

Production processes and methods – how far can you go?

Abby Semple

April 2012

One of the grey areas for sustainable public procurement has been the extent to which contracting authorities can specify environmental or social aspects of the production process. For example, if procurers wish to ensure that goods are produced in a factory which exercises good environmental management practices, or that workers are not exploited, they might seek to do this by including it in their specifications for the goods, services or works being purchased. They might also choose to address these considerations at selection stage, through award criteria or in contract clauses. The extent of what can be requested varies at each stage.

Under the current Directives (2004/17/EC and 2004/18/EC) production processes and methods may be specified for all types of contract. However this is accompanied by the general requirement for specifications not to be discriminatory or create obstacles to competition. Furthermore, you can only specify production processes or methods inasmuch as they serve to define the characteristics of the goods, services or works being purchased. The European Commission has at times adopted an interpretation of this which means that the final product must be altered in some perceptible way.

In the new proposed Directives, it is made clear that environmental and social aspects of production can be specified, and also addressed in contract award criteria. There is no reference to the idea of altering the final product, however the requirement for a 'link to the subject matter of the contract' applies – i.e. the criteria must relate to what is being purchased and not to the general practices of tenderers. There is explicit recognition that production processes and methods may relate to any stage in the life-cycle, from raw material acquisition onwards.

Recital 41 of the Directive gives some insight into what would be seen as the permissible extent of specifications and award criteria addressing environmental and social aspects of production. It also effectively places limits on the use of award criteria linked to social elements of production. Where MEAT is applied, contracting authorities may award marks based on the working conditions of people directly involved in the production of goods or provision of works or services. However,

“Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities.”

This would appear to rule out criteria linked e.g. to the wages paid to employees or their right to form unions. It is less clear whether it would include considerations such as working hours or break periods, as these may be included in a broad reading of 'protection of health.' It is still possible to exclude candidates or refuse to award a contract based on breach of certain environmental and social laws (including the ILO Conventions), and to address these in contract performance clauses.

Overall, the new provisions appear to resolve some of the ambiguity regarding the extent to which specifications and award criteria can address environmental and social aspects of production. In

doing so, they have also narrowed the scope of what can be done relative to what could reasonably be interpreted from the current Directives and case law. In particular, the limitation on social criteria contrasts with the recent opinion of Advocate General Kokott in [Case C-368/10 Commission v the Netherlands](#), which emphasises the freedom which contracting authorities have in this regard.