

## **Mixed offerings for sustainability in proposed EU Procurement Directives**

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On 20<sup>th</sup> December the European Commission published its proposal for new Public Procurement Directives. Following a year-long consultation and drafting process, the proposals are being put forward for adoption by the Parliament and Council, and then implementation by Member States. The current Public Sector Directive (2004/18/EC) will be repealed from 30<sup>th</sup> June 2014. As with the previous consolidation process leading to the 2004 Directives, multiple agendas have come into play in the drafting. The Commission's stated objectives were twofold: to improve the efficiency of procedures and to allow for greater strategic use of public procurement to further environmental, social and industrial/innovation policies.

To this end, a number of new provisions have been introduced, as well as reductions in the time limits and documentation requirements for some contract award procedures. Social, health and education services are to be subject to general rules, as opposed to specific award procedures. The focus of this article is on the content of the proposals with regards to the social and environmental dimensions of procurement.

### ***Social and environmental provisions***

The proposed Public Sector Directive offers:

- Increased scope for contracts to be reserved for enterprises employing disabled or disadvantaged workers (Article 17);
- Explicit recognition that technical specifications may include reference to the production process or any other stage of the life-cycle for all types of contract (Article 40);
- Possibility to refer to specific environmental or social labels in technical specifications (Article 41);
- Ability to invoke non-compliance with EU or international social and environmental law as grounds for refusal to award a contract to a tenderer (Article 54.2);
- Ability to exclude a candidate from a competition on the basis of violations of EU or international environmental or social obligations (Article 55.3(a));
- Explicit recognition that life-cycle costing (LCC), including external environmental costs, may be an award criterion and introduction of rules regarding the calculation of LCC (Article 67);
- Recognition (as in the current Directive) that contract conditions may include social and environmental requirements (Article 70);
- Requirement for national oversight bodies to report on sustainable procurement (Article 84).

### ***What is new?***

Arguably, only the first and last of these provisions go further than the current Directives and case law to actively facilitate sustainable public procurement. While the explicit recognition of the possibility to include production processes in technical specifications is welcome, this is already permitted under Annex VI of Directive 2004/18/EC. Unfortunately, the drafting of Articles 41 and 67

in the proposed Directive means that instead of facilitating the use of eco-labels and life-cycle costing by contracting authorities, they may make it more difficult and subject to legal challenge. The ability to exclude a candidate or refuse to award a contract based on violations of EU or international environmental or social law is valuable, however it does not extend to violations of national laws in these areas. It is also accompanied by a new 'self-cleaning' provision (Article 55.4) which, in seeking to make the use of mandatory and discretionary exclusions fairer, will also make them more complex. The requirement to reject tenders which are abnormally low due to violations of EU environmental legislation is also accompanied by a complex process which leaves ample room for challenges.<sup>1</sup>

### ***Use of environmental and social labels***

Article 41 is problematic in that it fails to resolve the uncertainty regarding the use of environmental or social labels as part of technical specifications. Article 41.1 states that where contracting authorities include environmental or social characteristics in a functional specification "they may require that these works, services or supplies bear a specific label..." provided certain conditions are met. However the next paragraph effectively removes the ability to insist on a particular label by requiring that all equivalent labels be accepted, as well as a manufacturer's dossier or other appropriate means of proof.

An unwary public authority may take this provision at face value – that a specific label can be required. While the caveat to accept equivalent labels is fair, the additional requirement to accept a manufacturer's own dossier completely removes the ability of the contracting authority to insist upon third-party certification regarding the environmental or social characteristics of the product they are buying. Not only does it lack any progression from the current position, it confuses the matter with seemingly contradictory wording.

### ***Life-cycle costing***

Article 67 on life-cycle costing faces similar problems, as contracting authorities will not be able to insist on a methodology of their choosing to calculate costs. Contracting authorities are to specify the methodology they will apply in the tender documents, however they must allow operators to apply their own, different methodology, provided the operator establishes its equivalence. Three conditions are set out for LCC methodologies, which must be met whether it is specified by the contracting authority or proposed by the tenderer. The methodology must be i) drawn up on the basis of scientific information or other objectively verifiable criteria; ii) established for repeated or continuous application and iii) accessible to all interested parties. The second condition appears to foreclose the possibility of applying a bespoke methodology suitable for one particular contract – which is possible under the current Directives provided this is done in compliance with the Treaty principles and the specific requirements for award criteria.

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<sup>1</sup> The reference value for calculation of an abnormally tender is set at more than 50% lower than the average price or cost and more than 20% lower than the second-lowest tender, where at least five tenders have been received (Article 69.1). It is perhaps unfortunate that this includes **all** tenders, and not only those which are valid and responsive to the specification set out.

Without the ability to insist on a particular methodology, it is likely that many authorities will choose not to apply LCC, as this may undermine the comparability of tenders and introduce further uncertainties into what is already often a complicated (if, ultimately, cost-saving) process. Article 67.3 provides that where a common methodology is developed at EU level for LCC in specific sectors, this shall be applied by contracting authorities. While this may assist in preventing fragmentation and offer greater legal certainty to contracting authorities to carry out LCC in those sectors, it depends very much on the quality and comprehensiveness of the methodologies developed at EU level. The list at present consists only of the Clean Vehicles Directive (2009/33/EC).

### ***Innovation Partnerships***

One other feature of the proposed Directive worth noting in this context is the introduction of a new procedure for the development and purchase of innovative supplies, services and works. Article 29 replaces the current exemption for certain research and development contracts with an ‘Innovation Partnership’, which allows contracting authorities to apply a negotiated procedure. This covers both the R&D phase and the purchase of any resultant innovation – addressing some of the concerns which have arisen regarding current forms of innovative procurement such as pre-commercial procurement (PCP). Under the current exemption from the Directives, it is not generally possible to proceed directly from the R&D phase to commercial procurement without a separate competition.

While the creation of a specific procedure for this may encourage some contracting authorities to pursue innovative purchases, the provisions set out in Article 29 seem overly prescriptive. For example, there are stipulations regarding the duration and value of the different phases of the procurement and of the contract itself, which “shall remain within appropriate limits, taking into account the need to recover the costs, including those incurred in developing an innovative solution, and to achieve an adequate profit.” Such a requirement leaves ample room for a disgruntled supplier to challenge the contract and may scare public authorities off the procedure altogether. Innovative public contracts are essential to sustainability and a lighter regulatory touch in this important area would be welcome.

### ***Room for improvement***

Overall, while some provisions of the proposed Directive will assist contracting authorities in implementing SPP, others may actually impede this. With the exception of the reporting requirement for national oversight bodies, the absence of any mandatory provisions on SPP is notable, but perhaps not surprising. The Commission notes in its introduction to the proposal that “many stakeholders, especially businesses, showed a general reluctance to the idea of using public procurement in support of other policy objectives.” It is regrettable that the views of public authorities and others – including businesses – committed to sustainability in public contracts were not put forward more effectively. Further work on the wording of the provisions on labels and life-cycle costing could enhance their usability, without creating unjustified barriers to competition. Clear, easy to use provisions in these areas would open up new ways for businesses to compete while allowing contracting authorities to meet their environmental and social obligations.