

EPSU response to the European Commission Green Paper on the modernization of EU public procurement policy: Towards a more efficient European Procurement Market

Introduction

- 1) In 2010 EPSU produced a joint response to the evaluation launched by the Commission of the 2004 procurement Directives, as part of trade union/NGO network on public procurement. The paper "*Evaluation of the impact and effectiveness of EU Procurement legislation and policy: Joint Initial Contribution to DG MARKET background paper of 26.05.2010,*" November 2010 <http://www.epsu.org/a/7046>¹ argues that public procurement should contribute to the realisation of a 'social market economy', as called for by the Lisbon Treaty² in order to ensure sustainable progress for society as a whole. The joint contribution sets out the different policy areas where we think procurement should be actively making a difference. EPSU's response to the Green Paper reflects this joint contribution and also incorporates the 'key joint messages' agreed in the network in response to the Green Paper (see annex). These additional comments focus on public services and quality of work.
- 2) EPSU regrets that the European Commission has chosen not to publish its evaluation of the Directives before launching the Green Paper, and that it is carrying out the evaluation in parallel – rather than prior - to the consultation (page 6). The former Internal Market Commissioner Frits Bolkestein argued that the current Directives "*will open up all the benefits of the Single Market to guarantee the competitiveness of companies, best value for money for taxpayers and improved quality of public services*"³. The text introducing the 2011 consultation says the aim is "*to achieve a more competitive public procurement market – and save more public money.*" However, we are lacking an evaluation of the current Directives.

(1) Questions linked to the scope and purpose of the Directives (Q 1-13, 29-33)

- 3) The Lisbon Treaty strengthens the responsibility of the EU to ensure **universal access to quality public services**. This demands universality/equal treatment, transparency, impartiality, public control, stability and continuity of service. These public service principles run counter to the logic of competition. Public services are often complex and require 'joined-up' policies that go across different services. They reflect 'general interest objectives' and

¹ Available in English, French, German, Spanish, Swedish and Russian.

² The Lisbon Treaty, stipulates that the EU should be 'based on a highly competitive Social Market Economy'. As well as the Protocol on Service of General Interest (SGI) which calls for "*a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights*" in public services and Charter of Fundamental Rights, the Treaty contains a "horizontal social clause" (Article 3). This states "*In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.*"

³ See PR 10.5.2000

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/461&format=HTML&aged=1&language=EN&guiLanguage=en>

public authorities retain the ultimate responsibility for provision. Public procurement procedures are not well-suited to supporting integrated service delivery and the setting up and functioning of local and regional networks based on cooperation. One of the key issues for EPSU is to ensure that **public authorities should have wide discretion in deciding how public services are delivered**; i.e., by the authority itself 'in-house', including through a legal entity which it owns or controls and through intercommunal service arrangements. The case law of the European Court of Justice has underlined that a public authority has the right to perform the public interest tasks using its own resources and without tendering and that it may do so in cooperation with other public authorities. As mentioned in a recent report carried out for the European Parliament, "*The new structure of the Treaties clearly strengthens self-administration on a local and regional level.... This new model is linked with a change of focus from formal aspects of the entities' organisation to material aspects of the common fulfillment of public tasks.*"⁴

- 4) Some public authorities even doubt whether 'in-house' service provision is allowed under EU law at all. **Public procurement rules should support a wide interpretation of the notion of 'in-house'** to include inter-municipal cooperation but also cooperative arrangements with non-profit organisations (e.g., providing social services see q 97) that meet certain general interest requirements. This would be in keeping with the objective of '*fulfillment of public tasks*' mentioned in the EP report. We would certainly not want B services subject to the full procurement directives (q 4, 5). Nor would we wish to see specific rules for procurement of social services based on a narrow definition of these services and without protection for the general interest and public services obligations (q 97.2). EU procurement policy should address also the 'pre' and a 'post' procurement phases, as well as alternatives' to procurement, in other words the 'good governance' framework.
- 5) The Green Paper reminds us that procurement rules are necessary to enforce commercial discipline on public purchasers who are not like, "*managers of a private business who bear the risks of losses and ultimately bankruptcy, and are directly controlled by market forces*" (page 6). This statement is astonishing in light of the recent crisis in the 'rational' financial services market. It also ignores the risks that public authorities bear when using public procurement to provide public services, and that the responsibility ultimately lies with the public authority. **Public authorities must reflect on whether public procurement is an appropriate way to provide a particular service** and should not only make public purchases "*in the most rational, transparent and fair manner*" (page 6). This is only possible if they monitor and evaluate the quality and cost of services that they are providing to citizens (as well as the costs that may arise from services not being provided).
- 6) A study for the European Commission in 2006 (based on the 'old' procurement Directives but still relevant) noted the detrimental effect of the procurement process for less standardised goods and services in particular. This deterioration was most pronounced for complex requirements and for small public authorities.⁵ **Public authorities need to be aware of the disadvantages, and limits, of public procurement.** EPSU and the local authority organisation CEMR have noted that, "*Balanced information regarding the "pros" and "cons" of different ways of delivering public services is lacking, and indeed biased against public sector delivery. Public authorities need to be in a better position to monitor and evaluate the different ways of providing local services and to assess the different risks involved, for example regarding the difficulties of defining quality criteria in public contracts, and indeed problems that arise from fragmented procurement processes.*"⁶ The Commission should support Member States to improve the quality of public services, focusing on desired objectives and outcomes

⁴ See <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>

⁵ Evaluation of the public procurement directives Markt/2004/10/D by Europe Economic, 15 September 2006.

⁶ CEMR and EPSU conclusions adopted on 24 June 2008 on the report "*Supporting the reform process in local and regional government: Joint evaluation of the experience in different forms of service provision.*" <http://www.epsu.org/a/4160>

rather than processes. However, as illustrated for example in the recent European Commission Communication on Public-Private Partnerships (PPPs) and comments in the Single Market Act, the Commission seeks to actively promote PPPs despite evidence of its higher costs and failures.⁷

- 7) The way public procurement works in practice in different countries reflects not just the procurement rules but also the **‘institutional framework’, including the capacity of public administration, democratic accountability, development of social dialogue and applicability of collective agreements**. This framework ensures public procurement takes place in an open, transparent and democratic manner. From our experience, the key question is not so much the level of detail in the rules but the extent to which quality outcomes are built into the procurement processes.
- 8) To summarise, **there are good reasons why public authorities may chose to provide public services ‘in-house’** and not put them out to tender. EU rules on procurement should not undermine this and should clearly respect the right of local, regional and national public authorities to provide public services directly to citizens. This means EU rules should:
- Be ‘without prejudice’ to the right of public authorities to provide services ‘in-house’. By ‘in-house’ we include public-public cooperation (q 29-33) and cooperation with non-profit making providers who meet general interest criteria (q 97).
 - Should clearly ‘exclude’ public-public cooperation from procurement rules (q 33)
 - Not oblige or encourage compulsory competitive tendering, or give rights to economic operators to initiate tendering processes (q 45)
 - Not promote Public-Private Partnerships (PPPs) (q 17)
 - Take account of national frameworks that influence the way public procurement takes place in practice (q 14- 21)

(2) Questions on the contribution of public procurement to ‘societal goals’, and in particular quality of work (q 23-25, 39 – 43, 62-82.4)

- 9) The Green Paper acknowledges the potential contribution that public procurement can make in support of “*common societal goals...*” and to “*ensuring the best possible conditions for the provision of quality public services*”; and that this may lead to “*more efficient public spending in the long-term, for example by moving the focus from lowest initial price to lowest life-cycle cost*” (page 5). However, the Green Paper proposes this as an ‘add-on’ to other policy objectives, and secondary to the primary objective of equal treatment of potential bidders. At times too, the Green Paper is ambiguous in its interpretation of ‘social’ objectives, referring only to social inclusion and not the more ambitious objectives of social and territorial cohesion and equality.
- 10) The European Commission seems to reduce the concept of ‘equal treatment’ to that of a ‘level playing field’ for bidders. In our view not safeguarding employment conditions and standards distorts competition by discriminating against good employers. **Equal treatment of workers – including equal pay for equal work – is an important principle** and supports businesses that compete on quality, excellence and innovation. Quality of services goes hand in hand with quality of work. Too often lowest price reigns in public procurement, and the interpretation of *most advantageous tender for the contracting authority* is far too narrow. In the economic and financial crisis, budget pressures are pushing even more authorities to award for lowest price rather than assessing wider benefits across the life of the contract and the long term benefits of adopting a more socially responsible procurement policy. **Furthermore, financially quantifiable costs are not always reliable, or a good basis for making a procurement award, not least because they ignore intangibles and externalities**. Public contracts going over budget is a common occurrence across the EU, especially in Public Private Partnership (PPP) contracts. There are countless examples of contracts let on lowest price which fail to

⁷ See EPSU <http://www.epsu.org/r/237>

deliver the quality of service or goods required, and have to be terminated and re-contracted. EU institutions⁸ and Member State fail to take account of these failures ignore the considerable costs incurred and the loss to citizens of contracts that are poorly provided or in some cases, not provided at all.⁹

11) There is considerable evidence that **'lowest price'** public procurement **exerts downwards pressures on costs, which in turn impact on wages and working conditions and ultimately on service quality. This also undermines** 'equal pay for equal work' principles.

For example:

- Danish trade union organisations recently examined the 15%-20% cost savings achieved by outsourcing local care services. The unions found that the difference was because the new firms used staff with lower levels of training, relied more on part-time workers, and paid no overtime.¹⁰
- Evidence from labour market placement and professional training services in Germany shows that public contracts offered on 'lowest price' entailed a general downwards spiral where considerably lower wages were paid, the number of precarious and fixed-term contracts strongly increased, and wage schedules (for new contracts or personnel entering the labour market) were downgraded. In other words, cost cutting at the expense of workers and reducing the quality of the service provided – clearly a false economy.
- The Norwegian union Fagforbundet discovered that private contractors in the health sector in Oslo had been exploiting their employees, in February 2011. The employees at Ammerudlunden elderly home had been working for wages below the agreed rate, with double shifts and were given accommodation in the basement of the elderly home. Because Norway has ratified ILO Convention 94¹¹ (which stipulates that all tenders apply 'no less favourable conditions of employment' than are in force at the local level, authorities had a legal basis to cancel the contracts with the contractor, Adecco. Local authorities around Norway are now investigating their contracts with Adecco, and several local authorities have found reason to end their contracts. This shows that ILO Convention 94 is an effective instrument for employment protection. The Green Paper is published at a time when the effect of the ECJ cases, Laval, Rueffert and Luxembourg have added uncertainty in areas of public contracting and have further undermined the potential of public contracts to include social criteria. The rulings also discourage the ratification and application of ILO Convention 94. The European Commission should encourage Member States who have not ratified ILO 94 to do so, and to apply it at all levels of government. The Green Paper recognises (but exaggerates) obligations arising from international trade law but is completely silent on social obligations set out in international law. We are still waiting for concrete action to uphold and encourage such instruments and to reverse the negative impact of these judgments.
- A Swedish waste company active in Norway hired Polish workers through a multinational, temporary agency at pay and conditions far below the Norwegian collective agreement. When the Polish workers questioned the situation they were

⁸ We would like to know to what extent the EC's Advisory Committee on public procurement has addressed these issues. "The Committee's task shall be to assist the Commission, either at the Commission's request or on its own initiative, in assessing the economic, technical, legal and social aspects of public procurement..." See <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1987/D/01987D0305-19871117-en.pdf>

⁹ Public authorities need to carefully scrutinise tenders and share information about 'costs'. A recent example from Billund, Denmark shows the importance of this. Here the municipality recently rejected tenders to run a public school when claims that this would save 7 million DKK were reduced to 2,5 million DKK and then to no savings at all...

¹⁰ [see for more details FOA \(DK\)](#)

¹¹ Labour Clauses in Public Contracts Convention. The Convention is ratified by 59 countries including several EU Member States : Austria (1951), Denmark (1955), France (1951), Finland (1951), Belgium (1952), Spain (1971), Italy (1952), the Netherlands (1952) and Cyprus (1960)

replaced by Estonian workers. Unions exposed this attempt to circumvent the collective agreement and sought to organize and represent the different workers and ensure that they are protected against exploitation.¹²

- Research in the UK underlined the clear link between working conditions and the quality of public services. Both school meals¹³ and hospital cleaning¹⁴ have been subject to competitive tendering since the 1980s. At first the contractors were viewed as being highly efficient, operating with half as many staff and with much lower overall costs. However, over time it became apparent the quality of the services was eroded. The cumulative effect of this was disastrous. The UK slipped down towards the bottom of the European league for dealing with hospital-acquired infections and UK children became obese on unhealthy school meals (and the kitchen staff became deskilled as their jobs became more about reheating than cooking). The government was forced to invest substantially in both services, and to improve the training, skills and working conditions of workers providing the services.
- In October 2004, the UK National Audit Office found that for clerical and manual workers in soft facilities Management services transferred to a private sector contractor through a public private partnership (PPP) or a private finance initiative (PFI) deal, the average real pay had fallen since the transfer.¹⁵

12) These examples illustrate failures of competition to produce efficient, high quality services. Public money should not be used to support companies undermining and undercutting local labour terms and conditions, standards, job security, and undermining individual or collective labour rights. Contracting authorities need to clearly set out their policies and principles before they enter any procurement exercise. The example of the UK Greater London Authority (GLA) is excellent: It cites national and local policy objectives as a context for procurement and covers the full range of sustainability issues that are to be addressed.¹⁶ The EU procurement rules should integrate this approach.

13) To summarise, EU procurement rules should underpin quality of work objectives. In particular, EPSU would like to stress:

- Employment conditions must be integrated fully into the procurement process, not just dealt with in the execution phase, i.e., also the 'subject-matter' and technical specifications (see annex 'joint key messages') (q 74)
- Public authorities need to have the tools to monitor and evaluate the implementation of contracts. Observance of collective agreements provides evidence of the quality of employment conditions (q 77, 78)
- The 'lowest price' option should be removed as a procurement option (q 70.1.1.)
- that public bodies should be entitled to require that the continuity of employment relations are safeguarded when staff are transferred to new employers as a result of procurement (q 39)
- public authorities should not merely safeguard minimum employment terms and conditions. Public authorities should be entitled to require that tenderers apply relevant collective agreements or other relevant employment conditions which are valid and applicable, in the jurisdiction where the service will be performed. The EU rules should oblige public authorities at all levels to apply the provisions of ILO Convention 94 (q 88)
- The EU should facilitate the exchange of data on bidders who should be disqualified from tendering (q 23-25, 104 -108)

¹² See http://www.epsu.org/IMG/pdf/Resyme_Asker-saken_2011.pdf

¹³ Davies, S (2005) *School meals, markets and quality*, UNISON

¹⁴ Davies, S (2005) *Hospital contract cleaning and infection control*, UNISON

¹⁵ NAO 2008, Protecting staff in PPP/PFI deals. , They surveyed 58 contractors working on 43 PPP/PFI deals with more than 15,400 staff transferring from public to private sector. The study looked at pay at the time of transfer and again in October 2004, an average of 3.3 years into the contracts. and http://www.nao.org.uk/publications/0708/protecting_staff_in_ppp-pfi.aspx

¹⁶ See GLA <http://legacy.london.gov.uk/gla/tenders/docs/responsibleprocurementpolicy.pdf>

(3) Key questions

- 14) EPSU considers that the EU public procurement rules (q 113, 114) should:
- (1) Respect the right of public authorities to provide public services ‘in-house’ (including through public-public cooperation). The EU must remain neutral as regards the financing, organisation and delivery of public services and not promote public procurement as *the* means to provide public services.
 - (2) Strengthen the social (sustainable) dimension to public procurement so that it is a tool to promote social, environmental and economic convergence upwards, as argued in the joint ‘key messages, in all sectors of the economy. This means removing the ‘lowest price’ option and ensuring that sustainability criteria are included in the different stages of the procurement process, including in the subject-matter and technical specifications.
 - (3) Be drawn up following full involvement of EPSU and other stakeholders. We point out that public procurement is relevant for many sectors and that Decision 98/500/EC stipulates that each European sectoral social dialogue committee, for the sector of activity for which it is established ‘*shall be consulted on developments at Community level having social implications*’¹⁷.

¹⁷ http://ec.europa.eu/governance/impact/commission_guidelines/docs/ia_guidelines_annexes_en.pdf

Annex

RESPONSE TO THE GREEN PAPER ON THE MODERNISATION OF EU PUBLIC PROCUREMENT POLICY: TOWARDS A MORE EFFICIENT EUROPEAN PROCUREMENT MARKET com(2011)15/4

KEY DEMANDS AND MESSAGES

Informal network for Sustainable Development in Public Procurement¹⁸

INTRODUCTION

These demands follow on from the paper *“Evaluation of the impact and effectiveness of EU Procurement legislation and policy: Joint initial contribution to DG MARKT’s background paper of 26.05.2010, November 2010.”*¹⁹

EU procurement rules should promote good quality employment and the provision of quality services, goods and works in Europe and abroad. When public authorities buy sustainable products and services this contributes to the EU objectives of sustainable development and the EU 2020 strategy. ‘Value for money/best value’ in public contracting is not achieved by going for lowest price. It is achieved only when wider social, ethical and environmental benefits are given clear weight in public procurement decisions. Currently this is not the case.

The EU Treaties do not just establish an Internal Market, they also establish clear objectives for the internal market to broadly promote sustainable development. The Treaty on the European Union provides:

*“[The Internal Market] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. . . .”*²⁰

¹⁸ Supporting organisations:

EFBWW – European Federation of building and woodworkers www.efbww.org Contact: Werner Buelens

EFFAT – European Federation of Food Agriculture and Tourism www.effat.org Contact: Kerstin Howald k.howald@effat.org

EPSU – European Public Service Unions www.epsu.org Contact – Penny Clarke pclarke@epsu.org

FERN – www.fern.org Contact Veerle Dossche veerle@fern.org

GMB – British Trade Union (Multi-sector) www.gmb.org.uk Contact: Kathleen Walker Shaw kathleenwalkershaw@gmbbrussels.be

SOLIDAR – www.solidar.org Contact – Conny Reuter conny.reuter@solidar.org

UNISON – British Public Sector Trade Union www.unison.org.uk Contact: Margie Jaffe

EFTA - European Fair Trade Association }

FLO - Fairtrade Labelling Organizations International }

WFTO - World Fair Trade Organization }

Contact for 3 organisations above: Sergi Corbalán, Fair Trade Advocacy Office Coordinator www.fairtrade-advocacy.org
corbalan@fairtrade-advocacy.org

UNI Europa – www.uniglobalunion.org Contact Laila Castaldo - laila.castaldo@uniglobalunion.org.

EMF –European Metal Workers www.emf-fem.org Contact: Judith Kirton-Darling Kirton-Darling@emf-fem.org

TUC – British Trades Union Congress www.tuc.org.uk Contact: Tim Page tpage@tuc.org.uk

EMCEF European Mine, Energy and Chemical Workers ‘Federation’ <http://www.emcef.org/> Contact: Reinhard Reibsch rreibsch@emcef.org

SETEM rvives@setem.org NETWORKWEAR www.networkwear.eu Contact: Ramon Vives Xiol
Ramon Vives rvives@setem.org

Ensie www.ensie.org Contact Patrizia Bussi info@ensie.org.

¹⁹ www.epsu.org/a/7046 in English, French, German, Swedish, Spanish and Russian.

²⁰ Article 3.3, Treaty on the European Union (hereinafter ‘TEU’).

Public procurement, as an integral part of the Internal Market, can and should contribute to these aims. Indeed, this is required by the Treaty on the Functioning of the European Union, which provides:

“In defining and implementing its policies and actions, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.”²¹

“Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.”²²

Furthermore, the Treaty recognises the principle of local and regional self-government (Article 4) and the broad discretion that public authorities have to organise their activities according to local circumstances and preferences.

The Procurement Directives comprise the overarching legal framework for public procurement within the EU. The EU Treaties require this framework to be designed to foster, rather than inhibit or obstruct, the ability of Member State, local, and regional governments to advance sustainable development objectives through their public procurement.

All tools that can contribute to achieving sustainable development objectives should be leveraged. Including sustainable development objectives as express objectives for public procurement ensures policy coherence between government purchasing decisions and other government policies and activities. Moreover, sustainable public procurement can play an important role in influencing markets generally to better serve sustainable development objectives. Therefore, the EU should encourage governments and contracting authorities to use procurement as a lever to promote sustainable development through employment and skills training, innovation, Fair Trade, social inclusion, and the efficient and sustainable management and use of natural resources.

Accordingly, new EU legislation on public procurement should:

1. Encourage the integration of ‘horizontal objectives’ in a transparent way
2. Recognise that production characteristics can be included as technical specifications
3. Drive standards and quality upwards
4. Allow the quality of the supplier to be taken into account at the selection stage
5. Make compliance and enforcement easier and more effective

KEY DEMANDS & MESSAGES

1. ENCOURAGE THE INTEGRATION OF HORIZONTAL OBJECTIVES IN A TRANSPARENT WAY

*Linked to: Subject matter of tenders
Relevant Green Paper questions: 79 to 82*

Background

Horizontal policy objectives such as quality of work, clean air, Fair Trade, and the efficient and sustainable management and use of natural resources are of equal value to the functional objectives of a specific purchasing decision by public authorities. The EC has a narrow interpretation of what

²¹ Article 9, Treaty on the Functioning of the European Union (hereinafter ‘TFEU’)

²² Article 11, TFEU.

can be linked to the ‘subject-matter’ of a contract under the current EU rules. For example, the recent EC Guide ‘Buying Social’ (p.23) states that the labour conditions of workers building a school cannot be part of the subject-matter.

It is important that public authorities can purchase products and services that include these sustainability characteristics and also that they can state this openly in the subject-matter of the tender, rather than having to include social considerations through the back door, in a non-transparent way. Therefore, public authorities should be able to describe the subject-matter that they seek to purchase as, for example, “tables made from sustainable wood” or “a school building built in accordance with a high standard of labour conditions.” The details of what comprises “sustainable wood” or “a high standard of labour conditions” should then be specified in the technical specifications.

Key messages

- Public authorities should be allowed to reference their horizontal procurement objectives in the subject matter of the contract.

2. RECOGNISE THAT PRODUCTION CHARACTERISTICS CAN BE INCLUDED AS TECHNICAL SPECIFICATIONS

Linked to: Technical specifications of tenders

Relevant Green Paper questions: 62, 63, 74, 82.1, 82.2, 82.3, 82.4

Background

Whether a product or service is produced through a sustainable production process—including social sustainability considerations—is essential to any comprehensive assessment of whether or not a product or service contributes to or hinders sustainable development objectives. However, the EC interpretation of the current Procurement Directives treats most aspects of the production process—including in particular social considerations—as if they were not “characteristics” of the product or service. Instead, such considerations, if they are recognized at all, are relegated to the performance conditions of the contract.

Whether or not a product or service has been sustainably produced, however, is rightly considered a characteristic of the product which can be compared and contrasted with products or services that have not been sustainably produced. Where a public authority has specified that it wants not just a ‘widget’ but a ‘sustainable widget’, it is appropriate to include criteria that distinguish a sustainable product or service from a non-sustainable product or service as part of the technical specifications. Indeed, many of the factors contributing to the sustainability or non-sustainability of a product or service can *only* be evaluated at the production stage and cannot be captured by technical specifications limited to the functional performance of the product or service. The “green electricity case”²³ has become the classic example of how and why production characteristics—and not just performance characteristics—can and should be included as technical specifications. The Commission has sought to describe green electricity as an “invisible” performance characteristic of green electricity, rather than a production characteristic—even though the performance or function of green electricity is indistinguishable from ‘grey’ electricity.²⁴ In truth the only distinction between green and grey electricity is in their production processes and the consequences of their respective production processes on broader sustainable development concerns. The “invisibility fallacy” propounded by the Commission must be rejected, and production characteristics given equal status

²³ Case C-448/01, EVN AG v Austria [2003] ECR I-14527 (“EVN-Wienstrom”).

²⁴ See *Buying Green!: A Handbook on Environmental Public Procurement* (Luxembourg: Official Publications of the European Communities, 2004) at section 3.4.2.

with functional characteristics in technical specifications.

Moreover, the Commission's current practice of relegating such criteria to contract performance clauses is not only insufficient to ensure compliance with sustainable procurement objectives. It is also inefficient, since compliance with contract performance clauses can only be checked after the tender has already been awarded. This is inefficient because, even where the provider is found to be noncompliant, it is difficult and costly to cancel the contract.

It is also highly questionable whether supply-chain social considerations can be linked to the performance of a contract between the public authority and the product or service provider. In the case of supply contracts, the goods at issue are generally not made-to-order (as is implied by the inclusion of production characteristics in contract performance clauses), but rather will be from warehoused stocks or otherwise obtained through established supply chains. Accordingly, where sustainability criteria are included as technical specifications, the bidder should be required to demonstrate, prior to the contract being awarded, that it is in fact able to provide goods compliant with the criteria specified. Likewise, in the case of service contracts, recognizing concerns such as the quality of work and the labour conditions of the workers employed to deliver the contract as technical specifications rather than contract performance conditions means that the bidder will need to demonstrate that it has in place the appropriate employment conditions to be able to satisfy the criteria specified, rather than merely that it will do so in the course of delivering the contract, if awarded. This will also serve the aim of sustainable procurement policies to shift markets towards greater sustainability in general, because bidders seeking to win public contracts for sustainable goods and services would be wise to shift towards more sustainable production and service delivery systems generally in order to be viewed most favourably for such contracts.

The Commission's current interpretation also goes against the three pillars of sustainable development (economic, environment and social) being interlinked and mutually reinforcing.

Key messages

- Consideration of the sustainability of a product's or service's production process is essential to the consideration of how sustainable the product or service is.
- Whether a product or service is sustainably produced is appropriately considered as a characteristic of the product or service being contracted, rather than as an aspect of the contract performance. Therefore, it is important to include social considerations relating to the production process of the product or service being procured in the technical specifications of the tender.
- The interpretation of what comprises "product characteristics" should not be limited to "functional characteristics" or "physical characteristics," but should also include "production characteristics." The *Wienstrom* ("Green Electricity") case confirms that technical specifications should include production characteristics.
- Who does the work, how they are paid and under what conditions are also production characteristics.
- Public authorities should be able to note, in the technical specifications, the types of evidence that can be provided to demonstrate compliance with the sustainability criteria specified. In the case of the procurement of goods, this could include reference to relevant, transparent and robust certification schemes with reliable verification systems as examples of goods that would be found compliant with the sustainability criteria specified. Collective agreements can provide evidence of the sustainability of employment conditions.

3. DRIVE STANDARDS AND QUALITY UPWARDS

Linked to: Evaluation of products and services and the award criteria
Relevant Green Paper questions: 70, 71, 72, 73, 82.3.1

Background

By allowing authorities to choose the cheapest products or services, current EU public procurement legislation allows them to ignore the best value offer, as the price of a product or service often does not reflect best value, especially in the long term. The quality of a service determines the effectiveness of that service. Moreover, allowing purchases to be based solely on the lowest price often encourages purchases that result in significant negative externalities, including lowering labour standards as well as environmental degradation. For labour intensive services in particular, such as social services, quality is very clearly linked to pay and working conditions. Research has demonstrated that this clear link between working conditions and quality. In the UK for example, both school meals²⁵ and hospital cleaning²⁶ were subject to competitive tendering since the 1980s. At first the contractors were viewed as being highly efficient, operating with half as many staff and with much lower overall costs. However, over time the quality of the services was eroded. The cumulative effect of this was disastrous. The UK slipped down towards the bottom of the European league for dealing with hospital-acquired infections and children became obese on unhealthy school meals (and the kitchen staff became deskilled as their jobs became more about reheating than cooking). The Government was forced to invest substantially in both services, and to improve the training, skills and working conditions of workers providing the services.

EU public rules should encourage public authorities to be leaders in sustainable consumption, rather than hindering it. Also, requiring public authorities to factor in the environmental and social impacts of their purchases encourages policy coherence between public authorities' purchasing decisions and numerous EU and Member State policies and action plans aimed at promoting sustainable development. In addition, an approach based on quality is more likely to encourage innovation in services, which can, sometimes lead to long-term efficiencies.

Key messages

- Remove the “price only” option. In principle, there should only be one option for the award of contracts, i.e the “Sustainably Most Advantageous Rated Tender” – SMART. This will drive markets to supply more socially, economically, and environmentally sustainable products, including for goods and services for which sustainability indicators are not yet clearly defined.
- Factoring in sustainability criteria ensures that multiple horizontal values that further sustainable development objectives are achieved, in addition to the functional purpose of the contract.
- When evaluating tenders, public authorities should, unless there is a very good reason not to, consider the economic, social and environmental externalities of products and services they want to buy. In Switzerland, for example, public authorities can base purchases solely on the lowest price in certain specified circumstances only.
- Requiring public authorities to consider the economic, social and environmental externalities of products and services promotes a life-cycle approach to evaluating products and services and should be promoted as a way to ensure resource-efficiency and otherwise reflect the sustainable development objectives of the EU. In addition, other concepts such ‘whole life costs’, ‘resource efficiency’, or ‘global costs’ are increasingly defining public contracting decisions. The European Commission, in consultation with stakeholders, should develop these concepts into a workable legislative framework.

4. ALLOW THE QUALITY OF THE SUPPLIER TO BE TAKEN INTO ACCOUNT AT THE SELECTION STAGE

²⁵ Davies, S (2005) *School meals, markets and quality*, UNISON

²⁶ Davies, S (2005) *Hospital contract cleaning and infection control*, UNISON

Linked to: Selection of bidders

Relevant Green Paper questions: 24, 25, 69, 105

Background

When evaluating tenders, public authorities rarely have information on the “track record” of bidders, namely whether bidders have already breached in the past their commitments in other tenders with other public authorities. Recognizing the added-value of suppliers with sustainable development practices is not possible at this stage under the current directives. At the moment, bidders can be excluded only on a narrow range of conditions (criminal offences, fraud) but this has proven insufficient to avoid problems of compliance with sustainable development (in particular social) issues. In addition to being able to consider whether bidders have a record of breaching prior commitments, public authorities should also be able to consider the demonstrated systems and practices of a bidder that would indicate whether the bidder has demonstrated its capacity to deliver on sustainable development criteria specified in the tender.

Key messages

- Public authorities should be allowed to take into account relevant information “a priori” (during the selection phase) on bidders, including bidders’ prior track record or demonstrated commitment to sustainable development objectives.
 - For example: suppliers that respect collective agreements, have decent employment conditions, invest in training and skills development, employ job seekers or persons with disabilities, should be favoured at the selection stage of the procurement process. To this end, public authorities should be allowed the tools to be able to be informed about past failures to comply with social obligations. Consideration should be given to the development of “quality of work” indicators that would help public authorities in this process.
 - For example: Bidders for contracts for sustainable supplies should be required to demonstrate that their supply-chains can provide goods that meet the sustainability criteria specified.

5. MAKE COMPLIANCE AND ENFORCEMENT EASIER AND MORE EFFECTIVE

Linked to: Compliance and contract performance clauses of tenders

Relevant Green Paper questions: 15, 41, 42, 44, 77, 78

Background

Few public authorities have enough resources to be able to check compliance of tenders once the tender has already been awarded. Since canceling the tender and setting up a new one is too expensive, public authorities can be powerless when faced with a defaulting supplier. Costs of monitoring and ensuring compliance must be factored in to the overall procurement budget.

Key messages

- Provision must be made to ensure that sustainable procurement objectives can be clarified in the subject-matter of the contract and that sustainability criteria can be assessed at the technical specification, award, and selection stages (as recommended above), rather than relegated to the performance clauses. This would make enforcement easier. Transparent and robust certification schemes that fulfill the specified sustainability criteria and have reliable verification systems also support enforcement.
- Contracting authorities should have the tools to effectively be able to implement “ex post” (when the contract has been already awarded, also in the case of sub-contracting) sustainable development considerations, including contract penalties for failing to deliver on sustainable development objectives in accordance with the criteria indicated in the contract.