

## **The role of environmental and social labels in procurement**

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Many public authorities who wish to include environmental and social requirements in their tenders will do so by referring to labels. A broad range of such labels exist, and an ISO classification distinguishes between the different types. Labels which enjoy widespread recognition include PEFC and FSC (for paper and wood products), Energy Star and TCO (for IT equipment) and the EU Ecolabel, Nordic Swan and Blue Angel (covering a wide range of products and services). On the social side, Fairtrade (FLO) is probably the best known but many other labels exist in specific sectors.

Labels can be useful in procurement if they offer information about the characteristics of a product or service which is certified by a third party. Not all labels involve independent testing or inspection, but the ones that do can reduce the work for procurers in identifying more sustainable options, and for suppliers in proving the characteristics of their products. There are three ways such labels can be used in the procurement process, under the current Directives:

- i) As a reference source in the development of technical specifications;
- ii) As evidence that a particular product or service meets the specifications;
- iii) As evidence of performance in respect of an award criterion (where MEAT is applied).

It is not permitted to insist that a product or service carry a particular label or certification, as equivalent evidence must also be considered. The European Court of Justice is currently examining the possibility of referring to particular labels in technical specifications and contract clauses, in a case concerning a Dutch authority's procurement of tea and coffee ([C-368/10](#)).

Article 41 of the proposed new Public Sector Directive addresses the role of labels and, for the first time, refers to social as well as eco-labels. Unfortunately the drafting of this article is likely to leave contracting authorities in serious doubt as to what they can and cannot do with labels, and whether the existing position has changed.

On the one hand, Article 41.1 states that contracting authorities may "require that th[e] works, services or supplies bear a specific label" provided the label meets certain conditions (being linked to the subject matter of the contract; drawn up on the basis of scientific information or other objectively verifiable and non-discriminatory information; established under an open and transparent procedure.) However this apparent ability to insist on a particular label is completely removed by a subsequent paragraph in Article 41.1, which states that, in addition to equivalent labels, a technical dossier of the manufacturer or any other appropriate means of proof must be accepted for products which do not bear the label.

This would mean it is not possible to insist on third-party certification with regard to the particular environmental or social characteristics which the contracting authority wishes to address. Similar wording appears in Article 23.6 of the current Public Sector Directive, so the position appears not to

change. However the initial statement that public authorities may 'require' a particular label will cause confusion and leave room for legal challenges.

The primary argument against allowing authorities to insist upon a particular label is that this may restrict competition for public contracts as enshrined in both the EC Treaty and Government Procurement Agreement of the WTO. While this is a good reason for stipulating that equivalent labels must be considered, it is not an argument against allowing contracting authorities to insist on some form of third-party evidence with respect to the environmental and social characteristics of products. Without this ability, the value of labels in the procurement process is severely limited. The principle of equal treatment must also be considered in this context, as a manufacturer's own statements regarding their products may not be as convincing as third-party certification.