in some cases, will challenge the market to develop innovative technical solutions. If the contracting authority opts for this approach, it does not need to go into too much detail in the technical specifications.

Having the possibility to define technical specifications in terms of performance or functional requirements enables contracting authorities to seek innovative solutions better suited to their needs. For example, accessibility requirements of a product may be defined either by setting very detailed technical standards or by setting standards based on functional accessibility requirements. The second option can act as a stimulus for economic operators to propose innovative solutions in their tenders.

As the options available on the market concerning performance-based specifications can vary considerably, the contracting authority should make sure its specifications are clear enough to allow it to make a proper and justifiable evaluation.

There may be more scope to take account of social issues in larger or complex projects, but regardless of the size of the project, the specifications must be:

- specific about the outcomes and output required and encourage bidders to use their skills and experience to devise solutions;
- sufficiently broad to allow bidders to add value, but not so broad that they feel exposed to risks that are difficult to quantify and therefore inflate their prices;

- linked to the subject-matter of the contract, while taking account of appropriate policy goals, including cross-cutting policies and legal obligations, and of market soundings about what industry can supply.

## 3. Use of variants

Dialogue with potential bidders before finalising the specifications can help to identify opportunities to promote equal opportunities and sustainability. These discussions can establish the best scope for requirements so that they are commercially viable, by making sensible arrangements for allocating and managing risk. Comparing current services with what is provided elsewhere could also help. When using these techniques, care should be taken to avoid putting any particular supplier at an advantage.

Even after such market research, it is possible that the contracting authority still might not be sure how best to integrate social standards into specific technical specifications. If this is the case, it might be useful to ask potential bidders to submit socially responsible variants. This means that the contracting authority should establish a minimum set of technical specifications for the product it wants to purchase, which will apply to both the neutral offer and to its socially responsible variant. For the latter, the contracting authority will add a social dimension to the technical specifications<sup>(45)</sup>.

When the bids are sent in, the contracting authority can then compare them all (both the neutral and the socially responsible bids) on the basis of the same set of award criteria. Hence, the contracting authority can use variants to support social standards by allowing comparison between standard solutions and social options (based on the same standard technical requirements). Companies are free to make offers based either on the standard solution or on the variant, unless indicated otherwise by the contracting authority.

<sup>(44)</sup> Article 23(3) of Directive 2004/18/EC.

<sup>(45)</sup> This social dimension must, of course, be linked to the subject-matter of the contract (meaning the actual supplies, services or works which the contracting authority wants to buy) and comply with all EU rules and principles applicable to technical specifications in public procurement.



Before the contracting authority can accept variants in a public procurement procedure <sup>(46)</sup>, it needs to indicate in advance in the tender documents:

- that variants will be accepted;
- the minimum social specifications which the variants have to meet (e.g. better social performance);
- specific requirements for presenting variants in bids (such as requiring a separate envelope indicating the variant or indicating that a variant can be submitted only in combination with a neutral bid).

Purchasers who allow variants can compare the neutral offers with the socially responsible variants — on the basis of the same award criteria — and evaluate bidders' proposals for additional gains in achieving social standards and decide if these are affordable.

#### Example:

One example is procurement of catering services for a public administration, where the contracting authority could invite suppliers to present, in addition to the neutral (standard) offer, a variant which will include a social dimension (preparation of low-calorie, unsalted and kosher food in order to meet the medical or religious needs of all categories of users).

## 4. Social labels and the implications for ethical trade

A contracting authority might want to purchase goods which make a contribution to sustainable development (hereafter referred to as "ethical trade goods"). In this case, it can take appropriate considerations



into account in the tender specifications, but it cannot require the products to bear a specific ethical trade label/certification <sup>(47)</sup>, because this would limit access to the contract for products which are not certified but meet similar sustainable trade standards. This is a general principle that applies not only to ethical trade labels, but to all labels which require prior certification of the economic operators or of their products. Likewise, a contracting authority that wishes to purchase 'bio' products cannot require a specific eco-label, but can ask, in the tender documents, for compliance with specific criteria for biological agriculture.

- (a) Sustainability requirements may be incorporated in the technical specifications of a public tender, provided these criteria are linked to the subject-matter of the contract in question <sup>(48)</sup> and ensure compliance with the other relevant EU public procurement rules <sup>(49)</sup> and with the principles of equal treatment and transparency.

<sup>(47)</sup> For the purposes of this Guide, 'ethical trade label/certification' means any non-governmental trade-related sustainability assurance scheme (for example, Fair Trade, Fairtrade, Max Havelaar, Utz, Rainforest Alliance, etc.). For further details on Fair Trade and other trade-related sustainability assurance schemes, see Commission Communication COM(2009) 215 final of 5 May 2009 'Contributing to sustainable development: The role of *Fair Trade* and nongovernmental trade-related sustainability assurance schemes' available at: [http://trade.ec.europa.eu/doclib/docs/2009/may/tradoc\\_143089.pdf](http://trade.ec.europa.eu/doclib/docs/2009/may/tradoc_143089.pdf)

<sup>(48)</sup> In accordance with Article 53 of Directive 2004/18/EC and Article 55 of Directive 2004/17/EC.

<sup>(49)</sup> For further details, see the section 'Defining the requirements of the contract'.

<sup>(46)</sup> See Article 24 of Directive 2004/18/EC and Article 36 of Directive 2004/17/EC.

A contracting authority that wants to purchase ethical trade goods can do so by defining the relevant sustainability criteria in its technical specifications for the goods. Once a contracting authority has decided on the subject-matter of the procurement contract (what generic type of products to buy), it is free to define the technical specifications of those products<sup>(50)</sup>. The requirements must, however, relate to the characteristics or performance of the products (e.g. recycled material) or the production process of the products (e.g. organically grown).

Requirements relating to the labour conditions of the workers involved in the production process of the supplies to be procured cannot be taken into account in the technical specifications, as they are not technical specifications within the meaning of the Procurement Directives. Under certain conditions, they may, however, be included in the contract performance clauses<sup>(51)</sup>.

Contracting authorities that intend to purchase ethical trade goods should not simply 'cut and paste' all the technical specifications for an ethical trade label/

certification<sup>(52)</sup> into the technical specifications for their purchases nor, even less so, designate a specific ethical trade label or certification. Instead, they should look at each of the sub-criteria underlying the ethical trade label or certification and must use only those which are linked to the subject-matter of their purchase. Contracting authorities may stipulate which ethical trade labels/certifications are deemed to fulfil these criteria, but they must always also allow other means of proof. Bidders should have the choice to prove compliance with the requirements defined either by using appropriate ethical trade labels/certifications or by other means.

- (b) Sustainability criteria (including social criteria) may also be incorporated **in the contract performance conditions**, provided they are linked to performance of the contract in question<sup>(53)</sup> (e.g. minimum salary and decent labour conditions for the workers involved in performance of the contract) and comply *mutatis mutandis* with the other requirements mentioned in paragraph (a) above and, more generally, with the conditions set out in the section of this Guide on 'Rules governing contract performance clauses'.

#### Examples:

If a contracting authority wants to buy ethical trade coffee or fruits, it can, for example, insert in the contract performance conditions of the procurement contract a clause requesting the supplier to pay the producers a price permitting them to cover their costs of sustainable production, such as decent salaries and labour conditions for the workers concerned, environmentally friendly production methods and improvements of the production process and working conditions.

#### Germany: City of Düsseldorf

Point 7.3 of the Public Procurement Order for the city of Düsseldorf in North Rhine-Westphalia (*Vergabeordnung für die Stadtverwaltung Düsseldorf*) on execution of contracts stipulates that: 'no products of exploitation of child labour are to be procured. Independent certification (for example, a Transfair seal or Rugmark seal) may prove this. If no such certification exists for the product in question, a declaration in the form of acceptance of the additional contract provisions for execution of the works and acceptance of the additional contract provisions of the Procurement Order for Supplies and Services Contracts is acceptable.'

<sup>(50)</sup> It being understood that technical specifications must be defined in a non-discriminatory way.

<sup>(51)</sup> See paragraph (b) below on contract performance clauses in procurement of sustainability assurance goods along with the general section 'Rules governing contract performance clauses'.

<sup>(52)</sup> Because certain specifications of these ethical trade labels/certifications may not be linked to the subject-matter of the contract. Therefore inserting them in the tender specifications would be contrary to the principles of the Procurement Directives.

<sup>(53)</sup> Conditions included in the contract performance clauses do not necessarily need to be linked to the subject-matter of the contract, but only to performance of the contract.

## 5. Taking into account social concerns in production and process methods

What a product is made of, and how it is made, can play a significant part in its social impact. Under the Procurement Directives, production methods can be taken explicitly into account when defining the technical specifications<sup>(54)</sup>.

### Example:

Public works contracts may include in the technical specifications technical requirements aiming to avoid accidents on the construction site. Such measures (which could include, for example, signposting, conditions for storage of dangerous products or routes for transport of equipment) are part of the project which is put out to tender.

In a contract for procuring catering services for a hospital, in order to improve the well-being of patients, the contracting authority may require in the technical specifications that food should be prepared in accordance to certain methods that meet the diet and medical requirements of specific categories of patients.

### Example:

**Italy:** The Stanca Law makes it compulsory that all public websites should be accessible. The Law lays down a set of requirements to be used in public procurement of websites. The 'Decree establishing Technical Rules for Law 4/2004' is made up mainly of annexes which contain the technical web accessibility requirements, the methodology for evaluation of websites and the requirements for accessible hardware and software. The primary sources of inspiration for these groups were the W3C's Web Accessibility Initiative and the positive experience with Section 508 of the US Rehabilitation Act. CNIPA (the National Centre for Informatics in Public Administration) is responsible for assessing high-impact public ICT procurement tenders to see that they also include the accessibility requirements agreed in the legislation. Law 4/2004 assigns responsibility for monitoring enforcement of the Law to the Presidency of the Council of Ministers (Department for Innovation and Technology) and to CNIPA. During 2006, fifteen major procurement projects (worth €71 million) were assessed to evaluate or improve their compliance with the Laws on Accessibility. Most of these projects, carried out by 10 different central administrations, focused on websites and hardware procurement.

However, since all technical specifications must be linked to the subject-matter of the contract, the contracting authority can only include social requirements which are also linked to the subject-matter of the contract.

## 6. Disability and technical specifications

The Procurement Directives<sup>(55)</sup> stipulate that technical specifications set out in the contract documentation should address the issue of accessibility of the works, supplies or services which are the subject of the contract. Article 23(1) of Directive 2004/18/EC states that 'Whenever possible ... technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.' As explained earlier, compulsory national requirements specified in relevant legislation for 'accessibility for all' must be reflected in the subject-matter of the contract. It is imperative that procurement managers are made aware of these specific national regulatory requirements on accessibility and design for all and that these are fully incorporated in the tender documents, primarily in the form of technical specifications.

<sup>(54)</sup> Annex VI to Directive 2004/18/EC and Annex XXI to Directive 2004/17/EC.

<sup>(55)</sup> Article 23(1) of Directive 2004/18/EC and Article 34(1) of Directive 2004/17/EC.

It is difficult for all contracting authorities to be experts in every social domain. It is important for contracting authorities to bear in mind that practices in some countries outside the EU could facilitate their work on developing accessibility standards. In the USA, Section 508 of the Rehabilitation Act requires Federal contracting authorities to use accessibility standards in their public procurement and this has had repercussions in various EU Member States as well and has influenced industrial practice. In the

EU, the European Commission has issued two standardisation mandates to support European accessibility requirements for public procurement of products and services in the area of information and communication technologies (ICT)<sup>(56)</sup> and the built environment<sup>(57)</sup> respectively. The results of the first phase of Mandate 376 are available and identify a set of standards on accessibility along with various methods to assess conformity with those standards when purchasing ICT<sup>(58)</sup>.

#### **Defining the requirements of the contract in the technical specifications — IN A NUTSHELL**

Draw up clear and precise technical specifications. Make sure that specifications are linked to the subject-matter of the contract, reflect all appropriate social requirements and are transparent and non-discriminatory.

Build on the 'best practices' of other contracting authorities. Use networking as a way of obtaining and spreading information.

Use performance-based or functional specifications to encourage innovative socially responsible offers. Consider taking social concerns into account in production and process methods.

If you are uncertain about the actual existence, price or quality of socially responsible products or services, you may ask for socially responsible variants.

Where appropriate, consider reserving the contract for sheltered workshops or provide for the contract to be performed in the context of sheltered employment programmes.

Make sure that all intended outcomes are included — they cannot be added later in the process.



<sup>(56)</sup> European Commission, Standardisation Mandate to CEN, CENELEC and ETSI in support of European accessibility requirements for public procurement in the ICT domain, M/376 EN, 7 December 2005.

<sup>(57)</sup> European Commission, Standardisation Mandate to CEN, CENELEC and ETSI in support of European accessibility requirements for public procurement in the built environment, M/420 EN, 21 December 2007.

<sup>(58)</sup> European accessibility requirements for public procurement for products and services in the ICT domain (European Commission Mandate M 376, phase 1); CEN/BT WG 185 and CLC/BT WG 101-5, Report on 'Conformity assessment systems and schemes for accessibility requirements'.

## B. Selecting suppliers, service-providers and contractors

Selection criteria focus on companies' ability to perform the contract they are tendering for. The Procurement Directives contain two sets of rules on selection: exclusion criteria and rules regarding technical and economic capacity.

### 1. Exclusion criteria

The Procurement Directives contain an exhaustive list of cases where the personal situation of a candidate or tenderer may lead to its exclusion from the procurement procedure<sup>(59)</sup>. Some of these shortcomings may be of a social nature. For instance, candidates or tenderers may be excluded:

- for failure to pay social contributions<sup>(60)</sup>; or
- where the economic operator 'has been convicted by a final judgment (which has the force of *res judicata* in accordance with the legal provisions of the country) of any offence affecting his professional conduct'<sup>(61)</sup> or 'has been guilty of grave professional misconduct (proven by any means which the contracting authorities can demonstrate)<sup>(62)</sup>, based on the concept of "grave professional misconduct" is defined in national legislation<sup>(63)</sup>.

<sup>(59)</sup> Article 45 of Directive 2004/18/EC and Articles 53(3) and 54(4) of Directive 2008/17/EC. In some particularly serious criminal cases, it may even be mandatory to exclude tenderers.

<sup>(60)</sup> Article 45(2)(e) of Directive 2004/18/EC.

<sup>(61)</sup> Article 45(2)(c) of Directive 2004/18/EC.

<sup>(62)</sup> Article 45(2)(d) of Directive 2004/18/EC.

<sup>(63)</sup> 'Grave professional misconduct' is not yet defined by European legislation or EU case-law. It is therefore up to 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.

#### What's permitted — examples

- Exclusion of a tenderer who has been convicted by a judgment that has the force of *res judicata* for failure to comply with national legislation prohibiting clandestine employment, with national rules regarding health and safety at work or with national rules prohibiting discrimination on various grounds (race, gender, disability, age, sex, religious belief, etc.).
- Exclusion of a tenderer 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 the legislation is classified as grave professional misconduct in the Member State in question.

#### What's not permitted — an example

- Exclusion of a potential tenderer on the basis of political or personal beliefs of the tenderer that don't relate to professional conduct.

### 2. Technical capacity<sup>(64)</sup>

The selection process enables the contracting authorities to assess candidates' ability to deliver the requirements specified in the contract. The Procurement Directives contain an exhaustive list of technical capacity selection criteria, which can be applied to justify the choice of candidates. Selection criteria differing from those set out in the Procurement Directives would therefore not comply with the Directives.

#### Example:

In the Beentjes case<sup>(\*)</sup> the Court found that a condition calling for employing long-term unemployed bore no relation to checking tenderers' suitability on the basis of their economic and financial standing and their technical knowledge and ability (clause 28 of the judgment)<sup>(\*\*)</sup>.

<sup>(\*)</sup> CJEU judgment of 20 September 1988 in case 31/87.

<sup>(\*\*)</sup> However, a condition calling for employment of long-term unemployed could be inserted in the contract performance clauses, provided this in line with the EU rules applicable at the performance stage (for further details, see the section 'Contract performance').

<sup>(64)</sup> This Guide will not analyse the economic and financial standing selection criteria, given that in view of the nature of the references required in order to assess the economic and financial standing of tenderers, it is not possible to include social considerations in them.



In addition, selection criteria must be non-discriminatory, proportionate and linked to the subject-matter of the contract.

In order to establish such a link, social considerations may be included in the technical selection criteria **only if** the achievement of the contract requires specific 'know-how' in the social field. Depending on the subject-matter of the contract, the contracting authority may investigate different aspects of candidates' technical capacity:

- Does the tendering company employ or have access to personnel with the knowledge and experience required to deal with the social issues of the contract (e.g. the need to have trained personnel and specific management experience in a contract for a crèche or engineers and architects qualified in accessibility matters for constructing a public building)?
- Does the tendering company own or have access to the technical equipment necessary for social protection (e.g. the need to have equipment suitable for elderly persons in a contract to run a retirement home)?
- Does the tendering company have the relevant specialist technical facilities available to cover the social aspects (e.g. in a contract for purchase of computer hardware, including accessibility requirements for disabled persons)?

Evidence of the economic operators' technical abilities may be provided by one or more of the exhaustive means specified in the Directives<sup>(65)</sup>, such as:

- evidence of previous contracts completed, indicating the technicians or technical bodies to be involved;
- a description of the technical facilities used and related measures taken by the contractor;
- the educational and professional qualifications of the contractor's personnel (these are especially important in contracts that can only achieve their social objectives subject to proper training of the personnel);
- details of the manpower of the service-provider and numbers of managerial staff;
- details of the proportion of the contract that may be subcontracted.

A balance must be struck between the need for the contracting authority to have sufficient proof that the contractor will have the capacity to perform the contract and the need to avoid placing excessive burdens on the contractors.

**Selecting suppliers, contractors and service-providers — IN A NUTSHELL**

Consider potential contractors' ability to deliver the particular contract in question. Establish selection criteria based on the exhaustive list set out in the Procurement Directives.

Does the contract require social capability or capacity (e.g. particular skills, training or adequate equipment to deal with the social aspects of the contract)? If so, include social criteria to demonstrate technical capacity to perform the contract.

The assessment of technical capacity must relate to the candidate's ability to deliver the contract.

Where relevant, consider suppliers' track record for delivering on similar contracts in relation to required social standards. Consider the possibility of excluding tenderers if the conditions of the Procurement Directives permitting such exclusion are met.

<sup>(65)</sup> Article 48 of Directive 2004/18/EC.

## C. Awarding the contract

### 1. General rules for drafting award criteria and on awarding contracts

Social award criteria may be applied, provided they<sup>(66)</sup>:

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

When the contracting authority evaluates the quality of tenders, it uses predetermined award criteria, published in advance, to decide which tender is the best. Under the Procurement Directives, the contracting authority has two options: it can either compare offers on the basis of price alone<sup>(67)</sup> or choose to award the contract to the 'most economically advantageous' or best-value tender, which means that other award criteria will be taken into account in addition to the price.

Since the 'most economically advantageous tender' (MEAT) or best-value tender always combines two or more sub-criteria, these can include social criteria. Indeed, the non-exclusive list of examples in the Procurement Directives<sup>(68)</sup> allowing contracting authorities to determine the most economically advantageous tender include quality, price, technical merit, aesthetic and functional characteristics, social characteristics,

running costs, cost-effectiveness, after-sales service, technical assistance, delivery date, delivery period and time to completion.

As the best offer will be determined on the basis of several different sub-criteria, the contracting authority can use several techniques for comparing and weighing up the different sub-criteria. These include matrix comparisons, relative weightings and 'bonus/malus' systems. It is the responsibility of contracting authorities to specify and publish the criteria for awarding the contract and the relative weighting given to each of those criteria in time for tenderers to be aware of them when preparing their tenders.

The individual criteria that will determine the most economically advantageous or best-value tender will need to be formulated in such a way that:

- They are linked to the subject-matter of the contract to be purchased (as described in the technical specifications).

The technical specifications define the level of performance required (e.g. accessibility standards in the technical specifications). But the contracting authority can decide that any product/service performing better than the minimum level can be granted extra points at the award stage. For example, when a reference is made to a standard on accessibility, for example to the web as in the case of standard **UNE 139803** 'Requisitos de accesibilidad para contenidos Web' (Spain), it is possible to comply at three levels — A, AA or AAA. Extra points could be given to the bid achieving the highest level.

- They allow the tenders to be assessed on the basis of their economic and qualitative criteria as a whole in order to determine which offers the best value for money<sup>(69)</sup>. In practice, this means that it is not necessary for each individual award criterion to give an economic advantage to the contracting authority, but that taken together the award criteria (i.e. economic plus social) must allow the authority to identify the bid offering the best value for money.

<sup>(66)</sup> For further details of the conditions set out below, see the next section 'Conditions applicable to award criteria in tender evaluation' Please see also Recitals 1 and 2 of the Directive 2004/18/EC and Recitals 1 and 9 of the Directive 2004/17/EC;

<sup>(67)</sup> For contracts awarded on the basis of the lowest price, the failure to take into account other award criteria (such as quality or social considerations) can to a certain extent be compensated by including high quality standards in the technical specifications for the contract (so that only offers complying with all the qualitative standards in the technical specifications will be taken into consideration at the award stage) or by including social considerations (depending on their nature) in the technical specifications (if such considerations are linked to the subject-matter of the contract) or in the contract performance clauses (if they are only linked to performance of the contract).

<sup>(68)</sup> Recital 46 and Article 53 of Directive 2004/18/EC.

<sup>(69)</sup> See recital 46 of Directive 2004/18/EC and recital 55 of Directive 2004/17/EC.

### What's permitted — examples

- In a contract for the procurement of care for persons with disabilities, the award criteria may take into account requirements relating to meeting the specific needs of each category of user (e.g. personalisation of the service depending on the age, gender or social difficulties of the users, etc.).
- In a contract for the procurement of recruitment tests and services for the public sector, the contracting authority can ask the tenderers to ensure that recruitment tests and services are designed and carried out in a way that ensures equal opportunities for all participants, irrespective of their age, gender and ethnic or religious background.
- In a contract for the procurement of software or hardware, an award criterion may be included that relates the number of points awarded to the levels of accessibility or specific accessibility features proposed for various groups of persons with disabilities. This includes, for example, whether the product or service is accessible for partially-sighted persons or blind people, for the hard of hearing or deaf, for persons with intellectual disabilities, or those with mobility and dexterity impairments, etc.

### What's not permitted — examples

- Using award criteria relating to local purchases of equipment by the contractor (for example, in a contract for construction of a hospital) in order to stimulate creation of new jobs on the local market. First of all, any such criterion is not linked to the subject-matter of the contract (construction of the hospital). Secondly, this criterion is also discriminatory, because it gives tenderers that buy their equipment on the local market an undue advantage over other tenderers who buy from elsewhere.
- Using award criteria introduced at the last moment and not included in the tender documents.
- Using award criteria that may grant undue discretion to the contracting authority. For example, in a contract for IT equipment, an award criterion specifying that tenderers may receive between 1 and 20 points for the technical merits of the accessibility of the proposed products, without indicating the parameters or characteristics that the contracting authority will take into account to determine the exact number of points to be granted in each case, may give the contracting authority undue discretion for evaluation of the technical merits of the tenders.

## 1.1. Conditions applicable to award criteria in tender evaluation

The Procurement Directives explicitly allow social considerations to be included in award criteria. This legislation builds on CJEU case-law. The basic rule on social award criteria is derived from cases C-513/99 (Concordia Bus) and C-448/01 (Wienstrom) and from the Procurement Directives, which specifically refer to this ruling in their first recital. All award criteria should meet the four conditions mentioned at the start of section C 1 above<sup>(70)</sup>.

### a) *Award criteria must be linked to the subject-matter of the contract*

This is essential. It ensures that award criteria relate to the needs of the contracting authority, as defined in the subject-matter of the contract. In its judgment in the 'Wienstrom case'<sup>(71)</sup> the CJEU provided further information on how the link with the subject of the contract should be interpreted.

<sup>(70)</sup> CJEU judgment in case C-513/99. This judgement concerns environmental award criteria, but the same principles may be applied, *mutatis mutandis* to social award criteria in public procurement.

<sup>(71)</sup> CJEU judgment in case C-448/01.



**Examples:**

**Wienstrom case:** In this case the CJEU ruled that in a tender for energy supply, a criterion relating solely to the amount of electricity produced from renewable sources in excess of the expected consumption of the contracting authority (which was the subject of the contract) could not be considered to be linked to the subject-matter of the contract. To establish such a link to the subject-matter of the contract, the criterion relating to the amount of electricity produced from renewable sources should have concerned only the electricity effectively supplied to the contracting authority.

**Works contract:** In the case of a contract incorporating social considerations, in a construction contract where the subject-matter of the contract consists of building a school, an award criterion based on how much money the contractor would transfer to the local community outside the contract is not legally permissible, as it would not be linked to the subject-matter of the contract.

b) *Award criteria must be specific and objectively quantifiable*

The CJEU ruled that, based on its previous judgments, award criteria must never confer unrestricted freedom of choice on contracting authorities. They must restrict this freedom of choice by setting specific, product-related and measurable criteria or, as the CJEU put it, 'adequately specific and objectively quantifiable' criteria. The CJEU provided further clarification in the Wienstrom and Concordia Bus cases<sup>(72)</sup>.

**Examples:****The lack of clarity and objectivity of the award criteria in the Wienstrom case:**

In the Wienstrom case the CJEU found that, in order to give tenderers equal opportunities when formulating the terms of their tenders, the contracting authority has to formulate its award criteria in such a way that 'all reasonably well-informed tenderers of normal diligence interpret them in the same way'<sup>(\*)</sup>. Another aspect of the necessary clarity and measurability of the award criteria, as formulated by the CJEU, was that the contracting authority can only set criteria against which the information provided by the tenderers can actually be verified.

**The specificity and measurability of the award criteria in the Concordia Bus case:**

In the Concordia Bus case, before evaluation of the tenders, the Community of Helsinki had decided and published a system for awarding extra points for certain noise and emission levels<sup>(\*\*)</sup>. The CJEU considered this system CJEU adequately specific and measurable.

(\*) In this case, the contracting authority did not determine the specific period for which the tenderers should state the amount that they could supply.

(\*\*) In this case, extra points were awarded, among other things, for 'use of buses with nitrogen oxide emissions below 4 g/kWh (+ 2.5 points/bus) or below 2 g/kWh (+ 3.5 points/bus) and with external noise levels below 77 dB (+1 point/bus)'.  
 (\*) In this case, the contracting authority did not determine the specific period for which the tenderers should state the amount that they could supply.

c) *Award criteria must have been publicised previously*

The Procurement Directives stipulate that contract notices must mention whether the contracting authority will award the contract on the basis of the 'lowest price' or the 'most economically advantageous tender'. The criteria used to identify the most economically advantageous tender must be mentioned in the notice or, at least, in the tender documents.

<sup>(72)</sup> Both these cases concern environmental award criteria, but the principles deriving from these judgments may be applied *mutatis mutandis* to social award criteria.



d) *Award criteria must comply with EU law  
(including the fundamental principles of the TFEU)*

The last condition derived from the TFEU and the Procurement Directives is that award criteria must comply with all the fundamental principles of EU law.

The CJEU has explicitly stressed the importance of the principle of non-discrimination, which is the basis of other principles, such as the freedom to provide services and freedom of establishment. The issue of discrimination was expressly raised in the *Concordia Bus* case<sup>(73)</sup>.

**Example:**

One of the objections of *Concordia Bus* was that the criteria set by the Community of Helsinki were discriminatory because the Community's own bus company HKL was the only company with gas-powered vehicles that could comply with the emission levels set. The CJEU ruled that the fact that one of a set of various award criteria imposed by the contracting authority could only be met by a small number of companies did not in itself make this discriminatory. Therefore, when determining whether there has been discrimination, all the facts of the case must be taken into account.

## 1.2. The 'additional criterion'

In case C-225/98 the CJEU held that contracting authorities can award a contract on the basis of a condition related to eg combating unemployment, provided this condition is in line with all the fundamental principles of EU law, **but only where the authorities had to consider two or more equivalent tenders**. The Member State in question regarded this condition as **an additional, non-determining criterion** and considered it only after tenders had been compared on the basis of the other award criteria. Finally, the CJEU stated that application of the award criterion regarding combating unemployment must have no direct or indirect impact on those submitting bids from other EU Member States and must be explicitly mentioned in the contract notice, so that potential contractors were able to know that such a condition existed.

Therefore, a criterion regarding combating unemployment (and other criteria which are not linked to the subject-matter of the contract) can be taken into account at the award stage only as 'an additional criterion' in order to choose between two equivalent tenders. All other award criteria (other than the additional criterion) must be linked to the subject-matter of the contract, as the CJEU ruled in 2001 in the '*Wienstrom* case'<sup>(74)</sup> (see above).

<sup>(73)</sup> CJEU judgment in case C-513/99.

<sup>(74)</sup> CJEU judgment in case C-448/01.

## 2. Dealing with 'abnormally low bids'

Under the Procurement Directives, if contracting authorities consider a tender to be abnormally low, they must ask for explanations before they can reject it. The Directives state that these explanations may also refer (amongst other factors) to compliance with the 'provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed'<sup>(75)</sup>. Thus, the Procurement Directives specifically link the issue of abnormally low tenders with the issues of employment protection and working conditions. Some practices, including ignoring working conditions that are legally required, may give rise to *unfair* competition.

### Examples:

**France:** The Ville d'Angers noticed that in the cleaning sector workers have tough work schedules. Thus an offer which is economically extremely attractive because it proposes a lower number of workers than is appropriate to the surface area to be cleaned, based on average ratios, will be considered abnormally low and rejected if the bidder is unable to explain how he will be able to guarantee such a low price without infringing any applicable laws (such as laws regarding the maximum number of working hours per day).

The Procurement Directives set out the procedures that the contracting authority must adopt before rejecting a tender on the ground that it is abnormally low<sup>(76)</sup>. Each case should be treated on its merits; there should be no automatic exclusion; tenderers should have an opportunity to rebut the case against them; and the condition of non-discrimination must be complied with.

### What's permitted — an example

A tenderer may be excluded if the enquiry carried out in accordance with the above-mentioned rules of the Procurement Directives<sup>(\*)</sup> finds the tender abnormally low as a consequence of non-compliance by the tenderer with the applicable rules regarding employment protection, payment of social contributions or of additional working hours, safety at work or prohibition of clandestine employment.

### What's not permitted — an example

The contracting authority may not impose complete and automatic exclusion of any tender that falls below a specified proportion (e.g. 80 %) of the average price of all tenders received.

(\*) Article 55 of Directive 2004/18/EC and Article 57 of Directive 2004/17/EC.

The contracting authority can ask in writing for details that it considers relevant to being able to assess an abnormally low bid. These can relate to employment protection and working conditions. This does not appear to be restricted to requesting such details from the tenderer alone. In the case of working conditions, for example, it might be appropriate to request information from trade unions. Where the contracting authority does obtain information from other sources, however, the Procurement Directives require the contracting authority to 'verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.' The practical rules regarding such verification by the contracting authority are governed by national law, it being understood that such rules must permit the tenderer to present his position.

If the enquiry finds that the offer appears abnormally low, the contracting authority may reject it (although the Procurement Directives place no obligation on it to do so). However, in Member States that have adopted legislation to this effect, contracting authorities can nevertheless be under an obligation to reject such tenders.

<sup>(75)</sup> Article 55(1)(d) of Directive 2004/18/EC and Article 57(1)(d) of Directive 2004/17/EC.

<sup>(76)</sup> Article 55 of Directive 2004/18/EC and Article 57 of Directive 2004/17/EC.

### 3. Debriefing unsuccessful bidders

The contracting authority must provide feedback to bidders once the contract has been awarded. This can be a useful opportunity to engage with unsuccessful bidders

in general and concerning the policies of the contracting authority regarding social issues in particular. If the bidder was unsuccessful in part because of failure to meet social criteria, details can be given of what the bidder might do in order to be more successful in future.

#### **Awarding the contract: tender evaluation — IN A NUTSHELL**

Establish award criteria: where the criterion of the 'most economically advantageous tender' is chosen, relevant social criteria may be inserted either as a benchmark to compare socially responsible offers with each other or as a way of introducing a social element and giving it a certain weighting.

Social (and also economic or environmental) award criteria must:

- be linked to the subject-matter of the contract;
- not confer unrestricted freedom of choice on the contracting authority;
- be expressly mentioned in the contract notice and tender documents;
- be consistent with EU law (including the fundamental principles of the TFEU: transparency, equal treatment and non-discrimination);
- help identify the bid offering the best value for money for the contracting authority; and
- be consistent with the relevant rules of the Procurement Directives.

Consider whether the bid is 'abnormally low' because the tenderer is breaching social standards.

## D. Contract performance

The first thing which must be said is that public procurement contracts must always be performed in compliance with all the mandatory rules which are applicable, including the social and health regulations. If, in addition, the contracting authority wishes a contractor to achieve additional social objectives<sup>(77)</sup>, it can use contract performance clauses to this end.

Contract performance clauses set out how the contract should be performed. Social considerations may be included in the contract performance clauses, provided (i) they are linked to performance of the contract, (ii) they are published in the contract notice and (iii) they comply with EU law (including the general principles of the TFEU).

### 1. Rules governing contract performance clauses

Contract performance clauses 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. Bids from tenderers who have not accepted any such conditions would not comply with the contract documents and could not therefore be accepted<sup>(78)</sup>. However, the conditions of contract need not be met at the time of submitting the tender.

Writing the required social standards into the contract will make the public authority's expectations clear. A rigorous approach during the planning and tendering phases will make it easier to state these intentions in specific terms, which can influence performance management.

Although contract performance clauses should neither play a role in determining which tenderer gets the contract nor be disguised technical specifications, award criteria or selection criteria, it is permissible to set additional conditions of contract, which are separate from the specifications, selection criteria and award criteria<sup>(79)</sup>. These can include social and environmental conditions. So, if the contracting authority wishes a contractor to achieve social goals that are not related to the specifications, it can set additional conditions of contract. These relate to performance of the contract only.

Tenderers must prove that their bids meet the technical specifications, but proof of compliance with contract performance clauses should not be requested during the procurement procedure.

In addition, contract performance clauses must:

- be linked to performance of the contract

This means that the contract performance clauses must be linked to the tasks which are necessary to produce the goods/provide the services/execute the works put out to tender. A condition would not be linked to 'performance' of the contract if, for example:

- it requires the contractor to hire a set proportion of workers with disabilities on another contract<sup>(80)</sup> or would restrict what the contractor is allowed to do on another contract;
- it requires the contractor to contribute financially to eg building a centre for disadvantaged people;
- it requires the contractor in a works contract to provide crèche services for staff's children. Such services are not related to tasks necessary for the performance of the works. If the contracting authority wishes to procure such services, it should also put them out to tender.

<sup>(77)</sup> i.e. objectives that go beyond those set by the applicable mandatory legislation and that do not relate to the technical specifications, the selection criteria or the award criteria.

<sup>(78)</sup> The CJEU judgment of 22 June 1992 in case C-243/89 (Storebaelt) stated that a contracting authority must reject bids which do not comply with the tender conditions to avoid infringing the principle of equal treatment of tenderers, which lies at the heart of the Procurement Directives.

<sup>(79)</sup> Beentjes case, CJEU judgment in case 31/87.

<sup>(80)</sup> However, a requirement to hire a set proportion of workers with disabilities for performance of the contract in question (and not for another contract) would be linked to performance of the contract in question.

- be published in the contract notice

Even though contract performance clauses are considered to be outside the procedure for awarding contracts, they still need to be set out clearly in the call for tenders. Tenderers should be aware of all the obligations laid down in the contract and be able to reflect this in their prices<sup>(81)</sup>. The winning bidder must honour the commitments made in his bid on meeting the conditions of contract.

- comply with EU law (including the fundamental principles of the TFEU)

For instance, the conditions of contract must not put at an unfair disadvantage potential contractors from another state or, more generally, lead to unequal treatment between potential bidders. It is equally important, however, that the conditions of contract also comply with EU law in general, including EU social law.

Finally, public procurement contracts should, in any event, be performed in compliance with all applicable rules, including social, labour and health regulations.

## 2. Examples of social considerations that may be included in the contract performance clauses

The recitals in Directive 2004/18/EC (with minor differences in Directive 2004/17/EC)<sup>(82)</sup> give examples of social considerations that may be included in contract performance clauses:

*‘They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment .... to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions<sup>(83)</sup> ... and to recruit more handicapped persons ....’*

Contract performance clauses are generally the most appropriate stage of the procedure to include social considerations relating to employment and labour conditions of the workers involved in performance of the contract<sup>(84)</sup>.

<sup>(81)</sup> Article 26 of Directive 2004/18/EC and Article 38 of Directive 2004/17/EC.

<sup>(82)</sup> Recital 33 of Directive 2004/18/EC and recital 44 of Directive 2004/17/EC.

<sup>(83)</sup> The basic ILO Conventions referred to in the Procurement Directives are the eight core ILO Conventions which have been ratified by all Member States (see footnote 11 for further details).

<sup>(84)</sup> As pointed out in the previous sections, labour conditions of the workers involved in performance of the contract are not technical specifications or selection criteria within the meaning of the Procurement Directives. In addition, given that such social considerations are difficult to link to the subject-matter of the contract, it would generally not be possible to include them in the award criteria for the contract (except as an ‘additional criterion’ to make the difference between two equal tenders, as accepted by the CJEU in case C-225/98 and as explained in the section ‘Awarding the contract’).

The Commission's interpretative Communication of 2001 states that 'Contracting authorities have a wide range of possibilities for determining the contractual clauses on social considerations' and lists 'some examples of additional specific conditions which a contracting authority might impose on the successful tenderer'. These are:

- 'The obligation to recruit unemployed persons, or to set up training programmes for the execution 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, or provide equal access to persons with disabilities;
- The obligation to comply, during the execution of the contract, with fundamental human rights (such as the prohibition of forced and child labour) guaranteed by the ILO core conventions, 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 persons with disabilities 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.'

Public contracts for works and services, in 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 contract performance clauses. It would appear more difficult to envisage contractual clauses relating to the manner in which supply contracts are performed, since 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.



#### Example:

#### Other examples:

**Sweden:** Construction contracts awarded by the National Road Administration contain a standard clause placing an obligation on the contractors to comply with certain (core ILO) conventions when performing contracts in Sweden. The same clause requires the contractor to comply with certain reporting requirements designed to verify that goods and products used in performance of the contract have been produced in a safe environment in accordance with the rules of the conventions mentioned. Goods found to be in conflict with this provision must be replaced at the contractor's expense. The contractor must ensure that subcontractors abide by the same obligations. A penalty is payable for any breach of these social obligations of the contractor.

**UK:** In 2004 Transport for London (TfL) put together a five-year £ 10 billion investment programme to fund large-scale construction projects in London, including an extension to the East London Line railway. Equality and inclusion were regarded as being at the heart of that programme and integral to procurement contracts. The East London Line Project (ELLP) was valued at £ 500 million for the main works and £ 350 million for the rolling stock and train servicing.

The strategy for the project set an objective of using the improved transport links to stimulate economic regeneration in areas surrounding the extension, which include some of the most deprived areas of London. These areas are home to a number of culturally and economically diverse communities, facing high levels of unemployment and social exclusion. There was also a need to foster positive community relations during the construction phase to minimise the impact of construction activity and create a positive environment for operation of the new railway. In the light of these circumstances, equality and inclusion were identified as two key social objectives. TfL therefore introduced a set of requirements for bidders to be implemented during the execution of the project: an equality policy for the project, a diversity training plan for staff working on the project and a supplier diversity plan (in order to ensure that diverse suppliers were able to bid for subcontracting opportunities arising from the project). These requirements were incorporated in the invitation to tender and in the conditions of contract.

Incorporation of social requirements into terms and conditions of contract should be balanced against the possibility, in practice, of monitoring compliance with these requirements during performance of the contract, in order not to add extra requirements which cannot (or will not) be monitored effectively. This implies contract management and compliance monitoring.

### 3. Compliance with national employment legal framework

Both Procurement Directives<sup>(85)</sup> make it clear that ‘the laws, regulations and collective agreements, at both national and EU level, which are in force in the areas

of employment conditions and safety at work apply during performance of a public contract, providing such rules, and the way they are applied, comply with EU law<sup>(86)</sup>.’

Some examples of the way that Member States have approached this issue have been controversial internally in Member States. One example is the Ruffert case<sup>(87)</sup>.

It must be pointed out that, although this judgment was rendered in the context of a public procurement contract, it has no implications for the possibilities offered by the Procurement Directives to take account of social considerations in public procurement. It only clarifies that social considerations (in public procurement) regarding posted workers must also comply with

#### Example:

##### Posted workers in the EU: the Ruffert case

The Law of Niedersachsen (the *Land of Lower Saxony*) on the award of public contracts stated, amongst other things, that public works contracts may be awarded only to contractors who undertake in writing to pay their employees at least the remuneration stipulated by the applicable (regional) collective agreement. The contractor must also undertake to impose the same obligation on subcontractors and to check that they comply with it. Non-compliance with that undertaking was triggering the payment of a contractual penalty.

The legality of these provisions was challenged before a regional German court in relation to the execution of a works contract between a German contracting authority and the company Objekt und Bauregie (O&B) to build the Göttingen-Rosdorf prison. The contracting authority had terminated the contract and sued O&B for payment of a contractual penalty, because it was found that the Polish subcontractor of O&B was paying its workers employed on the building site in Germany only 46.57% of the minimum wage stipulated by the applicable collective agreement.

Uncertain as to the lawfulness of the provision laying down a contractual penalty, the German regional court referred the issue to the CJEU for a preliminary ruling on interpretation of the EU law aspects relevant to this case.

The CJEU stated that the collective agreement had not been declared universally applicable (although Germany had a system for declaring collective agreements to be of universal application) and covered only part of the construction sector, since the relevant law making the ‘Buildings and public works’ collective agreement binding applied only to public contracts and not to private contracts. Therefore, the minimum wage provided for by the ‘Buildings and public works’ collective agreement was not set in accordance with one of the procedures laid down by Article 3 of Directive 96/71/EC concerning the posting of workers (“**Directive on the Posting of Workers**”)(<sup>(1)</sup>).

In conclusion, the Court of Justice’s judgment on the Ruffert case found the provisions in question incompatible with the Directive on Posting of Workers.

(<sup>(1)</sup>) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

(<sup>(86)</sup>) One example of such compliance with EU law is the need to comply with the requirements of Directive 96/71/EC, on posting of workers, in public procurement involving cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract.

(<sup>(85)</sup>) Recital 34 of Directive 2004/18/EC and recital 45 of Directive 2004/17/EC.

(<sup>(87)</sup>) CJEU judgment in case C-346/06 (Dirk Ruffert v. Land Niedersachsen).



EU law, in particular with the Directive on the posting of workers<sup>(88)</sup>.

The Procurement Directives provide that contracting authorities may address employment protection in the tendering process in two specific ways:

Firstly, contracting authorities may state in the contract documents where tenderers may obtain information on the obligations relating to employment protection and working conditions which are in force in the Member State, region or locality where the works are to be carried out or the service is to be provided<sup>(89)</sup>.

Secondly, any contracting authority that supplies this information should request the tenderers to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection<sup>(90)</sup> and working conditions which are in force in the place where the works are to be carried out or the service is to be provided<sup>(91)</sup>. The purpose of this is linked to the fear that contractors might seek to reduce their levels of employment protection in order to be able to submit a lower bid.

#### 4. Supply-chain management

Contracting authorities may also include in the contract performance clauses social considerations for subcontractors regarding, for example, prohibition of child and forced labour, health and safety requirements, minimum wage obligations, social security requirements and more generally decent work standards. Some contracting authorities have also begun to include clauses requiring subcontractors to comply with prohibitions on child and forced labour, in cases where the supply chain is likely to involve production or processing where these problems occur.



#### Example:

**France:** The clothing office of Paris city council has to provide clothing for its 29 000 employees. This office manages 300 000 articles of clothing and 300 orders per year. It has integrated social and environmental considerations into its purchasing procedures. In line with its social commitments, Paris city council asks its suppliers to sign a declaration committing themselves to respect certain fundamental rights at work (which include an explicit reference to the minimum age of workers), such as those defined by the International Labour Organisation, during performance of the contract. Paris city council also requires its suppliers to be subject to checks by an independent body designated by the city council and to implement any recommendations made as a result of these checks.

This has particular implications for dealings in and with countries outside the EU. For instance, public procurement authorities are increasingly concerned about the legality and sustainability of timber, especially when it is imported from third countries facing particular difficulties in this area. It is increasingly recognised that legal and sustainable forestry includes not only economic and environmental criteria, but also social criteria (such as decent wages and working, health and safety conditions, and respect for the tenure and use rights of local and indigenous communities).

<sup>(88)</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

<sup>(89)</sup> Article 27(1) of Directive 2004/18/EC.

<sup>(90)</sup> Including that such provisions must comply with all relevant EU law.

<sup>(91)</sup> Article 27(2) of Directive 2004/18/EC.

When such requirements are also imposed on subcontractors, contracting authorities should ask the main contractor to provide proof of compliance, either by reference to specific certification schemes (where such schemes exist) or by any other reliable means<sup>(92)</sup>.

For example, in the field of forestry, several certification schemes have been developed to provide independent verification that a timber source meets a certain standard of sustainability (including environmental and social criteria). Nevertheless, such schemes are not to be considered the exclusive means of proof for sustainable timber as other equivalent forms of evidence have to be accepted too.

## 5. Contract management and compliance monitoring

The performance management system will set the terms for assessing performance and taking action. This could mean rewarding contractors for good performance, addressing under-performance or working together to enhance delivery. Key performance indicators translate objectives into measurable targets and stipulate what would constitute an acceptable performance level. Monitoring arrangements should ensure that the right performance data are gathered and that they are analysed effectively. The payment conditions (which should be specified in the contract) provide the basis for ensuring that the contractor delivers to the required standard. They can provide financial disincentives for poor performance and incentives for exceeding baseline targets. These financial conditions must have been published in the contract notice.

The impetus for service improvement could come from poor key performance indicator results or from a sense that, while targets are being achieved, there is scope to do even better. Either way, the contractor and client should understand what is creating the current per-

formance levels and agree on how to improve results. Persistent failure by the contractor should lead to invoking the breach of contract conditions, though any action taken must be reasonable. Equally, the analysis might lead to contractual variations, redesign of the service or innovation.

### Example:

**UK:** To improve hospital catering services for the Northern Ireland Health Authority, the caterer contracted conducts an annual patient satisfaction survey and analyses the data by age, ethnic origin and gender. The Authority has also initiated an assessment of the meals service following press reports of malnutrition in geriatric wards. The combined evidence triggered contractual variations to improve the service to the geriatric ward by helping to feed patients.

A 'partnering culture' should underpin contract management. Clients and contractors can manage risks and achieve the best outcomes only with the aid of imaginative and committed teamwork. In general, the best contractors respond well in such relationships, voluntarily taking on additional commitments, such as: basic skills programmes, environmental innovation, or supporting small firms along their supply chain.

### Example:

**France:** Public institutions responsible for social inclusion have been instrumental in implementing the social clauses in procurement contracts, for example by providing facilitators helping successful bidders to manage the workforce involved in an insertion path, and can also act as certifiers of social compliance. For instance, the *Agglomération de Rouen* used money from the EU Social Fund to co-finance hiring a project manager responsible for implementation of the social insertion clauses in the different procurement contracts concluded. The Municipality of Arles chose to hire a specialised legal adviser to draft and manage procurement documents containing social clauses.

<sup>(92)</sup> Contracting authorities should always permit contractors to submit alternative means of proof (such as certificates issued by a public authority or by third parties, third-party audit reports, copies of the employment contracts, copies of all relevant documents, evidence of monitoring visits, etc.). However, the contracting authority may require additional proof if the initial evidence submitted by the contractor appears (in the circumstances of the case) insufficient or unreliable.

**Contract conditions, contract management and contract monitoring — IN A NUTSHELL**

Contract performance clauses are generally the most appropriate stage of the procedure for including social considerations relating to employment and the labour conditions of the workers involved in performance of the contract.

Make sure the contract performance clauses are:

- linked to performance of the contract;
- consistent with achieving the best value for money;
- included in the tender documentation; and
- compatible with EU law (including the fundamental principles of the TFEU).

Ensure that compliance with the conditions of contract can be monitored effectively.

Work in partnership with the supplier to manage performance and maximise achievement of objectives and compliance with conditions of contract.

Maintain appropriate records on the performance of suppliers, contractors and service-providers.

Use variance clauses to envisage changes that may be required to the contract over time, provided these are compatible with the provisions of the Procurement Directives and with the principle of transparency.

Work with suppliers for continuous improvement — on a voluntary basis — and keep up to date with developments on the market generally. In particular, work with suppliers to facilitate compliance with the principles of decent work and corporate social responsibility all along the supply chain.



European Commission

## **Buying Social – A guide to taking account of social considerations in public procurement**

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Public procurement accounts for about 17% of EU gross domestic product. Its leverage in areas such as social policy is thus considerable. With its Guide to Taking Account of Social Considerations in Public Procurement, the European Commission aims to capitalise on this by (a) raising contracting authorities' awareness on the benefits of opting for goods and services delivering good social outcomes and (b) explaining the opportunities offered by the existing EU legal framework to take into account social considerations in public procurement. The Guide defines socially responsible public procurement (SRPP) before explaining its benefits. It looks at SRPP in relation to the EU social model and the legal and policy approach to the subject in the Union. The Guide also elaborates an SRPP strategy and explains how to identify needs and plan procurement procedures. The Guide also explains from a legal perspective, how social considerations may be addressed at the different stages of the procurement process (from defining technical specifications and selection criteria, to awarding contracts and monitoring subsequent performance). National examples are provided to illustrate different steps within the process.

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