

# Distinguishing technical specifications and award criteria on the basis of role, not content

Updated



## 1. Introduction

It is a general principle of EU public procurement law that contracting authorities have broad discretion to decide and define what they want to buy.<sup>1</sup> However, under the current Directive regulating public procurement<sup>2</sup> (the **Current Directive**), there has been significant confusion with regard to the types of concerns that can be included at different stages of the procurement procedure. In addition to creating unnecessary complication and legal uncertainty, this confusion inappropriately constrains this principle of discretion.

In this briefing, we explain how the objectives of legal certainty, simplification, enabling more sustainable public procurement and respecting subsidiarity can all be advanced if the Current Directive is revised to clarify that technical specifications, award criteria and contract performance conditions should be distinguished on the basis of their role in the procurement procedure, not their content. That is, there should not be some types of concerns that could be reflected in technical specifications but not award criteria, or other types of concerns that could be reflected in award criteria but not technical specifications. Rather, it is for the contracting authority to determine whether to include a characteristic as a technical specification or award criterion, depending upon how the contracting authority intends for the characteristic to determine its procurement decision.

---

<sup>1</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>2</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L134, 30.4.2004, p.114) (as amended)

## 2. The issue

To date there has been a tendency to set out in detail in the Directives on public procurement the types of concerns that can and cannot be reflected in technical specifications and/or award criteria. The general effect of this approach has been to suggest that technical specifications and, to a lesser extent, award criteria ought to include only considerations relevant to the functional objectives, or use, of the procured supplies, works or services. This has tended to work against the fuller incorporation of sustainable development considerations into public procurement. In many cases the result has been that sustainable development issues, particularly social issues and sustainability considerations relevant to other phases of the life cycle of the procured supplies, works or services<sup>3</sup>, have been relegated to contract performance conditions.

One very important way to ensure the ‘opening up’ of technical specifications and award criteria to sustainable development considerations – including social criteria – is to ensure that the revised legislation clarifies that technical specifications, award criteria and contract performance conditions should be distinguished in accordance with their respective roles within the procurement process, not on the basis of their content.

## 3. The principle of broad discretion

Contracting authorities should be allowed broad discretion to choose technical specifications and award criteria in relation to the supplies, services or works they seek to procure. This is consistent not only with their role as purchasers but also with the subsidiarity principle. It has also been supported by the Court of Justice on several occasions.<sup>4</sup>

Any purchase made by a contracting authority will obviously have a functional objective. For example, a transportation authority might procure the construction of roads, bridges and bus services in order to perform the governmental function of facilitating public transport. However, public procurement can also be used to promote sustainable development via social, environmental and other societal objectives that are not necessarily connected with the procured items’ functional objectives.<sup>5</sup> The former can be as important as the latter, particularly where they relate to such vitally important matters as protecting human health and safety, promoting equality and dignity, conserving natural resources or preventing climate change. Thus, an important principle informing the analysis of public procurement law is the equal status of the sustainable development objectives and the functional objectives served by procurement.<sup>6</sup>

---

<sup>3</sup> In addition to the use phase, the life cycle of the procured supplies, works, or services will also include a production phase and, in the case of supplies and works, a disposal phase. All of these life-cycle phases can have significant sustainability impacts.

<sup>4</sup> See footnote 1.

<sup>5</sup> Procurement objectives that do not relate directly to the functional objectives of a specific procurement have also been referred to as ‘horizontal objectives’. The concept of horizontal policies is discussed in greater detail in Arrowsmith and Kunzlik (Eds.) (2009). *Social and Environmental Policies in EC Procurement: New Directives and New Directions* (Cambridge, UK: CUP).

<sup>6</sup> See ClientEarth, Legal Briefing, *Briefing No. 2: Horizontal Objectives in Public Procurement* (October 2011)

To that end, procurement processes can be designed to reflect the contracting authority's sustainable development objectives, as well as its functional procurement objectives. The choice for the contracting authority should be whether to use technical specifications, award criteria or contract performance conditions to introduce the chosen sustainable development objectives.

#### 4. Technical specifications, award criteria or contract performance conditions: what is the difference?

Technical specifications, award criteria and contract performance conditions play different roles within the procurement process, and it is on the basis of these roles that they should be distinguished.

##### *Role performed in the procurement procedure*

**Technical specifications** define the subject-matter of the contract. Ability to meet the technical specifications is a prerequisite for being considered a candidate for the contract. Only products or services meeting the specifications can be considered.

**Award criteria** enable the contracting authority to compare the relative advantages of different tenders. The criteria are weighted and each tender is scored on the extent of its satisfaction of each criterion, but ability to satisfy all the award criteria may not be required.

**Contract performance conditions** may be included in the contract to specify how the contract is to be performed. However, under the current Directive, the contracting authority is not able to assess compliance with these conditions as part of its selection of eligible tenders or its award decision. Once the contract has been awarded, the effective enforcement of contract performance conditions relating to sustainable development can be costly and otherwise difficult.

A contracting authority will have a number of concerns that it will want to factor into its procurement decision, including sustainable development concerns. It should be up to the contracting authority to determine whether to include a particular concern as a technical specification, award criterion or contract performance condition. The main consequence of choosing between these three options is the certainty of whether the winning tender will definitely include the characteristic in question:

- technical specifications = yes
- award criterion = maybe
- contract performance clause = difficult to know as not assessed upfront

This analysis has not been impacted by the changes proposed by the Commission (the **Proposal**).<sup>7</sup>

accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

<sup>7</sup> Proposal for a Directive of the European Parliament and of the Council on public procurement, 20 December 2011, COM(2011) 896 final.

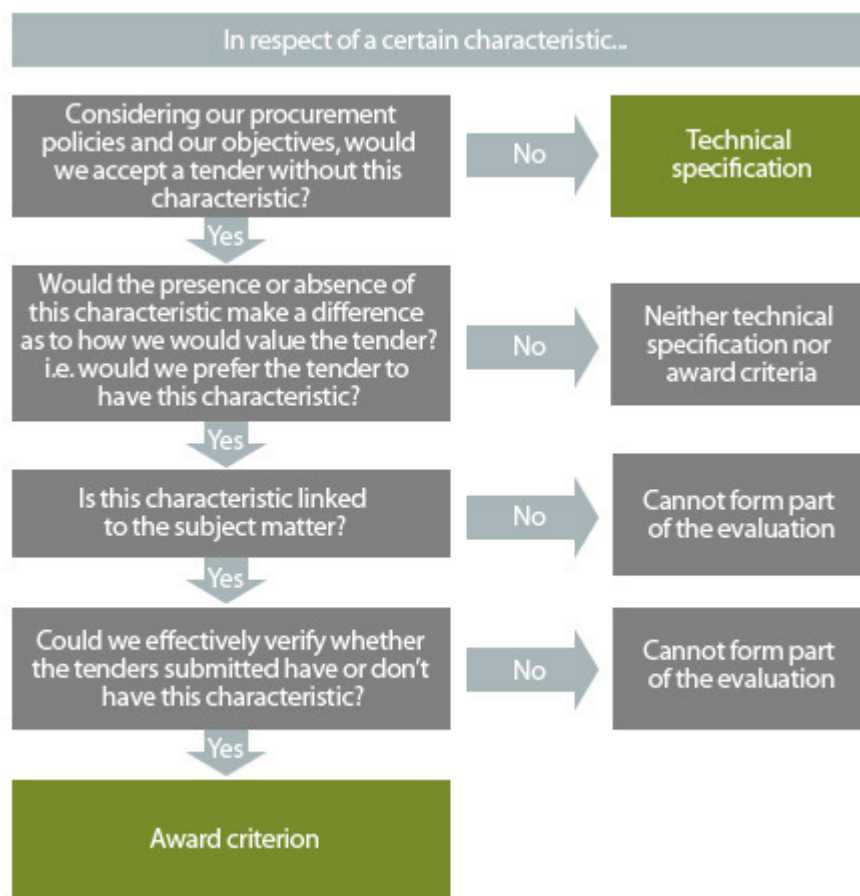


Figure 1: Flowchart to demonstrate steps in the decision process

## 5. The content-based approach: the problem with detailing which concerns are allowed to be used for which option

Cases brought to the Court of Justice of the European Union have posed questions about whether specific characteristics (often social or environmental sustainability concerns) have been correctly used by a contracting authority in a procurement procedure. The Court has therefore, in the past, attempted to distinguish and delineate types of concerns that can be reflected in technical specifications from types of concerns that can be reflected only in award criteria or only in contract performance conditions. In particular, attempts have been made to limit concerns relating to production processes or social sustainability objectives to award criteria only or, sometimes, to contract performance conditions only.

In previous revisions of the EU rules on public procurement, the legislature has sought to express these Court rulings by listing characteristics that can or cannot be addressed through technical specifications or award criteria. The lists, which have grown over time, epitomise the content-based approach of saying what concerns can be incorporated into which stage of the process.

Illustrations of the approach mentioned above can be found in Article 53(1)(a) of the Current Directive (criteria that can be used to identify the most economically advantageous tender) and

point 1 of Annex VI of the Current Directive (characteristics that can be technical specifications). But tinkering with lists can provoke confusion. For instance, in Article 53 ‘environmental characteristics’ is listed, in Annex VI ‘environmental performance’ – do these cover the same things? A contracting authority deciding whether to include an environmental aspect in a specific procurement procedure as an award criterion or a technical specification may struggle with this question. Yet, that question does not get to the heart of the matter: does the contracting authority wish to procure something that has that characteristic or would it just prefer such a characteristic (provided that the price or other characteristics are not too seriously affected)?

Unfortunately, the Proposal has continued to take a content-based approach. This is exemplified in the proposed Recital 41. Here the Commission appears to recognise that contracting authorities should be allowed to refer to a specific production process in technical specifications or award criteria, but then goes on to limit the inclusion of social aspects of production processes to award criteria only. Further, it appears from this proposed recital that it is only permitted to include social aspects of production processes that ‘have immediate consequences on staff members in their working environment’.<sup>8</sup> Such efforts to constrain Member State discretion in relation to the types of concerns that can be reflected in technical specifications or award criteria would seem to go beyond the scope of EU authority in the context of the Directive on public procurement. The Directive should be limited to defining how to buy, rather than what to buy.

In the operative provisions of the Proposal we also find a list of eligible award criteria – longer than that provided in Directive 2004/18 but still not presented as exhaustive, and with new complexities. The inclusion of specific processes of production or provision of services is made subject to further restrictions: the criteria must concern ‘factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services’.<sup>9</sup> These restrictions just seem to be an attempt to contextualise the ‘link to the subject-matter’ rule, which is a fundamental principle established by caselaw.<sup>10</sup>

We also note that the supplies and services that will be procured under the EU procurement rules are so varied that it would obviously be impossible to provide a list of examples that will be relevant to all procurement procedures, so why even try?

Such efforts needlessly complicate the EU procurement rules and cause significant legal confusion which, in turn, has a chilling effect on the development and take-up of sustainable public procurement policies. Thus we argue that technical specifications, award criteria and contract performance conditions should be distinguished in accordance with the role they play in the procurement procedure. The scope and type of sustainable development objectives that can be reflected in technical specifications and award criteria should be constrained by the ‘link to the subject-matter’ test, not by lists of eligibility criteria in the legislation.

---

<sup>8</sup> See Recital 41 of the Proposal.

<sup>9</sup> See Article 66(2)(d) of the Proposal.

<sup>10</sup> See footnote 1 and for further information on how the ‘link to the subject matter’ rule has been broadly interpreted, see ClientEarth, Legal Briefing, *Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria*, (October 2011) accessible at [www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

***Case C-368/10 Commission v The Kingdom of the Netherlands (the North Holland case)***<sup>11</sup>

This case relates to a tender for the supply and management of automatic coffee machines. However, the contracting authority sought to procure products that respected the environment and were socially responsible.

The case focussed on the use of two labels relating respectively to organic production and purchase on fair trade terms. The Court ruled that the contracting authority had referred to the labels in a way such that the technical specifications and award criteria could only be understood as requiring the supplied goods to bear specific labels, and that this was problematic.<sup>12</sup>

While the Court allowed that organic production could be a technical specification,<sup>13</sup> it found that the criteria of the fair trade label concerned<sup>14</sup> are not acceptable as technical specifications as they relate to 'the conditions under which the supplier acquired them from the manufacturer'.<sup>15</sup> However, the Court accepted that fair trade criteria could be either award criteria or a contract performance conditions.<sup>16</sup> This is a clear example of a content-based approach to distinguishing between technical specifications, award criteria and contract performance clauses.

It is noteworthy that the Court found that the criteria of the two labels are linked to the subject-matter<sup>17</sup> and can be award criteria,<sup>18</sup> while noting that award criteria are to allow 'the value of money of each tender to be measured'.<sup>19</sup>

***Commentary:***

It seems artificial to recognise that something can make a difference to the assessment of value for money yet deny that it results in a characteristic of the product.<sup>20</sup> ClientEarth argues that the processes touching a product throughout its life cycle can become embedded as a characteristic in a product, irrespective of whether the physical or functional properties of the product are affected. Such characteristics are linked to the subject-matter. What is important is that such a characteristic can be objectively identified and is valued by a contracting authority.

<sup>11</sup> Case C-368/10, *Commission v Kingdom of the Netherlands*, judgment of 10 May 2012.

<sup>12</sup> Ibid, paras 52, 57 and para 70.

<sup>13</sup> Ibid, para 61.

<sup>14</sup> The Max Havelaar label is based on four criteria: the price must cover all the costs; it must contain a supplementary premium compared to the market price; production must be subject to pre-financing and the importer must have long-term trading relationships with the producers. Ibid, para 73.

<sup>15</sup> Ibid, para 74.

<sup>16</sup> Ibid, para 75 (contract performance condition) and para 91 (award criterion).

<sup>17</sup> Ibid, para 92.

<sup>18</sup> Ibid, para 91.

<sup>19</sup> Ibid, para 86, citing Recital 46 of the Current Directive.

<sup>20</sup> cf Ibid, para 91 where the Court notes that 'there is no requirement that an award criterion relates to an intrinsic characteristic of a produce, that is to say something which forms part of the material substance thereof' and refers to the *Wienstrom* case.

## 6. Technical specifications define the subject-matter

As noted above, the technical specifications are the place for a contracting authority to set out exactly what it wishes to buy. Efforts to limit the types of concerns that can be included as technical specifications unjustifiably restrict a contracting authority's discretion to define the subject-matter of its contract. In accordance with the principle of broad discretion, the contracting authority can decide, if it chooses, to purchase not just 'X' but 'sustainable X'. The resistance to date to allowing sustainability, particularly social, criteria to be included as technical specifications is in contradiction to both the principle of equality between functional and sustainable development objectives and the principle of the contracting authority's broad discretion on what to buy.

The pursuit of sustainable development objectives through purchasing behaviour is normal market behaviour. This is illustrated by, for example, the growing demand for more sustainable and fair trade products over recent decades. When consumers opt to purchase chocolate that has been certified as compliant with fair trade principles over otherwise comparable (and perhaps lower-priced) chocolate, they are opting to purchase not only chocolate but also the contribution their purchase makes towards the economic development objectives of cocoa bean growers and a more equitable global trading regime. When consumers purchase recycled paper over otherwise equivalent paper, they are opting to purchase not only paper but also the contribution their purchase makes towards limiting the disposal of waste paper and the relatively higher use of resources that go into producing paper from virgin fibres.

By permitting that a product's fair trade origin could be an award criterion in the *North Holland* case,<sup>21</sup> the Court acknowledged that the fair trade status of a product can make a difference to the value for money. Where this is the case, surely it could also mean that a contracting authority can decide to buy a fair-trade product rather than a non-fair trade product, in the same way that it is already acceptable for it to choose recycled paper rather than paper made from virgin fibres. In both cases the contracting authority's choice will only be ensured when it is allowed to place this requirement in the technical specifications.

## 7. The link to the subject-matter is the appropriate constraint on award criteria and contract performance conditions

Distinguishing technical specifications, award criteria and contract performance conditions according to their content is at odds with the broader 'link to the subject-matter' rule which applies to award criteria and contract performance conditions. This rule is a core principle of jurisprudence on EU public procurement law.

The content-based approach is fuelled, in part, by a fear that the incorporation of sustainability objectives into technical specifications and award criteria might get out of control, that public procurement might become a 'back door' to impose additional requirements on tenderers that are essentially unrelated to the procurement itself. To counter this tendency, and address the fears

---

<sup>21</sup> Citation at footnote 18.



behind it, it is central to ClientEarth's analysis that the 'link to the subject-matter' rule should be affirmed rather than weakened or otherwise refuted. This rule provides an important constraint on the scope of sustainability procurement objectives but should nonetheless be given a very broad interpretation, as the Court of Justice of the European Union has shown.

For example, in the *Wienstrom* case,<sup>22</sup> reduction of greenhouse gases was considered linked to the subject-matter for a procurement of electricity supply. Likewise, in *Concordia Bus*,<sup>23</sup> reduction of air pollution was considered linked to the subject-matter of a procurement for municipal bus services. Also, as mentioned above, in the *North Holland* case the Court accepted that organic production and carrying out transactions under fair trade principles are linked to the subject-matter.<sup>24</sup>

## 8. Implications for amendments of the Proposal

Two key agendas for the new Directive are simplification and the improvement of legal clarity. Both of these agendas will be met by moving from a content-based distinction to a role-based distinction between technical specifications, award criteria and contract performance conditions.

Amendments to the Proposal should:

1. Remove the non-exhaustive lists and layers of detail about what types of criteria may or may not be technical specifications or award criteria. These represent the content-based approach.
2. Set out the role-based approach by clarifying that contracting authorities have discretion to:
  - a. include sustainability considerations, including social considerations, as either technical specifications, award criteria or contract performance conditions; and
  - b. decide whether they choose a technical specification or award criterion, depending on whether the characteristic is an absolute requirement or not.
3. Emphasise that the 'link to the subject-matter' rule is the appropriate constraint on which characteristics may be chosen and clarify that this test should be interpreted broadly to include for instance characteristics embedded in a product or service due to choices made in the production phase, but not necessarily visible in that product or service.

In particular, Recital 41, Articles 40 and 66 and Annex VIII of the Proposal should be amended to accord with these principles.

## 9. Conclusion

We should not miss the opportunity presented by the revision of the Current Directive to affirm contracting authorities' rights to include sustainable development objectives in technical specifications, award criteria and contract performance conditions. Increased legal certainty will give contracting authorities confidence to implement sustainable public procurement policies.

---

<sup>22</sup> Case C-448/01 *EVN AG and Another v Austria (Stadtwerke Klagenfurt AG and Another, intervening)* [2003] ECR I-14527.

<sup>23</sup> Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin Kaupunki and Hki-Bussiliikenne* [2002] ECR I-7123.

<sup>24</sup> Citation at footnote 17.



Efforts to distinguish technical specifications, award criteria and contract performance conditions according to their content fail to fully respect contracting authorities' discretion to decide and define what they want to procure. Limiting the types of concerns that can be included as technical specifications also unjustifiably restricts a contracting authority's discretion to define the subject-matter of its contract. Moreover, efforts to supplement the 'link to the subject-matter' test with legislative text setting out specific categories or types of concerns that can or cannot be included as either technical specifications or award criteria tend to complicate, rather than simplify, EU public procurement rules.

It is both more meaningful and more appropriate to distinguish technical specifications, award criteria and contract performance conditions according to the role each plays in the procurement process. Clarifying their respective roles in the procurement process, and ending the practice of distinguishing them on the basis of their content, would both simplify and greatly enhance the legal clarity of the Directive on public procurement.

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.

ClientEarth is funded by the generous support of philanthropic foundations and engaged individuals.

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)

For further information please contact

**Janet Meissner Pritchard**

Senior Lawyer  
Climate & Forests Programme  
t +44 (0) 207 749 5979  
[jpritchard@clientearth.org](mailto:jpritchard@clientearth.org)

**Catherine Weller**

Lawyer  
Climate & Forests Programme  
t +44 (0) 203 030 5968  
[cweller@clientearth.org](mailto:cweller@clientearth.org)

ClientEarth offices:

**Brussels**

4ème Etage  
36 Avenue de Tervueren  
Bruxelles 1040  
Belgium

**London**

274 Richmond Road  
London E8 3QW  
UK

**Warsaw**

Aleje Ujazdowskie 39/4  
00-540 Warszawa  
Poland

ClientEarth is a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 2-6 Cannon Street, London EC4M 6YH, with a registered branch in Belgium, N° d'entreprise 0894.251.512, and with a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208