

**ICLEI – Local Governments for Sustainability
(Leopolding 3, 79098 Freiburg, Germany)
(Interest Representative Register ID number: 69052845408-13)**

**Response to the *Green Paper*
on the modernisation of EU public procurement policy -
*Towards a more efficient European procurement market***

April 2011

Please find below the response from ICLEI – Local Governments for Sustainability to the *Green Paper on the modernisation of EU public procurement policy - Towards a more efficient European procurement market*. This contribution to the consultation is divided into two categories a) some general comments and b) responses to the specific questions posed by the Commission in the Green Paper.

ICLEI is an international association of local governments and national and regional local government organisations founded in 1990. ICLEI currently has 1,200 members worldwide and almost 200 in Europe. Since 1996, ICLEI's Sustainable Procurement team has been providing professional information, advice, networking opportunities, training and tools to public authorities wanting to implement high quality, cost effective sustainable procurement practices (www.iclei-europe.org/procurement).

Please note that we have only responded to those questions which we feel we have adequate knowledge and experience to answer.

A) General comments

- 1) We welcome the fact that public procurement is seen as an instrument to achieve common societal goals such as the Europe 2020 strategy objectives, and that this should be communicated in relevant Commission communications and documents where relevant and possible.

- 2) Page 3, paragraph 2 of the Europe 2020 strategy calls on public procurement to “support the shift towards a resource efficient and low-carbon economy, e.g. by encouraging wider use of green public procurement.” However, page 3, paragraph 3, line 1 states:

“The European 2020 strategy stresses that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open EU wide. Obtaining optimal procurement outcomes through efficient procedures is of crucial importance in the context of severe budgetary constraints and economic difficulties in Many EU Member States”.

- 3) We believe it is important to identify from the outset that these two sets of objectives may conflict. This is especially true where “efficiency” is interpreted as the purchase of goods, services or works with the lowest price only.

However where “optimal procurement outcomes” are understood as being linked inextricably to Europe’s environmental and social priorities, a different view emerges. In particular, this submission emphasises the importance of acknowledging that contracting authorities have environmental and social responsibilities, as well as policy objectives related to regional economic development, innovation and fairer allocation of resources, which they can and should pursue through their procurement. Indeed the Commission, Parliament and Council have all been active supporters of the ability and obligation of public authorities to pursue these objectives, including through award of contracts.

ICLEI considers that the current revision process is an opportunity to recognise these objectives explicitly in the text of the Procurement Directives, and to resolve ongoing legal uncertainty about the extent to which such objectives can be addressed in the context of regulated procurement procedures. At the same time, we recognise the need to preserve the coherence and strength of the Directives as instruments promoting competition, fairness and transparency.

- 4) Going further, given the urgency of addressing climate change, resource management and energy efficiency, ICLEI considers that the voluntary approach to green public procurement (GPP) may no longer be sufficient in certain high-impact sectors. As a local government association, we are strong supporters of the principle of subsidiarity and only argue for the imposition of mandatory requirements where these are established as both necessary and effective in addressing the environmental impact of procurement. We recommend drawing on existing successful approaches which have been applied at local, regional and national level, if mandatory requirements are to be introduced in this area.
- 5) Our submission focuses on the application of life-cycle costing, with the inclusion of monetarised environmental externalities, as a means of properly assessing the cost of public contracts. For sectors such as transport, electricity and construction, ICLEI recommends the mandatory inclusion of life-cycle costs in the contract award process. While a comprehensive impact assessment would need to be carried out in

order to introduce any such change, a step has already been taken in this direction with the Clean Vehicles Directive.¹

- 6) The Commission should keep in mind that the pursuit of the Europe 2020 strategy and other policy objectives through public procurement may require imposing additional requirements on contracting authorities and economic operators. This in turn would mean that purchasers do not pursue the objective of savings in the pure economic sense. This contradiction is something that the Commission has to be clear about when modernising EU public procurement and it is our belief that going for lowest price only can compromise the environment and social aspects.

When externality costs are monetised (i.e. reflecting the full costs or benefits of producing or consuming a product or service) purchasing products that take into account environmental and social issues can in fact be the cheapest option in the long-term. This is not currently recognised in the lowest price criterion, which does not allow for the inclusion of non-price costs.

- 7) For many policy objectives, the Directives are not the most suitable instrument of regulation – and in these cases it should be ensured that the revision process does not overstep its mark. Legislative changes can have far-reaching and unintended consequences. In addition, every change to procedures creates an additional administrative burden on contracting authorities. Local authorities in particular may find it difficult to adjust to changes due to resource constraints and lack of good legal advice. For this reason ICLEI considers that the revision process should be limited to the areas where the Directives currently fall short and can really make a difference.

- 8) ICLEI welcomes the push for innovation through procurement. While the focus of this submission is on the integration of environmental and social objectives into procurement, the purchase of innovative and eco-innovative goods and services and the adoption of innovative processes and methodologies can also contribute to sustainability. The legal framework for market consultation, supplier engagement, specification development, competitive procedures and contract performance clauses are all relevant in facilitating the procurement of innovation. A further dimension which merits detailed consideration in this context is joint procurement, which may help to address the technical, financial and risk-based barriers to the procurement of innovative goods and services.

- 9) The Commission should consider broad stakeholder consultation when the various Directorate Generals of the Commission develop, for example, standards, tools and procurement criteria. If possible a piloting/testing period should be undertaken to allow for modifications and to ensure that these standards, tools and procurement criteria work in practice.

¹ Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles

10) Some of the issues raised in the Green Paper cannot be solved through clarification or amendments. It is important to recognise that incorporating environmental and social aspects into procurement and using mechanisms such as the competitive dialogue and life-cycle costing can be complex. Senior managers and procurers require knowledge and skills through education and training to deal with such complexities. ICLEI supports the Commission's initiatives to develop such capacity-building across the EU, and will continue with these activities in its own work in the field of sustainable public procurement (SPP).

B) Response to the specific questions posed

Appropriate tools for aggregation of demand / joint procurement

34. In general, are you in favour of a stronger aggregation of demand/more joint procurement? What are the benefits and/or drawbacks in your view?

Joint procurement between two or more contracting authorities can offer benefits to both the demand and supply side. From the point of view of the contracting authority, joint procurement may lead to a better price and reduce overall administrative costs by aggregating procurement actions. It also encourages pooling of expertise and market knowledge (technical, procurement, environmental etc.). These benefits are particularly apparent in new markets – for example for innovative environmental technologies. On the supply side, aggregation of demand creates an incentive for research and development, bringing innovative goods and services to market and contributing to greening the economy.

In a risk-averse environment, providing smaller, less experienced authorities with the opportunity to make use of existing contracts (through for example the use of a common procurement entity, lead authority or piggy backing arrangement) may well be an effective way to encourage the spread of new technologies and solutions. Providing incentives for contracting authorities to include the possibility of other authorities accessing such contracts, and clarifying the legal framework for doing so, would encourage greater take-up.

35. Are there in your view obstacles to an efficient aggregation of demand/joint procurement? Do you think that the instruments that these Directives provide for aggregating demand (central purchasing bodies, framework contracts) work well and are sufficient? If not, how should these instruments be modified? What other instruments or provision would be necessary in your view?

Language is a particularly problematic barrier for cross border joint procurement, which may be at least partially tackled by certain standardised tender elements available in all languages, or a reduction in the administrative requirements of tendering. The Commission could consider providing services such as publishing documents in a second language or translating tender documents. A number of aspects are not standardised, for example, prequalification systems and recognition of certificates. The revision of the Directives should consider how instruments such as standardisation, mutual recognition and eProcurement systems may best be harnessed for the purpose of joint procurement.

Central purchasing bodies and framework agreements are relatively well established as means of carrying out procurement, although with varying rates of use across the Member States. Both approaches to purchasing can help in the aggregation of demand and the efficiency of procedures. Central purchasing bodies in some Member States have been at the vanguard of GPP/SPP implementation. However in many cases the scale of purchases carried out, and the need to meet a broad variety of needs from users or clients, inhibits the ability of these bodies to apply strong environmental and social criteria, and to consider innovative solutions. Framework agreements on the other hand, can be and are used effectively by contracting authorities to award multiple contracts. Frameworks allow a

degree of flexibility which can be conducive to progressively introducing higher requirements and working with suppliers to implement these.

One area in which frameworks are currently underutilised is to allow contracting authorities to opt in to contracts which have been tendered by others, for example through a lead authority or piggy-backing arrangement. ICLEI considers that the possibility for doing this could be made clearer in Article 32 of Directive 2004/18/EC as well as in the standard form of notice for establishing a framework agreement.

37. Do you think that joint public procurement would suit some specific product areas more than others? If yes, please specify some of these areas and the reasons.

For highly standardised products (such as medical devices, stationery or office IT equipment) joint procurement is considerably easier to organise, and the extra administrative burden of organising co-operation is often outweighed by the potential cost savings. It may also be applicable for highly innovative technologies, where public authorities are interested in exploring the boundaries of the market. In these cases, the pooling of expertise and aggregation of demand has significant potential to generate optimal procurement outcomes, including the application of high standards of environmental performance.

The high purchase price for some ‘green’ products in certain countries compared to the non-green alternative is also a good reason for opting for joint public procurement. Cases have shown that economies of scale, i.e. a group of organisations buying a larger amount of products, can reduce the overall costs of a product.

STRATEGIC USE OF PUBLIC PROCUREMENT IN RESPONSE TO NEW CHALLENGES

“How to Buy” in order to achieve the Europe 2020 objectives

Describing the subject matter of the contract and the technical specifications

62. Do you consider that the rules on technical specifications make sufficient allowance for the introduction of considerations related to other policy objectives?

Existing legal framework

The rules on technical specifications are set out in Article 23 and Annex VI of Directive 2004/18/EC (the Public Sector Directive) and Article 34 and Annex XXI of Directive 2004/17/EC (the Utilities Directive). In addition, the ECJ has interpreted the application of the Treaty principles to technical specifications in a number of cases.² Contracting authorities are given the choice between formulating technical specifications in terms of the required characteristics of the supplies, works or services, in terms of performance or functional requirements, or by a combination of these two approaches. A non-exhaustive list is given in Annexes VI and XXI of the characteristics which may be used to define technical specifications. This includes, *inter alia*, levels of environmental performance, design for all requirements and production processes or methods.

² Notably Case 45/87 *Commission v Ireland*; Case T-345/03 *Evropaiki Dynamiki v Commission*; Case C-6/05 *Medipac-Kazantzidis AE v Venizelio-Pananio*

Where a performance-based or functional specification is applied, contracting authorities may refer to technical standards or specifications as a means of presuming conformity with the stated requirements. An overriding obligation which applies to the use of either type of specification is that of ensuring that tenderers are afforded equal access to the contract in question and that unjustified obstacles to competition are not created. The scope of this obligation, as interpreted in Case T-345/03,³ may include taking positive steps to place tenderers in a position of equality, as well as avoiding discriminatory or overly restrictive specifications.

Strategic importance

The rules regarding technical specifications are of particular significance for contracting authorities wishing to pursue environmental or social policy objectives via procurement. Technical specifications define the subject matter of a contract. They thus shape the nature of the competition as well as delimiting the scope of award criteria and contract performance clauses which may be applied.⁴

Furthermore, they are a frequent source of challenges from unsuccessful tenderers, as they often form the basis on which tenders are rejected. For these reasons, contracting authorities exercise particular care when developing technical specifications and assessing compliance.

GPP and SPP applications

Existing successful approaches to GPP and SPP typically involve the application of technical specifications which incorporate requirements related to the performance, materials, design or production processes and methods of the goods or services being tendered.

For example, the EU GPP criteria for office IT equipment include requirements relating to energy performance, design to facilitate memory upgrading, and the amount of mercury contained in LCD screens.

In many cases, minimum requirements relating to environmental characteristics will be set out in the specifications, with further marks available at award criteria stage for performance above the prescribed minima.

Problems

Issues which have arisen in relation to the application of specifications aimed at implementing environmental or social policy objectives include:

- *To what extent must technical specifications relate to characteristics of goods, services or works which are discernible in the finished 'product'?*

This poses a particular problem in determining the scope to include requirements related to production process or methods, as authorised under the Directives. It is common practice, for example, to specify food which has been produced using organic farming methods or electricity which is produced from renewable sources. In both cases, the 'finished product' is identical to one which has been produced by an entirely different production method. It is

³ *Evropaïki Dynamiki v Commission, ibid*

⁴ Award criteria must be linked to the subject matter of the contract as defined in the technical specifications. Contract performance clauses must not introduce a material amendment to the contract as tendered. The role of award criteria and contract performance clauses in pursuing policy objectives is discussed *infra* in the response to Question 72.

not possible to distinguish between renewable and non-renewable electricity on any basis other than knowledge of the production process applied.⁵

However it is not clear to what extent this approach of distinguishing between otherwise identical products based on production processes is also applicable in respect of social characteristics, for example relating to the labour conditions under which a particular good or service is produced.⁶

The acceptable scope of technical specifications related to production processes and methods in respect of service contracts is also somewhat unclear. The Directives specifically contemplate the inclusion of production processes and methods in technical specifications for service contracts.⁷ As the production process for services often relies primarily or even solely upon human labour, the conditions under which this labour is rendered may be considered a key part of a technical specification for that service. Otherwise the possibility of specifying production processes and methods in respect of service contracts as set out in Annex VI, paragraph 1 (b) of Directive 2004/18/EC would be meaningless.

- *If contracting authorities choose to apply specifications which require a higher level of environmental or social performance than that provided for in harmonised EU legislation, or which correspond to national standards which are higher than those applicable in other Member States or countries with equivalent rights, do these risk being identified as measures with equivalent effect to quantitative restrictions as prohibited under Article 34 of the Treaty?*

The freedom of contracting authorities to define what it is that they wish to purchase, and apply technical specifications which are appropriate to that purpose, is well established. However certain questions have arisen regarding the interaction between the application of procurement specifications by contracting authorities which pursue specific policy objectives and the general prohibition on quantitative restrictions or measures having equivalent effect under Article 34 of the Treaty.

In particular, two recent decisions of a Swedish administrative court⁸ regarding the application of specifications aimed at ensuring animal welfare in the context of a procurement procedure for meat found that these constituted unjustified restrictions on the free movement of goods.

- *To what extent must contracting authorities be capable of verifying at a technical level compliance with requirements in specifications relating, e.g. to restriction of hazardous substances? Is it possible to rely upon supplier self-declarations in this regard?*

⁵ Given the impossibility of distinguishing between electricity produced from renewable and non-renewable sources by examining the final product, the acceptability of a technical specification for renewable electricity (as was approved by the Court in Case 448/01 *EVN and Wienstrom*) cannot arise from the fact that this relates to the environmental characteristics of the finished product, but must arise from the legitimacy of specifying a production process or method.

⁶ Doubt has been cast upon the acceptable scope of technical specifications which relate to the labour conditions under which a good or service are produced by the seeming exclusion of this possibility in the recent *Buying Social Guide* (see page 32).

⁷ Annex VI, Article 1(b) of Directive 2004/18/EC and Annex XXI, Article 1(b) of Directive 2004/17/EC

⁸ Judgments 2216-2221-10 and 2921-2922-10 of the administrative court in Gothenburg (Kammarrätten)

Technical specifications often relate to matters which are outside of the capacity of the contracting authority to verify at first-hand. On a practical level, recourse is often had to third-party certification, conformance with technical standards or self-declaration by the supplier or service provider.

Verification raises a number of potential issues regarding non-discrimination and equal treatment, in particular where the contracting authority relies upon self-declaration regarding compliance with technical specifications. The absence of robust and transparent verification techniques threatens to undermine the credibility of environmental and social requirements which are included in tender specifications. Specific means of verification for environmental and social criteria are considered further in our response to Question 78.

Recommendations

62a) *The scope for including requirements regarding the production process in the technical specifications for all types of contract should be clarified. This is a vital tool for contracting authorities to be able to control the environmental and social impact of contracts awarded by them. It is argued that the existing text of Annex VI of Directive 2004/18/EC and Annex XXI of Directive 2004/17/EC, read in conjunction with ECJ case law, does not preclude technical specifications which address e.g. the labour conditions of workers involved in producing goods or services.⁹*

However the argument advanced in certain guidance documents regarding the need for production processes or methods to be discernible in the “finished product” has cast doubt upon the ability to specify production processes and methods. Annex VI of Directive 2004/18/EC and Annex XXI of Directive 2004/17/EC should be amended to include the following in the non-exhaustive list of characteristics which may be prescribed by technical specifications:

*“...production processes or methods **including the environmental or social conditions of production.**”*

62b) *Where contracting authorities are found to comply with the requirements set out in the Procurement Directives regarding technical specifications, a presumption should exist that they have also complied with Treaty obligations regarding free movement of goods and services. This could be achieved by including, in the text of the Directives, a specific reference to the relevant articles of the Treaty, for example in Article 23(2) of Directive 2004/18/EC:*

*“Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition. **Technical specifications formulated in accordance with this section shall be presumed to comply with the principles set out in Article 34 of the Treaty on the functioning of the European Union.**”*

⁹ The argument is sometimes made that considerations such as labour conditions are best addressed via contract performance clauses. However there are several shortcomings to this approach, which are discussed in the response to question 74 *infra*.

62c) *A new paragraph should be added to Article 23 of Directive 2004/18/EC and Article 34 of Directive 2004/17/EC outlining the requirement for compliance with technical specifications to be capable of verification by reference to objective means where possible, and in other cases by reference to a supplier declaration which is legally binding. A **non-exhaustive list of means of verifying compliance with technical specifications** should be included.*

63. Do you share the view that the possibility of defining technical specifications in terms of performance or functional requirements might enable contracting authorities to achieve their policy needs better than defining them in terms of strict detailed technical requirements? If so, would you advocate making performance or functional requirements mandatory under certain conditions?

In practice, many contracting authorities employ specifications which are based partly on performance or functional requirements and partly on technical prescriptions (e.g. standards). The development of robust specifications, as noted above, can be challenging. Performance-based specifications may offer advantages in stimulating the market to deliver innovative, environmentally and socially sound solutions. However it is difficult to envision a mandatory requirement for such an approach which could adequately reflect the diversity of situations in which such specifications are, and are not, appropriate.

Changes to the Directives which limit the freedoms currently available to contracting authorities to conduct procurement processes in the manner which is best suited to their needs must be carefully scrutinised, and are only recommended in this submission where the benefits are unambiguous.

It is argued that the above recommended amendments to the provisions on technical specifications would, in themselves, encourage contracting authorities to make greater use of functional and performance-based specifications. This is because they would clarify the scope for including environmental and social considerations in such specifications, and reduce the legal uncertainty currently associated with specifications targeting high levels of performance and the verification process.

Recommendations

63) *The application of functional or performance-based specifications under certain conditions should not be made mandatory under the Directives. The application of such specifications in appropriate conditions should be encouraged by:*

- i) *reducing the legal uncertainty associated with specifying levels of performance related to environmental and social characteristics ,in line with recommendations 62a and 62b above; and*
- ii) *reducing the legal uncertainty associated with verification of compliance with specifications, in line with recommendation 62c.*
- iii) *providing guidance on the application and evaluation of performance-based specifications, together with examples of their successful application for different types of contract.*

65. Do you think that some of the procedures provided under the current Directives (such as the competitive dialogue, design contests) are particularly suitable for taking into account environmental, social, accessibility and innovation policies?

Some contracting authorities we have worked with have emphasised the value of the competitive dialogue procedure – however its use across the EU-27 remains at low levels. Competitive dialogue allows contracting authorities to discuss more complicated contracts in detail and enables them to clarify various aspects. As innovation, social and environmental aspects can bring an added element of complexity, competitive dialogue provides an opportunity for contracting authorities and economic operators to look into them and discuss any uncertainties.

The fact that a dialogue can be initiated can have a lot of value, for example to ensure that the solution (i.e. product/service) being developed really meets the need of the contracting authority. Competitive dialogue also allows contracting authorities to discuss uncertainties regarding the legal and financial set-up of the contractual relationship. It is of particular value if the contracting authority has undertaken a market analysis and finds that a solution to their needs or a product or service they would like is not readily available.

However, there is a lack of understanding by both contracting authorities and economic operators of how competitive dialogue works and whether they are implementing it correctly or not from a legal perspective. Due to these factors competitive dialogue is underused.

The benefits and drawbacks of competitive dialogue include:¹⁰

- The procedure provides a structured tendering approach with more flexibility to develop innovative solutions, allowing for a constructive dialogue between contracting authorities and economic operators.
- The process requires skilful managing and often needs more time than other processes. The process is seen as extremely resource heavy, as a dedicated project team will need to meet regularly and for extended periods of time. In addition external advice may be needed in the preparatory phase of the procedure.
- The process of progressively refining the proposals during the dialogue phase requires considerable investment for the economic operators concerned. It is advisable to foresee an adequate reimbursement.
- Suppliers may see a risk that their ideas, solutions or other business secrets will be revealed to their competitors. Contracting authorities, in their effort to achieve the best final results, could transfer ideas between participants of the dialogue – or even use them to determine the basis on which final proposals will be invited.

Recommendations

Competitive dialogue can be a useful mechanism for contracting authorities to take into account environmental, social, accessibility and innovation policies and its use should be encouraged. Considerable time is required, there is a lack of understanding of how to use it and what the legal implications are. Training and guidance on how it can be used and

¹⁰ Clement, S; Tepper, P; Acker, H; Seebach, D; Geuder, A; Adell, A. (2009) "Driving energy efficient innovation through procurement: A practical guide for public authorities". The SMART SPP consortium, c/o ICLEI – Local Governments for Sustainability.

providing examples of the value of competitive dialogue would ensure the further uptake of this mechanism.

More specific recommendations regarding potential revisions to the Directives are provided in the response to question 66.

66. What changes would you suggest to the procedures provided under the current Directives to give the fullest possible consideration to the above policy objectives, whilst safeguarding the principles of non-discrimination and transparency ensuring a level playing field for European undertakings? Could the use of innovative information and communication technologies specifically help procurers in pursuing Europe 2020 objectives?

Existing legal framework

Under the 2004 Directives contracting authorities may choose between the open and restricted procedures, and in certain circumstances may employ the competitive dialogue or negotiated procedure with or without prior publication of a contract notice. Design contests or dynamic purchasing systems may also be employed to award specific types of contract. Accelerated versions of the procedures are also available in circumstances where urgency renders the normal timescales impracticable.

The 2004 Directives also introduced a number of measures aimed at enhancing the use of electronic tendering, in particular the reduction in timescales where such methods are used and the possibility of conducting electronic auctions.

GPP and SPP applications

As discussed above, the competitive dialogue procedure offers considerable scope for implementing social and environmental policy objectives, as well as those related to innovation. Given the advantages which have been identified in applying this procedure, particularly in terms of allowing more innovative environmental and social solutions, its further use is to be encouraged.

The role of ICT in enhancing the transparency, efficiency and openness of tender procedures should also be recognised. Applications range from electronic publication of notices through to real-time data allowing verification of renewable electricity generation.

ICT can specifically enable the implementation and monitoring of GPP and SPP, for example by assisting suppliers to anticipate and meet these criteria and allowing contracting authorities to verify compliance. While the existing procedures do not prevent e.g. the inclusion in databases such as eCERTIS of information regarding environmental technical capacity requirements, this has not been their primary focus to date.

One of the most valuable contributions of ICT in this area is its ability to facilitate the gathering of information about procurement procedures carried out. As GPP/SPP policies are implemented at local, national and European level there is an increasing need for authorities at all levels to monitor its implementation. A mandatory field in contract notices and/or contract award notices indicating the social and environmental criteria which an authority applies would assist in the gathering of information related to GPP/SPP.

Problems

At present, use of the competitive dialogue procedure is limited,¹¹ with uneven distribution across the Member States. One of the reasons for this may be that it is a relatively new procedure, introduced under the 2004 revision. As highlighted in the response to question 65, contracting authorities may be unaware of the procedure, or uncertain of how to implement it. They may also consider that it is more time and resource-consuming to conduct than the open or restricted procedures.

National implementations of the competitive dialogue also vary, and Member States were given the choice under Directive 2004/18/EC of whether to allow this procedure to be used. Finally, the restriction in Article 29 of Directive 2004/18/EC which states that competitive dialogue may only be used “in the case of particularly complex contracts...where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract” also effectively limits the application of this procedure.

Many contracting authorities are still far from the reality of paperless tendering and the accessibility and interoperability of ICT systems poses challenges. The approach recommended is to build incrementally on existing successful applications such as TED at EU level, while removing barriers to the development of more advanced and innovative applications such as PEPPOL.¹²

Recommendations

66a) *The competitive dialogue procedure could become a key tool enabling more effective interaction between purchasers and suppliers and leading to the award of contracts which deliver innovative environmental and social solutions. While uptake of this procedure across the EU-27 has been limited to date, addressing the barriers to broader uptake is preferable to introducing an entirely new procedure.*

The following revisions to Directive 2004/18/EC could help encourage broader uptake:

- *Removing the restrictions placed upon the competitive dialogue, to make it generally available in the same manner as the open or restricted procedures.*
- *Removing the provision allowing Member States to choose whether or not to implement this procedure in national law.*

66b) *Annex VII of Directive 2004/18/EC, Annex XIII of Directive 2004/17/EC and the relevant standard form notices should be amended to require the inclusion of information regarding the environmental and social criteria applied by contracting authorities. This will enable the collection of data related to GPP/SPP implementation, as well as increasing the visibility and transparency of these criteria.*

¹¹ See Burnett, Michael (2009) *Using competitive dialogue in EU public procurement-Early trends and future developments*. EIPAScope, 2009 (2)

¹² Pan-European Public Procurement Online (www.peppol.eu)

67. Do you see cases where a restriction to local or regional suppliers could be justified by legitimate and objective reasons that are not based on purely economic considerations?

There are contradictory or conflicting aspects when it comes to EU economic, social and environmental policy. An example of this is having a preference to purchase regional or local products and services. It can often make sense to purchase regionally or locally with regards to job creation, promotion of SMEs and meeting, for example, CO₂ reduction targets. At a local and regional government level, representing a large proportion of overall procurement spend, the purchase of local goods and services can often be seen as a way to boost the local economy. Currently this is not legally possible under the Directives and Treaty, inasmuch as it violates the principles of free movement and non-discrimination. In a ruling by the ECJ in the *Du Pont de Nemours* case¹³, it was concluded that procurement measures directed at regional development may not be authorised under state aid rules, if they violate the rules on free movement.

At the same time however regional development is seen as a policy objective by the European Commission and Member States. A recent study has shown that direct cross border procurement accounts for less than 2% of contracts awarded.¹⁴ Although indirect cross border procurement accounts for a larger share, it is clear that if the sole purpose of the Procurement Directives were to promote the free movement of goods and services between Member States, this policy would need to be considered a failure. Fortunately this has never been the sole purpose of the Directives, and the principles of transparency, value for money and fairness have been equally important in the development of procurement law and practice.

ICLEI considers that in the context of the current revision, the obligation and ability of contracting authorities to pursue environmental and social objectives should be given the same value within the Directives as the above-mentioned principles. In some cases, this may involve derogation from the free movement principles, where there is compelling evidence that this would be an effective and efficient use of procurement. One area which suggests itself for such a derogation is the procurement of food and drink by public authorities. The environmental impact of such contracts is high, and the use of local suppliers can considerably reduce this. A full impact assessment of a derogation in this area would reveal the trade-off between environmental and social benefits associated with local food sourcing and the potential reduction in competitiveness.

Recommendations

- 67) *An impact assessment should be carried out to determine whether a derogation from the full application of the Procurement Directives to food and drink purchased by public authorities, or other areas with a high environmental and social impact, would be an effective means of addressing the impact of such contracts. Other options should also be considered in the assessment, such as the introduction of common criteria or the relaxation of procedures for such contracts.*

¹³ Case C-21/88, *Du Pont de Nemours*

¹⁴ Monti, M (2010) *A New Strategy for the Single market: At the Service of Europe's Economy and Society*. Report to the President of the European Commission, José Manuel Barroso

68. Do you think that allowing the use of the negotiated procedure with prior publication as a standard procedure could help in taking better account of policy-related considerations, such as environmental, social, innovation, etc.? Or would the risk of discrimination and restricting competition be too high?

Existing legal framework

The negotiated procedure may be used by contracting entities within the meaning of Directive 2004/17/EC and, in certain exceptional circumstances, by contracting authorities under 2004/18/EC. Subject to the general requirements to ensure transparency, non-discrimination and equal treatment of tenderers, the negotiated procedure offers greater flexibility in awarding contracts. In particular, it is possible to engage with tenderers in successive stages to determine price and contract terms.

GPP and SPP applications

The negotiated procedure may offer certain advantages to public authorities implementing GPP/SPP, as they can examine the effect of environmental and social requirements on cost and other factors more freely. Subject to the requirement for equal treatment, it can allow for requirements to be refined in the context of negotiations, potentially leading to higher levels of GPP/SPP performance.

Problems

The overall success of a negotiated procedure is dependent upon the negotiating skills and experience of the awarding authority. In addition, this procedure lacks the transparency associated with the open, restricted and competitive dialogue procedures. Some contracting authorities may experience difficulty in switching modes between more regulated procedures and the negotiated.

Recommendations

The competitive dialogue represents a kind of 'halfway house' between the restricted and negotiated procedures. It introduces elements of flexibility and allows for direct engagement in successive rounds with tenderers, but preserves the finality of the sealed-bid. Allowing for variations in the way negotiated procedures are carried out in different countries, the competitive dialogue would appear to be a good alternative which preserves transparency and integrity in procurement.

68) *The negotiated procedure with prior publication of a contract notice should continue to be available to public authorities only in exceptional circumstances under Directive 2004/18/EC. The competitive dialogue procedure should be developed as a viable alternative to the negotiated procedure allowing in particular for environmental and social considerations to be taken into account in successive stages of engagement with operators.*

Requiring the most relevant selection criteria

69. What would you suggest as useful examples of technical competence or other selection criteria aimed at fostering the achievement of objectives such as protection of environment, promotion of social inclusion, improving accessibility for disabled people and enhancing innovation?

Existing legal framework

The criteria for qualitative selection of tenderers are set out in Articles 45 to 48 of Directive 2004/18/EC. Case law has emphasised the exhaustive nature of this list, as well as the need to avoid duplicated or misplaced assessment of selection criteria at award stage.¹⁵

GPP and SPP applications

Under Article 45, operators may be excluded where they have been convicted of grave professional misconduct (which may, under national law, arise in connection with environmental or social breaches) or have not fulfilled obligations relating to the payment of social security obligations. Under Article 48, the ability to assess previous experience and the educational and professional qualifications of staff may be relevant for identifying organisations with appropriate environmental and social capacity and competence. For works and services contracts, tenderers can be asked to indicate the environmental management measures they will be able to apply.

Problems

The grounds listed above allow for some assessment of environmental and social considerations when selecting tenderers. However the nature of the exhaustive list provided means that certain considerations which may be important in determining operators' environmental and social capacity have been left out. The objective of the selection criteria prescribed should be to allow contracting authorities to make a comprehensive assessment of operators' abilities relevant to the contract, without putting in place obstacles to effective and fair competition.

Where the contract at hand includes specific environmental and social requirements, assessment of operators' technical capacity and competence to fulfil such requirements will be indispensable at selection stage. The grounds for qualitative selection should thus explicitly mention this possibility.

Article 48(2) f on environmental management measures states that ability to apply such measures can be assessed "only in appropriate cases." It is argued that this is an unnecessary and confusing limitation, as Article 44(2) already provides:

"The extent of information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract."

¹⁵ See, in particular, Case C-532/06, *Emm. G. Lianakis AG v Dimos Alexandroupolis*

Where environmental management measures are related and proportionate to the subject-matter of the contract it should not be necessary to apply a further test regarding their “appropriateness.”

Furthermore, the exclusion of **supply** contracts from this provision seems unjustified given the high environmental impacts which such contracts may have and the effectiveness of environmental management measures in addressing these impacts.

Recommendations

The following should be included in the permitted criteria for qualitative selection of tenderers:

- *The **technical capacity and competence of operators related to specific environmental or social requirements associated with the contract being tendered.***
- *The provision under Article 48(2) f allowing contracting authorities to assess operators’ ability to apply environmental management measures should be extended to **include supply contracts, and the limitation to “appropriate cases” removed.***

Using the most appropriate award criteria

70. The criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objectives. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts/ some specific sectors/ in certain circumstances):

70.1.1. to eliminate the criterion of the lowest price only;

70.1.2. to limit the use of the price criterion or the weight which contracting authorities can give to the price;

70.1.3. to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer? If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives more effectively and guarantee a level playing field and fair competition between European undertakings?

Existing legal framework

Contracting authorities are given the choice between awarding contracts based on lowest price only or most economically advantageous tender (MEAT). Where MEAT is chosen, various criteria can be applied which are linked to the subject matter of the contract.

A number of important cases have addressed the scope of criteria which may be taken into account under MEAT, as well as the requirements for transparency, non-discrimination and equal treatment in their formulation and application.

GPP and SPP applications

The *Concordia*¹⁶ case established the possibility of taking environmental considerations into account in award criteria, a provision which was later adopted in the 2004 Directives. Award criteria are one of the key tools for authorities to influence the market and adopt more sustainable solutions.

While most existing GPP/SPP approaches emphasise the use of most economically advantageous tender, for certain contracts this may not be appropriate. For example, where a technical specification for a standardised product prescribes a very high level of environmental performance, applying the award criterion of lowest price may make sense.

However for contracts in high-impact sectors such as construction, vehicles and electricity the introduction of a third type of award criterion which explicitly acknowledges the environmental impact of these sectors should be considered. Current EU Directives¹⁷ already create obligations on contracting authorities in respect of procurement from these sectors, and the creation of a separate award basis for contracts within the Procurement Directives themselves which reflects these obligations may simplify their application by contracting authorities. In particular, a step in this direction has already been taken with the implementation of the Clean Vehicles Directive.

Problems

While life-cycle costs and environmental impact can be taken into account where the MEAT award criterion is applied, take up of these approaches by contracting authorities remains relatively low. As stated previously, changes to the Directives which limit the freedoms currently available to authorities must be approached with caution. However in specific sectors the environmental impact of contracts awarded may justify creating a new award criterion which would require contracting authorities to apply a life-cycle costing approach which includes environmental externalities.

The mandated use of an award criterion based on “most environmentally and economically advantageous tender” (MEEAT) could help ensure that the environmental impacts associated with contracts in the most deleterious sectors are addressed.

MEEAT would include the requirement that total life-cycle costs be considered in the financial assessment of bids, while contracting authorities would be free to specify other qualitative sub-criteria relevant to the subject matter of the contract. Where existing harmonised approaches to life-cycle costing and monetisation of environmental impacts have been developed in sectoral legislation, these could be referred to in the Directives.

Recommendations

70) *A new award criterion based on “most environmentally and economically advantageous tender” (MEEAT) should be mandated under the Directives for application in specified sectors. The suggested sectors are construction, vehicles and*

¹⁶ Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin kaupunki*

¹⁷ Specifically *Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles*; *Directive 2010/31/EU on the Energy Performance of Buildings* and *Directive 2009/28/EC on the promotion of the use of energy from renewable sources*.

electricity however an impact assessment would need to be conducted to determine the appropriate and effective scope for such an award criterion.

The application of MEEAT would require that the entire life-cycle, including environmental externalities of the relevant goods, services or works be considered in the cost evaluation of tenders. An exemption would exist where such costs are already reflected in the purchase price of the goods, services or works. Contracting authorities would be free to specify other sub-criteria in accordance with Article 53 of Directive 2004 and the relevant case law of the Court of Justice.

71. Do you think that in any event the score attributed to environmental, social or innovative criteria, for example, should be limited to a set maximum, so that the criterion does not become more important than the performance or cost criteria?

This would imply a limitation on the existing freedom of contracting authorities to choose the weightings they apply to award criteria.¹⁸ Such intervention is not warranted by any overriding policy objective, as the realisation of value for money may be achieved through a variety of scoring systems.

Recommendations

It is not recommended to limit the weight or score which can be attributed to environmental, social, innovative or other criteria.

72. Do you think that the possibility of including environmental or social criteria in the award phase is understood and used? Should it in your view be better spelt out in the Directive?

Existing legal framework

Article 53 of Directive 2004/18/EC and Article 55 of Directive 2004/17/EC explicitly include environmental considerations in the non-exhaustive list of award criteria which may be applied in assessing MEAT. In addition, the recitals to both Directives indicate that contracting authorities and entities:

“...may use criteria aiming to meet social requirements, in response in particular to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.”

GPP and SPP applications

Award criteria, as stated above, are a key tool for implementing social and environmental objectives in procurement. They allow contracting authorities to assess and compare the quality of proposals put forward by tenderers, and encourage the market to deliver more sustainable solutions. In many cases award criteria can be used in combination with technical specifications which set minimum levels of environmental or social performance, in order to reward better and more innovative proposals.

¹⁸ As confirmed, in particular, by the Court in Case C-448/01 *EVN AG & Wienstrom GmbH v. Austria*

Problems

Although the recitals to the Directives acknowledge the possibility of including social award criteria, the example given relates solely to the end application of the goods, services or works being purchased.

There is no case law from the European Court of Justice on whether social characteristics, such as the employment conditions of those responsible for producing a product or service, may also be considered as award criteria. It is however clear from the case law of the Court that not every award criterion need confer a direct economic advantage on the contracting authority.¹⁹

The European Commission has argued (notably in the *Buying Social* Guide) that labour conditions of workers involved in delivering a works contract are not linked to the subject matter of the contract, and therefore cannot be taken into account as award criteria.²⁰ It is not clear whether this is also considered to apply to service contracts, where the subject matter of the contract might consist solely of such human labour.

Recommendations

Articles 53 of Directive 2004/18/EC and Article 55 of Directive 2004/17/EC should be amended to include specific reference to social considerations in the non-exhaustive list of criteria which may be taken into account to determine the most economically advantageous tender.

73. In your view should it be mandatory to take life-cycle costs into account when determining the most advantageous offer, especially in the case of big projects? In this case, would you consider it necessary/appropriate for the Commission services to develop a methodology for life-cycle costing?

As outlined above, for contracts in high-impact sectors it should be mandatory to take life-cycle costs into account when determining the most advantageous offer. In the light of the financial crisis procurers across Europe need to be well informed about current and future costs of products and services. For the majority of product and service groups, including works contracts, a higher purchase price referring to environmental, social and quality standards corresponds to savings in maintenance, operation and end-of-life costs. Overall, contracting authorities can save money, taking into account the full life-cycle of purchases.

LCC is a key driver to allow for a resource efficient economy that no longer builds on “end-of-pipe” solutions but on concepts taking into account the whole value chain, e.g. as referred to in the concept “cradle-to-cradle”. Obstacles include the splitting of costs between different departments or authorities still need to be solved – the European Commission could support contracting authorities by taking on this challenge and making LCC mandatory, for those sectors where this is justified by the environmental impact of contracts over their lifetime.

With regards to the question if a new methodology would be required, we believe that there are sufficient LCC methodologies currently being used by many contracting

¹⁹ Case C-513/2009 *Concordia Bus Finland Oy Ab v Helsingin kaupunki*, at para 55 (the Helsinki bus case)

²⁰ *Buying Social: a Guide to Taking Account of Social Considerations in Public Procurement* (2010) at page 23

authorities. One example is the LCC-CO₂ assessment tool developed by the SMART SPP partnership (<http://www.smart-spp.eu/guidance>). Experience shows that such tools need to be introduced in stages and continuous training is required. The tools may also need to be adapted to the local, regional and national needs on a case-by-case basis and to the product/service being purchased.

A key aspect connected to LCC are CO₂ emissions. It is recommended that a closer look into the linkages is undertaken and that suitable data sets and methodologies for the calculation of embedded CO₂ emissions throughout the production process of products and services are provided. The work on ISO 14068 goes in the right direction to make the use of criteria regarding embedded CO₂ emissions verifiable in tendering, taking into account the principles of equal treatment, transparency and non-discrimination.

Imposing proper contract performance clauses

74. Contract performance clauses are the most appropriate stage of the procedure at which to include social considerations relating to the employment and labour conditions of the workers involved in the execution of the contract. Do you agree? If not, please suggest what might be the best alternative solution.

Existing legal framework

Article 26 of Directive 2004/18/EC and Article 38 of Directive 2004/17/EC allow for the inclusion of social and environmental considerations in the conditions for performance of contracts. Such conditions must be compatible with Community law and indicated in the contract notice or tender documents.

Contract performance clauses must not be disguised technical specifications, selection or award criteria – they cannot be assessed as part of the contract award process, however tenderers can be asked to confirm compliance.

Case law indicates that changes to contract performance clauses during the lifetime of a contract may lead to the requirement for a new tender procedure.²¹

GPP and SPP applications

Contract performance clauses play a vital role in underlining the GPP and SPP commitments made by tenderers and providing for appropriate remedies in case of breach. They may also be used to incentivise contractors to deliver higher levels of environmental or social performance, for example by linking progressive improvements to bonus payments. However it is argued that contract performance clauses are most effective where they relate to matters which have already been examined as part of the tender process, either in the technical specifications, selection or award criteria.

Problems

²¹ See Case C-496/99 P *Commission v CAS Succhi di Frutta*, paras. 115-121 and Case C-454/06 *pressetext Nachrichtenagentur*

Where a contractual condition does not form part of the assessment of tenders (other than by a simple declaration of compliance), tenderers may not in fact take adequate account of these requirements in their tendered price and delivery terms. As contracting authorities are not generally able to negotiate on price, the delivery of the contract may be compromised.

On a practical level, contracting authorities lose the opportunity to verify whether economic operators have the technical and professional capacity to deliver their requirements as part of the procurement process. Additional costs may be incurred in monitoring compliance with these provisions throughout the lifetime of the contract.

'Hiding' social requirements in contract conditions limits the opportunity for market-led innovation in this area, as tenderers will not be rewarded in the competition for innovation related to social requirements. In particular, this may exclude SMEs which are better equipped to compete on these factors than on cost or other traditional criteria.

Many contracting authorities also lack access to appropriate and rigorous contract clauses aimed at delivering social requirements, and the means of verifying compliance with such clauses.

Recommendations

The possibility to include social and environmental conditions in contract performance clauses should be maintained. The ability of contracting authorities to examine capacity to deliver such requirements, and to award marks in the tender process for social performance, should also be established clearly within the Directives.

75. What kind of contract performance clauses would be particularly appropriate in your view in terms of taking social, environmental and energy efficiency considerations into account?

Contracting authorities apply a wide range of approaches to contracting, and a number of distinct approaches are also discernible in the field of GPP/SPP. In some cases, contract terms are standardised, however specific commitments made by the supplier in the course of tendering may be incorporated by reference in the contract. In other cases, detailed clauses including performance indicators, penalties and bonuses linked e.g. to environmental performance are applied.

Due to the diversity of legal systems in operation across the EU, as well as the diversity in administrative practices, it is difficult to recommend "one size fits all" clauses which could be mandated or even recommended for use. However the move towards more harmonised SPP/GPP approaches is considered to have certain advantages in terms of encouraging market adaptation and ensuring that investments made to meet more stringent requirements have EU-wide benefits.

In sectors where certain mandatory minimum requirements already apply in respect of procurement (office IT equipment, vehicles, timber) the development of common contractual terms underlining these requirements may be valuable. However it is suggested that the application of any such common contractual terms should be voluntary, as these may not be appropriate to all contracts.

Recommendation

The Commission should consider the development of common contractual terms in sectors where certain binding minimum requirements apply in respect of procurement (office IT equipment, vehicles, timber). These terms however should be voluntary in application.

Verification of the requirements

77. Do you think that the current EU public procurement framework should provide for specific solutions to deal with the issue of verification of the requirements throughout the supply chain? If so, which solutions would you propose to tackle this issue?

Yes, there is a need to have measures to verify the requirements throughout the supply chain. Suitable verification is one of the key obstacles for the implementation of reliable and effective social and environmental criteria.

78. How could contracting authorities best be helped to verify the requirements? Would the development of "standardised" conformity assessment schemes and documentation, as well as labels facilitate their work? When adopting such an approach, what can be done to minimise administrative burdens?

Possible solutions to be considered in the context of a full impact analysis include:

- The potential adaptation for the purposes of procurement of the Environmental Technology Verification (ETV) scheme.²² ETV is a voluntary scheme developed by the European Commission under the Environmental Technologies Action Plan (ETAP) to generate independent and credible information on new environmental technologies, by verifying that environmental performance claims put forward by technology developers and vendors are complete, fair and based on reliable test results. Building on the success of similar schemes established in the United States and Canada, the objectives of the EU ETV are threefold:
 - To help developers and vendors, especially SMEs, provide objective and reliable evidence on the environmental performance of new environmental technologies arriving on the market, in order to convince first investors and customers on the merits of these technologies;
 - To support technology purchasers (public or private) in basing their decisions on sound information, widely recognised as scientifically valid and acceptable as proof of evidence in tendering and purchasing procedures;
 - To facilitate the implementation of public policies and regulations by providing citizens, regulators and decision-makers with solid information on the level of performance achievable by new environmental technologies ready for the market.

²² EC (2004): Communication from the Commission to the Council and the European Parliament, 'Stimulating Technologies for Sustainable Development: An Environmental Technologies Action Plan for the European Union', COM(2004)38 final, Brussels 1.2.2004.04, ialavbale at:http://ec.europa.eu/environment/etap/files/com_2004_etap_en.pdf

There may be potential to set up independent verification schemes in Europe to provide an option for public authorities to use them and gain insight into the environmental impacts of products and services which is not otherwise available to them.

- A voluntary database of third party assessment / verification certificates could be considered. The primary objective of a third party assessment / verification certificate is to authenticate information being made available by economic operators (concerning the product it produces for instance) and claims of having achieved a specified level of performance. A database would allow economic operators to promote their products and services where these have been tested that they have tested. The database would also provide an opportunity for public authorities and other organisations to see what economic operators are claiming their products do.
- Further development of Ecolabels should be considered and in particular the introduction of independent third party testing which could be linked to bullet point 2 above. Some of the labels rely on self declaration by economic operators. Independent third party verification would ensure better credibility.

Link with the subject matter / with the execution of the contract

ICLEI would like to respond to the passage at pages 39-40 of the Green Paper, which suggests:

- i) That there is a requirement for all elements of the procurement process, including technical specifications and contract execution clauses, to be related to the subject matter of the contract;
- ii) That 'relaxation' of this requirement might enhance the ability of contracting authorities to pursue horizontal objectives such as those set out in the Europe 2020 strategy;
- iii) That the requirement for a link with the subject-matter of the contract acts as a "guarantee of purchases at the best price...as it makes sure that no undue economic advantage is conferred on economic operators through the award of public contracts."

As these statements form the premise for questions 79-82, it is important to consider to what extent they are true. With regard to the first statement, the basis in legislation or case law for this is not clear. The rules regarding technical specifications and contract performance clauses have been discussed in earlier sections of this submission, and do not include an explicit requirement of a link to the subject-matter of the contract. In the case of technical specifications, this would be redundant, as they themselves define the subject matter of the contract. With regard to contract performance clauses, there is little case law regarding the acceptable scope of such requirements, with the exception of that addressing material changes to contracts.²³

The requirement for a link to the subject-matter of the contract, in relation to award criteria only, was discussed at length by the court in *Concordia*. There appears subsequently to have been some discussion of this as a general test for the legitimacy of various procurement actions, although the precise basis for this development is not clear. It is argued that the test as set out by the Advocate General and Court in *Concordia*, and further developed in the

²³ See e.g. Case C-496/99 P *Commission v CAS Succhi di Frutta*, Case C-454/06 *pressetext Nachrichtenagentur*

EVN Wienstrom case, is an appropriate basis for determining the acceptability of award criteria only. It is not a relevant consideration to determine the legitimacy of specifications or contract performance clauses.

With regard to technical specifications and contract performance clauses, the ability of contracting authorities to develop and apply requirements which meet their needs – however broadly defined – should not be interfered with. Rather the Commission could clarify that the test of a subject-matter link (as defined and applied by the Court) is limited to award criteria, and that it should not be seen in any event as a limitation on the ability of contracting authorities to pursue the Europe 2020 or other policy objectives – provided these are done in a fair and transparent manner in accordance with the specific rules set out in the Directives.

Regarding the third statement quoted above, it is not clear on what basis it can be argued that a requirement to the link to the subject matter of the contract acts as a guarantee of purchases at the best price or effectively forestalls undue economic advantage being conferred on certain economic operators. The example cited of requiring solar heating for offices in supply contracts is somewhat misleading, as this would likely fall afoul of the general requirement for technical specifications to afford equal access to tenderers and not have the effect of creating unjustified obstacles to competition (set out in Article 23 of Directive 2004/18/EC)

Given that questions 79-82 appear to follow from the above statements, it is not considered appropriate to respond to them. However any steps taken in the context of the revision to clarify the existing freedoms which contracting authorities enjoy in this area are to be welcomed.

Recommendation

The Commission should clarify that the test for a link to the subject matter of the contract, as defined by the Court of Justice, does not apply to technical specifications and contract performance clauses. Specific amendments which facilitate the inclusion of environmental and social considerations in technical specifications, selection criteria and contract performance clauses should be considered in line with the recommendations set out for Questions 62, 69, 74 and 75.

What to buy in support of Europe 2020 policy objectives

84. Do you think that further obligations on "what to buy" at EU level should be enshrined in policy specific legislation (environmental, energy-related, social, accessibility, etc) or be imposed under general EU public procurement legislation instead?

With any type of obligations on "what to buy" it is always important to consider what the implications are of restricting the freedom of contracting authorities to conduct procurement processes and whether there are clear benefits.

Depending on the type of product or service and the complexity of the environmental, energy-related, social or accessibility aspect being considered it may make sense for further obligations on "what to buy" at EU level to be enshrined in sector-specific legislation. A

successful example of this approach is the Energy Star Regulation.²⁴ Its success is partly due to the nature of the product group covered and the fact that introducing minimum energy efficiency standards, for example, is easier than addressing other environmental or social aspects.

It may be that both obligations through sector-specific legislation and general EU public procurement legislation are required and that common mandatory minimum requirements for a core set of products and services should be imposed under general EU public procurement legislation, while for more complex products and services sector-specific legislation is developed.

A core set of common mandatory minimum requirements could be selected based high impact sectors and/or highly standardised products. An impact assessment should be undertaken to decide on the most relevant products and services. These common mandatory minimum requirements for products would need to be applicable throughout Europe (e.g. take into account geographical issues) and be easy to update on a regularly basis.

The common mandatory minimum requirements should include both social and environment aspects where possible and not just take into account individual issues e.g. environmental, energy-related, social, accessibility issues etc.

Having common mandatory minimum requirements for a core group of products imposed under the procurement directives rather than sector-specific legislation will:

- accelerate the shift towards a more a resource efficient and low-carbon economy;
- help avert distortions of the single market;
- reduce the administrative burden for economic operators and for public administrations;
- provide a framework for Member States to develop minimum mandatory requirements;

Setting obligations, other than a core group of products and services, generally would not work if imposed under general EU public procurement legislation. Reasons for this include but are not limited to:

- difficult to accommodate the views of all 27 Member States and agree on minimum mandatory requirements;
- Member States are currently at very different levels of implementation and it would be difficult to reconcile the needs of pioneering Member States wishing to go further with those that would like lower common mandatory minimum requirements
- Differing geographical, climatic and market conditions

At the very least the general EU public procurement legislation should refer to obligations that already exist such as the Clean Vehicles Directive and, if possible, refer to the GPP toolkit and the voluntary common GPP criteria which currently exist for 18 product / service groups.²⁵

²⁴ Regulation No 106/2008 of the European Parliament and of the Council on a Community energy-efficiency labelling programme for office equipment (recast version)

²⁵ See http://ec.europa.eu/environment/gpp/gpp_criteria_en.htm

86. Do you think that obligations on what to buy should lay down rather obligations for contracting authorities as regards the level of uptake (e.g. of GPP), the characteristics of the goods/services/works they should purchase or specific criteria to be taken into account as one of a number of elements of the tender?

86.1. What room for manoeuvre should be left to contracting authorities when making purchasing decisions?

86.2. Should mandatory requirements set the minimum level only so the individual contracting authorities could set more ambitious requirements?

Depending on the product and service being purchased and the environmental and social aspect that is being considered all three ideas outlined could have a role.

It can be useful at a political level to have targets for the level of uptake for GPP, but in practice targets need to be well thought through and only set if it is known they will have an impact. Otherwise general targets can become meaningless. Setting targets also requires broad stakeholder input, particularly from the business sector.

It would be more difficult to set obligations for the characteristics of goods/services/works that contracting authorities should purchase other than for those products where the environment and social impact is obvious and quite straight forward. Developing obligations for the characteristics would be seen by many contracting authorities as being too prescriptive as to what a contracting authority should buy.

Mandatory requirements should only set the minimum level so the individual contracting authority can set more ambitious requirements. This approach would recognise that public authorities have different levels of ambitions and priorities. It also allows for the fact that one set of mandatory requirements is unlikely to satisfy and be appropriate for all Member States i.e. the minimum standards may be too low in one country but too high in another.

As with the Commission's GPP Toolkit, core criteria with recommendations for more comprehensive criteria could be developed. The core criteria act as a minimum mandatory level, with the comprehensive criteria providing guidance for those contracting authorities that want to go further.

It is important to highlight that the weakness of having a minimum level of mandatory requirements is that agreeing this with all MS is likely to mean that the level could be quite low. This in turn would not push the market for sustainable products as much as other mechanisms could.

As highlighted in question 84 with any type of obligations on "what to buy" it is always important to consider what the implications are of restricting the freedom of contracting authorities to conduct procurement processes and whether there are clear benefits.

87. In your view, what would be the best instrument for dealing with technology development in terms of the most advanced technology (for example, tasking an entity to monitor which technology has developed to the most advanced stage, or requiring contracting authorities to take the most advanced technology into account as one of the award criteria, or any other means)?

In our opinion, the pre-procurement phase is key to drive innovative solutions onto the market and important for contracting authorities tendering for advanced technologies. Experience shows that suppliers and manufacturers of advanced technologies are ready to engage with contracting authorities before tendering, using appropriate and legally-sound formats and mechanisms such as those developed by the European project SMART SPP (<http://www.smart-spp.eu>). A success factor is the institutionalisation of such early market engagement processes to become a regular activity and to allow public authorities to adapt their planning timeframes for tendering.

Monitoring (market sounding) of advanced technologies can be shared between contracting authorities and product/service providers. Experience shows that such pre-procurement activities contribute to the better understanding of needs from both sides.

In combination with the use of award criteria which contribute to the assessment of advanced technologies, the application of performance-based specifications and a complete LCC-CO₂ assessment approach, public procurement can make a strong contribution to boost advanced technologies.

88. The introduction of mandatory criteria or mandatory targets on what to buy should not lead to the elimination of competition in procurement markets. How could the aim of not eliminating competition be taken into account when setting those criteria or targets?

Any minimum requirements should only be developed and implemented following an impact assessment and broad stakeholder consultation.

-END-