

Reform of Procurement Directives: Council's draft offers some progress on SPP

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On 24 July the European Council published its [proposed compromise text](#) for a new public sector procurement directive. This follows the [Committee draft report](#) from the European Parliament in May 2012, tabling a number of amendments to the Commission's draft. The majority of these amendments have not been incorporated in the current version, nor has the rapporteur's emphasis on social, environmental and innovation aspects (sustainable public procurement, or SPP) been preserved. Nevertheless, changes to several provisions appear to resolve some of the potential snag-points for SPP arising from the Commission's draft.

In [previous articles](#) I looked at the Commission's proposals and how they might work in practice – including those related to production processes and methods, life-cycle costing, environmental and social labels and the new Innovation Partnership procedure. Potential problems included the requirement for contracting authorities to accept alternative methods of calculating life-cycle costs put forward by tenderers (thus undermining the comparability of tenders) and the requirement to accept self-declarations as an alternative to third-party environmental or social labels. While these issues have been partially resolved, barriers still remain to the practical take-up of the directive's SPP measures.

The main changes and suggested areas for further work are highlighted here.

Social aspects of production

The Council's draft aims to incorporate the ruling of the European Court of Justice in the recent Dutch coffee case (C-368/10, case note [here](#)), to the effect that fair trade production requirements are acceptable as award criteria and contract performance clauses. This is highlighted both in the recitals and in Article 66 (2) concerning award criteria, which also confirms that production processes need not affect the 'material substance' of the supplies, services or works being purchased. Recital 41 suggests however that social provisions can only be included in award criteria and contract performance conditions, not in technical specifications. This is one possible interpretation of the ECJ's judgment in the Dutch coffee case, as the Court chose to treat the requirement for fair trade production in that case as a contract performance clause.

However as is made clear in the draft directive and in previous case law of the ECJ, compliance with contract performance clauses cannot form part of the assessment during the tender process. This creates a problem regarding social matters which the contracting authority may wish to inspect and verify – for example compliance with a requirement that child labour not be used at any stage in the production process. Unless this is included as a technical specification, it is not clear how it can be meaningfully assessed. Articles 54 (5) and 55 (3)a do provide for refusal to award a contract or exclusion of a tenderer where they are found not to be in compliance with certain social and environmental laws. However this is would generally relate to past performance, and may not allow assessment or exclusion of sub-contractors proposed for a particular contract. It also would not extend to compliance with social provisions outside of the ILO core conventions, for example relating to working hours or health and safety.

The suggestion in recital 41 that social provisions cannot form technical specifications also contradicts the wording in Article 41 which permits reference to labels to verify compliance with social requirements in technical specifications, as well as in award criteria and contract

clauses. It is vital that clarity is achieved in this area, as the opening up of competition for public contracts under the WTO Government Procurement Agreement is likely to increase situations in which contracting authorities wish to verify compliance with basic social provisions as part of the tender process. The general saver to the effect that nothing in the directive should prevent enforcement of sustainable development measures which are in conformity with the Treaty (recital 41c) is insufficient in itself to provide such clarity.

Labels

Social and environmental labels are a key part of many SPP strategies, and suppliers are increasingly aware of their value in objectively verifying performance. Article 41 should enhance the usability of labels in procurement, by establishing the conditions of transparency and objectivity which such labels must meet and allowing contracting authorities to refer to them directly in specifications. The Commission's draft included a requirement to accept self-declarations (a 'technical dossier') where an operator did not have access to a label or could not obtain it within the relevant time limits. The Council's draft adds a requirement that this must not be attributable to the operator itself, which goes some of the way to ensuring that contracting authorities can insist on third-party verification.

Life-cycle costing

Article 67 now removes the requirement to allow economic operators to submit their own methodology for LCC, but does require that data requested for LCC "can be provided with reasonable effort by normally diligent economic operators, including operators from third countries party to the Agreement or other international agreements by which the Union is bound." It also reaffirms the position from the Commission's draft that LCC methodologies must be 'established for repeated or continuous application' – meaning that tailor-made methodologies developed for the purpose of an individual contract would not be allowed. According to recital 40, this requirement is intended to prevent distortions of competition, presumably through the invention of a methodology which would favour a particular undertaking in the context of a specific contract.

While safeguards are undoubtedly needed to ensure that the integrity of LCC processes is maintained, this could arguably be met in the same way as for other award criteria – i.e. through the requirements of transparency and equal treatment as set out in the Directives and case law. Publishing the LCC methodology in the tender documents, together with the weightings to be applied, and the imperative to apply equal treatment to all tenderers would achieve this. For certain contracts, an off-the-shelf LCC methodology may not be available (either at EU or another level) which adequately captures all internal and external costs. Under the existing provisions, it is not clear whether contracting authorities could modify an existing methodology in this case, or must strictly apply a pre-existing methodology.

This could lead to disproportionate outcomes in individual cases, for example where existing methodologies do not take account of a major category of greenhouse gas emissions which are relevant for a specific contract. Given that the additional transparency benefits of using a pre-existing methodology over publishing the specific methodology in the tender documents are negligible, the second approach seems preferable and less likely to impede adoption of LCC by contracting authorities.

Abnormally low tenders

Article 69 removes the mandatory obligation to examine abnormally low tenders, which was accompanied in the Commission's draft by a formula for determining if a tender is abnormally low. However if such examination is undertaken, contracting authorities are

obliged to exclude tenders which are abnormally low due to non-compliance with certain social or environmental laws. The process for mandatory examination was complicated, but its removal means that only if a contracting authority chooses to seek explanation of an abnormally low tender may it be obliged to exclude it. This could impede such enquiries, as exclusion of a tenderer is likely to be legally fraught. A better approach might be to require examination where a contracting authority considers that a tender may be abnormally low due to non-compliance with social or environmental obligations.

Innovation partnership

Finally, the provisions governing the new Innovation Partnership procedure have been adjusted slightly to make them less prescriptive – notably by removing the requirement to ensure an ‘adequate profit’ for the private partner, which appeared in the Commission’s draft. The recitals also make clear that existing procedures such as pre-commercial procurement will be available under the ongoing exemption from the directives of research and development services. Facilitating public procurement of innovation has proven to be a complex process, and specific measures to assist this are welcome. Many of the matters affecting rates of innovation procurement fall outside the scope of the procurement directives, relating for example to the state aid rules and intellectual property law.

Note on drafting

The recitals prefacing the current draft address a range of matters at length and in detail. This compromises legal clarity, as the recitals are not binding provisions but may affect the construction of the Directives by courts. Recitals are a good way to emphasise what is set out in the legislative text itself, not to extend it or compensate for unclear drafting of binding provisions. At just over 400 pages including annexes, this draft could benefit from more concise wording throughout. Examples of what is and isn’t allowed under the proposed rules, while offering insight into the drafters’ intentions, can create as many questions as they answer.

Comment

Public procurement which is fit to deliver on the Europe 2020 objectives is essential, and the Directives play an important role in this. A multitude of interests have come into play in the revision process, and some retrenchment from the level of emphasis on social and environmental considerations in the Parliament committee’s draft might have been expected. Focus within the Council on areas such as public-public cooperation, modifications to contracts and e-procurement may also have distracted in some measure from a more detailed consideration of the SPP provisions.

What is still needed is a rigorous assessment of how the proposed changes will affect SPP as it is currently practiced by a wide range of public authorities. This perspective should be brought to the ongoing negotiations, allowing consideration of how the wording of provisions can facilitate life-cycle costing, use of labels and other common SPP approaches while also making them more legally robust. Expert input from both procurers and suppliers who have been through these processes may assist drafters in getting it right.