

# Procuring best value for money

Why eliminating the 'lowest price' approach to awarding public contracts would serve both sustainability objectives and efficient public spending



## 1. Introduction

The award phase of a procurement procedure is where a contracting authority chooses between a number of tenders that ostensibly all meet its minimum requirements (as set out in its technical specifications). There is potential in this phase to reward tenders that go beyond the minimum requirements and/or contribute to strategic policy goals unrelated to the functional objectives of the procurement. By choosing such a tender the contracting authority will get the best value for its money, where value for money is considered over the long-term and from a sustainable development perspective.

Under the Commission's proposal for a new Directive on public procurement (the **Proposal**)<sup>1</sup> contracting authorities would have a choice between awarding a contract on the basis of the 'most economically advantageous tender' (known as 'MEAT') or the new concept of 'lowest cost'.<sup>2</sup>

Unfortunately, as 'lowest cost' may be assessed on lowest price only,<sup>3</sup> the Proposal is not in fact responsive to calls by the European Parliament and others to move away from allowing authorities to simply choose the lowest priced tender.<sup>4</sup>

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<sup>1</sup> Proposal for a Directive of the European Parliament and of the Council on public procurement, 20 December 2011, COM(2011) 896 final.

<sup>2</sup> Article 66(1) states, 'Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting authorities shall base the award of public contracts shall be one of the following:  
(a) the most economically advantageous tender;  
(b) the lowest cost.

Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.'

<sup>3</sup> Ibid.

In this briefing we explain how the current Directive regulating public procurement<sup>5</sup> (the **Current Directive**) and the Commission's approach in the Proposal fail to adequately reflect the requirement under the Treaty on the Functioning of the European Union (**TFEU**) to integrate environmental protection into the definition and implementation of the Union's policies and activities, with a view to promoting sustainable development (the **Integration Principle**).<sup>6</sup> The Treaty's requirement that the Union takes into account adequate social protection and a high level of protection of human health when defining and implementing its policies and activities<sup>7</sup> and the aspirations to improve policy coherence set out in the EU's Sustainable Development Strategy (the **SDS**)<sup>8</sup> also appear to have been forgotten.

We argue that the general elimination of the lowest price option for the award of procurement contracts would be a significant step towards enabling public procurement officials to consistently utilise public procurement to achieve strategic policy goals, such as the promotion of sustainable development. In addition, we question whether the term 'MEAT' adequately communicates that a broad range of strategic factors may be taken into consideration when choosing between the tenders that meet the minimum requirements.

## 2. The issue

Two of the key goals of the revision process are efficient public expenditure and the promotion of sustainable public procurement.<sup>9</sup> Some see these as conflicting principles, but in fact if sustainable development can be promoted alongside the satisfaction of the functional needs of the contracting authority, more value is being squeezed from the taxpayers' money that is being spent. Therefore, value for money needs to be considered from a perspective that looks at the extent to which sustainable development goals can be served by the procurement, taking the whole life cycle of the product or service into consideration.

Given the pressure on public expenditure, it is not surprising that price is a determining factor in contracting authorities' choices. The problem is that the price does not always tell the full story - by looking only at price, the contracting authority may actually be ignoring the best value. Further, focusing on price may lead to procurement choices that are potentially incompatible with wider policy initiatives.

Although the Commission's Proposal changed the terminology used from 'lowest price' to 'lowest cost', as noted above, it is still possible for contracting authorities to resort to the 'lowest price'

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<sup>4</sup> The elimination of the lowest price as the determining criterion was supported by the European Parliament in resolution 2011/2048(INI), on the modernisation of public procurement, 25 October 2011, para 13.

<sup>5</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L134, 30.4.2004, p.114) (as amended).

<sup>6</sup> Treaty on the Functioning of the European Union (2007) (consolidated version), 2010 O.J. C83/47, Article 11.

<sup>7</sup> Ibid, Article 9.

<sup>8</sup> The revised SDS is annexed to document 10917/06 from the Council of the European Union. See the policy guiding principles on page 5.

<sup>9</sup> The Single Market Act announced in April 2011 sets out the aim of revising the public procurement framework 'with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works'. See Commission Communication, COM(2011) 206 final, 13 April 2011, *Single Market Act – Twelve levers to boost growth and strengthen confidence*.

option. Yet, in the Commission's impact assessment it is acknowledged that the status quo would restrict the scope for contracting authorities to use public procurement to achieve strategic goals.<sup>10</sup>

Retaining the option for contracting authorities to simply choose the lowest priced tender means that no attention is paid to the costs that may be directly incurred by the contracting authority during and after the use phase, the consequences for the communities where the resources used for the products and materials originate or the externalities that will impact on global society as a whole.

By retaining the term 'MEAT' to describe the basis for the award, the Proposal may be perpetuating confusion through an apparent emphasis on the economic aspect of value. Instead, there is an opportunity to clarify that contracting authorities may introduce award criteria for which there is no method of calculating costs to society, but which nonetheless serve, for example, to protect the environment and promote sustainable development.

### 3. The Integration Principle means that the lowest price option must be abandoned

The Integration Principle is set out in Article 11 of the TFEU:

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.<sup>11</sup>

Environmental policy cannot be viewed in isolation as environmental issues impact and are impacted by a whole range of policies and activities. The Court of Justice of the European Union (CJEU) has referred to environmental protection as 'one of the essential objectives of the Community'<sup>12</sup> and in various cases has found that by virtue of the Integration Principle such protection must be regarded as an objective which also forms part of other policies.<sup>13</sup> There is no reason why this is not also true of policies relating to the internal market, such as the public procurement directives. Indeed, both the Current Directive and the Proposal expressly recognise that the Integration Principle and the values it promotes is particularly relevant to public procurement.<sup>14</sup> Furthermore, various EU action plans call upon public procurement as a strategic tool to achieve their objectives.<sup>15</sup>

<sup>10</sup> Impact assessment accompanying the proposal for a Directive of the European Parliament and of the Council on public procurement and the proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors, 20.12.2011, SEC(2011) 1585, pg 29.

<sup>11</sup> This was formerly Article 6 of the Treaty of Amsterdam. The requirement to integrate the requirements 'with the view to promoting sustainable development' was added in 1999. The reference to the concept of sustainable development, which was advocated for primarily by Sweden, sought to assemble opposing interests of environmental protection, social progress and economic growth into one formula. The three pillars of sustainable development (environmental, social and economic) consequently became more equally recognised as the underlying objectives of all policies and activities of the EU.

<sup>12</sup> Case C-428/07, *R (Horvath) v Secretary of State for Environment, Food and Rural Affairs*, [2009] ECR I-6355, para 29.

<sup>13</sup> In relation to the common agricultural policy, see Case C-428/07, *R (Horvath) v Secretary of State for Environment, Food and Rural Affairs*, para 29; in relation to the common transport policy, see Case C-440/05, *Commission of the European Communities v Council of the European Union*, para 60.

<sup>14</sup> See Recital 5 of the Proposal (cited at footnote 1), and Recital 5 of the Current Directive (cited at footnote 5).

<sup>15</sup> For examples of action plans that call upon public procurement as a strategic tool to achieve their objectives please see section 3 of ClientEarth, Legal Briefing, *Briefing No. 1 Sustainable Development as a Key Policy Objective of the European Union*, (October 2011)

In addition, Article 37 of the Charter of Fundamental Rights of the EU mirrors the language of Article 11 TFEU and establishes that:

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.<sup>16</sup>

These provisions do not have specific addressees, but the wording is clear that the stated outcome must be achieved. In the absence of any limitation and given that the integration has to take place both at the stage of defining policies and at the stage of their implementation, it seems logical that both the EU and Member States are targeted. Both are relevant in the context of public procurement: the EU sets out general procedural rules while the Member States have the option to develop procurement policies.<sup>17</sup>

As a rule of thumb, there is a greater risk that cheaper products or services will not reach the same standards of environmental protection – the price is low because environmental externalities (degradation) have not been taken into consideration. To allow contracting authorities to opt for the lowest price option, with no safeguards ensuring that environmental protection requirements have otherwise been integrated, is obviously a contravention of Article 11 TFEU and Article 37 of the Charter of Fundamental Rights of the EU.

As the CJEU has ruled, Article 11 TFEU does not mean that any criteria relating to the protection of the environment may be taken into consideration.<sup>18</sup> Criteria may only be taken into consideration provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, and comply with the fundamental principles of EU law (for example, non-discrimination and transparency). In respect of the latter point, the contracting authority needs to be able to verify the accuracy of the information supplied by tenderers<sup>19</sup> - this will also impose a practical restriction on the type of criteria that can be used.

#### 4. Other EU commitments mean that the lowest price option must be abandoned

More broadly, the European Union is committed to sustainable development.<sup>20</sup> Further, it has been acknowledged that coherence between all European Union policies and coherence between local, regional, national and global actions is needed in order to enhance their contribution to sustainable

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<sup>16</sup> Charter of Fundamental Rights of the European Union, OJ C 83, 30.03.2010, pg 389. With the entry into force of the Lisbon Treaty, the Charter has acquired a legally binding status equal to the Treaties (see Article 6 Treaty on the European Union, OJ C 115, 9.5.2008.).

<sup>17</sup> Under the Current Directive, we understand that some Member States only allowed contracting authorities to use the lowest price option. Therefore, it is highly likely that environmental protection was not integrated into the decision making process.

<sup>18</sup> Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin Kaupunki and Hkl-Bussiliikenne* [2002] ECR I-7123, para 58; case C-448/01 *EVN AG and Another v Austria (Stadtwerke Klagenfurt AG and Another, intervening)* [2003] ECR I-14527, para 34.

<sup>19</sup> Case C-448/01 *EVN AG and Another v Austria (Stadtwerke Klagenfurt AG and Another, intervening)* [2003] ECR I-14527, paras 49-52.

<sup>20</sup> Article 3(3) of the Consolidated version of the Treaty on the European Union, OJ C 115, 9.5.2008. 'The Union shall establish an internal market. It 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.' Article 3(5) goes on to state that, in its relations with the wider world, the EU shall contribute to 'the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights.'

development.<sup>21</sup> Environmental protection, discussed above, is in fact just one of the three pillars of sustainable development.

The TFEU sets out other principles that the EU should be seeking to achieve in defining and implementing its policies and activities. For example, Article 9 relates 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 and Article 10 to combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Favouring procurement outcomes which perform better in respect of these principles would appear consistent with the EU's commitments.

The problem with keeping the option to favour only the lowest price is that it shows no ambition to address the challenge identified in the SDS adopted in 2006: 'the main challenge is to gradually change our current unsustainable consumption and production patterns and the non-integrated approach to policy-making'.<sup>22</sup>

Focussing exclusively on price can lead to incoherence between purchases made with taxpayers' money and wider policy initiatives, such as the promotion of sustainable development. Low prices can sometimes be due to unsustainable practices<sup>23</sup> - the race to be the cheapest offer incentivises poor wages and working conditions and low environmental standards, thereby undermining the quality and sustainability of products and services.

For the revised Directive on public procurement to allow Member States and contracting authorities to choose on the basis of lowest price alone, with no safeguard that sustainable development is otherwise integrated, would be a betrayal of the EU's commitments to sustainable development.

## 5. Price can and should still play a part in the decision

Further to the various commitments and obligations outlined above, there are several ways that sustainable development concerns can be brought into procurement processes. If environmental protection requirements or social criteria are built into the minimum requirements (set as technical specifications), then clearly the contracting authority has addressed its obligations to integrate those concerns into its decision making. With all of the eligible tenders meeting those standards, then it is perfectly understandable that a contracting authority should compare the price of the different tenders to understand which provides the best value for money. Nonetheless, in the spirit of ensuring that best value for money is achieved, the award criteria could also look to reward tenderers who go beyond the minimum requirements.

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<sup>21</sup> This is one of the guiding principles set out in the Renewed EU Sustainable Development Strategy as adopted by the European Council on 15/16 June 2006, pg 5.

<sup>22</sup> Ibid, pg 2.

<sup>23</sup> This concern is recognised in the SDS in another of the guiding principles: 'ensure that prices reflect the real costs to society of consumption and production activities and that polluters pay for the damage they cause to human health and the environment.' Ibid. pg 6.

It is also not the case that using an alternative to ‘lowest price’ would necessarily result in the most expensive tender being chosen. Moving away from lowest price does not mean that an assessment of the costs to the contracting authority is abandoned; it simply becomes one of the factors that the contracting authority considers in its evaluation, not the only one.

## 6. The alternative to choosing the cheapest is to look for the best value

As mentioned above, if sustainable development goals can be achieved alongside the satisfaction of the functional needs of the contracting authority, then better value for money is achieved. ‘Best value’ is without doubt a subjective concept and the contracting authority is best placed to decide what it means, bearing in mind its own procurement policies, strategic priorities, or national or EU initiatives. This is in line with the principle of contracting authorities’ discretion, which is well-established by caselaw,<sup>24</sup> and with the EU rules’ focus on how to buy not what to buy.<sup>25</sup> Therefore, it is not appropriate that particular factors are specified in the EU rules.<sup>26</sup>

However, it is ClientEarth’s contention that any assessment of best value and therefore any basis for the award phase should focus on more than the costs to be borne by the contracting authority. All responsible contracting authorities should already be evaluating the direct costs that will occur over the life time of the product and the indirect costs (such as treating consequential health impacts on the population) that will result from the use phase. What is needed is clarity that contracting authorities can integrate sustainable development objectives into procurement and a move away from ‘value’ being defined solely in terms of monetary cost.

### 6.1 ‘MEAT’: does it mean what it says?

As the alternative to the lowest price or lowest costs, the Current Directive and Proposal both state that the contracting authority can award the tender to the ‘most economically advantageous tender’ – this is known as MEAT.

It is made clear in both the Current Directive and the Proposal that the assessment of what this might mean in a particular context is ‘from the point of view of the contracting authority’. It is important to emphasise this point: contracting authorities may define the criteria to determine the winning tender, provided those criteria are linked to the subject-matter of the contract.

Decisions of the CJEU have shown that the assessment of the ‘most economically advantageous tender’ does not need to be limited to factors that provide direct economic benefit to the contracting authority and also that contracting authorities can choose award criteria that help

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<sup>24</sup> This principle is set out in cases such as Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin Kaupunki and Hkl-Bussiliikenne* [2002] ECR I-7123, Case 31/87 *Gebroeders Beentjes BV v. Netherlands* [1988] ECR 4635 and C-324/93 *R v. Secretary of State for the Home Department, ex parte Evans Medical and MacFarlan Smith* [1995] ECR-I-563.

<sup>25</sup> For further discussion of Member State discretion and EU competence to regulate public procurement, please see section 3 of ClientEarth, Legal Briefing, *Briefing No. 2: Horizontal Objectives in Public Procurement* (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

<sup>26</sup> In any event, given the wide range of products and services that are procured in accordance with the Directive’s rules it would be impossible to make a list of criteria that would be relevant to all procurements.

evaluate sustainability concerns (see box). Nonetheless, some contracting authorities may still be confused by the language which emphasises the economic aspect.

Legal uncertainty was cited in the impact assessment as a reason for the contracting authorities not always making the best purchasing choices.<sup>27</sup> Legal clarity could be improved by removing the ambiguous language of ‘most economically advantageous’ and clarifying that the contracting authority should choose the ‘best tender’ or ‘most advantageous tender’, or simply that the contracting authority should seek to achieve the best value for money.

***CJEU judgments: MEAT doesn't just mean economic, even though it uses the term***

In *Concordia Bus*,<sup>28</sup> the question before the CJEU was whether a contracting authority awarding a contract on the basis of MEAT could include criteria promoting environmental policy objectives, even if these criteria did not contribute to the direct economic advantage of the contracting authority.

The CJEU clarified that it was not correct that ‘each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature’ and that ‘it cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority’.<sup>29</sup> In *Concordia Bus*, the level of nitrogen oxide emission and the noise level of the buses that were to be procured were criteria that the contracting authority wished to use.

This view was followed in *Wienstrom*<sup>30</sup> where the CJEU was again asked to clarify whether the EU Directive allows the contracting authority to use criteria that ‘pursue advantages which cannot be objectively assigned a direct economic value, such as advantages related to the protection of the environment’. The CJEU followed the decision in *Concordia Bus* and accepted that a criterion requiring that the supplied electricity be produced from renewable energy sources is not precluded in principle.<sup>31</sup>

In a recent decision relating to MEAT under the Current Directive (the *North Holland case*),<sup>32</sup> the CJEU has expanded the above rationale to permit award criteria that address social policy objectives. This case was about award criteria relating to organic production and fair trade. The Court stated, ‘it must therefore be accepted that contracting authorities are also authorised to choose the award criteria based on considerations of a social nature, which may

<sup>27</sup> Cited at footnote 10, pg 23. This case related to Directives 92/50 and 93/38 – predecessors to the Current Directive – however, the provision using the term ‘MEAT’ was similar.

<sup>28</sup> Cited at footnote 18.

<sup>29</sup> Ibid, para 55.

<sup>30</sup> Case C-448/01 *EVN AG and Another v Austria (Stadtwerke Klagenfurt AG and Another, intervening)* [2003] ECR I-14527.

<sup>31</sup> Ibid, para 34. The Court goes on to reiterate the other conditions set out in *Concordia Bus*: the criterion must be linked to the subject-matter of the contract, must not confer an unrestricted freedom of choice on the authority, must be expressly mentioned in the contract documents or the contract notice and must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

<sup>32</sup> CaseC-368/10, *Commission v Kingdom of the Netherlands*, judgment of 10 May 2012.



concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons'.<sup>33</sup> The Commission had argued that these issues do not concern the products themselves but the general policy of the tenderers and, therefore, could not be reflected in award criteria, but this argument was rejected by the Court.

## 6.2 Best value: more than just life-cycle costing

Some stakeholders tend to assume that a shift from lowest price towards the incorporation of sustainable development objectives into procurement procedures will mean the adoption of life-cycle costing (**LCC**). However, while LCC can be a valuable tool, it is not necessarily the case that LCC is the best or only way for a contracting authority to take sustainable development factors into account.

In line with the principle of contracting authority discretion, it might be decided that an impact is not acceptable or should be minimised, whether or not it can be monetised. For example, the levels of emissions of pollutants could be evaluated (as in the *Concordia Bus*<sup>34</sup> case) with the aim of rewarding the least polluting product/service in the award phase.

Furthermore, current LCC methodologies do not address all sustainability impacts and are not available for all products or services. The main focus to date has been on monetising environmental impacts, but although there has been less work on methodologies monetising, for example, social impacts, this does not mean that these should be excluded.

The concept of LCC is that the costs across the life-time of the product are calculated so that more information is available than just the upfront price. Therefore, it is entirely appropriate to use it as one of the award criteria to determine the winning tender. It also clearly responds to the demands for economic value in the current austerity drive. However, it is important that the incorporation of sustainability considerations into public procurement is not limited to the applications of LCC, but rather that the Directive should provide an enabling framework not only for the further development of LCC but also for the further development of other methods and tools for assessing the full social, environmental and economic impact of procurement choices.

## 7. Conclusion

In its October 2011 report on modernisation of public procurement, the European Parliament noted that use of the lowest price as the determining criterion was hindering the development of the full potential of public procurement.<sup>35</sup> The report also noted that, 'public procurement, if used effectively, could be a real driver in promoting quality jobs, wages and conditions as well as equality,

<sup>33</sup> Ibid, para 85.

<sup>34</sup> Cited at footnote 18.

<sup>35</sup> The European Parliament resolution following the Commission Green Paper on modernisation of public procurement in the EU, 2011/2048(INI), 25 October 2011, para 13.



in developing skills and training, in promoting environmental policies and in providing incentives for research and innovation'.<sup>36</sup>

Enabling the more strategic use of public procurement to achieve these goals requires a move away from the concept that only price matters in the assessment of value. As established by the Integration Principle and other EU commitments to achieve coherence across policies, sustainable development considerations are also very important.

Put simply, by leaving it as an option to automatically choose the lowest priced tender, it is still possible that contracting authorities will make choices that are potentially incompatible with wider policy initiatives and contrary to the public good. Unless the legislation is changed, this will continue to be the case.

EU legislators should use the pending revision of the procurement directives to clarify, at the very least, that simply ignoring the potential of furthering strategic policy goals in favour of spending the least amount of money in the short term will no longer be acceptable.

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<sup>36</sup> Ibid, para 14.

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

As legal experts working in the public interest, we act to strengthen the work of our partner organisations. Our work covers climate change and energy system transformation, protection of oceans, biodiversity and forests, and environmental justice.

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This briefing builds on ideas elaborated in the ClientEarth briefing series 'Identifying opportunities for sustainable public procurement' in which ClientEarth identified particular areas that need to be addressed in the revision of the procurement legislation.

The briefing series 'Identifying opportunities for sustainable public procurement' is available at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

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