

**BUYING SOCIAL:
A GUIDE TO TAKING ACCOUNT OF SOCIAL CONSIDERATIONS
IN PUBLIC PROCUREMENT**

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Important notice

This handbook is an indicative document of the Commission services and cannot be considered binding to this institution in any way. It should also be noted that the handbook is subject to the evolution of Commission practice and case-law of the European Court of Justice.

INTRODUCTION

Socially-responsible public procurement is about setting an example and influencing the market-place. By promoting SRPP, public authorities can provide companies with real incentives for developing socially-responsible management. By purchasing wisely, public authorities can promote employment opportunities, decent work, social inclusion, SMEs, accessibility and design for all, fair and ethical trade and seek to achieve wider adherence to the CSR values.

The legal basis for public procurement within the European Union is Directives 2004/17/EC¹ and 2004/18/EC² (hereafter together the “**Procurement Directives**”), within which there is scope for taking account of social considerations, provided they are linked to the subject matter of the contract and as long as the principles of value for money and equal access for all EU suppliers are respected. The subject has been informed over the years by European Court of Justice case law, by a European Commission Communication in 2001, and by a study published by the Commission in 2003 on diversity and equality in public procurement (http://ec.europa.eu/employment_social/fundamental_rights/public/arc_en.htm#Leaflets).

The purpose of this Guide is: (a) to raise contracting authorities' awareness about the potential benefits of SRPP and (b) to explain in a practical way the possibilities offered by the existing Community legal framework for public authorities to take into account social considerations in their public procurement, thus paying attention not only to price but also quality/best value.³ In establishing this Guide, the Commission has consulted widely among public authorities in the Member States, and among various other interested parties and stakeholders.

This guide has been produced chiefly for public authorities, but it is hoped that it will also inspire corporate purchasers.

For practical reasons, the Guide follows the logic and structure of a procurement procedure.

SOCIALLY-RESPONSIBLE PUBLIC PROCUREMENT: THE ESSENTIALS

Public authorities are major consumers in Europe, spending some 16 % of the EU's gross domestic product (which is a sum equivalent to half the GDP of Germany). By using their purchasing power to opt for goods and services that also deliver good social outcomes, they can make an important contribution towards sustainable development.

Socially responsible public procurement (SRPP) may be an important tool both for the advancement of sustainable development and for the achievement of EU (and Member States) social objectives. SRPP refers to a wide spectrum of social considerations, which may be integrated at the appropriate stage of the procurement process. Here are the steps to illustrate how social issues can be addressed at each stage of procurement.

1. Strategic development and prioritisation of SRPP initiatives

¹ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (hereafter the “**Directive 2004/17/EC**”);

² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (hereafter the “**Directive 2004/18/EC**”);

³ **Important notice:** Although the information in the handbook has been carefully checked, the European Commission accepts no liability or responsibility with regard to the specific cases mentioned in the handbook or the linked websites.

Develop objectives and an action plan to address social issues in procurement

Identify the products and services the Contracting Authority procures that generate the greatest social risk and have the greatest capacity to enhance social outcomes. Provide for high level political commitment and leadership for SRPP

Raise awareness of socially responsible public procurement among the various stakeholders.

Ensure that procurement practices are open to bodies like small and medium size enterprises, social economy enterprises, and the voluntary and community sector, independently of the legal form they use. But ensure that standards are not reduced.

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2. Planning of specific procurement actions

In individual procurement contexts ...

Identify the Contracting Authority's needs and express them appropriately.

Consider how, and to what extent, possible economic, social and environmental policy⁴ objectives/obligations fit with this procurement.

Apply the tests of affordability and cost effectiveness including assessing the benefits and costs of using procurement to deliver social objectives.

Identify the subject matter of the contract and determine to what extent the social objectives should be/can be specified as part of the subject matter of the contract.

Engage in early dialogue with potential suppliers, contractors and service providers, provided this does not lead to discrimination against potential contractors from other Member States.

Consider how best to communicate the Contracting Authority's policy to the outside world, ensuring optimum transparency for potential suppliers or service providers, and for the citizens the Contracting Authority is serving.

3. Defining the requirements of the contract: specifications

⁴ You may refer to the European Commission document: "Buying Green! A handbook on environmental public procurement", available at: http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf.

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Draw up clear and precise technical specifications. Ensure that specifications are linked to the subject matter of the contract, reflect all appropriate social requirements and are transparent and non-discriminatory.

Build upon the 'best practices' of other contracting authorities; use networking as a way of obtaining and spreading information.

Use performance-based or functional specifications to encourage innovative socially responsible offers.

If the Contracting Authority is uncertain about the actual existence, price or quality of socially responsible products or services, it may ask for socially responsible variants.

Where possible the Contracting Authority could reserve the contract for supported employment.

The Contracting Authority should ensure that all intended outcomes are included - they cannot be added later in the process.

4. Selecting suppliers, contractors and service providers

Consider the ability of the potential contractors to deliver the particular contract in issue. Establish selection criteria on the basis of the exhaustive list of criteria mentioned in the Procurement Directives.

Does the contract require social capability or capacity? (e.g. particular skills, training, or equality/accessibility requirements). If so, include social criteria to prove technical capacity to perform the contract.

The assessment of technical capacity must relate to the candidate's ability to deliver the particular contract.

Where relevant, consider suppliers' track record for delivering on similar contracts in relation to required social standards.

5. Awarding the contract: tender evaluation

Establish award criteria: where the criteria of the ‘economically most advantageous tender’ is chosen, relevant social criteria may be inserted either as a benchmark to compare socially responsible offers with each other or as a way of introducing a social element and giving it a certain weighting.

- Social, (and also economic or environmental) award criteria should: Be linked to the subject-matter of the contract.
- Be consistent with fundamental principles of the EU treaty: transparency, equal-treatment and non-discrimination.
- Help identify the bid that represents best value for money from the view of the contracting authority.
- Be consistent with the criteria allowed in the Procurement Directives, where they apply.
- Consider whether the bid is “abnormally-low” because the tenderer is in breach of social standards.

Where allowed consider variants, alternative bids, or additional proposals to determine a tie-break

6. Contract conditions, contract management and contract monitoring

Contract performance clauses are generally the most appropriate stage of the procedure for including social considerations relating to employment and labour conditions of the workers involved in the execution of the contract. Ensure the contract conditions are...

- Linked to the performance of the contract,
- Consistent with the achievement of best value for money,
- Included in tender documentation,
- Compatible with EU Treaty principles.

Work in partnership with the supplier to manage performance and maximise achievement of objectives and compliance with contract conditions.

Maintain appropriate records on the performance of suppliers, contractors and service providers.

Use variance clauses to negotiate any contractual changes required over time, provided these are compatible with the provisions of the Procurement Directives and with the principle of transparency.

Work with suppliers for continuous improvement and keep up to date with developments in the market generally. In particular, work with suppliers to facilitate their adherence to principles of Corporate Social Responsibility throughout the supply chain.

I. BUYING SOCIAL: KEY ISSUES

1. Socially responsible procurement (SRPP): a definition

- 1.1 Socially Responsible Public Procurement (SRPP) refers to procurement operations that take into account one or several of the following considerations: the promotion of decent work, the respect of human and labour rights, the support of social inclusion (including persons with disabilities), social economy and SMEs, the promotion of equal opportunities and “accessibility and design for all”, the inclusion of sustainability criteria including taking account of fair and ethical trade issues, and the achievement of wider voluntary adherence to CSR while observing the principles of the EU Treaty and the Procurement Directives.
- 1.2 In furtherance of their social policies, contracting authorities have many possibilities for taking account of social considerations in public procurement.

Here is a non-exhaustive list of examples of social considerations that may be taken into account in public procurement, subject to compliance with the Procurement Directives and the fundamental principles of the EC Treaties. Contracting Authorities should determine on a case-by-case basis which social considerations are the most appropriate for their procurement, depending on the subject matter of their contract and of their objectives.

- Promoting “Employment Opportunities” e.g.:
 - promotion of youth employment
 - promotion of gender balance
 - promotion of employment of persons from disadvantaged groups (e.g. ethnic minorities, religious groups, gay and lesbian people)
 - promotion of employment opportunities for the long-term unemployed
 - promotion of employment for old-age unemployed (older workers)
 - promotion of on the job skill development programs including for persons with disabilities
 - promotion of inclusive and accessible work environments.
- Promoting “Decent Work”⁵: This universally endorsed concept is based on the idea that people have the right to productive employment in conditions of freedom, equity, security and human dignity. Four equally important and interdependent objectives make up the concept of decent work: fundamental principles and rights at work, employment providing a decent income, social protection and social dialogue. Gender equality is part and parcel of the Decent Work approach. In the context of SRPP a number of issues, can play an important role, such as:
 - Respect of Core Labour Standards⁶
 - Decent Pay

⁵ EC, COM (2006) 249, May 2006: “Combining economic competitiveness and social justice in this way is at the heart of the European model development. Playing an active part in promoting decent work forms an integral part of the European Social Agenda and of the EU’s efforts to promote its values and share its experience and its model of integrated economic and social development”, p. 2. See also the renewed commitment to the Decent Work agenda in the Commission Staff Working Document “Report on the EU contribution to the promotion of decent work in the world”, SEC(2008)2184, based on COM(2008)412 final.

⁶ILO Core Labour Standards comprise the banning of forced labour, child labour, as well as the right to freedom of association and collective bargaining and antidiscrimination. The Core Labour Standards have their legal basis in eight ILO Conventions. It should be pointed out that according to the EC Treaties, European law should prevail where there are possible inconsistencies between European law and certain international conventions (such as ILO conventions).

- Occupational Safety and Health
 - Social dialogue
 - Access to training
 - Access to basic social protection
 - Gender Equality
- Supporting *Social Inclusion* through Promoting Social Economy Organizations, e.g.:
 - Equal access to procurement opportunities of firms owned by or employing persons from ethnic/minority groups, for example from cooperatives, social enterprises, and non-profit organizations
 - access to employment for persons with special needs to enhance their employability to secure decent work
 - promoting supportive employment for persons with disabilities
 - Promoting “SMEs” (while ensuring that adequate precautions are taken, for example in relation to adherence to health and safety legislation):
 - provisions reducing the cost/burden of participating in SRPP opportunities
 - provisions enabling greater access by SMEs to public procurement, where possible ensuring that the size of the contract is not an obstacle in itself for the participation of SMEs, giving sufficient time to prepare the tenders and ensuring payments on time, setting proportionate qualification and economic requirements, etc.
 - opportunities through making sub-contracting opportunities more visible and ensuring equal terms for subcontractors
 - Promoting “*Accessibility and Design for All*”, e.g.:
 - Mandatory provisions in technical specifications to ensure access by persons with disabilities to, e.g. public services, public buildings, public transport, public information, ICT goods and services including web based applications. The key issue is to buy goods and services that are accessible to all.
 - Taking into account “*Fair or Ethical Trade*” issues
 - Possibilities to take into account fair and ethical trade issues in tender specifications and conditions of contracts
 - Seeking to achieve wider voluntary adherence to “*Corporate Social Responsibility*”
 - working with awarded contractors to enhance adherence to CSR values. CSR is companies acting voluntarily and beyond the law in pursuit of environmental and social objectives in their daily business operations.

The status of these social policy objectives differ markedly both in EU law and in different Member States. For example, in some sectors there are mandatory provisions in some Member States regarding accessibility that go beyond the requirements of EU law, but not in other Member States.

2. The potential benefits of SRPP

2.1 Assisting compliance with social and labour law, including related national and international policy commitments/agenda

SRPP may contribute to enhancing legal and policy compliance with national/international commitments to social development goals, as there is growing concern in many countries that traditional mechanisms of encouraging social justice and social cohesion are not adequate.

2.2 Stimulating socially-conscious markets

SRPP may contribute to the development of a market in socially-beneficial products by expanding or creating new markets for goods and services that support the achievement of social objectives, and serving as a model for other consumers through offering standards and information to them. Indeed, social public procurement can help create a "level playing field" in Europe and economies of scale. Market innovation can be stimulated as can competition at international level.

2.3 Demonstrating socially-responsive governance

SRPP may contribute to enhance compliance with community values and needs, as it responds to the growing public demand for governments to be socially responsible in their operations.

2.4 Addressing issues about markets

Governments can stimulate the availability of certain products. By purchasing certain devices or devices with certain characteristics (for example, ICT that is accessible for persons with disabilities) governments can foster competition and innovation among industries to develop accessible products that could lead to more, better, and cheaper accessible products on the market.

2.5 Stimulating integration

Government intervention is sometimes desirable to encourage inclusion of significant groups in society (people with disabilities, small businesses, women, or minorities, for example) in important market activities in order for an effective market to develop.

2.6 More effective public expenditure

The volume of public procurement and the limits placed upon direct social intervention by budgetary stringency could make procurement an attractive area for "buying" social standards.

3. SRPP and the EU social model

3.1 One of the major benefits of SRPP, as we have seen, is that it can be used by public authorities to further the European social model. The examples of the types of social standards that SRPP has been used to advance reflect closely that model. The European social model is a vision of society that combines sustainable economic growth with improved living and working conditions. This has been seen to involve the creation of a successful economy in which a particular set of social standards are progressively achieved: good quality jobs, equal opportunities, non-discrimination, social protection for all, social inclusion, and the involvement of individuals in the decisions that affect them. These standards are not only intrinsically important but are also factors that are crucial in promoting innovation, productivity and competitiveness.

4. The legal and policy approach to SRPP in the EU

4.1 The developing social and human rights dimension of EU policies and legislation

Over the past twenty years, the EU has developed its social dimension to a significant degree, embodied in 2008 by the renewed Social Agenda. The importance of these developments is that SRPP now increasingly furthers EC level policy, including its interaction with the international environment; some have become central to Community law, others have not. In some areas, notably in the area of gender equality and non-discrimination on grounds of race, age, sexual orientation, disability and religious and other beliefs, as well as on health and safety at the workplace, working time, working conditions, and information and consultation, the Community has adopted legislation. Based on a number of EU Treaty provisions, whilst there is extensive Community legislation dealing with status equality, there is no equivalent Community level promotion through legislation of policies dealing with most labour conditions, but further advancement of social standards is nevertheless an important objective of the EU in several respects, particularly where such social standards are also fundamental rights. There is also some experience with autonomous social partner agreements.

4.2 The legal and policy approach to SRPP in the EU

The European Commission developed a strategy for clarification of the scope of SRPP. In its interpretative communication of 15th October 2001, the European Commission set out the possibilities offered by Community law to integrate social considerations into public procurement procedures.⁷ The aim of this Communication was “to clarify the range of possibilities under the existing Community legal framework for integrating social considerations into public procurement. It seeks in particular to provide a dynamic and positive interaction between economic, social and employment policies, which mutually reinforce one another.” Both before and after the publication of these communications, the Court of Justice further clarified those possibilities in a series of important cases.⁸

The Procurement Directives adopted on 31 March 2004 consolidate and complement the legal context.⁹ They specifically mention in their recitals and provisions the possibilities for adopting social considerations in technical specifications, selection and award criteria and contract performance clauses. A new provision was introduced regarding workshops for workers with disabilities.

The Procurement Directives do not apply to all public contracts. Some contracting authorities have adopted SRPP policies that specifically apply to contracts that are not or only partially covered by the Procurement Directives, such as: contracts below the thresholds for application of the Procurement Directives, and contracts for services that exceed the thresholds for application of these directives listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC.

This Guide does not address the EU law relating to these contracts in detail. However, it should be noted that the European Court of Justice (ECJ) has confirmed in its case law that the internal market rules of the **EC Treaty apply also to contracts outside the scope of the Procurement Directives**. The ECJ has ruled that the EC Treaty principles of equal treatment and transparency, as well as the free movement of goods, the freedom of establishment and the freedom to provide services, apply to contracts under these thresholds.

4.3 Services of general economic interest

The Guide does not specifically address either the legal issues related to the application of public procurement rules in general, or related particularly to services of general economic interest.

In November 2007, the Commission adopted a Communication on services of general interest, including social services of general interest.¹⁰ It aims to provide practical guidance on the application of Community rules to these services. The Communication is accompanied by two Staff Working Papers, which reply to a series of questions relating to the application of State aid and public procurement rules to services of general interest.¹¹ Most of these questions were gathered during a large consultation process that took place in 2006-2007 in the area of social services. As a follow-up of the Communication, an interactive information service (IIS) has also been set up in January 2008, through which answers are provided to

⁷ Interpretative Communication of the Commission on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Social Considerations into Public Procurement, COM (2001) 566 final, 15.10.2001

⁸ E.g. Judgments of the Court of Justice of 17 September 2002 in case C-513/99 and of 4 December 2003 in case C-448/01.

¹⁰ See Communication on "Services of general interest, including social services of general interest: a new European commitment" (COM(2007) 725 final of 20 November 2007).

¹¹ http://ec.europa.eu/services_general_interest/faq_en.htm.

other questions from citizens, public authorities and service providers regarding the application of Community rules.¹²

4.4 Initiatives by EU social partners

With the financial support of the Commission, four sectoral social dialogue committees (contract catering, cleaning, private security and textiles) have issued handbooks for organizations and public authorities awarding contracts.¹³ These sectoral handbooks are a result of autonomous work by the social partners in the framework of European social dialogue. The Commission accepts no liability or responsibility with regard to the specific content of these handbooks, especially since some of the guides are based on the legal and policy framework that existed only at the time of drafting. Since then the legal framework has evolved as illustrated in point 4.2. of this Guide, and the sectoral guides cannot be considered as in line with current EC public procurement law.

4.5 Small and medium size enterprises

There are several issues regarding the relationship between SMEs and SRPP. One particularly important issue relates to the potential burdens that adopting SRPP approaches in public procurement may generate for SMEs directly (if an SME is the main contractor) or indirectly (if the SME is a subcontractor to whom SRPP obligations have been passed on by the main contractor). Public authorities contemplating the introduction of SRPP should make themselves aware of these direct and indirect costs and should take these into account in deciding how, or whether, to adopt SRPP in their procurement operations. In this context, estimating the effect of SRPP may not be easy, as it will sometimes be difficult distinguishing the costs arising from the imposition of the social standard from the specific costs arising from implementing the social standard through SRPP. Contracting authorities will also need to be aware that the introduction of SRPP is unlikely to affect all SMEs in the same way. In particular, some SMEs may be better able to take advantage of the SRPP and create opportunities to compete on the delivery of the social standard aspect of the contract itself.

II. AN ORGANIZATIONAL STRATEGY TO BUY SOCIAL

Public authorities that wish to achieve social objectives through SRPP, will need to set up a strategy for implementing SRPP.

1. Identifying the objectives for Socially Responsible Public Procurement

Organizational strategies for SRPP should reflect the national/government social priorities and at the same time should explicitly acknowledge the role that procurement plays in contributing to its achievement.

Examples:

FR French Government: A Strategie nationale du développement durable was launched in 2003 (<http://www.ecologie.gouv.fr/-SNDD-actualisee-.html>), followed by a Plan national d'action pour des achats publics durables (<http://www.ecologie.gouv.fr/pnaapd.html>) in 2007. The French

¹² http://ec.europa.eu/services_general_interest/registration/form_en.html.

¹³ Catering: 'Guide to most economically advantageous offering in contract catering' (2006); Cleaning industry: 'Selecting best value – A manual for organisations awarding contracts for cleaning services' (2004); Private security: 'Selecting best value – A manual for organisations awarding contracts for private guarding services' (1999); Textiles: 'Public procurement awarding guide for the clothing-textile sector' (2005).

Government has engaged in a major consultation with the social partners – the so-called Grenelle de l'environnement and Grenelle de l'insertion – involving different actions impacting social integration, including public procurement. The aim is build around the central idea of the “Etat exemplaire”. The State, and more generally all public law entities are expected to show the way forward to sustainable development.

2. Providing for high level political commitment and leadership for SRPP

Leadership is a key element for the success of an SRPP strategy. It involves identifying the management structure and the resources necessary (human and financial) to carry out SRPP. SRPP needs leadership from the very top of the organization and involves political commitment as well as leadership through the management structures. Though SRPP is not an issue just for procurement professionals, the procurement function can act as a catalyst for making resources available as well as for coordinating wider team efforts. Finally, leadership needs to be embedded through identifying "champions" for SRPP.

In principle, it should be fairly easy for all public authorities to take the political decision to buy social. Indeed, they should be encouraged to do this as it will not only benefit society but also the contracting authority by improving its public image. In fact, a social purchasing policy does not normally require any structural changes by the contracting authority.

3. Measuring the risks and prioritising the organizational spend categories to enhance social outcomes

Organisations need to assess the social risks and impacts of their purchasing and supply chain activity. This helps to focus their efforts on the spend categories of greatest concern and on those which can contribute to the achievement of their social targets.

Here are some suggestions for what to think about in prioritising an approach to SRPP:

- Adopt a step-by-step approach. Start with a small range of products and services where the social impact is clear or where socially responsible alternatives are easily available and not more expensive. For example, select those products (i.e. vehicle fleet) or services (i.e. cleaning services) that have a high use of vulnerable workers (from ethnic minorities and women).
- Alternatively, start by ensuring that contract specifications do not have a negative impact on social conditions (e.g. by assessing the impact of privatising the delivery of services on vulnerable groups).

Example:

SV Swedish Social Insurance Agency: To facilitate access to public procurement opportunities by SMEs, social economy and voluntary type organizations who work with socially disadvantaged groups, the organization sometimes includes in the initial study of procurement participation of these groups. To identify the risk of non-compliance with social standards, the organization analyses the risks at the beginning of procurement. For example, in procurement of cleaning services, the risk of non-compliance is regarded as high.

- Focus initially on one or more social problem, such as fair wages, or health and safety.

- Consider availability and cost of socially superior alternative approaches. Are there more socially responsible ways of achieving the aims of the procurement strategy the Contracting Authority has adopted, will they meet the Contracting Authority's requirements, and can it afford them? Consider what extra costs (if any) the introduction of social considerations may generate.
- Consider availability of data. Can the Contracting Authority find the social data it needs to establish a more socially responsible procurement strategy? How complicated will it be to decide what the Contracting Authority wants technically, and to express it in a call for tender?
- Consider the capacity of the Contracting Authority to put into effect a workable and effective programme of action regarding SRPP.
- Consider alternative ways of delivering the social policy at issue. Is delivering this social policy (partly) through public procurement an appropriate use of resources, or is there a more effective mechanism for delivering this policy by using other tools at the disposal of the Contracting Authority?
- Look for visibility. How visible will the socially responsible policy be to public and staff? High-profile changes like a change to sustainably produced/fair trade coffee in the cafeteria, can help build awareness of the policy and link it to other social projects.
- Consider the potential for future developments. If socially responsible purchasing can target services at an early stage in their development and marketing, this may be more successful than trying to change the social characteristics of mature sectors.

Examples:

FR Ville d'Angers: This town instituted an internal focal point (specialized legal advisor) for eco-responsible procurement in 2005, in charge of developing the practices for socially responsible public procurement with the objective of making them a fully established practice in the procurement operations of the entity. The specialized legal advisor provided training of the directorate general staff and of the internal services on sustainable procurement. Awareness raising and tutoring was undertaken on both the technical and legal level at the time of identification of needs, of the preparation and launch of the tender and of the analysis and evaluation of the offers received, in close cooperation with enterprise. For the social aspects, public works and services are in general considered priority sectors: in particular construction of buildings, public roads, and public parks and gardens.

UK Task Force on Sustainable Public Procurement Prioritisation Methodology: The Sustainable Procurement Task Force (SPTF) was set up in May 2005 and published its Action Plan in June 2006. The Action Plan presented the business case for sustainable procurement, recommended actions across six broad areas and provided two tools that can help organizations' progress: the Prioritization Methodology, and the Flexible Framework. The Prioritization Methodology is a risk-based approach that helps organizations focus their efforts and resources appropriately. Instead of using just expenditure data, the methodology allows organizations to take account of environmental and socio-economic risk, the potential that they have to influence suppliers and the actual scope to improve sustainability. The Flexible Framework is a tool designed to help organizations understand the steps needed at an organizational and process level to improve procurement practice and make sustainable procurement happen.

Putting an SRPP policy into practice will thus require strategic planning: setting priorities when choosing the contracts most suitable for SRPP. Some contracting authorities have chosen to adopt a co-ordinated

and holistic approach to the integration of social considerations.

Examples:

UK Greater London Authority: In June 2006, the GLA Group adopted a new Sustainable Procurement Policy to support the Mayor's policies. The term "Sustainable Procurement" was the term used in this policy statement, but this became "Responsible Procurement" to reflect the importance of both social and environmental objectives.

The current policy statement¹⁴ refers to improvements in the health of Londoners, and equality of opportunity for all people, in a context of greater wealth creation overall. The Policy sets out several social and economic "themes" across which the GLA Group aimed to improve London's sustainability:

1. Encouraging a diverse base of suppliers, by promoting greater supplier diversity in the private sector.
2. Promoting fair employment practices, seeking "to ensure we move towards a position that, where appropriate, our contractors' staff receive a fair wage reflecting the environment in which they work, and that they enjoy contractual terms which represent reasonable minimum standards and which provide for family friendly, flexible and diverse working environments."
3. Promoting workforce welfare, seeking to "ensure that wherever appropriate, our contract terms require our suppliers to make provision for the welfare of their workforce"
4. Meeting strategic labour needs and enabling training opportunities, seeking "to incorporate provisions into our contracts, where appropriate, to offer training and employment opportunities for London's communities and to address under-representation of particular groups in particular sectors, and the need for providing skills and opportunities for people experiencing long-term unemployment."
5. Ethical sourcing practices, seeking to work with suppliers who: do not use forced, bonded or non-voluntary prison labour; establish recognised employment relationships with their employees that are in accordance with their national law and good practice; can demonstrate a commitment to equality of opportunity; impose working hours compliant with national laws or industry standards; work within the laws of their country; ensure the health and safety of the workforces and the wider public; take measures to ensure that child labour is not utilised in their operations, and offer wages and benefits that at least meet relevant industry benchmarks or national legal standards.¹⁵

4. Raising awareness on SRPP and involving key stakeholders

SRPP is an issue of interest to a wide range of stakeholders, which need to be involved in the process of developing a SRPP approach in order to gain confidence in it and get committed to the achievement of its objectives. Key stakeholders for SRPP include government representatives at central, regional, local level, representatives of potential suppliers/contractors, representatives of the civil society, representatives of employers' organizations and trade unions. Workshops, seminars, conferences should be organized in

¹⁴ Mayor of London, GLA Group Responsible Procurement (March 2006, updated January 2008).

¹⁵ For a case study of this in operation in the GLA Group, see the case study of the procurement of uniforms by London Underground at <http://www.london.gov.uk/tp/casestudies/casestudy08.jsp>, and "Ethical driving force", in Company Clothing, April 2007.

order to gather views and opinions on documents laying down the draft approach for SRPP. They should be organized at various stages of the development process, i.e. at the very start of the process when ideas are formulated, during the course of drafting the approach and towards the end when a final draft can be made available.

Finally, effective communication about SRPP benefits, good practices, quick wins/success stories also place a key role in achievement of progress. Communication should also involve a wide range of stakeholders. It is very important that all these stakeholders understand the nature of the challenge and their roles within it. Better results will be achieved through imaginative and committed partnership working between purchasers and contractors.

Examples:

FR Ville d'Angers: Pre-bid meetings are organized for social-economy organizations in order to make them better understand the administrative procedures/ regulations which are often complex and heavy.

SV Regional Administration for South-Western Sweden: Pre-bid meetings are used to explain "design-for-all" requirements if any such requirements are included in the technical specifications.

Cooperation between purchasing authorities is another way of increasing access to social expertise and know-how, and of communicating the policy to the outside world.

Example:

DA National Procurement Ltd: SRPP is one of the topics in the market analysis that is carried out before each call for tender. The organization has training programs and workshops for all suppliers and before any call for tender the authority invites potential suppliers to information meetings about the tender. The organization tries to make the tender material as simple as possible so that SMEs also have the resources to submit their bid. Often framework contracts are split into several calls for tender but without infringing the thresholds set by the Procurement Directives,¹⁶ in order to give suppliers the opportunity to submit a bid e.g. on a contract covering a certain region.

5. Implementing the SRPP strategy

The SRPP strategy will need to detail how SRPP will be implemented and the steps which need to be undertaken to achieve progress. The strategy will need to take into considerations factors such as:

- The legal and regulatory framework
- The institutional framework
- The management structure
- The availability of professional capacity and resources
- The involvement of stakeholders

¹⁶ Art 9(3) of Directive 18/2004 and Art 16(2) of Directive 17/2004.

In terms of how to implement the strategy, this will need to detail responsibilities, targets and realistic timescale for their achievement, the management structure for their implementation, necessary professional and financial resources, and measures for progress monitoring and reporting.

In terms of the steps that need to be undertaken, this involves setting up a Social Procurement (SP) Task Force/Team, designing an action plan, including SP into policies and procedures, including STDs, developing simplified Guidelines for requisitioners/budget holders and procurement officers at all levels.

In terms of capacity building, this will involve training programmes for executives, managers and staff. It will involve sharing good practices, the availability of skills to implement SP, inclusion of SP competences in candidates' selection criteria, and the availability of information on SP initiatives at EU/government level.

The staff making the purchases should be given the legal, financial and social knowledge they need to decide to what extent and where social factors can best be introduced into the procurement procedure, whether they are set at the right level to get best value for money and whether they match the social priorities of the contracting authority.

6. Monitoring and controlling effective implementation

Measuring and controlling effective implementation of the SRPP strategy and achievement of its outcome involves setting-up internal and external control measures, which should assess outcomes against stated targets and standards of performance.

Internal measures need to be linked to existing reporting systems, which will have to be adapted in order to take into consideration SRPP objectives. They need to be linked also to internal auditing procedures and need to incorporate sanctions for non-compliance with SRPP objectives.

External measures should involve independent auditing of SRPP performance. They may also include benchmarking against past performance/performance of other organizations.

The outcome of SRPP performance auditing should be made available to the general public and should contribute to review and update policies, objectives and procedures for SRPP.

7. Overview of the procurement process

Public procurers act on two main principles:

- Getting the best value for money
- Acting fairly

Best value for money: Contracting authorities have the responsibility to get the best value for taxpayers' money for everything they procure. Best value for money does not necessarily mean going only for the cheapest offer. It means the Contracting Authority has to get the best deal within the parameters it sets. Value for money may also include social considerations.

Acting fairly: Acting fairly means following the principles of the internal market, which form the basis for the Procurement Directives and the national legislation based on these directives. The most important of these principles is the principle of equal treatment, which means that all competitors should have an equal opportunity to compete for the contract. To ensure this level playing field, the principle of transparency must also be applied.

- Examples of provisions that embody the principle of equal treatment in the Procurement Directives are the time limits set for the receipt of tenders and requests for participation, the common rules on technical specifications, and the provisions prohibiting discrimination against contractors from other Member States.

- Examples of application of the principle of transparency can be found in the different provisions on the publication of notices and the obligation for contracting authorities to inform the tenderers concerned why their tenders were rejected.

7.1 The importance of legal advice

EC procurement rules stipulate how to handle the procurement process to safeguard principles of fairness, non-discrimination and transparency. These rules permit the incorporation of sustainability and equality of opportunity, but this must be compliant. Early expert legal advice on the establishment of an SRPP action plan is likely to save difficulties later.

7.2 Preparing the procurement procedure

The preparatory stage of any procurement procedure is crucial, as all stages build upon each other. Therefore, before starting a tendering procedure, the Contracting Authority should set aside enough time for defining the subject of the contract and the instruments to be used to reach the end result. Another factor underlining the importance of the preparatory stage is that the early stages of the procurement procedure offer the best possibilities for taking into account social considerations.

8. Stages of the procurement procedure and approaches to SRPP

Following the logic of this process, there are now at least four basic approaches of how social issues are currently addressed in public procurement.

The *first* approach arises where the purchaser decides to include social criteria in the subject matter of the contract itself, and/or the tender laying down the technical specifications that must be met by successful contractors in a way that includes social criteria. One example is specifying that computer equipment must conform to certain accessibility criteria.

In the *second* approach, there is a prohibition on obtaining government contracts where there has been previous wrongdoing, or to prevent public bodies contracting with those who are currently failing to achieve a particular standard of social behaviour.

The *third* approach attempts to get tenderers to commit to social standards and have their success in doing so taken into account in the award of the contract. The form in which this third approach can be found in practice is where the public body takes conformity to certain social issues into account as an award criterion. This approach differs enormously, however, between different programmes.

The *fourth* approach focuses its attention on the stage after the contract has been awarded. It requires whoever is awarded the contract to comply with certain conditions in carrying out the contract once it is awarded. This model presents all contractors with the same requirement that the contractor must sign up to, although there is no building of the ability of the contractor to comply with certain conditions.

These four basic approaches are not necessarily alternatives, and are frequently combined in any one public procurement procedure.

Example:

ES Basque Country Government: The Basque Country Government has an Agreement on the incorporation of social, environmental and other public policies criteria in the public procurement of the public administration of the Basque Country. This agreement is the instruction that fixes how and which social and environmental criteria must be included in all the public procurement for all the public sector of the region.

Main Goal: To include social, environmental and other criteria related to other public policies in the public procurement of the Basque Country Public Administration and its public entities.

Assessment and monitoring: The public departments on employment, social inclusion, social affairs and environment will periodically assess performance in contracting. The assessment will include the specifications writing, its application in the awarding process, and its performance.

Subject matter of the contract: The Instruction says explicitly that the definition of the subject matter of the contract must be defined according the following terms: The subject matter of the contract should be respectful toward the environment. The subject matter of the contract should be respectful towards health and social welfare at work.

The Instructions add the social and environmental issues because the sustainability approach includes both aspects. The health and safety conditions are closely linked with the environmental characteristics of the workplace and the environmental characteristics of the products used.

Technical specifications: The Instruction recommends to incorporate in the technical specifications Accessibility and Design for All requirements.

Award Criteria: Whenever there is more than one award criterion, these award criteria have to include that the products and services must be well suited for people with disabilities (whenever this adaptation is above the legal mandatory minimum). Whenever the provision of services defined in the subject matter of the contract has disadvantaged groups as beneficiaries, the characteristics related to the fulfilment of their social needs will be included as an award criterion.

Contract Performance Clauses: The instruction foresees that the specifications include special contract performance clauses: environmental, social and those related to other public policies as well. The aim of the special contract performance clauses is: to protect the environment and health and safety; to promote the employment of disadvantaged groups; to remove gender inequality in the labour market; and to fight unemployment.

Examples of contract performance clauses:

1. Labour inclusion of unemployed people that are difficult to employ: The contract performance must include minimum 20% of unemployed people with high difficulties in being employed on the staff of the organisation that will perform the contract. People with disabilities, women above 30 that are long term unemployed, household violence victims, persons with mental illness, unemployed father or mother of one-parent families, immigrants unemployed for 6 months, long term unemployed people (more than one year), and unemployed young persons are some examples of unemployed people with high difficulties included in the instruction.

2. Gender equality: In the contract performance, the contractor will guarantee equality among men and women in working conditions, salary, etc.

3. Employment quality and basic labour rights: At least 30% of the staff for the contract performance must have a contract for an indefinite period. The contractor must guarantee in the contract performance respect of the ILO Core Labour Standards along the product supply chain.

4. Safety and health in the contract performance for building works and services.

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III. IDENTIFYING THE NEEDS AND PLANNING THE PROCUREMENT

1. The importance of assessing actual needs

There is one crucial step that the Contracting Authority needs to take at this preparatory stage even before defining the subject of the contract, which is to assess its actual needs.

For example, the Contracting Authority may have decided that it needs to disseminate information to the public. This may include a more socially inclusive solution, such as dissemination of information in accessible formats that will also be useable by members of the public with disabilities.

This is the stage at which the public sector can best identify the social standards that the procurement can help deliver. It requires those involved in the “client-side”, from policy makers to practitioners, to

- Actively seek out opportunities to promote social standards;
- Ensure that the opportunities are linked to the subject-matter of the contract and cost-effective to incorporate;
- Focus on the outcomes required, rather than the inputs or even outputs;
- Build in flexibility to accommodate changing requirements over the life of a project;
- Identify the needs of all categories of users of the service/works/supplies to be procured.

Therefore, in order to be effective, the Contracting Authority should rather consider its needs in a functional manner, so as not to exclude any social effects.

2. Defining the subject matter

The ‘subject matter’ of a contract is about what product, service or work the Contracting Authority wants to procure. When defining the subject matter of a contract, contracting authorities have great freedom to choose what they wish to procure, including achieving a social standard. In the case of accessibility for example this is often so as it is a feature of the good or service being purchased. This should be done without distorting the market, i.e. by limiting or hindering access to it. The process of determination of what the subject matter of the contract is will generally result in a basic description of the product, service or work, but it can also take the form of a performance-based definition.

Example: France

The new French procurement Code (2006) provides various ways to integrate environmental and social agendas into procurement. The first approach is essentially to “mainstream” public policy concerns into the planning process of public procurement. This has been particularly related to the goal the Code stresses, for example, that one of the ways of addressing the goal of achieving sustainable development is to build in the issue of sustainable development right at the beginning of the project, regarding one of the purposes of the contract as being the achievement of such sustainable development. Article 5 of the Code, indeed, imposes on the public body the duty to take into account concerns of sustainable development, defined as development that meets the needs for the present without compromising the capacity of the future generations to answer theirs. Thus, it is at the first stage of the procurement process (the definition of the subject matter of the contract) that the Code envisages that the public body should consider the possibilities of integrating requirements in terms of the environment, and cost implications of doing so.

In principle, the Contracting Authority is free to define the subject of the contract in any way that meets its needs. Public procurement legislation is not so much concerned with what contracting

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authorities buy, but mainly with how they buy it. For that reason, none of the Procurement Directives restrict the subject matter of a contract as such.

However, **freedom to define the contract is not unlimited**. In some cases the choice of a specific product, service or work may distort the level playing-field in public procurement for companies throughout the EU. **There have to be some safeguards**.

These safeguards lie, first of all, in the fact that the provisions of the EC Treaty on non-discrimination, the freedom to provide services and the free movement of goods, apply in all cases, and therefore also to public procurement contracts under the thresholds of the Procurement Directives or to certain aspects of contracts which are not explicitly covered by these directives.

In practice, this means that in all cases the Contracting Authority has to ensure that the contract will not affect access to its national market by other EU operators and operators from countries benefiting of equivalent rights¹⁷. For contracts covered by the Procurement Directives, the principle of non-discrimination has a more restrictive meaning requiring a strict equality between all candidates/tenderers in respect to all aspects of the procedure.

A second safeguard, considered in the next chapter, is that, according to public procurement rules, the technical specifications used to define the contract must not be defined in a discriminatory way and must be linked to the subject matter of the contract.

3. Increasing access to procurement opportunities

3.1 Improving access to procurement opportunities

However, it is clear that some classes of tenderers have more difficulty in accessing the public procurement market than others, e.g. SMEs, women-owned businesses, minority-owned businesses. Purchasers may address these difficulties, but are not permitted to prefer specific classes of tenderers. EU law permits positive action by purchasers, but not positive discrimination.

What's not permitted – an example

□ With the exception of the special provisions relating to sheltered workshops and sheltered employment programmes, purchasers are not permitted to reserve performance of contracts to particular classes of firms, as that would breach the equal treatment requirements of EU law, as described above.

(In the field of social services, it is however possible, in exceptional cases, when certain specific conditions are met, to reserve performance of certain contracts to non-profit operators¹⁸. This requires the existence of a national law regulating this particular activity and providing for a restricted access to certain services for the benefit of non-profit operators. Nevertheless, such a national law would constitute a restriction to Articles 43 and 49 of the EC Treaty, on the freedom of establishment and the free movement of services and would have to be justified on a case by case basis. On the basis of the case-law of the European Court of Justice, such a restriction could be justified, in particular, if it is necessary and proportionate in view of the attainment of certain social objectives pursued by the national social welfare system.)

¹⁷ For example, operators from countries that are members of the Government Procurement Agreement within WTO;

¹⁸ See Judgement of the Court of 17 June 1997 in case C-70/95 (Sodemare) [1997] ECR I-3395. See also the answer to question 2.7 of the Commission Staff Working Document – “Frequently asked questions

The purpose is, instead, to ‘level the playing field’, so that purchasers offer under-represented businesses the same opportunities to compete for public contracts as other qualified suppliers. In doing so, competition can be encouraged, drawing on more companies into the tendering process. There are various actions that can be taken, within these limits:

- Requiring large organisations to address supplier diversity by providing equality of opportunity to diverse suppliers as subcontractors, and by promoting equality and diversity practices.
- Encouraging the participation of diverse suppliers by publishing a forward plan of major procurement activity, identifying large contracts that are due to be tendered over the coming 12 months.
- “Meet the buyer” events hosted in partnership with key suppliers to increase the transparency and accessibility of the procurement process.
- Developing business support programmes to improve the capacity of small and diverse suppliers and to provide guidance on the public sector procurement process.

Example:

UK Greater London Authority (GLA): The GLA has adopted a policy of encouraging a diverse base of suppliers, by promoting greater supplier diversity in the private sector. The purpose is to ‘level the playing field’, so that “we offer under-represented businesses the same opportunities to compete for GLA group contracts as other qualified suppliers.”¹⁹ Procurement procedures have been developed which include requirements for large organisations to address supplier diversity by providing equality of opportunity to diverse suppliers as subcontractors, and by promoting equality and diversity practices. The GLA Group has agreed a standard format for the collection and reporting of supplier diversity statistics, and information is collected on how much money is spent with diverse suppliers. Each member of the GLA group submits a quarterly return on its expenditure with diverse suppliers to the Responsible Procurement Steering Group. Data is captured with regard to the requirements of the Data Protection Act. Participation from diverse suppliers is encouraged by publishing a forward plan of major procurement activity, identifying large contracts that are due to be tendered over the coming 12 months. “Meet the buyer” events are also hosted in partnership with key suppliers to increase the transparency and accessibility of the procurement process. In addition, the GLA Group, through the London Development Agency (LDA), has developed business support programmes to improve the capacity of small and diverse suppliers and to provide guidance on the public sector procurement process.

IR InterTrade Ireland: The aim of the Go-Tender Programme was: “to create cross-border business opportunities for SMEs in the all island Public Procurement market through the provision of carefully targeted regional workshops”. The objectives of the Programme were to: increase awareness amongst suppliers, particularly regarding cross-border contracts and to create cross-border opportunities for SMEs in the all island public procurement market; provide knowledge to SMEs regarding the public sector market throughout the island; provide

concerning the application of public procurement rules to social services of general interest”, available at the following address: http://ec.europa.eu/services_general_interest/docs/sec_2007_1514_en.pdf

¹⁹ 2008 “Mayor of London’s Responsible Procurement Report”, p. 25.

development of the skills required to win public sector work in both remits; and provide experienced one to one support in the process of bidding for work. Over the previous three years presentations were made at 30 workshop events, which were attended by over 400 SME suppliers. Many of these suppliers have gone on to successfully compete for public sector contracts both on the island of Ireland and across Europe.

- some contracting authorities have suggested splitting a specific call for tender into composite lots. This is acceptable, provided that the same procurement requirement is not subdivided with the aim of avoiding the application of the Procurement Directives²⁰.

Examples:

FR: in order to attract the widest possible competition, the general rule is to award contracts in the form of separate lots. However, contracting authorities have the freedom to award global contracts if they consider that the sub-division into lots would restrict competition, or risk rendering the execution of the contract technically difficult or expensive, or if the contracting authority were not in a position to ensure the co-ordination of the performance of the contract.

3.2 Set-asides for sheltered workshops

In both the Procurement Directives²¹, there is, however, an explicit provision permitting Member States 'to reserve the right to participate in award procedures for public contracts' to sheltered workshops or "provide for such contracts to be performed in the context of sheltered employment programmes".

The explanation is that "sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition."²² Consequently, it is appropriate to provide that Member States may accord preferences to enable them to achieve their aim without having to compete in the same way as other operators.

According to the above-mentioned provisions of the Procurement Directives, such reservation is allowed only under certain conditions:

- any such reservation must be initiated by Member States and may not be adopted ad hoc by public bodies;
- at least 50% of the employees of such sheltered workshops or sheltered employment programs are persons with disabilities;
- given the nature and seriousness of their disabilities, the employees concerned cannot carry on occupations under normal conditions.

²⁰ Art 9(3) of Directive 18/2004, Art 16(2) of Directive 17/2004.

²¹ Article 28 of Directive 2004/17/EC and Article 19 of Directive 2004/18/EC.

²² Recital 28 of Directive 2004/18/EC; Recital 39 of Directive 2004/17/EC

Examples:

DE Federal Legislation: A Federal Decree on Contracts for Workshops for the Disabled of 10 May 2005 requires federal procurement authorities to reserve a part of their contract budget for contracts which can be awarded to workshops for workers with disabilities. This might even involve large supply and services contracts. Participation in these workshops is limited to workshops for workers with disabilities. Nevertheless, these workshops have to compete in the award procedures and make economically sound tenders. Moreover, contracting authorities have to follow the general transparency requirements of the Procurement Order VOL/A. There appears to be a procurement policy in favour of workers with disabilities in many municipalities. According to the City of Düsseldorf especially low value contracts are directly awarded to workshops for workers with disabilities. These workshops are often partly or fully owned by the municipalities who award these contracts.

FR: French Legislation: French law mandates hiring a certain percentage of the workforce among persons with disabilities. Under Art. L323-8 of the Code du travail, employers, and procuring entities in particular, may partially fulfil their obligation by “sub-contracting” the duty. People with disabilities employed by contractors are to a given extent counted in favour of the procuring entity.

Where Member States take advantage of these provisions, then the contract notice must make reference to it, and it is also required that the scope of the preferences be included in the PIN notice and contract notices.²³

IV. THE CONTRACT

a) DEFINING THE REQUIREMENTS OF THE CONTRACT

1. Drawing up the technical specifications

Once the Contracting Authority has defined the subject of the contract, the Contracting Authority has to translate this into measurable technical specifications that can be applied directly in a public procurement procedure.

Technical specifications, therefore, have three functions:

- They describe the procurement requirement to the market so that companies can decide whether it is of interest to them. So they determine the level of competition.
- They provide measurable requirements against which tenders can be evaluated.
- They constitute minimum compliance criteria. If they are not clear and correct, they will inevitably lead to unsuitable offers. Offers not complying with the technical specifications need to be rejected.

Under EU public procurement rules, the client can only evaluate or compare bidders' proposals against requirements in the specification. Similarly, they can only assess bidders' competence to deliver what is

²³ Directive 2004/18/EC, Annex VII; Directive 2004/17/EC, Annex XIII: PIN and Contract Notices must indicate, where appropriate, “whether the public contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes.”

in the specification. The specification is issued early in the tendering process, which is why authorities have to get their requirements “right first time”.

Technical specifications should be **linked to the subject matter of the contract**. Requirements that bear no relation to the product or the service itself, such as a requirement relating to the way in which an undertaking is managed, are not technical specifications within the meaning of the Procurement Directives. Thus requirements regarding for instance the recruitment of staff from certain groups of persons (disabled persons, women, etc) would not qualify as technical specifications.

In addition, according to the Procurement Directives, technical specifications should **not reduce competition**;²⁴ should be **transparent**;²⁵ and **should not discriminate** against possible contractors from outside the Member State of the contracting authority.²⁶

What’s permitted – some examples

- Requiring, in a contract for works, measures to avoid accident at work and specific conditions for storage of dangerous products in order to preserve the health and safety of workers
- Require compliance with certain ergonomic characteristics for products, in order to ensure access for all categories of users, including disabled people

What’s not permitted – some examples

- Requiring an outsourced contact centre, delivering online and telephone support (which could legitimately be provided from any location), to locate in a particular town.
- Issuing a specification for a housing management contract and then selecting bidders on the basis that they might also be able to purchase the houses in future, if the authority decided to privatise the housing.

2. Using performance-based specifications

The Procurement Directives explicitly allow contracting authorities to choose between specifications based on technical standards or on performance-based requirements.²⁷ A performance-based approach usually allows more scope for market creativity and in some cases will challenge the market into developing innovative technical solutions. If the Contracting Authority uses this approach, it does not need to express the technical specifications in too much detail.

²⁴ Article 23(2) of Directive 2004/18/EC..

²⁵ Article 23(1) of Directive 2004/18/EC.

²⁶ Article 23 (3) of Directive 2004/18/EC.

²⁷ See Article 23 of Directive 2004/18/EC and Article 34 of Directive 2004/17/EC.

- For instance, if a contracting authority wants to include accessibility requirements in contracts for the purchase of computer equipment, vehicles or buildings, it could do this either by setting very detailed technical standards or by simply requiring that the equipment must also be adapted for the needs of people with disabilities. The second option usually allows more scope for innovative solutions.

As the options available on the market concerning performance-based specifications can vary considerably, the Contracting Authority should make sure its specifications are clear enough to allow it to make a proper and justifiable evaluation.

There may be more scope to incorporate social issues into larger or complex projects, but regardless of the size, the specification should:

- Be specific about the outcomes and outputs required and encourage bidders to use their skills and experience to develop solutions;
- Be sufficiently broad to allow bidders to add value, but not so broad that they feel exposed to risks that are difficult to quantify and therefore inflate their prices;
- Link to the subject matter of the contract while taking account of appropriate policy goals, including cross-cutting policies and legal obligations, as well as market soundings about what industry can supply.

3. Use of variants

Dialogue with potential bidders before finalising the specification can help to identify opportunities for promoting equality of opportunity and sustainability. These discussions can establish how best to scope requirements so that they are commercially viable, through sensible arrangements for allocating and managing risk. Comparing current services with what is provided elsewhere may also help. Care should be taken in using these techniques to avoid giving advantage to any particular supplier.

Even after such market research, it is possible that the Contracting Authority is not sure how best to integrate social standards into specific technical specifications. If this is the case, it may be useful to ask potential bidders to submit socially responsible variants. This means that the Contracting Authority should establish a minimal set of technical specifications for the product it wants to purchase, which will apply to both the neutral offer and its socially responsible variant. For the latter, the Contracting Authority will add a social dimension.

When the bids are sent in, the Contracting Authority can then compare them all (the neutral ones and the socially responsible ones) on the basis of the same set of award criteria. Hence, the Contracting Authority can use variants to support social standards by allowing a comparison between standard solutions and social options (based on the same standard technical requirements). Companies are free to provide offers based on the variant or the initial tender, unless indicated otherwise by the contracting authority.

To be able to accept variants in a public procurement procedure,²⁸ the Contracting Authority needs to indicate in advance in the tender documents:

- That variants will be accepted,
- The minimum social specifications the variants have to meet (e.g. better social performance),

²⁸ See Article 24 of Directive 2004/18/EC and Article 36 of Directive 2004/17/EC.

- Specific requirements for presenting variants in bids (such as requiring a separate envelope indicating variant or indicating that a variant can only be submitted combined with a neutral bid).

Where a purchaser allows variants, it can take account of tenders submitted that not only meet but exceed the minimum requirements necessary to fulfil a contract. Authorities can then evaluate bidders' proposals for additional gains in achieving social standards and decide if these are affordable.

An example is the procuring of "fair trade" products, where the public bodies invite suppliers to say how they would deliver the fair trade element without specifying that only products with a particular label will be accepted. This would involve evaluation in part on the basis of the social aspect. The contracting authority should pay attention to the selection of the "fair trade" specifications. The next section provides some guidelines in this respect.

4. Social Labels and the implications for Fair and Ethical Trade

If a contracting authority wants to purchase fair trade goods (goods which make a contribution to sustainable development which allows them to be described as fair and ethically traded), it cannot require that the products shall carry a specific Fair Trade label, because this would limit the access to the contract of products which are not so certified but meet similar sustainable trade standards.

- (a) However, sustainability requirements may be incorporated in the technical specifications of a public tender, provided these criteria are linked to the subject-matter of the contract in question²⁹, and ensure compliance with the other relevant EU public procurement rules and with the principles of equal treatment and transparency.

Therefore, if a contracting authority intends to purchase fair trade goods, it can define in the technical specifications of the goods the relevant sustainability criteria, which must be linked to the subject matter of the contract. . Once a contracting authority has decided on the subject matter of the procurement contract (what generic type of products to buy), it is free to define the technical specifications of those products. The requirements must, however, relate only to the characteristics or performance of the products (e.g. glasses or plates made out of recycled material) or the production process of the products (e.g. organically grown).

Contracting authorities that intend to purchase sustainability assurance goods should not simply take the concept of Fair Trade and include it in the technical specifications of their purchases (still less, require a specific Fair Trade label, which is absolutely prohibited). They ought instead to look at each of the sub-criteria underlying the Fair Trade label and use only those which are linked to the subject matter of their purchase. Contracting authorities may stipulate which Fair Trade labels are deemed to fulfill these criteria, but they must always also allow for other means of proof. Therefore, bidders will have a choice to prove compliance with these standards by using appropriate Fair Trade labels or by other means.

- (b) Sustainability criteria (including social ones) may also be incorporated **in the execution clauses**, provided these criteria are linked to the performance of the contract in question and comply *mutatis mutandis* with the other requirements mentioned above in paragraph (a).

²⁹ According to article 53 of Directive 2004/18/EC and in article 55 of Directive 2004/17/EC;

Examples: Germany

City of Düsseldorf: The Public Procurement Order for the Administration of the City of Düsseldorf in North Rhine-Westphalia [German: *Vergabeordnung für die Stadtverwaltung Düsseldorf (VergO)*] provides in Point 7.3. that: “ no products of exploitative child labour are to be procured. An independent certification (for example a Transfair seal or Rugmark seal) may prove this. If such a certification for the product in question does not exist a declaration through the acceptance of the additional contract provisions for the execution of works and the acceptance of the additional contract provisions of the Procurement Order for Supplies and Services Contracts is acceptable.”³⁰

5. Taking into account social concerns in production and process methods

What a product is made of, and how it is made, can form a significant part of its social impact. Under Directives 2004/17/EC and 2004/18/EC, production methods can explicitly be taken into account when defining the technical specifications.³¹ However, since all technical specifications should be linked to the subject matter of the contract, the Contracting Authority can only include those social requirements which are also related to the subject of the contract. The Contracting Authority may not impose social requirements on issues which are not linked to the subject matter of the contract in question.

6. The case of disability and technical specifications

The Procurement Directives³² provide that technical specifications set out in the contract documentation should address the issue of accessibility. Article 23(1) of the Directive 2004/18/EC provides: “Whenever possible ... technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.” As explained earlier, national requirements specified in relevant legislation for “accessibility for all” must be reflected in the subject matter of the contract. It is imperative that procurement managers are made aware of these specific national regulatory requirements in the area of accessibility and design for all and that these are fully incorporated in the tender documents, primarily in the form of technical specifications.

³⁰ Translation Trybus.

³¹ Annex VI of Directive 2004/18/EC and Annex XXI of Directive 2004/17/EC.

³² Article 23(1) of Directive 2004/18/EC and Article 34(1) of -Directive 2004/17/EC.

Example:

Italy

The Law Stanca makes it compulsory that all public web sites should be accessible. The law sets out a set of requirements to be used in the public procurement of web sites. The decree “Technical Rules of Law 4/2004” is mainly made up of annexes which contain the technical Web accessibility requirements, the methodology for the evaluation of Web sites and the requirements for accessible hardware and software. The primary sources of inspiration for these groups were the W3C’s Web Accessibility Initiative and the positive experience of Section 508 of the U.S. Rehabilitation Act. An organization called CNIPA National Centre for Informatics in Public Administration was made responsible for checking all the public procurement tenders to see that they are including the accessibility requirements for the web sites that are agreed in the legislation. The Law 04/2004 assigns the duty to monitor the enforcement of the Law to the Presidency of the Council of Ministers (Department for Innovation and Technology) and to CNIPA. During 2006, 15 major procurement projects (worth 71 million Euros) were assessed to evaluate or improve their compliance with the Laws on accessibility. These projects, carried out by 10 different central administrations, mostly related to Web sites and hardware procurement.

It is difficult for all contracting authorities to be experts in all social domains, and it is important for contracting authorities to bear in mind that, in the context of accessibility issues, there are practices in some countries outside the EU that may facilitate their work in developing accessibility standards. In the United States, federal contracting authorities are required under Section 508 of the Rehabilitation Act to use accessibility standards in their public procurement and this has had repercussions in various EU Member States as well, and has influenced industry practices. In the EU, the European Commission had issued two standardisation mandates in support of European accessibility requirements for public procurement of products and services in the area of information and communication technologies (ICT),³³ and the built environment.³⁴ The results of the first phase of Mandate 376 are available and identify a set of standards for accessibility as well as various methods to assess conformity with those standards when purchasing ICT.³⁵

b) SELECTING SUPPLIERS, SERVICE PROVIDERS, AND CONTRACTORS

Selection criteria focus on a company’s ability to perform the contract they are tendering for. The Directives contain two sets of rules on selection: exclusion criteria and technical and rules regarding technical and economical capacity.

³³ European Commission, Standardisation Mandate to CEN, CENELEC and ETSI in support of European Accessibility requirements for public procurement in the ICT domain, M/376 EN, 7th December 2005.

³⁴ European Commission, Standardisation Mandate to CEN, CENELEC and ETSI in support of European Accessibility requirements for public procurement in the built environment, M/420 EN, 21 December 2007.

³⁵ European accessibility requirements for public procurement of products and services in the ICT domain (European Commission Mandate M 376, Phase 1) **CEN/BT WG 185 & CLC/BT WG 101-5 Report on “Conformity assessment systems and schemes for accessibility requirements”**

1. Exclusion criteria

The Directives contain an exhaustive list of cases where the personal situation of a candidate or tenderer may lead to its exclusion from the procurement procedure³⁶. Some of these failures may have a social nature. For instance candidates or tenderers may be excluded:

- (a) for failure to pay social contributions; or
- (b) where the economic operator has been convicted by a final judgment (criminal offence) affecting his professional conduct or has been guilty of “grave professional misconduct” (proven by any means), as this concept is defined in national legislation

What’s permitted – an example

Exclusion of a tenderer who has been convicted by a judgment that has force of *res judicata* for failure to comply with national legislation prohibiting the employment of clandestine workers or with national rules regarding security at work.

What’s **not** permitted – an example

Exclusion of a potential tenderer on the basis of political or personal beliefs of the tenderer that don’t relate to professional conduct.

2. Technical capacity

The selection process enables authorities to assess candidates’ ability to deliver the contract requirements. Selection criteria must be non-discriminatory and related to the subject-matter of the contract. Social considerations may be included in the technical selection criteria, only if the achievement of the contract requires specific “know-how” in the social field. Depending of the subject matter of the contract, the contracting authority may investigate different aspects of the technical capacity:

- Does the tendering company employ or have access to technicians with the required knowledge and experience to deal with the social issues of the contract? (e.g. need to have trained personnel and specific management experience in a contract for a crèche)
- Does the tendering company own or have access to the necessary technical equipment for social protection? (e.g. need to have adequate equipment for old persons, in a contract for the operation of a retirement hotel)
- Does the tendering company have the relevant research and technical facilities available to cover the social aspects? (e.g. in a contract for the purchase of computer hardware including accessibility requirements for disabled persons)

Evidence of the economic operators’ technical abilities may be furnished by one or more of the exhaustive means specified in the directives³⁷, such as

³⁶ Article 45 of the Directive 2004/18/EC. In some particularly serious criminal cases, it may even be mandatory to exclude tenderers.

³⁷ Article 48 of Directive 2004/18/EC.

- By providing evidence of previous contracts completed, an indication of the “technicians” or technical bodies to be involved.
- A description of the technical facilities and measures used by the contractor.
- The educational and professional qualifications of the contractor (these qualities are especially important in contracts that can only achieve their social objectives through proper training of the personnel).
- Details of the manpower of the service provider and numbers of managerial staff.
- Indications of the proportion of the contract that may be sub-contracted.

There is a need to balance the desire on the part of the contracting authority to satisfy itself that the contractor will be able to deliver on what it has been contracted to do, with the need to avoid placing excessive burdens on the contractors.

c) AWARDING THE CONTRACT

1. General rules for drafting award criteria and on awarding the contract

It is possible to apply social award criteria, provided those criteria:

- are linked to the subject-matter of the contract,
- do not confer unrestricted freedom of choice on the contracting authority,
- are expressly mentioned in the contract notice and tender documents,
- comply with the fundamental principles of EU law.

Mis en forme : Police :11 pt

When the Contracting Authority evaluates the quality of tenders, it uses predetermined award criteria, published in advance, to decide which tender is the best. Under the Procurement Directives, the Contracting Authority has two options: the Contracting Authority can either compare offers on the basis of lowest price alone, or the Contracting Authority may choose to award the contract to the ‘economically most advantageous’ or best value tender, which implies that other award criteria will be taken into account, in addition to the price.

Since the criterion of the ‘economically most advantageous tender’ or best value tender always consists of two or more sub-criteria, these can include social criteria. Indeed, the non-exclusive list of examples in the directives³⁸ to allow contracting authorities to determine the most economically advantageous tender (MEAT) include: quality, price, technical merit, aesthetic and functional characteristics, social characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period, and period of completion. Some contracting authorities adopt the ‘economically most advantageous tender’ criterion because it is likely to be more compatible with taking social considerations into account. For example it would be possible to include accessibility criteria in the purchase of goods and services so that they can be used by a larger part of the population, as this is more economical than having to provide alternative assistive solutions for persons with disabilities.

As the best offer will be determined on the basis of several different sub-criteria, the Contracting Authority can use several techniques for comparing and weighing up the different sub-criteria. These techniques include matrix comparisons, relative weightings and bonus/malus systems. It is the responsibility of contracting authorities to specify and publish the criteria for awarding the contract and

³⁸ Recital 46 and article 53 of Directive 2004/18/EC;

the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders.

Example:

AT The Federal Ministry of Social Affairs and Consumer Protection is the Austrian ministry at federal level responsible for a wide area of social policy. The BMSK wishes to promote equal opportunities for men and women in private companies, generally on a voluntary basis as part of a general policy supporting ‘Corporate Social Responsibility’ (CSR). In view of the requirements of European Community law, the BMSK differentiates between three types of contracts when taking equal treatment and gender mainstreaming into account as an award criterion. First, for contracts above the thresholds of Directive 2004/18/EC, CSR is only taken account when, in relation to the subject matter of the contract in question, they contribute to the determination of the economically most advantageous tender. Second, for contracts below the thresholds of Directive 2004/18/EC but above €40,000.00, CSR can be taken into account, first, when in relation to the subject matter of the contract in question they contribute to the determination of the economically most advantageous tender or, second, in “other cases”³⁹. Third, for contracts below a threshold of € 40,000.00 CSR criteria are not to be taken into account at all since there is generally no formalised procurement procedure.

In the second type of contract, those below the thresholds of Directive 2004/18/EC but above €40,000.00, where the social considerations are included as part of “other cases”, the weight of the CSR considerations as part of the award criteria should not exceed 2 per cent of the overall assessment. In order to determine the CSR weight in the assessment, companies have to address the following two questions in the tender documentation: Is the equal treatment of men and women implemented in your company? Does your company implement any other voluntary CSR measures? If yes, which are these (only list measures which go beyond legal requirements or requirements imposed by the administration)?

Tenderers have to support their answers with credible data, figures, and facts from their company and summarise the answers in an overview. Then, up to nine points can be allocated for the answer to each of these two questions. Finally a price bonus can be allowed using the following percentages: 0-1 point: 0%; 1-3 points: 0.25%; 4-5 points: 0.5%; 6-7 points: 0.75%; 8-9 points: 1.00%. For both questions this would amount to a maximum overall price bonus of 2%. The allocation of 1 – 9 points should take into account: (i) The structure of the personnel of the company: percentages of men and women, age of men and women working for the company, percentage of women in leading positions; (ii) policies and instruments in place promoting equal treatment of men and women in the company (gender mainstreaming programme, etc.); (iii) company directives to ensure the balanced representation of men and women, especially in professional positions. If yes, what do these directives provide? (iv) the state of implementation of equal treatment in the company; and (v) other possible considerations that can be taken into account in this context relevant to the equal treatment of men and women including: possible part-time positions for employees with families, including opportunities to return to a full time position; the existence of procedures for dealing with discrimination and sexual harassment; measures to promote the combination of professional and private life, including part-time positions and flexible working time models; as well as child care facilities or programmes for child care support.

³⁹ However, it should be pointed out that procurement contracts below the thresholds of the Directives (and the award criteria of these contracts) must nevertheless comply with the fundamental principles of the EC Treaties.

The different criteria that will determine the most economically advantageous/best value tender will need to be formulated in such a way that:

- They are linked to the subject matter of the contract to be purchased (as described in the technical specifications);
- They allow the tenders to be assessed on the basis of their economic and qualitative criteria as a whole in order to determine the tender that offers the best value for money.⁴⁰ This means in practice that it is not necessary for each individual award criterion to give an economic advantage to the contracting authority, but that taken together (i.e. economic and social) the award criteria must allow for determining the best value for money.

What's not permitted – examples

- Using award criteria not linked to the subject matter of the contract
- Using award criteria introduced at the last moment and not included in the tender documents
- Using award criteria that may grant undue discretion to the contracting authority.

Linking award criteria with technical specifications

There may be a link between the requirements in the technical specifications and the award criteria. The technical specifications define the required level of performance to be met. But, as a contracting authority, the Contracting Authority can decide that any product/service/work performing better than the minimum level can be granted extra points, which can be distributed at the award stage. Therefore, it should be possible to translate all technical specifications into award criteria.

2. Using the award criteria in tender evaluation

The Procurement Directives explicitly allow social considerations to be included in award criteria. This legislation builds on European Court of Justice case-law. The basic rule on social award criteria is derived from Case C-513/99 (Concordia Bus) and from Directives 2004/17/EC and 2004/18/EC, which specifically refer to this ruling in their first recital. All award criteria should meet four conditions.⁴¹ The criteria must:

- Be linked to the subject-matter of the contract,
- Not confer unrestricted freedom of choice on the contracting authority,
- Be expressly mentioned in the contract notice and tender documents, and
- Comply with the fundamental principles of EU law.

(a) Award criteria must be linked to the subject matter of the contract

⁴⁰ See recital 46 of Directive 2004/18/EC and recital 55 of Directive 2004/17/EC.

⁴¹ Judgment of the Court of Justice in Case C-513/99.

This is essential. It ensures that award criteria relate to the needs of the contracting authority, as defined in the subject matter of the contract. In a further judgment the ‘Wienstrom case’,⁴² the Court of Justice provided some further information on how the link with the subject of the contract should be interpreted.

Examples: Wienstrom

In this case, the Court of Justice ruled that in a tender for the supply of energy, a criterion relating solely to the amount of electricity produced from renewable sources in excess of the expected consumption of the contracting authority (which was the subject of the contract) could not be considered as being linked to the subject matter of the contract.

In the context of a contract involving social considerations, in a construction contract, where the subject matter of the contract was the building of a school, an award criterion based on how much money the contractor would transfer to the local community outside the contract, is not legally permissible as it would not be linked to the subject matter of the contract.

(b) Award criteria must be specific and objectively quantifiable

The Court of Justice ruled that, based on its previous judgments, award criteria must never confer unrestricted freedom of choice on contracting authorities. They must restrict this freedom of choice by setting specific, product-related and measurable criteria, or, as the Court of Justice put it, ‘adequately specific and objectively quantifiable’ criteria. The Court of Justice provided further clarification in the Wienstrom case.

Example: Wienstrom

In the Wienstrom case, the Court of Justice found that, in order to give tenderers equal opportunities in formulating the terms of their tenders, the contracting authority has to formulate its award criteria in such a way that ‘all reasonably well-informed tenderers of normal diligence interpret them in the same way’. Another element of the necessary clarity and measurability of the award criteria as formulated by the Court of Justice was that the contracting authority should only set criteria against which the information provided by the tenderers can actually be verified.

(c) Award criteria must have been advertised previously.

According to the Procurement Directives, contract notices will have to mention whether the contracting authority will award the contract on the basis of ‘lowest price’ or ‘economically most advantageous tender’. The criteria used to identify the economically most advantageous tender should be mentioned in the notice or, at least in any case, in the tender documents.

Mis en forme : Police :11 pt

(d) Award criteria must respect Community law.

This last condition deriving from the EC Treaty and the Procurement Directives is that award criteria must comply with all the fundamental principles of Community law.

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⁴² Judgment of the Court of Justice in Case C-448/01.

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The Court of Justice has explicitly mentioned the importance of the principle of non-discrimination, which is the basis of other principles, such as the freedom to provide services and the freedom of establishment. The issue of discrimination was expressly raised in the Concordia Bus case.⁴³

Example

One of the objections of Concordia Bus was that the criteria set by the Community of Helsinki were discriminatory because the Community's own bus company HKL was the only company with gas-powered vehicles that could comply with these emission levels. The Court of Justice ruled that the fact that one of the award criteria set by the contracting authority could only be satisfied by a small number of companies did not in itself make this discriminatory. Therefore, when determining whether there has been discrimination, all the facts of the case must be taken into account.

3. Dealing with "abnormally-low bids"

Under the current Procurement Directives, where contracting authorities consider a tender to be abnormally low, they must ask for explanations before being able to reject the tender. According to the directives, these explanations may also refer (amongst other factors) to compliance with the "provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed" may be one such factor.⁴⁴

Thus, the Directives specifically link the issue of abnormally low tenders with the issues of employment protection and working conditions. Some methods of competition, including ignoring working conditions that are legally required, may be *unfair* competition.

Examples: France - Ville d'Angers

The Entity noticed that in the cleaning sectors workers have tough work schedules: thus an offer which is economically extremely attractive because it proposes workers the number of which is not appropriate in relation to the surface to be cleaned on the basis of average ratios, will be considered as abnormally low and rejected.

The Directives provide for procedures that the contracting authority must adopt before the tender is rejected on the ground that it is abnormally low.⁴⁵ Each case should be treated on its merits; there should be no automatic exclusion; tenderers should have the opportunity to rebut the case against them; and the condition of non-discrimination must be complied with.

⁴³ Judgment of the Court of Justice in Case C-513/99.

⁴⁴ Article 55(1)(d) of Directive 2004/18/EC; Article 57(1)(d) of Directive 2004/17/EC.

⁴⁵ Article 55 of Directive 2004/18/EC; Article 57 of Directive 2004/17/EC

What's not permitted – an example

The contracting authority introduces a complete and automatic ban on considering any tender that falls below a specified proportion of the average price of all tenders received.

A contracting authority can ask in writing for details of the tender that it considers relevant in being able to assess an abnormally low bid. These can relate to employment protection and working conditions. The request for such details does not appear to be restricted to making a request only from the tenderer alone, and in the case of working conditions, for example, it may be appropriate to request information from trade unions. Where the contracting authority does obtain information from other sources, however, the Procurement Directives require the contracting authority to “verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.”

If as a result of the enquiry, the offer appears abnormally low, the contracting authority may reject it (although it is not obliged by the Procurement Directives to do so). However, in Member States that have adopted legislation to this effect, contracting authorities can nevertheless have the obligation to reject such tenders.

4. De-briefing unsuccessful bidders

The contracting authority must provide a mechanism for feedback to bidders once the contract has been awarded. This can be used as a useful opportunity to engage with unsuccessful bidders in general, and concerning the policies of the contracting authority regarding social issues in particular. Where the bidder was unsuccessful in part because of failure to meet social criteria, the details of what the bidder might do in order to be more successful in the future can be explained.

d) CONTRACT PERFORMANCE

Contract conditions set out how the contract should be performed. So, where an authority wishes a contractor to achieve social goals that do not relate to the technical specifications, the selection or the award criteria; it can do so by using contract performance clauses. Social considerations may be included in the contract performance clauses, provided: (i) they are linked to the performance of the contract, (ii) they are published in the contract notice and (iii) they comply with Community law (amongst which the general principles of the EC Treaties).

1. Rules governing contract performance clauses

Writing the requirements for social standards into the contract will make the authority's expectations clear. A rigorous approach during the planning and tendering phases will make it easier to state these intentions in specific terms, which can influence performance management.

Although contract clauses should not play a role in determining which tenderer gets the contract, nor should they be disguised technical specifications, award or selection criteria, it is permissible to set additional contract conditions, that are separate from the specification, selection and award criteria.⁴⁶ These can include social and environmental conditions. So, where an authority wishes a contractor to achieve social goals that do not relate to the specification, it can do so by using additional contract conditions. These contract conditions relate to the performance of the contract only.

⁴⁶ Beentjes case, Judgment of the Court of Justice in Case No. 31/87.

Whereas tenderers must prove that their bids meet the technical specifications, proof of compliance with contract clauses should not be requested during the procurement procedure. For example, the Contracting Authority may not use contract clauses to require a particular production process (for supplies), or staff with particular experience (for services), since these are conditions that relate to the selection of the contractor. These aspects should be handled within the relevant stage of the procedure laid down in the Public Procurement Directives.

In addition, contract performance clauses must:

(a) be linked to the execution of the contract

A contract condition would not be linked to the “performance” of the contract if it required, for example, that the contractor hire a proportion of workers with disabilities on another contract or would attempt to restrict what the contractor is allowed to do on another contract.

(b) be published in the contract notice

Even though contract clauses are considered to be outside the procedure of the award of contracts they still need to be set out clearly in the call for tenders. Indeed, tenderers should be aware of all the obligations laid down in the contract and be able to reflect this in the price of their bids.⁴⁷ The winning bidder must carry out the commitments made in his bid for fulfilling the contract conditions.

(c) comply with European rules (including, the basic principles of the EC treaties)

For instance, the choice of contract conditions must not be such as to unfairly disadvantage potential contractors from another state. It is also important, however, that the contract conditions also comply with Community law in general, including EU social law.

What’s not permitted – example

- Although a recital in the Directive 2004/18/EC gives as an example a contract condition regarding the “employment of people experiencing particular difficulty in achieving integration,” it would not be permissible under Community law to include a condition that required contractors to employ 20 percent of the workforce working on the contract to be of a particular racial origin, because that would be contrary to the Race Directive.

Examples: Sweden - National Road Administration

Construction contracts contain a standard clause referring to the UN Global Compact and obliging the contractors to follow some conventions when executing the contract in Sweden (ILO and UN conventions)⁴⁸. The contractor, according to the same clause, must comply with certain reporting requirements designed to verify that goods and products used in the performance of the contract have been produced in a safe environment

⁴⁷ Article 26 of Directive 2004/18/EC and Article 38 of Directive 2004/17/EC.

⁴⁸ It should be pointed out that according to the EC Treaties, European law shall prevail, in case of possible inconsistencies between European law and international conventions (such as ILO Conventions).

according to the rules of the conventions mentioned. Goods found to be in conflict with this provision must be replaced at the contractor's expense. The contractor must ensure that subcontractors abide by the same obligations. A penalty is payable for any breach of these social obligations of the contractor.

2. Examples of social considerations that may be included in the contract performance clauses

The recitals in Directive 2004/18/EC (with minor differences in Directive 2004/17/EC),⁴⁹ set out some examples of social considerations that may be included in these contract conditions:

“They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment ... to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, ... and to recruit more handicapped persons ...”

The Commission's Interpretative Communication states: “Contracting authorities have a wide range of possibilities for determining the contractual clauses on social considerations.” It listed “some examples of additional specific conditions which a contracting authority might impose on the successful tenderer”:

- The obligation to recruit unemployed persons, or to set up training programmes
- The obligation to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity;
- The obligation to comply with the substance of the provisions of the ILO core conventions, during the execution of the contract, in so far as these provisions have not already been implemented in national law;
- The obligation to recruit, for the execution of the contract, a number of persons with disabilities over and above what is laid down by the national legislation in the Member State where the contract is executed or in the Member State of the successful tenderer.” (para 1.6)

Other Examples:

DA Danish municipality: Since March 2001, a Danish municipality has included a requirement in public procurement contracts for contractors to draw up a policy to promote **equal treatment for people of different ethnic backgrounds**. As described by research commissioned by the European Commission: “For those employed under the contract, the contractor must develop a written policy ensuring the equal treatment of persons with different ethnic backgrounds, covering hiring, dismissal, transfer, training and education, promotion, wages and working conditions. The policy must include measurable aims and cover at least the period of the

⁴⁹ Recital 33 of Directive 2004/18/EC; Recital 44 of Directive 2004/17/EC.

contract. The contractor can be requested to substantiate the existence of such a policy, and to record the attainment of its specific goals. Lack of compliance with this condition is considered to be equivalent to non-fulfilment of the main contract.”⁵⁰**UK Transport for London (TfL) East London Line Extension Project:**⁵¹ In 2004, TfL put together a 5-year £10 billion investment programme to fund large-scale construction projects including the East London Line extension, the Crossrail project, the Thames Gateway bridge, and other developments linked to the 2012 Olympic and Paralympic Games.⁵² Equality and inclusion were regarded as being at the heart of that programme and integral to procurement contracts. The first project was known as the East London line extension and this is an extension to the existing East London line (valued at £500 million for the provision of the main works and £350m for the rolling stock and train servicing agreement). A policy decision was taken to try to bring benefit to the communities that the line extension is going to serve. It is a diverse community, culturally and economically, so the aim was to impact on some of the issues that those communities were facing. Various things were to be required from the contractors: to have an equality policy, to have a training plan, and to have a plan around how they were going to diversify their supply base. These requirements were incorporated in the invitation to tender and in the contract conditions.

Contract conditions are obligations which must be accepted by the successful tenderer and which relate to the performance of the contract. It is therefore sufficient, in principle, for tenderers to undertake, when submitting their bids, to meet such conditions if the contract is awarded to them. A bid from a tenderer who has not accepted such conditions would not comply with the contract documents and could not therefore be accepted. However, the contract conditions need not be met at the time of submitting the tender.

The incorporation of social requirements in contract terms and conditions should be balanced against the effective possibility of monitoring compliance with these requirements during contract performance, in order not to add extra requirements which cannot (or will not) be monitored effectively. This implicates contract management and compliance monitoring.

3. Compliance with domestic employment laws

Both Procurement Directives⁵³ make clear that “the laws, regulations and collective agreements at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with Community law⁵⁴”.

⁵⁰ EU study, p. 59.

⁵¹ This discussion of the ELLX case study is based on: EDF Seminar Series: Can Procurement be used to promote equality? Lessons from experiences at home and abroad: Summary note of seminar on Thursday 2nd March 2006, contribution of Valerie Todd from which quotations from a senior public servant are taken; and the following websites: <http://www.london.gov.uk/rp/casestudies/casestudy01.jsp>

⁵² GLA Economics, Women in London’s Economy 2007, 3.5

⁵³ Recital 34 of Directive 2004/18/EC; Recital 45 of Directive 2004/17/EC.

⁵⁴ An example of such compliance with Community law is the need to comply with the requirements of the *Directive 96/71/EC on posting of workers, in public procurement involving cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract*

Some examples of the way that Member States have approached this issue have been controversial internally in Member States. One of these examples is the Rüffert case⁵⁵

It shall be pointed out that, although rendered in the context of a public procurement contract, this judgment has no implications on the possibilities offered by the Procurement Directives to include social considerations into public procurement. It only clarifies that social considerations (in public procurement) regarding posted workers must also comply with Community law and in particular the provisions of the Directive on the Posting of Workers.⁵⁶

Example: EU Posted workers: the Rüffert case

The Law of Land Niedersachsen (the *Land* of Lower Saxony) on the award of public contracts stated, amongst other things, that public works contracts may be awarded only to undertakings which undertake in writing to pay their employees at least the remuneration prescribed by the applicable (regional) collective agreement. The contractor must also undertake to impose that obligation on subcontractors and to monitor their compliance with it. Non-compliance with that undertaking was triggering the payment of a contractual penalty.

The legality of these provisions was challenged before a regional German court in relation to the execution of a works contract entered into between a German contracting authority and the company Objekt und Bauregie (“O&B”) for the building of the Göttingen-Rosdorf prison. The contracted authority had terminated the contract and sued O&B for the payment of a contractual penalty, because it was found that the Polish subcontractor of O&B was paying its workers engaged on the building site in Germany only 46,57% of the minimum wage prescribed by the applicable collective agreement.

Uncertain as to the lawfulness of the provision laying down a contractual penalty, the German regional court referred a question to the European Court of Justice for a preliminary ruling on the interpretation of the Community law aspects relevant in the case.

The Court of Justice stated that the collective agreement had not been declared universally applicable (although Germany had a system for declaring collective agreements to be of universal application) and that covered only a part of the construction sector, since the relevant law making the ‘Buildings and public works’ collective agreement binding applied only to public contracts and not to private contracts. Therefore, the rate of minimum pay provided for by the ‘Buildings and public works’ collective agreement was not fixed according to one of the procedures laid down by article 3 of the Community directive 96/71/EC concerning the posting of workers (“Directive on the Posting of Workers”)⁵⁷.

In conclusion, the Court of Justice found, in its judgment on the Rüffert case, that the provisions at issue were incompatible with the Directive on Posting of Workers.

The Procurement Directives provide that contracting authorities may address employment protection in the tendering process in two ways that are specific to the issue of employment protection issues:

⁵⁵ Judgment of the Court of Justice in Case C-346/06 - *Dirk Rüffert v. Land Niedersachsen*

⁵⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

Firstly, a contracting authority may state in the contract documents where a tenderer may obtain information on the obligations relating to employment protection and working conditions which are in force in the Member State, region or locality in which the works/services are to be carried out/provided⁵⁸.

Secondly, a contracting authority that supplies this information should request the tenderers to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions⁵⁹ and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided⁶⁰. The purpose of this is linked to the fear that contractors may seek to reduce their levels of employment protection in order to be able to submit a lower bid. This provision requires contracting authorities to require tenderers to indicate that they have taken the legal requirements “into account” when drawing up the tender.

3. Supply-chain management

Contracting authorities should also ensure that social requirements for sub-contractors are appropriate, for example regarding health and safety requirements, minimum wage obligations, social security requirements, and decent work standards more generally. Some contracting authorities have also begun to consider requirements on sub-contractors concerning compliance with prohibitions on child and forced labour, in circumstances where it is likely that the supply chain involves production or processing where these problems occur.

This has particular implications for dealings in and with third countries outside the EU. For instance, in the field of public procurement of timber, public authorities are increasingly concerned about the legality and sustainability of timber, especially when it is imported from third countries facing particular difficulties in this area. Sustainable forestry includes not only environmental criteria, but also social criteria (such as decent wages and work conditions, health and safety conditions).

When such requirements are put also on sub-contractors, contracting authorities should ask the main contractor evidence of compliance. Such evidence may be provided by reference to specific certification schemes (where such schemes exist) or by any other reliable means of proof.

For example, in the field of forestry, several certification schemes have been developed as a mean to provide independent verification that a timber source meets a certain standard of sustainability (including environmental and social criteria).

4. Contract management and compliance monitoring

The performance management regime will set the terms for assessing performance and taking action. This could mean rewarding the contractor for good performance, addressing under-performance or working together to enhance delivery. Key performance indicators translate objectives into measurable targets and stipulate what would constitute an acceptable performance level. Monitoring arrangements should ensure that the right performance data is gathered and analysed effectively. The payment mechanism (conditions for which should be specified in the contract) provides the basis for ensuring that the contractor delivers to the required standard. It can provide financial disincentives for poor performance and incentives for exceeding baseline targets. These financial conditions must have been published in the contract notice.

The impetus for service improvement could come from poor Key Performance Indicator results or from a sense that, while targets are being achieved, there is scope to do even better. Either way, the contractor and client should understand what is creating current performance levels and to agree on how to improve

⁵⁸ Article 27(1) of Directive 2004/18/EC;

⁵⁹ Including that such provisions must comply with all relevant Community law;

⁶⁰ Article 27(2) of Directive 2004/18/EC;

results. Persistent failure by the contractor should invoke the contractual default conditions, though action must be reasonable. Equally, the analysis might lead to contractual variations, service redesign or innovation.

Example: UK Northern Ireland Health Authority:

Service improvement: hospital catering: Contract caterer conducts annual patient satisfaction survey and analyses data by age, ethnicity and gender. The Authority also initiates assessment of meals service following press research into malnutrition in geriatric wards. The combined evidence triggers contractual variations to improve the service to the geriatric ward by helping patients with feeding.

A partnering culture should underpin contract management. Clients and contractors can only manage risks and achieve the best outcomes through imaginative and committed team-working. In general, the best contractors respond well in such relationships, voluntarily taking on additional commitments, such as: basic skills programmes; environmental innovation; and supporting small firms within their supply chain.

Example: France

Public institutions responsible for social inclusion have been instrumental in the follow up of the implementation of the social clauses of the procurement contracts, for example providing *facilitateurs* helping successful bidders in managing the workforce involved in an insertion path, and they may also act as certification entities for social compliance. For instance: the *Agglomeration de Rouen* used money from the EU social fund to co-finance hiring a project manager charged with the implementation of the *clauses d'insertion* in the different procurement contracts passed; the Municipality of Arles chose to hire a specialised legal counsel to draft and manage procurement documents with social clauses.