



**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 Procurement  
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## 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.”*<sup>1</sup>

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. . . .”*<sup>2</sup>

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.”*<sup>3</sup>

*“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>4</sup>

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

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<sup>1</sup> [www.epsu.org/a/7046](http://www.epsu.org/a/7046) in English, French, German, Swedish, Spanish and Russian.

<sup>2</sup> Article 3.3, Treaty on the European Union (hereinafter ‘TEU’).

<sup>3</sup> Article 9, Treaty on the Functioning of the European Union (hereinafter ‘TFEU’)

<sup>4</sup> Article 11, TFEU.

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 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”<sup>5</sup> 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.<sup>6</sup> 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 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

<sup>5</sup> Case C-448/01, EVN AG v Austria [2003] ECR I-14527 (“EVN-Wienstrom”).

<sup>6</sup> See *Buying Green!: A Handbook on Environmental Public Procurement* (Luxembourg: Official Publications of the European Communities, 2004) at section 3.4.2.

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 meals<sup>7</sup> and hospital cleaning<sup>8</sup> 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.

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<sup>7</sup> Davies, S (2005) *School meals, markets and quality*, UNISON

<sup>8</sup> Davies, S (2005) *Hospital contract cleaning and infection control*, UNISON

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

*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 fulfil 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.

## Supporting organisations:

EFBWW – European Federation of building and woodworkers [www.efbww.org](http://www.efbww.org) Contact: Werner Buelens

EFFAT – European Federation of Food Agriculture and Tourism [www.effat.org](http://www.effat.org) Contact: Kerstin Howald [k.howald@effat.org](mailto:k.howald@effat.org)

EFTA - European Fair Trade Association

FLO - Fairtrade Labelling Organizations International

WFTO - World Fair Trade Organization

} Sergi Corbalán, Fair Trade Advocacy Office  
Coordinator, [www.fairtrade-advocacy.org](http://www.fairtrade-advocacy.org)  
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EMCEF- European Mine, Energy and Chemical Workers 'Federation <http://www.emcef.org/> Contact: Reinhard Reibsch [rreibsch@emcef.org](mailto:rreibsch@emcef.org)

EMF – European Metal Workers [www.emf-fem.org](http://www.emf-fem.org) Contact: Judith Kirton-Darling [Kirton-Darling@emf-fem.org](mailto:Kirton-Darling@emf-fem.org)

ENSIE - [www.ensie.org](http://www.ensie.org) Contact: Patrizia Bussi [info@ensie.org](mailto:info@ensie.org)

EPSU – European Public Service Unions [www.epsu.org](http://www.epsu.org) Contact: Penny Clarke [pclarke@epsu.org](mailto:pclarke@epsu.org)

FERN – [www.fern.org](http://www.fern.org) Contact Veerle Dossche [veerle@fern.org](mailto:veerle@fern.org)

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

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UNISON –British Public Sector Trade Union [www.unison.org.uk](http://www.unison.org.uk) Contact: Margie Jaffe