



Brief 13

September 2016

Public Procurement

Incorporating Environmental Considerations into Public Procurement

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Environmental considerations

The Europe 2020 Strategy¹ has three main priorities:

- **smart growth**: developing an economy based on knowledge and innovation;
- **sustainable growth**: promoting a more resource-efficient, greener and more competitive economy;
- **inclusive growth**: fostering a high-employment economy that delivers social and territorial cohesion.

The main objectives to ensure sustainable growth are environmentally focused: supporting the shift towards a low-carbon economy in all sectors, promoting climate-change adaptation, protecting the environment, promoting resource efficiency and greater energy security.

An “environmental consideration” has no fixed definition. The concept is most easily understood by way of examples:

Examples of environmental considerations:

- Minimising the impact on the environment of a construction project – *by deciding to build a tunnel rather than a road*;
- Encouraging environmentally sensitive working practices by economic operators – by requiring an economic operator that is building a road through an area of natural beauty to apply specific environmental management measures;
- Increasing the energy efficiency of buildings – by requiring architects to design a building that meets the highest energy-efficiency standards;
- Reducing wastage of natural resources – by requiring economic operators to recycle and re-use products;
- Encouraging the development of alternative energy sources – *by purchasing green energy*;
- Reducing the carbon footprint – by purchasing electric vehicles.

Public procurement is one of the market-based instruments that can be used to achieve the Europe 2020 objectives. Contracting authorities have already used public procurement to further these types of broader policy objectives.

The key questions from a procurement perspective are as follows:

- What provisions in the Public Sector Directive (the Directive)² enable contracting authorities to incorporate environmental considerations into the procurement process?
- If it is legally permitted to do so, when and how can this be done?

What the Directive says about environmental considerations?

The Directive clarifies how contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, while ensuring that they can obtain the best value for money for their contracts.

¹ [EUROPE 2020. A European strategy for smart, sustainable and inclusive growth.](#)

² Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

Two approaches must be kept in mind:

First, the Directive lays down a general obligation for all Member States (and contracting authorities) to take appropriate measures to ensure that in the performance of public contracts economic operators comply with the obligations in the field of environmental law. This obligation is aimed at ensuring the appropriate integration of **environmental requirements** into public procurement procedures.

The obligations that must be complied with are those applicable at the place where the works are executed or the services provided and that result from laws, regulations, decrees and decisions, at both national and European Union (EU) levels. The obligations may also be derived from collective agreements or international environmental law provisions, provided that such rules, and their application, comply with EU law³.

Control of the observance of environmental law provisions can be performed in all of the relevant stages of the procurement procedure: when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria, and when applying the provisions concerning abnormally low tenders.

Second, the Directive contains a number of key provisions that refer specifically to the way to incorporate environmental considerations into the procurement process in order to **promote the objectives of sustainable growth**:

- **Technical specifications – environmental characteristics:** Technical specifications may be formulated in terms of performance or functional requirements, which may include environmental characteristics. Contracting authorities may also use detailed specifications, as defined by European or multinational eco-labels or other eco-labels, but only subject to fulfilling specified conditions.
- **Conditions for performance of contracts – favouring the implementation of measures for the protection of the environment:** Contracting authorities may lay down special environmental conditions relating to the performance of the contract, provided that:
 - they are linked to the subject matter of the contract;
 - they are indicated in the call for competition or in the procurement documents.

With a view to improving the integration of environmental considerations in procurement procedures, contracting authorities are allowed to use contract performance conditions relating to the works, supplies or services to be provided, at any stage of their life cycles, from extraction of raw materials for the product to the stage of disposal of the product. Contracting authorities may use contract performance conditions related to factors that are involved in the specific process of production, provision or trading, even where such factors do not form part of the material substance of the purchased works, supplies or services.

For example, contracting authorities may establish conditions pertaining to environmental considerations such as:

³ Annex X of the Directive contains a list of international environmental conventions: Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention); Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention); Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its three regional Protocols.

- The manufacturing of the purchased products shall not involve toxic chemicals;
- The purchased services shall be provided using energy-efficient machines;
- The packaging of the purchased products shall be fabricated by using recyclable materials.

However, contracting authorities are not allowed to require tenderers to have a corporate environmental responsibility policy in place.

Moreover, economic operators that accept the conditions cannot be excluded simply because the contracting authority has the opinion that the economic operator will not meet the conditions.

- **Evidence of an economic operator’s technical capabilities – environmental management measures:** In appropriate cases (related to technical capability), contracting authorities may request environmental management measures as evidence of an economic operator’s technical abilities in delivering a public works or public services contract.

Where contracting authorities require the production of certificates drawn up by independent bodies attesting to the economic operator’s compliance with certain environmental management systems or standards, they shall refer to the EU’s Eco-Management and Audit Scheme or to other recognised environmental management systems.

- **Environmental characteristics as award criteria:** The most economically advantageous tender from the point of view of the contracting authority may be identified on the basis of the price or cost, using a cost-effectiveness approach such as life-cycle costing, and may include the best price/quality ratio.

In the context of the best price/quality ratio, the Directive sets out a non-exhaustive list of criteria on which a contracting authority may base its award for the most economically advantageous tender. This list refers specifically to “environmental characteristics”. The criteria used must be linked to the subject matter of the contract and must not give the contracting authority an unrestricted freedom of choice.

Where life-cycle costing is used, specific costs linked to environmental considerations may be taken into account, such as:

- end-of-life costs (e.g. collection and recycling costs);
- costs imputed to environmental externalities linked to the products, services or works during their life cycle, provided that the monetary value can be determined and verified (e.g. cost of emissions of greenhouse gases, other pollutant emissions, and other climate change-mitigation costs).

Incorporation of environmental considerations into the procurement process

One of the common challenges facing public procurers in the implementation of environmental considerations is identifying the environmental criteria to be used, as procurers will not typically have expertise in this area.

Preparation

The Directive includes very little information specifically concerned with the conduct of the pre-advertisement stage. The Directive's focus is on the conduct of the competitive procurement process.

In principle, the Directive does not prevent a contracting authority from implementing environmental considerations when deciding on a purchase. Strategic purchasing decisions can therefore be taken with environmental considerations in mind, provided that these considerations are not in breach of the Treaty⁴ provisions.

In practice, the preparation stage provides significant opportunities for the inclusion of environmental considerations that will impact on the entire procurement process. The reason for such opportunities is that at the preparation stage:

- key strategic purchasing decisions are made;
- the subject matter of the contract is defined;
- the contract notice is drafted;
- general and technical specifications are prepared;
- the contract terms and conditions are drafted.

These elements have direct links with later stages in the process, and thus the decisions made before the start of the procurement can have a major impact. For example, if technical specifications are prepared while taking into account relevant environmental criteria, these criteria can then form part of the tender evaluation criteria and therefore impact on the final award decision.

Defining the subject matter of the contract and choosing a relevant title provides an opportunity to inform the market of the contracting authority's objectives (e.g. energy-efficient computers, energy from renewable sources, sustainable building construction, sustainable cleaning services).

Note on EU Green Public Procurement (GPP) criteria:

The EU GPP criteria have been developed to facilitate the inclusion of green requirements in procurement documents. The GPP criteria aim to reach a good balance between environmental performance, cost considerations, market availability and ease of verification. Contracting authorities may choose, according to their needs, to use all or only certain requirements in their procedures.

At the moment, common GPP criteria are available for the following sectors:

- copying and graphic paper
- cleaning products and services
- office IT equipment
- construction
- transport
- furniture

⁴ Treaty on the Functioning of the European Union – consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326, 26 October 2012. The Treaty is referred to in the Procurement Brief as “TFEU” or “Treaty”.

- electricity
- food and catering services
- textiles
- gardening products and services
- electrical and electronic equipment used in the health care sector
- imaging equipment
- sanitary tapware
- waste water infrastructure
- water-based heaters
- toilets and urinals
- wall panels
- combined heat and power
- road construction and traffic signs
- street lighting and traffic signals
- indoor lighting

For further information on the GPP criteria, refer to the Europa website⁵.

Preliminary market consultation may also assist in identifying, prior to commencing the procurement, technologies or solutions with the potential of meeting environmental objectives. See SIGMA Public Procurement Brief 32, *Market analysis, preliminary market consultations and prior involvement of candidates/tenderers*.

Note on Environmental Impact Assessments:

For certain types of public and private projects, it is obligatory to undertake an Environmental Impact Assessment (EIA). This obligation does not derive from the procurement directives, but from Directive 2011/92/EU, the “EIA Directive”.

Where a project is of a type that is subject to the EIA Directive, the contracting authority must carry out an EIA in advance so that the authority has all relevant information that will enable it to take a decision, in the full knowledge of the environmental impact of that decision.

The types of project covered are set out in the EIA Directive and can include, for example, oil refineries, power stations, airports’ waste disposal installations, and other major infrastructure projects.

The implementation of an EIA may have an effect on the subject matter of the contract and/or on the performance clauses.

For further information on the EIA Directive, see the Europa website⁶.

⁵ http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm

⁶ <http://ec.europa.eu/environment/eia/>

Advertising

It is important for the contracting authority to identify in advance whether and how environmental considerations are to be incorporated into the process. If the contracting authority wishes to use such considerations, it must refer to them in advance in the call for competition and/or in the procurement documents. If it fails to do so, then it may not be able to incorporate those considerations at a later stage. For example:

- The contract opportunity must be clearly and accurately described. If, for example, a contracting authority requires a road with tunnels rather than a road that is cut out of the hillside, this requirement should be included in the description of the contract so that it is clear to economic operators.
- If the contracting authority requires variants – which could relate to environment-friendly alternatives – then this requirement needs to be provided for in the call for competition.
- Minimum specifications that tenders have to meet must be clearly indicated in the specifications.
- Special contract conditions must be specified in the procurement documents.
- If the contracting authority is using environmental issues as award criteria, then the award criteria must be specified in the call for competition or in the procurement documents.

Selection

Following the publication of a call for competition, the contracting authority will receive requests from economic operators that wish to participate in the process and tender. The contracting authority will undertake a process in which it decides with which economic operator it will conclude the contract, provided that the winning tenderer is not excluded in accordance with exclusion grounds and meets the selection criteria set out by the contracting authority.

Exclusion: With respect to environmental considerations, the Directive sets out non-mandatory grounds on which economic operators may be excluded. The non-mandatory grounds include exclusion on the grounds of professional misconduct or grave misconduct, which may possibly be used in relation to environmental considerations. In this context, contracting authorities have the possibility to exclude economic operators that have proven to be unreliable because of violations of environmental obligations.

Selection of suitable tenderers: The Directive sets out an exhaustive list of selection criteria that can be used by the contracting authority to select economic operators. There are limitations on the extent to which environmental selection criteria can be used. The Directive and case law confirm the following:

- The list of selection criteria is exhaustive, i.e. it cannot be expanded.
- This limited list of criteria is narrowly constrained, with little room for interpretation or manoeuvre.
- The assessment based on the selection criteria can only relate to the tenderer's ability to deliver the specific contract that is the subject matter of the procurement.

It is very unlikely that environmental considerations can be incorporated into the consideration of a tenderer's "economic and financial standing". As a result, in most cases the way in which environmental considerations can be used as grounds for not selecting a

particular tenderer is if these considerations can be regarded as affecting the tenderer's "technical knowledge and/or professional ability".

It is permitted to ask the tenderer for information related to the specific circumstances, such as information on relevant experience of:

- Managing hazardous waste, in relation to a waste disposal contract;
- Designing buildings to a high environmental quality, in relation to a contract for architectural and design services;
- Dealing with the removal and disposal of asbestos, in relation to a contract for the demolition of a building.

For further information, refer to SIGMA Public Procurement Brief 7, *Selecting economic operators*.

Tender evaluation

The contracting authority evaluates tenders received and awards the contract.

The tender must comply with the specifications set out by the contracting authority, including the environmental requirements. If the tender does not satisfy all of the required characteristics, it shall be considered as irregular.

Specific rules on labels: Labels (or eco-labels) may be used in public procurement, as both a source of environmental criteria – for specifications or for the award phase – and a form of verification.

Contracting authorities may require a specific label as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled:

- The label requirements only concern criteria that are linked to the subject matter of the contract and are appropriate to define the characteristics of the works, supplies or services that are the subject matter of the contract.
- The label requirements are based on objectively verifiable and non-discriminatory criteria.
- The labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate.
- The labels are accessible to all interested parties.
- The label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

Contracting authorities requiring a specific label must accept all labels confirming that the works, supplies or services meet the equivalent label requirements.

Where an economic operator clearly had no possibility of obtaining the specific label indicated by the contracting authority or an equivalent label within the relevant time limits for reasons that are not attributable to it, the contracting authority must accept other appropriate means of proof, such as a technical dossier from the manufacturer or a test report from a recognised body.

Award criteria: The contracting authority must base the award of a public contract on the most economically advantageous tender. The contracting authority will have decided, at the procurement planning stage, how to identify the most economically advantageous tender. In

this respect, the contracting authority will have established whether it will award the contract on the basis of (1) the price only, (2) the cost, or (3) the best price/quality ratio. The basis for the award must be stated in the call for competition.

It is possible to include environmental considerations in tenders to be awarded on the basis of the price only, by incorporating the relevant requirements into the technical specifications and contract conditions. As the price is the sole award criterion, there is no opportunity to include specific criteria relating to environmental considerations.

Where environmental requirements are legitimately incorporated into the technical specifications, then there is a clear link to the subject matter of the contract. It is also possible to translate all or some of the technical specifications into award criteria. This is the case where a contracting authority proposes to award a contract on the basis of the best price/quality ratio, thus obtaining more opportunities to incorporate environmental considerations. Such criteria allow for a comparative assessment of the level of performance offered by each tender in the light of the subject matter of the contract, as defined in the technical specifications.

The Directive provides a non-exhaustive, illustrative list of tender evaluation criteria, which includes a reference to environmental characteristics. The contracting authority has discretion in choosing the criteria to be applied.

However, this discretion is not unrestricted and has some limitations. All award criteria relating to environmental considerations and used for assessing the best price/quality ratio must meet four conditions. Award criteria must:

- have a link to the subject matter of the contract;
- be specifically and objectively quantifiable;
- have been advertised/notified previously;
- respect EU law and comply with the fundamental principles of equal treatment, non-discrimination and transparency.

The award criteria must also be distinct from the selection criteria.

Taking into consideration all costs incurred during the whole life cycle of the product can also be used in an efficient manner to promote environmental considerations. For example:

- **Savings on the use of water and energy** – in the design of energy-efficient buildings the initial building costs may be higher but the life-cycle costs are lower than for a traditionally designed building due to better insulation, air circulation systems rather than air conditioning, and the re-use of rainwater.
- **Taking externalities into account** – Externalities are damages or benefits that are not paid for by the polluter or users under normal market conditions but are borne by society as a whole. This approach may only be taken into account where the external costs are due to the execution of the contract and where at the same time the costs are borne directly by the purchaser of the product or the service.

The methods that contracting authorities use for assessing costs imputed to environmental externalities must be established in advance in an objective and non-discriminatory manner, and they must be accessible to all interested parties.

Abnormally low tender: The Directive permits a contracting authority to reject an abnormally low tender. The contracting authority must first of all request in writing the details of the constituent elements of the tender that it considers to be relevant. Where the tenderer cannot provide a sufficient explanation, the contracting authority is entitled to reject the tender.

Rejection is mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory environmental EU law (or national law compatible with EU law).

Contract conditions

Contract conditions can include contract performance clauses, which are used to specify how a contract is to be carried out.

The Directive specifically states that contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are:

- linked to the subject matter of the contract;
- indicated in the call for competition or in the procurement documents;
- neither directly nor indirectly discriminatory.

The conditions governing the performance of a contract may, in particular, involve environmental considerations.

Restrictions on the use of these conditions during the procurement process: Contract conditions should not be disguised as technical specifications, selection criteria or evaluation criteria; whoever is awarded the tender should be able to meet the conditions as from the start of the contract.

Contract conditions do still need to be set out clearly so that economic operators that are tendering are aware of all of the obligations in the contract and are able to set prices accordingly.

Proof of compliance with the contract conditions should not be requested during the procurement procedure. Economic operators must accept the conditions in order to be awarded the contract.

Contract conditions should be used carefully and they should be supported by the costs and benefits that they accrue.

Examples of possible contracts with conditions incorporating environmental considerations:

- A works contract for construction of a new office building, which includes a contract condition requiring the use of re-usable containers to transport materials to a construction site as well as efforts to reduce waste generation on site and to increase recycling rates;
- A cleaning contract requiring the use of dosage indicators to ensure that an appropriate quantity of cleaning product is used and obliging the contractor to recycle packaging wherever possible;
- A contract for the supply of photocopier paper requiring delivery in appropriate quantities so as to keep the number of deliveries to a minimum as well as delivery outside peak times to reduce petrol consumption by delivery vehicles.

Contract management

An important part of contract management is monitoring to ensure that the contract is being carried out as agreed. Careful drafting of specifications and of contract conditions to incorporate environmental conditions is a waste of time if the contracting authority fails to check whether those requirements are complied with and fails to take action if it establishes that the requirements are not being met.

Observance of the applicable obligations in the field of environmental law, by the contractor as well as by its subcontractors, must be ensured through appropriate actions by the competent national authorities, such as environmental protection agencies, within the scope of their responsibilities and remit.

Utilities

To a large extent, the same legal rules apply under the Public Sector Directive and the Utilities Directive⁷. These directives have many similar or parallel provisions. The Court of Justice of the European Union has tended to apply the same interpretation to both contracting authorities in the public sector and contracting entities in the utilities sector.

The key difference relates to the rules on the exclusion and selection of economic operators, where the provisions in the Utilities Directive are much less detailed and less prescriptive than those in the Public Sector Directive.

What does the Utilities Directive say about environmental considerations? The Utilities Directive contains a number of provisions that refer specifically to the incorporation of environmental considerations into the procurement process. These provisions reflect, to a significant extent, the provisions in the Public Sector Directive. Some of the key differences are set out below.

Selection

Selection of tenderers: The Utilities Directive does not set out an exhaustive list of the criteria to be used for the selection of tenderers. This is very different from the position under the Public Sector Directive, which provides a detailed and exhaustive list of the criteria that can be used and the information that can be requested.

Under the Utilities Directive, contracting entities are required, when selecting economic operators, to use “objective rules and criteria”. Those objective rules and criteria must be available to the interested economic operators. Contracting entities therefore probably have more flexibility to incorporate environmental considerations into this stage of the procurement, provided that the criteria relate to the subject matter of the contract and to the economic operator’s ability to deliver the particular contract that is the subject matter of the procurement. The rules and criteria must also not breach Treaty principles.

The same principles of selection apply to the selection of economic operators to participate in qualification systems.

Grounds for mandatory exclusion: A contracting entity that is a public sector contracting authority must comply with the provisions requiring mandatory exclusion of economic operators if found guilty of specified offences, which cover convictions for participation in a criminal organisation, corruption, fraud, money laundering, terrorist activities, child labour and other forms of trafficking in human beings. As in the Public Sector Directive, the grounds for obligatory exclusion in the Utilities Directive do not specifically cover environmental issues.

On the other hand, contracting entities that are not contracting authorities are not obliged to exclude tenderers from participation in the procurement process under the above-mentioned provisions.

Grounds for non-mandatory exclusion: All contracting entities may choose to exclude tenderers on non-mandatory grounds, but they are not obliged to do so. Non-mandatory grounds include professional misconduct or grave misconduct, and contracting entities thus have the possibility of excluding economic operators that have proven to be unreliable because of their violations of environmental obligations.

Tender evaluation

The contracting entity will have decided, at the procurement planning stage, how it would

⁷ Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

award the contract on the basis of the most economically advantageous tender. The “most economically advantageous tender” is defined in the same way as in the Public Sector Directive and includes a reference to environmental aspects.

The basis for the award must be stated in the call for competition.

Where a qualification system is used, the contracting entity is still required to invite tenders by way of a call for competition. The same principles apply to the use of tender evaluation criteria.

Further Information

Publications

Public Procurement Training Manual – Module C5, SIGMA (2015), OECD Publishing, Paris,
<http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

Public Procurement Briefs

<http://www.sigmaweb.org/publications/key-public-procurement-publications.htm>

SIGMA (2016), *Selecting Economic Operators*, Brief 7, OECD Publishing, Paris,

Other sources

Green Public Procurement website, http://ec.europa.eu/environment/gpp/index_en.htm