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Public Procurement

Incorporating Social Considerations into Public Procurement

CONTENTS

- [Social considerations](#)
- [What the Directive says about social considerations](#)
- [Incorporation of social considerations into the procurement process](#)
- [Preparation](#)
- [Advertising](#)
- [Selection](#)
- [Tender evaluation](#)
- [Contract conditions](#)
- [Contract management](#)
- [Further information](#)

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Social considerations

The Europe 2020 Strategy¹ puts forward 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 inclusive growth are socially focused: promoting employment and supporting labour mobility; promoting social inclusion and combating poverty; investing in education, skills and lifelong learning; and enhancing institutional capacity and an efficient public administration.
- There is no fixed definition of a “social consideration”. The concept is most easily understood by way of examples:

Examples of social considerations:

- reducing unemployment
- preventing the use of child labour
- preventing discrimination on the grounds of race, religion, disability, sex or sexual orientation
- encouraging good employment practice
- reducing local unemployment
- reducing social exclusion
- promoting training opportunities for the young or disadvantaged
- facilitating access to work for people with disabilities.

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.

Some of the ways in which contracting authorities try to incorporate social considerations into procurement processes (including some of the examples above) are not legally permitted under the EU *acquis communautaire* (EU *acquis*). Others are permitted, provided that certain conditions are met. Some are specifically permitted in the Directive².

The two key questions from a procurement perspective are:

- What provisions in the Directive enable contracting authorities to incorporate social considerations into the procurement process?
- If it is legally permitted to do so, when and how can this incorporation of social considerations be done?

The answers are not straightforward, and sometimes there is a conflict between general policy and what is achievable under the EU *acquis*. When considering the incorporation of social considerations, it is always necessary to consider whether the proposed approach is in

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.

compliance with the fundamental Treaty³ principles, even in cases where specific provisions in the Directive permit the incorporation of these considerations. The Directive makes it clear that the main concern is compliance with the Treaty, as does the case law and guidance.

Local preferences, price preferences and offer-back provisions that are not permitted under the EU *acquis*

Procurement has traditionally been an important tool for national industrial development policy in many countries. Procurement has been used, for example, in the past to support businesses in depressed regions, encourage business development in a particular sector, favour economic operators that may otherwise struggle to succeed in procurement processes, and implement “buy national” policies.

Some examples of the measures used are outlined below for purposes of illustration, but it should be noted that these types of measures are not permitted under the EU *acquis*. They are considered to be in breach of both Treaty provisions and procurement law.

Procurement methods supporting national industrial policies vary, but most commonly these methods take the following forms:

- **Set-aside:** Specific types of contracts or a given percentage of contracts are set aside so that only a specific group of economic operators may tender. Those groups may comprise, for example, only small and medium-sized enterprises, economic operators based in a particular region, or economic operators with particular expertise or structures, such as workers’ and artisans’ co-operatives.
- **Regional or national price preference (domestic preference schemes):** A financial advantage is given to particular types of contractor or to products produced in a specific region or country. A common example is a percentage price preference given to economic operators based in the country/region where the contracting authority is based. When tenders are evaluated, the price submitted by an economic operator based in the region is discounted by 10%. A similar approach is sometimes used in the assessment of tenders for products, where a price advantage is given to products produced in the country where the contracting authority is located.
- **Offer-back:** A competitive tender process is conducted, but when tenders are received, the best performing tenderer from a favoured group is awarded the contract if it can match the best tender overall.

The above types of measures create direct discrimination and are in breach of the Treaty, and Member States are not permitted to use them.

What the Directive says about social considerations

The Directive clarifies to some extent how contracting authorities can contribute to the promotion of inclusive growth, while ensuring that they can obtain the best value for money for their contracts.

There are two approaches that 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 social and labour law.

³ 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”.

This obligation is aimed at ensuring an appropriate **integration of social and labour requirements** into public procurement procedures.

The obligations that must be complied with are those applicable where the works are executed or the services provided and that result from laws, regulations, decrees and decisions, at both national and 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 law⁴.

Control of the observance of social and labour law provisions can be performed in all the relevant stages of the procurement procedure, when applying (1) the general principles governing the choice of participants and the award of contracts, (2) when applying the exclusion criteria, and (3) when applying the provisions concerning abnormally low tenders.

Second, the Directive contains several key provisions that refer specifically to the ways of incorporating social considerations into the procurement process in order to **promote the objectives of inclusive growth**:

- **Contracts reserved in the context of sheltered employment programmes:** Employment and occupation contribute to integration into society and are key elements in guaranteeing equal opportunities for all. In this context, Member States are permitted to have “reserved contracts”. These contracts are to be performed (1) by sheltered workshops and economic operators that have as their main aim the social and professional integration of disabled or disadvantaged persons (e.g. unemployed, members of disadvantaged minorities or otherwise socially marginalised groups); or (2) in the context of sheltered employment programmes, provided that at least 30% of the employees of the workshops, economic operators or programmes are disabled or disadvantaged workers. Such workshops or businesses might not be able to obtain contracts under normal conditions of competition.

The contracting authority is still required to advertise in the *Official Journal of the European Union* by publishing a call for competition and to follow the usual competitive procedures, but it may reserve the right to such entities to participate in award procedures for public contracts or for certain lots only of those contracts.

- **Technical specifications – accessibility criteria for people with disabilities:** For all procurement that is intended for use by natural persons, contracting authorities should, except in duly justified cases, lay down technical specifications so as to take into account, for example, accessibility criteria for people with disabilities or designs intended for all users.

Good examples of where technical specifications can be defined in this way include specifying that buses are to provide good disabled access or requiring that the design of a new library specifically address the needs of those with limited or no eyesight.

⁴ Annex X of the Directive contains a list of international social conventions, as follows:

- ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise;
- ILO Convention 98 on the Right to Organise and Collective Bargaining;
- ILO Convention 29 on Forced Labour;
- ILO Convention 105 on the Abolition of Forced Labour;
- ILO Convention 138 on Minimum Age;
- ILO Convention 111 on Discrimination (Employment and Occupation);
- ILO Convention 100 on Equal Remuneration;
- ILO Convention 182 on Worst Forms of Child Labour.

- **Conditions for performance of contracts:** Contracting authorities may lay down special social conditions relating to the performance of the contract, provided that these conditions are:
 - linked to the subject matter of the contract;
 - indicated in the call for competition or in the procurement documents.

With a view to improving the integration of social 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.

Contracting authorities may use contract performance conditions related to factors that concern 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 social considerations such as:

- recruitment of long-term job seekers;
- recruitment of more handicapped persons than is required under national legislation;
- employment of persons experiencing a particular integration difficulty.

However, contracting authorities are not allowed to require tenderers to have a corporate social 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.

- **Social 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 “social characteristics” as award criteria, and it is clear that these criteria can be incorporated, provided that they are linked to the subject matter of the contract and do not give the contracting authority an unrestricted freedom of choice.

Incorporation of social considerations into the procurement process

One of the common challenges facing public procurers in implementing social considerations is identifying which social criteria to use, as procurers will not typically have expertise in this area.

Preparation

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

In practice, the preparation stage provides significant opportunities for the inclusion of social 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 Directive requires contracting authorities, whenever possible, to define technical specifications in such a way as to take into account accessibility criteria for persons with disabilities and to design products or services for all users;
- 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 social criteria, these criteria can then form part of the tender evaluation criteria and therefore impact on the final award decision.

An example of the impact of social issues on the decision as to what to purchase:

A housing authority wishes to award a contract for double-glazed windows for social housing. It is aware that a number of sheltered workshops across the EU produce double-glazed window units. It decides to classify this contract as a “reserved contract” under Article 19 and to thereby limit the competition to operators of sheltered workshops/programmes. This limitation of the competition is specifically permitted in the Directive.

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

Advertising

It is important for the contracting authority to identify in advance whether and how social 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:

- If the contract is reserved to sheltered workshops or businesses in the context of sheltered employment programmes, then this information must be indicated in the call for competition.
- The contract opportunity must be clearly and accurately described. If, for example, a contracting authority requires computer equipment adapted to the needs of the visually impaired, this requirement should be in the technical specifications so that it is clear to economic operators.
- If the contracting authority requires variants – which could relate to solutions with social benefits – then this requirement needs to be provided for in the contract notice.
- 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 permitted social 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 exclusions grounds and meets the selection criteria set out by the contracting authority.

Exclusion: The Directive sets out grounds on which economic operators must be excluded if they have been found guilty of specific offences. These offences cover convictions for participation in a criminal organisation, corruption, fraud, money laundering, terrorist activities, child labour and other forms of trafficking in human beings.

The Directive also sets out non-mandatory grounds on which economic operators may be excluded. These non-mandatory grounds include exclusion on the grounds of professional misconduct or grave misconduct, which may possibly be used in relation to social considerations. In this context, contracting authorities have the possibility to exclude economic operators that have proven unreliable because of violations of social and labour 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 social 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 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 social considerations can be incorporated into assessment of a tenderer's "economic and financial standing". Therefore, in most cases the way in which social 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:

- working with children with disabilities, in relation to a contract for the management of a crèche;
- production of food for persons with special dietary requirements, in relation to a contract for the provision of pre-cooked meals to a hospital.

For further information, see 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 social requirements, such as rules on accessibility for disabled persons. If the tender does not satisfy all of the required characteristics, it is to be considered as irregular.

Specific rules on labels: Social labels may be used in public procurement, both as a source for social criteria for specifications or the award phase and as 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 had clearly 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.

Award criteria: The contracting authority must base the award of public contracts 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 social 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 social considerations.

Where social requirements are legitimately incorporated into the technical specifications, then there is a clear link with 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 may propose to award a contract on the basis of the best price/quality ratio, thereby obtaining more opportunities to incorporate social 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 sets out a non-exhaustive, illustrative list of tender evaluation criteria, which includes references to social characteristics. The contracting authority has discretion in choosing the criteria to be applied, including criteria relating to social considerations. However, this discretion is not unrestricted and has some limitations. All award criteria relating to social 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 must comply with the fundamental principles of equal treatment, non-discrimination and transparency.

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

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 cost proposed results from non-compliance with mandatory social and labour 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 involve, in particular, social or employment-related considerations.

In accordance with the case law of the Court of Justice of the European Union (CJEU), contract conditions may be related, in the course of the performance of the contract, to the supply or utilisation of fair trade products. Criteria and conditions relating to trade and its conditions may refer, for instance, to the fair trade origin of the product concerned, and include the requirement to pay a minimum price and a price premium to producers.

Contract performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market, and the reconciliation of work with private life.

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 social considerations:

- A works contract for the refurbishment of a community centre, with a condition that 5% of the work is to be delivered by new entrants who have an apprenticeship or a training contract with the economic operator.
- A contract for a catering service in a day-care centre for the elderly, with a condition that all staff are to have training on various dietary requirements for the elderly and for persons with disabilities.

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 social 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 social and labour law, by the contractor as well as by its subcontractors, must be ensured through appropriate actions by the competent national authorities, such as labour inspection agencies, within the scope of their responsibilities and remit.

Utilities

To a large extent, the same legal rules apply under the Directive and the Utilities Directive⁵. These directives have many similar or parallel provisions. The CJEU has tended to apply the same interpretation to both public sector contracting authorities and contracting entities.

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 Directive.

What does the Utilities Directive say about social considerations? The Utilities Directive contains a number of provisions that refer specifically to the incorporation of social considerations into the procurement process. These provisions reflect, to a significant extent, the provisions in the Directive, and they include the provisions relating to reserved contracts for sheltered workshops and sheltered employment programmes. Some of the key differences between the directives 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 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

⁵ 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.

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 social 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 contracting authority from public sector must comply with the provisions requiring mandatory exclusion if found guilty of specified offences, which include convictions for participation in a criminal organisation, corruption, fraud, money laundering, terrorist activities, child labour and other forms of trafficking in human beings.

Contracting entities that are not contracting authorities from public sector 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. The non-mandatory grounds include exclusion on the grounds of 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 social and legal obligations.

Tender evaluation

The contracting entity will have decided, at the procurement planning stage, how it would 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 Directive and includes a reference to social aspects.

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>

Other sources

Webpage: Follow the link to “Promoting the strategic use of green, social and innovative procurement” and then select “Social Considerations”, http://ec.europa.eu/growth/single-market/public-procurement/strategy/index_en.htm