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Study on the incorporation of Social Considerations in Public Procurement in the EU

Proposed Elements for taking account of the Social Considerations in Public Procurement

21st July 2008

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LIST OF ACRONYMS AND ABBREVIATIONS

AT	Austria
CDP	Central Procurement Directorate
CEO	Chief Executive Officer
CSR	Corporate Social Responsibility
DA	Denmark
DE	Germany
DG	Directorate General
EC	European Commission
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ES	Spain
EU	European Union
FI	Finland
FF	Flexible Framework
FR	France
GLA	Greater London Authority
GDP	Gross Domestic Product
ILO	International Labour Organization
ISO	International Standard Organization
IT	Italy
ITC-ILO	International Training Centre of the ILO
LDA	London Development Agency
MEAT	Most Economically Advantageous Tender
MEEDAT	Ministry of Ecology, Energy, Sustainable Development and Territorial Development
MIFA	Mission Interministérielle France Achats-Ministry of Budget, Public Accounts and Public Service

MS	Member States
NL	Netherlands
OHS	Occupational Health and Safety
PIN	Prior Information Notice
SMEs	Small and Medium Enterprises
SA	Social Accountability
SP	Sustainable Procurement
SPTF	SP Task Force
SRPP	Socially Responsible Public Procurement
STDs	Standard Tender Documents
SV	Sweden
TEU	Treaty on European Union
TfL	Transport for London
UK	United Kingdom
UN	United Nations
US	United States
USEL	Ulster Supported Employment Limited

SOCIALLY RESPONSIBLE PROCUREMENT: THE ESSENTIALS

Socially responsible public procurement (SRPP) is a potentially significant tool for the achievement of EU (and Member State) social objectives. SRPP refers to a wide spectrum of social consideration, 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

This is a key stage at which to consider social issues

In general

Develop 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. Consider which products, services or works are the most suitable on the basis both of their social impact and of other factors, such as costs and visibility.

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. But ensure that standards are not reduced

See further Chapter II

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 policy 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 decide to what extent the social objectives should 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.

See further Chapter III

3. Defining the requirements of the contract: specifications

Draw up clear and precise technical specifications. Ensure that specifications are relevant to the subject matter of the contract, reflect all applicable 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.

See further Chapter IV

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 public procurement directives.

Does the contract require social capability or capacity? (e.g. particular skills, training, or equality 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

Consider whether the supplier has been convicted of an offence or is guilty of grave professional misconduct in respects that demonstrate non-compliance with required social standards

Consider suppliers' track record for delivering on similar contracts in relation to required social standards. Ensure any pre-qualification questionnaires only ask for relevant information.

See further Chapter V

5. Awarding the contract: tender evaluation

Establish award criteria: where the criteria of the 'economically most advantageous tender' is chosen, insert relevant social criteria 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, economic or environmental award criteria will not be appropriate at this stage unless they...
- Are relevant to the subject of the contract.
- Are 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
- Are consistent with the criteria allowed in the Directives, where they apply.
- Consider whether the bid is "abnormally-low" because the tenderer is in breach of social standards.

Where allowed consider variants or alternative bids and additional proposals included to determine a tie-break.

See further Chapter VI

6. Contract conditions, contract management and contract monitoring

Use contract performance clauses as a way of setting relevant extra social conditions in addition to the socially responsible contract.

Ensure the contract conditions are...

- Relevant 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 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.

See further Chapter VII

I. BUYING SOCIAL: KEY CONCEPTS AND KEY CONTEXTS

- 1.1 “Proposed Elements for Taking Account of the Social Considerations in Public Procurement” (hereafter “guide”) is part of the work product that, together with the other work products that accompany it, constitutes the Study on Social Considerations in Public Procurement. This “guide” is designed to help the Commission develop a publication in the future to enable public authorities successfully to develop a socially responsible purchasing policy. It explains the possibilities offered by European Union law in a practical way, and looks at simple and effective solutions that can be used in public procurement procedures. For practical reasons the guide follows the logic and structure of a procurement procedure. In this first chapter, however, several key concepts are explained: the meaning of “socially responsible public procurement”, the potential benefits of Socially Responsible Public Procurement (SRPP), how SRPP can reinforce the objectives of the EU social model, and the policy and legal context for SRPP in the EU. The guide does not purport to be a draft Commission publication, but it is drafted as if it were such a publication, in order to illustrate the ways in which a Commission publication might approach the issues.
- 1.2 We have produced this guide chiefly for public authorities, but we hope that it will also inspire corporate purchasers. It should also help suppliers, service providers and contractors — particularly smaller companies — to understand and meet the social purchasing requirements affecting them. It draws significantly, taking into account the necessary adaptations arising from differences in the legal position and other relevant differences, on the European Commission’s publication “Buying Green! A handbook on environmental procurement” (2004), as well as other Member State guides to social procurement, detailed in the Appendix.
- 1.3 This guide contains practical examples of what contracting authorities in Member States are currently doing in different areas of SRPP, drawn from the research undertaken for the Commission as part of the study on “Social considerations in public procurement” undertaken in 2008. These examples are illustrations only, and do not purport to be comprehensive. For further information on these and other uses of SRPP, the other parts of the Study should be consulted.

1. Socially responsible procurement (SRPP): a definition

- 1.4 Socially Responsible Public Procurement (SRPP) refers to procurement operations that take into consideration, inter alia, the promotion of employment opportunities, build-in safeguards with respect to the standards of working conditions, strive to support social inclusion (including persons with disabilities), social economy and SMEs, promote equal opportunities and “accessibility and design for all”, take into account Fair and Ethical Trade issues as well as human and labour rights and seek to achieve wider voluntary adherence to CSR while observing the principles of the EU treaty and the EU Procurement Directives.
- 1.5 Here is a non-exhaustive list of examples of the use of public procurement to reinforce social policy objectives under each category:
 - Promoting “*Employment Opportunities*” e.g.:
 - promotion of youth employment
 - promotion of employment of persons from disadvantaged groups
 - 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
- “Decent Work”¹: promotion of Labour Rights (ILO Core Labour Standards), Human Rights and Standards of Working Condition and Promotion of Equal Opportunities and Non-Discrimination; e.g.:
 - social security and benefits
 - working hours
 - sufficient and equal pay
 - occupational safety and health (OSH)
 - freedom of association
 - collective bargaining
 - gender (equal opportunities for women)
 - prohibition of child labour
 - elimination of forced labour
 - integration of migrant workers
 - access to vocational training
 - anti-discrimination based on disability, race, ethnic origin, age, sexual orientation or religion or ex-offenders
- Supporting *Social Inclusion* and Promoting Social Economy Organizations, e.g.:
 - participation of firms owned by or employing persons from ethnic/minority groups
 - firms employing persons with disabilities above the percentage prescribed by national law
 - access to employment for persons with special needs to enhance their employability to secure Decent Work
 - access by cooperatives and non-profit organizations
- Promoting “SMEs”
 - provisions reducing the cost/burden of participating in SRPP opportunities
 - provisions enabling greater access by SMEs to public procurement opportunities through prescribed sub-contracting requirements
- 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, IT applications. The key issue is to buy goods and services that are accessible to all.
- Taking into account “Fair or Ethical Trade” issues
 - use of stipulations of these labels 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

The status of these social policy objectives differ markedly, of course, both in EU law and in different Member States. Thus, for example, some of these social policies are legally obligatory under EU law, such as equal opportunities between men and women, whilst some are not, such as fair trade. In Member States, some of these social policies are legally obligatory, e.g. 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.

¹ 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.

2. The potential benefits of SRPP

- 1.6 What is the connection between public purchasing and the delivery of these social objectives? 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 social justice. In this section, we suggest that there are several potential benefits of integrating social issues into public procurement.

Assisting compliance with social law

- 1.7 It contributes to enhance legal and policy compliance with national/international commitments to social development goals (i.e. EU social agenda) There is growing concern in many countries that traditional mechanisms of securing social justice and social cohesion are not adequate. Orthodox legal methods of combating discrimination in employment, for example, have proved to be of limited effectiveness. The power of using SRPP lies in the firm's economic interest in obtaining business from public authorities and linking social issues to procurement seeks to use this economic interest for the promotion of social policy objectives, usually in addition to the use of other regulatory approaches. The use of procurement is not usually the sole or even the primary method adopted to enforce social standards. More frequently, it is but one of several other methods that mutually reinforce each other.

Stimulating socially-conscious markets

- 1.8 It contributes to the development of a market in socially-beneficial products. SRPP helps to do this in two ways. First, it expands or creates new markets for goods and services that support the achievement of social objectives. It helps to do this because in certain sectors of the economy, government purchasing is sufficiently important in market terms that if government decides that a particular socially desirable product is to be purchased, then the market is likely to react by providing it, thus stimulating the development of a product that might not otherwise have been created. Second, SRPP can serve as a model for other consumers and offer standards and information for use by other consumers.

Demonstrating socially-responsive governance

- 1.9 It contributes 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). Governments award public contracts on behalf of the communities that they serve. It is not unreasonable that these communities expect that public contracts should go to contractors who do not violate the basic norms of that community. The award of public contracts is not simply an economic activity by the administration, in which the contracting authority can consider itself simply as equivalent to a private sector organization. It is unacceptable that government should allow those acting in its place to behave in ways in which government itself would not wish or be permitted to act, and in this context some contracting authorities have considered it an act of good government that social considerations should enter into the award of government contracts. Those acting with government financing should at least uphold the norms that government would be held to, acting directly.

Addressing concerns about markets

- 1.10 Extensive changes are occurring in the delivery of public services, in part under pressures from global economic developments. This involved a combination of privatisation, and contracting out. These contractual methods came to be seen by some as important instruments of deregulation. Procuring services from the private sector has distributional consequences for employees and consumers that need to be taken into account in the procurement process. An important example of this is contracting-out the delivery of services that have previously been delivered by government itself through its own directly employed workforce to private sector service deliverers employing workers not in public employment. Where procurement is thought likely to lead to a reduction in social standards, then, linkage between procurement and social policy is justified to limit or control the perceived damage. The role of SRPP in some contexts, then, is to reinsert public values into a contractual context that might otherwise underestimate them.

Stimulating competition

- 1.11 It contributes to strengthening strategic cooperation and dialogue with the supplier base. Several examples of SRPP attempt to ensure that there is no unfair exclusion of some from the procurement market. Such exclusion is damaging to everyone in that it deprives society from the benefits that would derive from their involvement, and the greater competition that this would bring. Government intervention is sometimes necessary to ensure that significant groups in the society (small businesses, women, minorities) are included in important market activities in order for there to be an effective market in the first place.

More effective public expenditure

- 1.12 The volume of public procurement and the limits placed upon direct social intervention by budgetary stringency make procurement an attractive area for buying social standards. The greater the emphasis placed on the importance of the efficient use of tax expenditure, the more likely that the argument will be made that if it is possible to use procurement to deliver on necessary social policies the more efficient that will be. A European Parliamentary Committee, for example, argued: “the limits placed upon direct social expenditure by budgetary stringency make [procurement] an attractive area for the promotion of socially desirable outcomes.”²

3. SRPP and the EU social model

- 1.13 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, 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.

² European Parliament, Committee on Employment and Social Affairs, Response to the Green Paper on Procurement Reform.

1.14 Social standards have come to play a central role in building Europe's economic strength, through the development of what came to be identified by Community institutions as a unique social model.³ Economic progress and social cohesion have come to be regarded as complementary pillars of sustainable development and both are at the heart of the process of European integration. There has been an increasing emphasis in the Community on social and equality rights, particularly in the workplace. As sustainable development moved beyond environmental issues into social issues, social standards were increasingly identified as an element in the growing movement for corporate social responsibility. Increasingly, at the Community level, and also at the national level in several states, gender equality became “mainstreamed”, meaning that the need to further status equality came to be seen (at least at the rhetorical level) as something to be integrated into a wide range of policies and institutional practices.

4. Political and legal context of SRPP in the EU

The developing social and human rights dimension of the EU

1.15 Over the past twenty years, the EU has developed its social dimension to a significant degree. The importance of these developments is that SRPP now increasingly furthers EC level policy; 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, the Community has adopted legislation. 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.

1.16 The ECJ incorporated human rights into EC law, as part of the ‘general principles of Community law.’⁴ Article 6(2) TEU (the Nice Treaty) commits the Union to ‘respect fundamental human rights as guaranteed by the [ECHR] and by the constitutional traditions common to the Member States, as general principles of Community law’. The Treaty of Amsterdam, 1997 recognised human rights as part of the principles upon which the Union is founded. More specifically, Article 6(1) TEU states that: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”

1.17 In the general statement of the objectives of the Community in the EC Treaty (Article 2 EC), one of the aims is to promote ‘equality between men and women.’ Articles 2 and 3(2) EC impose the objective of promoting equality between men and women in the Community. Article 141 EC provides for the right to equality between men and women in the context of pay. This also provides, however, that the principle of equal treatment does not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.⁵

1.18 Although not legally binding, the EU Charter of Fundamental Rights is also relevant in this context. The Charter contains many provisions that aim to safeguard and further various

³ See, for example, Preface to the Communication on the Social Policy Agenda.

⁴ Two early landmark rulings are Case 29/69, *Stauder v City of Ulm* [1969] ECR 419 and Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁵ Art 141(4) EC.

fundamental rights that are also social standards of the type that SRPP aims to advance. The European Court of Justice has regarded the Charter as relevant to the interpretation of Community law in other contexts.

The legal and policy approach to SRPP in the EU

- 1.19 The European Commission developed a strategy for clarification of the scope of SRPP. In its interpretative communication of 4 July 2001, the European Commission set out the possibilities offered by Community law to integrate social considerations into public procurement procedures.⁶ A separate Communication on social aspects was published on the 15th October 2001.⁷ The aim of the second 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
- 1.20 The public 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. These are considered in detail below.
- 1.21 The purpose of this Guide is, primarily, to address the issue of how social considerations can best be taken into account where the general provisions of the Public Procurement Directives apply. The Public Procurement Directives do not apply to all public contracts. There remains a wide range of contracts that are not or only partially covered by them, such as: contracts below the thresholds for application of the Public 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. Some contracting authorities have adopted SRPP policies that specifically apply to such contracts. Indeed, some contracting authorities prefer to apply social criteria to tenders below the thresholds, for example, because of the greater flexibility that they consider this gives.

Example:

DE State of Brandenburg: “The Regulation on the Preferred Consideration of Companies During the Award of Public Contracts for the Promotion of the Employment of Women” (Verordnung über die bevorzugte Berücksichtigung von Unternehmen bei der Vergabe öffentlicher Aufträge zur Förderung von Frauen im Erwerbsleben) of 1996, which is applicable

⁶ COM(2001)0274, 4.07.2001.

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.

⁹ 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 (hereinafter: Directive 2004/18/EC) and 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 (hereinafter: Directive 2004/17/EC).

below the EC thresholds, favours companies with a high percentage of female employees. The preference applies when two bids are economically equally competitive and one of the bidders is part of the preferred group (§ 6 of the Regulation). There are many additional provisions to ensure equal treatment and transparency of award decisions partly based on the Regulation. However, there are no data as to how often such provisions did actually impact the outcome of the award.

- 1.22 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 Public 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. The Commission has published guidance on how Member States should apply the basic principles deriving from this case law. This interpretative communication addresses the two groups of contracts mentioned above as not or only partially covered by the Public Procurement Directives.¹⁰

Services of general economic interest

- 1.23 The Guide does not specifically address either the legal issues related to the application of competition law to public procurement 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.¹¹ 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.¹² Most of these questions were gathered during a large consultation process that took place in 2006-7 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 other questions from citizens, public authorities and service providers.¹³

Small and medium size enterprises (SMEs)

- 1.24 There is one further area where EU law and policy relating to SRPP intersects with EU law and policy regarding small and medium size enterprises. There are several aspects of the relationship between SMEs and SRPP. One aspect relates to the ability of SMEs to gain access to public procurement opportunities. This concern is illustrated by the Commission's Communication "A single market for 21st century Europe" COM(2007) 725 final, in which the Commission states that it will "examine a range of initiatives to back SMEs, in the form of a Small Business Act for Europe in 2008. This could provide guidelines and provisions tailored for SMEs according to the "think small first" principle. It could draw together the SME elements

¹⁰ See Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02).

¹¹ 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).

¹² http://ec.europa.eu/services_general_interest/faq_en.htm.

¹³ http://ec.europa.eu/services_general_interest/registration/form_en.html.

present in various policies and laws, with the aim of reducing further unnecessary administrative burdens, increasing SMEs' participation in EU programmes, further improving SMEs' access to public procurement and reducing obstacles to cross-border trade, thus fostering further innovation and growth. The Commission will also examine how taxation policies and practices affect SME growth and will propose a European Private Company statute to facilitate cross-border activities of SMEs". This issue is considered in more detail below, at para. 3.13.

- 1.25 There are, however, several other 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

2.1 This section addresses the key elements of an organizational strategy for SRPP. It also discusses why it is important and which steps need to be undertaken for its implementation.

1. Identifying the objectives for Socially Responsible Public Procurement

2.2 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. PP not only represents huge spending power, which directly contributes to the fulfilment of social priorities and objectives, but also gives a signal to the market and to the general public in favour of social responsibility, and therefore influences and contributes to shape choices and behaviours of suppliers and consumers.

Examples:

FR French Government: A Strategie nationale du développement durable was launched in 2003 and has been updated since (<http://www.ecologie.gouv.fr/-SNDD-actualisee-.html>). It was followed by a Plan national d'action pour des achats publics durables (<http://www.ecologie.gouv.fr/pnaapd.html>) in 2007. At present, the French Government is 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. In this framework a working group on sustainable procurement (“*Achats publics durables*”) has been established, and produced a report which is expected to be translated into a directive of the Prime Minister. The document is supplemented with annexes covering twenty different procurements procedures ranging from office materials to wood”.

UK Northern Ireland Government: The Programme for Government (PfG), Budget, and Investment Strategy (ISNI-2), all endorsed by the Northern Ireland Assembly in January 2008, set out an ambitious economic, social and equality agenda. Public procurement was recognized as one major tool for achieving these goals, involving significant economic muscle. Procurement spend each year in Northern Ireland has been estimated as being c £1.7 bn per year (15-20% of NI GDP). The PfG said: “Government procurement can play an active and effective role in the process of tackling patterns of socio-economic disadvantage”.¹⁴ The Budget continued: “ ... support will be provided to the wider public sector in taking account of sustainable development principles when procuring works, supplies and services.”¹⁵ Procurement issues were particularly prominent in the Investment Strategy for Northern Ireland (ISNI-2): “We will seek opportunities to promote social inclusion and equality of opportunity in the procurement of infrastructure programmes. This will impact through employment plans, by building opportunities for local apprenticeships into major delivery contracts, and through a tendering process that prioritises the most economically advantageous option in this context”.¹⁶

¹⁴ P. 12.

¹⁵ P. 78.

¹⁶ P. 2.

¹⁷ P. 3.

It continued: “We are encouraging departments ... to take advantage with contractors in each major procurement opportunity to progress the Executive’s wider economic, social and employment objectives”.¹⁷

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

2.3 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. In other words it involves identifying who leads on SRPP, its role and responsibilities. SRPP needs leadership from the very top of the organization and involves political commitment as well as leadership through the management structures. Leaders may be the Chief Executive Officer (CEO), the political leader as well as heads of functional services and senior managers. They need to be found at all levels within the organizations. 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, which should have a clear role, should be trained and their performance monitored and rewarded if good results are achieved.

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

2.4 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. The prioritisation of key spending areas based on their social impacts can be reflected in the organizational policy and strategy and can assist in the more effective allocation and use of financial resources, which are often limited.

2.5 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. Examples from Member States include: construction materials (DE and DA), coffee (Copenhagen), clothing (Fire Service, Dusseldorf), kindergarten furniture (Copenhagen). 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).
- Consider the social impact of the Contracting Authority’s procurement. 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).

Example:

SV Swedish Social Insurance Agency: The organization, to facilitate awareness by procurement officers of SRPP initiatives, participates in network and tries to follow the legal progress in this area. 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 this groups. The organization has worked against the use of labour that arises from the informal (or “black” economy) since 2007. To identify the risk of non-compliance with social standards, the organization analyse the risks at the beginning of procurement. For example, in a procurement of cleaning services, the risk of such labour 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 in 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? Will they realise that we are making an effort to improve our social performance? High-profile changes like a change to fair trade coffee in the canteen, 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 Ministry of Environment and SD (MEEDDAT): There are action plans and performance targets to favor SRPP: the organization mentions the “Plan ministériel de modernisation de l’achat”. The products, services and sectors where SRPP is considered most relevant are: construction works, transportation services, catering services, cleaning services, waste recycling, printing and routing/posting. A list of priority supplies works and services which a significant social impact is maintained by the organization.

FR Ville d’Angers: Institution of an internal focal point (specialized legal advisor) for eco-responsible procurement since 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. Specialized legal advisor in charge of training of the directorate general staff and of the internal services on sustainable procurement. Awareness raising and tutoring 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. This is performed in close cooperation with enterprises. For the social aspects, public works and services are in general considered priority sectors: in particular construction of buildings, public roads, public parks and gardens. For Sustainable Public Procurement in general procurement of supplies is also considered a priority: paper, furniture, office supplies, clothing, food, electronic equipment, lighting, maintenance equipment/items, and publications.

UK Task Force on Social Considerations in 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 (FFW). The Prioritization Methodology is a risk-based approach that helps organizations focus their efforts and resources appropriately. The Task Force identified a set of ‘Top 10’ spend areas at national level. Each organization has the opportunity to do the same by applying this methodology, taking into account its own drivers, stakeholders, policies and objectives. 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.

- 2.6 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 (consisting of the Greater London Authority, the London Development Agency, Transport for London, the London Fire

and Emergency Planning Authority, and the Metropolitan Police Authority)¹⁸ 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 in January 2007 the policy was renamed "Responsible Procurement" because "it had become clear [sustainable procurement] is often understood to refer only to environmental issues, and to exclude social ones" and the Mayor "wanted to communicate the importance of both social and environmental objectives."

The current policy statement,¹⁹ sets the Policy in the context of the Greater London Authority Act 1999, which sets out the principle purposes of the GLA as economic development, wealth creation, and social development, within the Greater London area, and improvement of the environment.²⁰ The Policy states that the GLA has the power to do anything in furtherance of these principle purposes. In exercising these powers, the GLA must do so in ways calculated to promote improvements in the health of Londoners, and in ways calculated to contribute towards the achievement of sustainable development in the United Kingdom. In performing these functions, the GLA must also have regard to the principle that there should be equality of opportunity for all people. The Mayor considered procurement "as a key opportunity to take forward the delivery of these principal purposes." The Policy sets out six social and economic "themes" across which the GLA Group aimed to improve London's sustainability (in addition to the seventh theme of "promoting greater environmental sustainability").

1. Encouraging a diverse base of suppliers, by promoting greater supplier diversity in the private sector. Supplier diversity had already been adopted as a policy in 2005, when a group statement of principles on supplier diversity had been agreed. 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."²¹
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." The Mayor has established a Living Wage Unit within GLA Economics to set an annual figure for the London Living Wage, taking into account the costs of living in London compared with other parts of the country.
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", and seeking "to work with suppliers who do not prevent or discourage employees from joining trade unions or discriminate against employees who hold trade union membership."
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. Community benefits, encouraging "a positive contribution from our suppliers to the local communities in which they work on our behalf".

¹⁸ The policy is also supported by the Metropolitan Police Service.

¹⁹ Mayor of London, GLA Group Responsible Procurement (March 2006, updated January 2008).

²⁰ Section 30(2).

²¹ 2008 "Mayor of London's Responsible Procurement Report", p. 25.

6. 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.²²

According to the 2008 “Mayor of London’s Responsible Procurement Report”, the approach of the GLA Group “has been for each member to be responsible for its own operational implementation of the Responsible Procurement Policy. There is a pan-organisation Steering Group to ensure consistency and drive continuous improvement, supported by a working group to share good practice.” Implementation is being taken on a contract-by-contract approach.

4. Raising awareness on SRPP and involving key stakeholders

- 2.7 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. Involving key stakeholders from the very beginning of the process will help to get their views and strengthen relationship with them at an early stage. 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. The consultation process should be managed by those responsible for developing the SRPP approach, including policy makers/high level management, head of services, procurement staff, and communication specialists. Workshops, seminars, conferences should be organized in 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. Web-based networks are also relevant initiatives for awareness raising and exchange of best practices. Finally, effective communication about SP benefits, good practices, quick wins/success stories also place a key role in achievement of progress.
- 2.8 Achieving equality of opportunity and sustainable development through public procurement is challenging. Success requires all stakeholders – political leaders and public authorities, contractors from the private and voluntary sector, community representatives and non-government organisations, trade unions and employees – to rise to the challenge.
- 2.9 It is important to communicate a socially responsible purchasing policy to a wide range of stakeholders, including present and future suppliers, service providers or contractors, so that they can take account of the new requirements.
- 2.10 It is crucial 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

²² 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/rp/casestudies/casestudy08.jsp>, and “Ethical driving force”, in Company Clothing, April 2007.

between purchasers and contractors. Both need to be prepared to work as a team to manage the complex risks involved in outcome-based contracting.

Examples:

FR MEEDDAT: pre-bid meetings with contractors to raise awareness about promotion of labour rights and about standards of working conditions. Pre-bid meetings organized to set aside contracts for enterprises that employ mainly people with disabilities.

FR MIFA The organization uses pre-bid meetings with contractors to raise awareness about employment opportunities.

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 are included in the technical specifications.

SV Gothenburgh City Board: Pre-bid meetings will be used to explain "design-for-all" requirements if any such are included in the technical specifications.

2.11 All companies gain a competitive edge through responsible behaviour that contributes towards enhancing social standards. For contractors wishing to win public sector business, there is also a yet more central requirement - to fulfil the objectives of social justice that sit at the core of their contracts. To win the business, they must demonstrate that they have the commitment and skill to do this.

2.12 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 a topic in 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 also SMEs have the resources to submit their bid. Often framework contracts are split in several calls for tender but without infringement of the thresholds set by the EU public procurement directive,²³ e.g. geographically, in order to give suppliers the opportunity to submit a bid e.g. on a contract covering a certain region.

²³ Art 9(3) Directive 18/2004 and Art 16(2) Directive 17/2004.

5. Implementing the SRPP strategy

- 2.13 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
- 2.14 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.
- 2.15 In terms of the steps that need to be undertaken, this involves setting up a 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.
- 2.16 In terms of capacity building, this will involve training programmes for executives, managers and staff, sharing of good practices, availability of skills to implement SP, inclusion of SP competences in candidates' selection criteria, availability of information on SP initiatives at EU/government level.
- 2.17 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

- 2.18 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.
- 2.19 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.
- 2.20 External measures should involve independent auditing of SRPP performance. They may also include benchmarking against past performance/performance of other organizations.
- 2.21 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

2.22 To make an SRPP policy work it is essential to look at the public procurement procedure itself. A socially responsible procurement policy can, if it is not carefully implemented, founder on practical issues such as when to ask for it, who to ask for it and what criteria to use.

The nature of the public procurement procedure

2.23 Public procurement is in essence a question of matching supply and demand, just as with any private procurement procedure, the only difference being that contracting authorities have to exercise special caution when awarding contracts. This is because they are public entities, funded by the taxpayer's money.

2.24 This special caution can be translated into two main principles:

- getting the best value for money
- acting fairly

2.25 *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 does not exclude social considerations.

2.26 *Acting fairly:* Acting fairly means following the principles of the internal market, which form the basis for the public 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.

Following processes that comply with policy and legislation: the importance of legal advice

2.27 The European 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.

The different stages of the procurement procedure

2.28 The preparatory stage of any procurement procedure is crucial. Any mistakes at this stage will adversely affect every successive stage, and ultimately the end result, 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.

- 2.29 The general structure of a public procurement procedure is essentially no different from a private one. They both follow roughly the same stages: defining the subject matter of the contract, drawing up the technical specifications and the contractual parameters for the product/ work/service, selecting the right candidate, determining the best bid, and managing the performance of the contract.

8. Stages of the procurement procedure and approaches to SRPP

- 2.30 Following the logic of this process, there are now at least four basic approaches of how social issues are currently addressed in public procurement.
- 2.31 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 of this approach is where the specifications specify that computer equipment must conform to certain accessibility criteria.
- 2.32 In the *second* approach, there is a prohibition on obtaining government contracts as a penalty for previous wrongdoing, or to prevent public bodies contracting with those who are currently failing to achieve a particular standard of social behaviour. Where this approach is adopted, it is most likely that the tender (or general legislation) will specify that a person will be disqualified from tendering for the contract if they have been found to have failed to comply with social requirements. The point of this use of procurement is, essentially, to add the deprivation of government contracts to the other penalties that the contractor may be subject to.
- 2.33 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.
- 2.34 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. In this approach there is no attempt to build the ability of the contractor to comply with such conditions into the award of the contract. This model presents all contractors with the same requirement that the contractor must sign up to.
- 2.35 It is important to understand that 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 assess periodically the instruction performance. The assessment will include the specifications writing, its application in awarding process and its performance.

Subject matter of the contract: The Instruction defines 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. Whenever the gender perspective is a technical characteristic of the contract, the gender perspective must be include explicitly in the subject matter of the contract. For example: "The subject matter of the contract is to design an urban mobility plan with gender perspective" The subject matter of the contract should be respectful towards the social and working safety and health.

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

Technical specifications: The Instruction includes that the technical specifications incorporates the gender perspective in order to avoid gender discrimination and to incorporate Accessibility and Design for All.

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 characteristics). Whenever the provision of services defined in the subject matter of the contract has disadvantaged groups as beneficiaries, the characteristics related with the fulfilment of their social needs will be included as an award criterion. The Gender Perspective will be included as award criteria whenever this inclusion involves increasing the advantage related to real gender equality.

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

Contract performance clauses:

1. Labour inclusion of unemployed people with high difficulties for being employed: The contract performance must include minimum 20% of unemployed people with high difficulties for being employed in the staff that will perform the contract. People with

disabilities, women above 30 long term unemployed, household violence victims, mental illness persons, unemployed father or mother of one-parent families, 6 months unemployed immigrants, long term unemployed people (more than one year), unemployed young persons, are some examples of unemployed people with high difficulties included in the instruction.

2. Men and women equality: In the contract performance, the contractor will guarantee the equality among men and women in the work conditions, salary, etc. Whenever the staff has less than 40% of women, during the contract performance the contractor must contract at least one more woman or transform one woman temporary contract in a contract for an indefinite period.
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 the respect towards the ILO Core Labour Standards along the production chain of the products.
4. Safety and health in the contract performance for building works and services
5. Environment protection

2.36 The rest of this Guide devotes a chapter to each stage, looking at ways of taking social issues into account at each stage, and giving practical examples and recommendations.

III. IDENTIFYING THE NEEDS AND PLANNING THE PROCUREMENT

- 3.1 The previous chapter emphasised that public purchasers have a stricter obligation than private purchasers to get the best value for money and to be fair in procurement procedures. Best value for money can include social considerations.
- 3.2 In this chapter, we see that the preparatory stage in the procurement process is crucial. Thorough analysis and planning is essential before launching a tender if social goals are to be achieved. It is particularly important to analyse exactly what it is the Contracting Authority needs, before deciding on the approach to take.

1. The importance of assessing actual needs

- 3.3 There is one crucial step that the Contracting Authority needs to take at this preparatory stage even before defining the subject of the contract. It needs to assess its actual needs.
- 3.4 For example, the Contracting Authority may have decided that it needs to disseminate information to the public. It has decided to purchase printed flyers, posters, brochures and newspaper ads. However, if it thinks in terms of actual needs before deciding on the possible solutions, it may decide on more socially inclusive solution, such as dissemination of information in ways that will also be useable by members of the public with disabilities.

Example:

NL Ministry of Housing, Spatial Planning and Environment: There are special programmes, special purchasing procedures and guidelines, and special measures taken by the government to ensure selection of the optimal location of a procurement requirement for a public building or a public service facility that may result in a positive impact on benefits to the local community or to the regeneration of an area.

Identifying the social requirements within a procurement

- 3.5 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 relevant to 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;
 - Engage with service users and community groups.

- 3.6 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. Once it has properly analysed its needs, it may even conclude that there is no need for a procurement solution at all.

2. Defining the subject matter

- 3.7 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. Subject to what is said below, there is no reason in principle why achieving any social standard could not be made the subject matter of the contract.
- 3.8 This allows ample scope for including social considerations, provided that this is 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. (See example following para 2.35 above.)
- 3.9 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 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.

Example:

UK Northern Ireland Central Procurement Directorate: A Pilot Project provided that for those projects included in the pilot, it would be an objective of the contract to create opportunities to facilitate the unemployed into work. The “unemployed” were defined as any person resident in the EU or any other country covered by the WTO Government Procurement Agreement who was not in paid employment in the three months immediately prior to being employed on the contract. Contractors wishing to be considered for a contract within the Pilot Study would be required to demonstrate clearly their commitment to the scheme. Tender documentation would require the contractor to provide an “unemployment utilisation plan”.

- 3.10 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.
- 3.11 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 directives or to certain aspects of contracts which are not explicitly covered by the directives.
- 3.12 In practice, this means that the Contracting Authority has to ensure that the contract will not affect access to its national market by other EU operators. (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.)

Example:

FR: 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.

3. Increasing access to procurement opportunities

Reserving performance of contracts to particular classes of firms not generally permitted

3.13 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.

What’s not permitted – an example

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

3.14 It is both permissible, and desirable, for purchasers to address these difficulties, without going so far as preferring them. EU law permits positive action by purchasers, but not positive discrimination.

3.15 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.”²⁴ 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.

SV National Road Administration: to facilitate increased access to public procurement opportunities by SMEs, social economy and voluntary type organizations who work with socially disadvantaged groups, the organization uses information meetings for contractors, with special emphasis to widen the circle of companies willing to tender.

IR InterTrade Ireland: Go-Tender Programme was piloted under the title ‘Supplier Education Programme’ for an initial six-month period, which commenced in July 2003. After the successful completion of a pilot phase, the Programme was then rolled out in January 2005 as a two-year Programme (Phase 1 and Phase 2). The aim of the 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 Programme aimed to enhance the skills, expertise and efficiency of those SME businesses that wish to target the public sector. Specifically, the Programme sought to provide participating companies with the basic knowledge and practical support required to target and win contracts in the all island public procurement market. 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 development of the skills required to win public sector work in both remits; provide experienced one to one support in the process of bidding for work. Over the previous three years SSD presented 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. Recent research by Intertrade Ireland indicated their Go Tender Programme had resulted in companies being awarded 120 public sector contracts to a value in excess of £18 million.

²⁴ 2008 “Mayor of London’s Responsible Procurement Report”, p. 25.

- some contacting 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 EU Directives²⁵.

Examples:

FR French Legislation: According to Art. 10 of the Code des marchés publics, to enhance competition and if compatible with the subject matter of the contract, procuring entities may subdivide their procurements into lots, within one call for tender of the procurement they intend to undertake, account being taken of the technical characteristics of the subject matter of the contract, of the economic structure of the relevant market and, if applicable, of the specific rules applicable to some professions. The French Government has given indications to procuring entities strongly recommending the splitting into lots of the procurement they pass.

DE German Länder: Many German states have special laws to support SME. Examples are the Act for the Promotion of SME (*Gesetz zur Mittelstandsförderung*) of Baden-Württemberg, the Act on the Promotion of SME and the Professions (*Gesetz über die Förderung der kleinen und mittleren Unternehmen sowie der freien Berufe*) of Bavaria, the Act on the Promotion of SME in the State of Brandenburg (*Gesetz zur Förderung des Mittelstandes im Land Brandenburg*), the Act on the Promotion of SME and the Economically Active Professions (*Gesetz über die Förderung der kleinen und mittleren Unternehmen und der in der Wirtschaft tätigen freien Berufe*) of Hamburg, the Act on the Promotion of SME of the economy of Hessen (*Gesetz zur Förderung der kleinen und mittleren Unternehmen der hessischen Wirtschaft*), the Act on the Economic Promotion of SME in Mecklenburg- Hither Pommerania (*Gesetz zur wirtschaftlichen Flankierung des Mittelstandes in Mecklenburg-Vorpommern*), the Act on the Promotion of SME (*Gesetz zur Förderung kleiner und mittlerer Unternehmen*) of Lower Saxony, the Act on the Promotion and Strengthening of SME (*Gesetz zur Förderung und Stärkung des Mittelstandes*) of North-Rhine-Westphalia, the State Act on the Promotion of SME and the Economically Active Professions (*Landesgesetz über die Förderung der kleinen und mittleren Unternehmen und der in der Wirtschaft tätigen freien Berufe*) of Rhineland-Palatinate, the Act on the Promotion of SME and the Professions in the Economy (*Gesetz zur Förderung der kleinen und mittleren Unternehmen sowie der freien Berufe in der Wirtschaft*) of Saarland, the SME Promotion Act (*Mittelstandsförderungsgesetz*) of Saxony-Anhalt, the Act on the Promotion of SME (*Gesetz zur Förderung und Stärkung des Mittelstandes*) of Schleswig-Holstein, and the Act on the Promotion of SME and the Professions (*Gesetz über die Förderung der kleinen und mittleren Unternehmen sowie der freien Berufe*) of Thuringia.

There are two main methods to promote SME in public procurement in the German states. First, comparable to § 5 VOL/A outlined above, contracting authorities are required to split contract into lots to allow SME to bid – as far as this is possible in the economic and technical context of the contract in question. (In such cases, the EU prescribed procurement methods are still observed for the whole procedure. However, award can be distributed among the winners on a lot by lot basis, which will enhance SME's opportunities to win one or more lots within a large procurement.) This is provided in § 22 (1) of the Baden-Württemberg SME Act, § 5 (3) of the Brandenburg SME Act, § 15 (2) of the Mecklenburg-Hither Pommerania SME Act, § 14 (2) of the Lower Saxony SME Act, § 21 (1) of the North Rhine-Westphalia SME Act, § 18 (1) of the Rhineland-Palatinate SME Act, § 17 (1) of the Saarland SME Act, § 2 (1) of the Saxon SME Act, § 8 (1) of the Saxony-Anhalt SME Act, § 14 (3) last sentence Schleswig-Holstein SME Act, § 13 (1) Thuringian SME Act and for the federal level in § 5 paragraph 1 of the Procurement Order VOL/A. Second, contract conditions with main contractors should include a clause

²⁵ Art 9(3) of Directive 18/2004, Art 16(2) of Directive 17/2004.

providing for the participation of SME as subcontractors as long as this can be reconciled with the general requirements of the execution of the contract in question. This is provided in § 22 (4) of the Baden-Württemberg SME Act, § 5 (5) of the Brandenburg SME Act, § 6 of the Hesse SME Act, § 15 (4) of the Mecklenburg-Hither Pommerania SME Act, § 14 (4) of the Lower Saxony SME Act, § 21 (4) of the North Rhine-Westphalia SME Act, § 18 (3) of the Rhineland-Palatinate SME Act, § 17 (3) of the Saarland SME Act, § 2 (2) of the Saxon SME Act, § 8 (3) of the Saxony-Anhalt SME Act, § 14 (4) Schleswig-Holstein SME Act, and § 13 (3) Thuringian SME Act. Finally, some German states merely have a general rule to allow SME a fair share in public contracts (§ 12 of the Bavarian SME Act) or require to specifically ask SME to bid for public contracts in the context of restricted and negotiated procedures (§ 6 of the Hesse SME Act).

Set-asides for sheltered workshops

- 3.16 In both the Utilities²⁶ and Public sector²⁷ Directives, there is, however, an explicit provision permitting Member States, as the Recitals put it, ‘to reserve the right to participate in award procedures for public contracts’ to sheltered workshops or to reserve performance of contracts to firms operating sheltered employment programmes.²⁸
- 3.17 The explanation provided 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.’ 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.
- 3.18 Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are persons with disabilities who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

²⁶ Article 28 Utilities.

²⁷ Article 19 Classic.

²⁸ Recital 28 Public sector; Recital 39 Utilities.

Examples:

DE Federal Legislation: A Federal Decree on Contracts for Workshops for the Disabled of 10 May 2005 (*Allgemeine Verwaltungsvorschriften für die bevorzugte Berücksichtigung von Werkstätten für behinderte Menschen und Blindenwerkstätten bei der Vergabe öffentlicher Aufträge*) 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 (§ 3 (2) of the Decree). 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 (*German Behindertenwerkstätten*). 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”.

UK Northern Ireland Central Procurement Directorate: Certain workshops employing disabled workers are able to bid for contracts under the EC procurement thresholds on preferential terms. A list of eligible establishments is maintained, the principal one being Ulster Supported Employment Limited (USEL). USEL is a Non Departmental Public Body which was established in 1962 under the Disabled Persons (Employment) Act (NI) 1945 to provide sheltered employment for people with severe disabilities. It merged with Workshops for the Blind in 1980 and acquired charitable status in 1986. USEL employs more than 750 people throughout Northern Ireland in a range of programmes, making it the largest employer of people with disabilities in Northern Ireland.

3.19 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.²⁹ There are several important features of this provision:

- Any such reservations must be initiated by Member States, and not simply adopted ad hoc by particular public bodies.
- Although there is no specific definition of a “sheltered workshop”, this has a limited meaning in practice.
- The provision applies not only to sheltered workshops but also to “sheltered employment programmes”. These are defined in way that is relatively constraining:
 - “most of the employees concerned” in the programme must be “handicapped persons”;

²⁹ Public sector Directive, Annex VII; Utilities Directive, 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.”

- these “handicapped persons” must be unable to “carry on occupations under normal conditions” due to “the nature and seriousness of their disabilities”.
- Article 19 of Directive 2004/18/EC provides that “handicapped persons” are those who “who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.” Although there is no definition of “disabilities”, the meaning of this term should be read as the same in all material respects to the interpretation of “disability” in the Framework Directive.

IV. DEFINING THE REQUIREMENTS OF THE CONTRACT

1. Drawing up the technical specifications

- 4.1 The specification sits at the heart of any procurement. The specification sets out the parameters of what will be delivered. Initial planning will have determined the need to procure and identified the “subject matter of the contract”. 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.
- 4.2 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.
- 4.3 Under European 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 in the specification. The specification is issued early in the tendering process, which is why authorities have to get their requirements “right first time”. Offers not complying with the technical specifications have to be rejected.
- 4.4 The provisions of the procurement directives relating to technical specifications seek to achieve three main aims: first, that the technical specifications should not reduce competition;³⁰ second, that they should be transparent;³¹ and, third, that they should not discriminate against possible contractors from outside the Member State of the contracting authority.³²

2. Using performance-based specifications

- 4.5 The procurement directives (2004/17/EC and 2004/18/EC) explicitly allow contracting authorities to choose between specifications based on technical standards or on performance-based requirements.³³ 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.
- 4.6 However, when setting performance-based specifications, the Contracting Authority has to be even more careful than when setting conventional technical specifications. As the options available on the market can vary considerably, the Contracting Authority should make sure its specifications are clear enough to allow it to make a proper and justifiable evaluation.
- 4.7 The Contracting Authority can build into its specification requirements to promote equality of opportunity, for example, so long as these can be related to the subject matter of the contract.

³⁰ Article 23(2).

³¹ Article 23(1).

³² Article 23 (3).

³³ See Article 23 of Directive 2004/18/EC and Article 34 of Directive 2004/17/EC.

Defining the subject matter of the contract, and therefore the specification, in terms of the outcomes to be achieved, maximises the scope to do this.

What's permitted – some examples

- Requiring personnel of a cleaning contractor to adopt the purchaser's dress code that complies with dress requirements for certain religious groups.
- Requiring the outsourced contact centre to have high health and safety standards - and for employees to have equality training to meet the needs of specific user groups identified by the purchaser.

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.

4.8 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;
- Relate 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.

Examples:

SV Regional Administration for South-Western Sweden: about disability requirements that are reflected in the technical specifications of a procurement need, the organization mentions: interior design of facilities, e.g. doors and staircases. Coffee machines may be required to be accessible by persons with disabilities.

UK Northern Ireland Central Procurement Directorate: Buildsafe NI is a five-year safety initiative for the construction industry run under the auspices of the Construction Industry Forum Northern Ireland. Buildsafe NI brings together the public sector client, the industry, the trade unions and the *Health and Safety Executive for Northern Ireland* as partnering groups and is being taken forward in the context of the existing legal obligations and requirements.³⁴ Each of the partnering groups to the Initiative is devising its own Action Plan to contribute to the overall aim and target. The Government Clients have produced several action plans.³⁵ Action Point 4 of the GCCG Buildsafe-NI Second Action Plan introduced a requirement for the Principal Contractor to report regularly on health and safety matters. To ensure uniformity of reporting, the Principal Contractor is required to use the Buildsafe – Contractors Health and Safety Report Template to report at each site meeting.³⁶ A Sustainable Construction Group was set up in December 2004 to issue guidance to Project Sponsors and Project Managers in relation to sustainable construction. The Central Procurement Directorate chairs the group and membership includes representation from Centres of Procurement Expertise and Government Construction Clients in Northern Ireland. The work of the group is guided by the Policy Framework for Construction Procurement and in particular the following two documents, which set targets and objectives: the Sustainability Action Plan³⁷ produced by the Government Construction Clients Group. This set targets to be achieved in all projects by March 2006. The Procurement Board endorsed the extension of the Sustainability Action Plan to 2008 to further embed this work. Guidance Note 5: Considerate Constructors' Scheme promotes the use of the Considerate Constructors' Scheme which embodies respect for people and their local environment in its code of practices.³⁸ This is a key aspect of the social responsibility dimension of sustainable construction. The use of the Considerate Constructors' Scheme, or similar, is a mandatory requirement of the Sustainability Action Plan. These negotiated standards are then set as the basis for the specifications included in the tender.

3. Use of variants

- 4.9 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.

³⁴ <http://www.cpdni.gov.uk/index/guidance-for-suppliers/buildsafe.htm>.

³⁵ Buildsafe - Government Clients 1st Action Plan; Buildsafe - Government Clients 1st Action Plan - Guidance Note;

³⁶ Buildsafe - Government Clients 2nd Action Plan. Buildsafe - Contractors Health and Safety Report Template.

³⁷ Sustainability Action Plan.

³⁸ The Guidance Note 5: Considerate Constructors' Scheme.

- 4.10 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.
- 4.11 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.
- 4.12 To be able to accept variants in a public procurement procedure,³⁹ 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),
 - 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).
- 4.13 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.
- 4.14 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.

Example:

FR Ville d'Angers: Often fair-trade requirements are included in the tender documents as compulsory requirements: This is normally the case for t-shirts in cotton bio-fair, fair-trade coffee for consumption in public premises by the staff and visitors, 100% recycled paper. If the requirements are optional, either they are included as award criteria or in form of variants.

4. Social labels

- 4.15 The United Kingdom's Office of Government Commerce has defined a "social label as: "a broad term relating to the social capacity of a company or undertaking and can cover both fair and ethical trade. It can be used in reference to goods produced in line with standards aimed at securing fair terms of trade for suppliers in the developing world, or general business practice which is deemed to be carried out in an ethical manner through promotion of certain

³⁹ See Article 24 of Directive 2004/18/EC and Article 36 of Directive 2004/17/EC.

labour and environmental standards.” (para 4.4) A wide range of social labels have been developed to communicate information on the social credentials of a product or service in a standardised way, with a view to helping consumers or other businesses to select socially responsibly products or services. Social label criteria are usually based on studies that analyse the social impact of a product or service or process. The Contracting Authority can use the information from social labels in different ways:

- to help the Contracting Authority draw up its technical specifications in order to define the characteristics of the supplies or services it is purchasing;
- for checking compliance with these requirements, by accepting the label as a means of proof of compliance with the technical specifications;
- as a benchmark against which to assess offers at the award stage (see the example below);
- by using different types of labels for different purposes, for example, single-issue labels can be useful for a step by step approach. However, the Contracting Authority can never require tenderers to be registered under a certain social label scheme.

Example:

NL Gemeente Ridderkerk: The organization uses extracts of specifications from fair trade or equivalent social labels. For instance: for coffee beans in the beverage machine; production of bricks made from rock with no child labour.

4.16 The public procurement directives (2004/17/ EC and 2004/18/EC)⁴⁰ do not explicitly allow the Contracting Authority to use the underlying specifications of *social* labels when defining performance-based or functional social requirements, but *eco*-labels are permitted to be used provided that:

- the specifications are appropriate for defining the characteristics of the supplies or services covered by the contract -- in order for criteria to be applicable to public procurement they have to relate to the subject matter of the contract;
- the requirements for the label are based on verifiable information;
- the social labels are adopted with the participation of all stakeholders, such as government bodies, consumers, manufacturers, distributors and social organisations;
- they are accessible to all interested parties.

4.17 **By analogy**, these same conditions would apply to assess the acceptability of social labels. Those products and services which bear a social label are presumed to comply with the technical specifications. It is, however, not permitted to set a requirement for companies to possess specific social labels or to be (fully) compliant with a certain social label. The Contracting Authority must always accept, and state that it is prepared to accept, other suitable evidence as well.

⁴⁰ See Article 23 of Directive 2004/18/EC and Article 35 of Directive 2004/17/EC.

Examples:

EU: European Commission: In a reply to a question in the European Parliament, the European Commission stated that: “a contracting authority *wishing to procure Fair Trade products* needs to define the technical specifications of the product in relation to the social or environmental performances underlying the label. Products which have obtained the specific label which was used as a basis may then be deemed to comply with the technical specification. However, other economic operators must be allowed to prove their compliance with the technical specifications by any other appropriate means. Which Fair Trade standard is appropriate for the respective tender needs to be established on a case by case basis”.⁴¹

FR Ville d’Angers: The contracting authority asks candidates to comply with labels or equivalent, despite there are not officially recognised labels in the area of fair-trade. However, the Entity considers that labels such as Max Havelaar, Alter Eco or equivalent meet the requirements.

DA National procurement ltd: The organization has an electronic product catalogue. In this catalogue the suppliers have the possibility to label their products with environmental labels (e.g. The EU Flower) and also the Max Havelaar label.

DE: 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. If possible, preference has to be given to products of fair trade. 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.”⁴²

- 4.18 Criteria that relate to the general management practice of the company making the product or offering the service, or those that deal with ethical and other similar issues, do not qualify as technical specifications as defined in the public procurement directives (unless these issues are included in the subject matter of the contract) and so should not be used for contracts falling under these directives. (We consider subsequently, paras 7.2, 7.5, 7.7, the position relation to performance conditions.)

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

- 4.19 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.⁴³ However, since all technical specifications should bear a link 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

⁴¹ Written question E-3517/03 by Baroness Sarah Ludford (ELDR) to the Commission (17 November 2003) - Answered by Commissioner Bolkestein on 8 January 2004.

⁴² Translation Trybus.

⁴³ Annex VI of Directive 2004/18/EC and Annex XXI of Directive 2004/17/EC.

Authority may not impose social requirements on issues which are unrelated to the subject matter of the contract in question.

6. The case of disability and technical specifications

4.20 The procurement directives⁴⁴ provide that technical specifications set out in the contract documentation should address the issue of accessibility. Article 23(1) 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.

Example:

SV Swedish Administrative Development Agency, Verva: To ensure that disability requirements are reflected in the technical specification of a procurement, the C.A. has a long tradition and experience (since at 1988 at least) of “design for all” requirements, mainly concentrated to PCs, printers and other products that people “touch” or handle. The organization refers to ISO 9241-11, Guidance on usability specification and measures, other standards/specifications like “*Electronic and Information Accessibility Standards, 21 December 2000*”, (US Federal standard), and “ISO-standard, ISO TS 16071, Ergonomics of human-system interaction – Guidance on accessibility of human-computer interfaces”.⁴⁵

Example:

EU: European Commission: The Commission has supported the establishment of a Pilot Project (“Build for All”) to mainstream disability policies, in particular promoting accessibility to the built environment. The Commission had established an Expert Group on Full Accessibility, which delivered its conclusions at the end of 2003, the European Year of People with Disabilities. The report⁴⁶ identified a lack of awareness as one of the most important obstacles to achieving accessibility in the built environment. The report also recommended that Guidelines should be produced that would help tenderers to comply with the new provision of the Directive. In January 2005, the Commission helped launch the “Build for All Reference Manual,” as part of a public consultation. The manual gives guidance in the establishment of essential accessibility criteria, and a methodology for step-by-step implementation of accessibility as provided for by the EU Public Procurement Directives.

4.21 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

⁴⁴ Article 23(1) of the Public Sector Directive and Article 34(1) of the Utilities Directive.

⁴⁵ See web site <http://www.access-board.gov/sec508/standards.htm>

⁴⁶ “2010 A Europe Accessible for All,” October 2003, available at <http://www.eca.lu/upload/egafin.pdf>

standards. In the United States, federal contracting authorities are required under Section 508 of the Rehabilitation Act to develop accessibility standards in public procurement and this has had repercussions in various EU Member States as well, and influenced industry practices. In the EU, the European Commission had developed a standardisation mandate in support of European accessibility requirements for public procurement of products and services in the area of information and communication technologies (ICT),⁴⁷ and the built environment.⁴⁸

⁴⁷ 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.

⁴⁸ 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.

V. Selecting suppliers, service providers, and contractors

5.1 Selection criteria focus on a company's ability to perform the contract they are tendering for. This stage differs from the stage of evaluating the tender and awarding the contract, which is considered in the next chapter. In this chapter we will show how to use the scope available under the public procurement directives to apply social aspects at the selection stage. We shall look in turn at two different categories of selection criteria, i.e. exclusion criteria, and technical capacity criteria, consider the role of pre-qualification questionnaires. We shall also consider particular ways in which contracting authorities may address employment protection issues.

1. Exclusion criteria

5.2 Candidates can be excluded for specific failings, including criminal offences or failure to comply with social legislation or regulations if this relates to their professional conduct. The exclusion criteria deal with circumstances in which a company can find itself that normally cause contracting authorities not to do any business with it. For example, if the company is bankrupt or has been wound up, has committed serious professional misconduct, or has not paid taxes or social security contributions. The cases where a contracting authority can exclude a tenderer are listed in full in the public procurement directives. In some particularly serious criminal cases, it may even be mandatory to exclude tenderers.⁴⁹

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.

5.3 Concerning the professional conduct of a company, two provisions in the exclusion criteria can be used to take into account companies' behaviour, i.e. where the economic operator has been convicted by a final judgment affecting his professional conduct or has been guilty of grave professional misconduct.⁵⁰

⁴⁹ See Article 54 of Directive 2004/17/EC and Article 45 of Directive 2004/18/EC.

⁵⁰ Article 45 of Directive 2004/18/EC and Articles 53 and 54 of Directive 2004/17/EC..

Example:

IT Legislation: Under Art. 38 of the Italian Procurement Code, those firms having breached either security at work provisions or rules on social contributions in their home countries are excluded from all proceedings procedures (Art. 38(1), *Requisiti di ordine generale*, «e) see also Art. 40(4) (d) of the Code, setting up a qualification system for works procurements).

- 5.4 Therefore, according to the procurement Directives 2004/17/EC and 2004/18/EC, it is considered that, if national law contains provisions to this effect, a case of non-compliance with social legislation, which has been the subject of a final judgment or a decision having equivalent effect, may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct, permitting to exclude the party concerned from competing for the contract.

EU: Posted Workers Directive

Non-compliance with national law obligations implementing the Posted Workers Directive “may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.”⁵¹ In addition, “[n]on-observance of national provisions implementing the Council Directives 2000/78/EC(15) and 76/207/EEC(16) concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.”⁵²

⁵¹ Recital 34 Public sector; Recital 45 Utilities.

⁵² Recital 43 Public sector; recital 54 Utilities

Example:

UK Northern Ireland: The Fair Employment and Treatment Order 1998, which is the Northern Ireland legislation prohibiting discrimination on ground of religion and politics. This legislation introduced a system that uses government contracts and grants as a final sanction against an employer who was acting contrary to the provisions of the legislation in a recalcitrant way. The legislation imposed significant duties on employers to take “affirmative action” where the employer’s workforce did not accord “fair participation” to both religious communities in Northern Ireland. The legislation provided that both government contracts and government grants may be withdrawn in cases of persistent and recalcitrant behaviour (where the respondent was deemed to be “in default”), thus placing contract compliance on a statutory footing.⁵³ An employer was regarded as “in default”, for example, where the employer had failed within the time allowed to serve a monitoring return and he or she has been convicted of an offence in respect of that failure, or where the employer has failed to comply with an order of the Fair Employment Tribunal (for example to engage in “affirmative action”) and a penalty had been imposed.⁵⁴

2. Technical capacity

- 5.5 The selection process enables authorities to assess candidates’ ability to deliver the contract requirements. The procurement directives contain an exhaustive list of selection criteria that can be prescribed by the contracting authority with a view to checking the technical capacity of the tenderers to execute the tendered contract.⁵⁵ Evidence of the economic operators’ technical abilities may be furnished by one or more of several specified means, such as
- 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,
 - 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.
- 5.6 There is a need to balance an appropriate desire on the part of the contracting authority that it satisfy itself that the contractor will be able to deliver on what it has been contracted to do, with the need that contractors do not have excessive burdens placed on them by contracting authorities.
- 5.7 Depending on the subject matter of the contract, these provisions may enable the contracting authority to investigate aspects of the behaviour of the contractor. Social technical competence could include technical competence in minimising violations of health and safety requirements, avoiding racial discrimination, training workers from disadvantaged backgrounds, and attracting

⁵³ 1989 Act, sections 38-43

⁵⁴ For an earlier discussion of this system, see Ruth Fee and Andrew Erridge, Contract Compliance in Canada and Northern Ireland: A Comparative Analysis, 8th International Annual IPSERA Conference, 1999.

⁵⁵ Article 48 Public sector.

the unemployed to work for the contractor. In practical terms, it concerns questions such as the three listed below.

- 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?
- Does the tendering company own or have access to the necessary technical equipment for social protection?
- Does the tendering company have the relevant research and technical facilities available to cover the social aspects?

5.8 In the technical capacity criteria, the past experience of a company and the professional qualifications of its personnel offer good opportunities for including socially responsible considerations. In order to check whether tenderers can perform social measures prescribed by the contract, contracting authorities may ask them to demonstrate their technical capacity to do so.

5.9 A useful instrument for integration of social criteria is the records of contracts carried out. When the contract tendered is a socially responsible one, the Contracting Authority can use this criterion to ask for past experience of companies in such contracts. In doing so the Contracting Authority should ensure setting out clearly what type of information is considered relevant and what means of proof will have to be provided.

5.10 In other cases, social aspects can be adopted in the educational and professional qualification. These qualities are especially important in contracts that can only achieve their social objectives through proper training of the personnel.

3. Pre-qualification questionnaires

5.11 Pre-qualification questionnaires can provide a good format to assess economic and financial standing and technical or professional ability.

Example:

IT Sotral SPA: To analyse procurement requisitions or annual procurement plan to identify the risk of non-compliance with social standards, Sotral has a plan of monitoring of all suppliers including quality, environmental and social responsibility criteria according to the integrated management system based on ISO 9001 (obtained in 1998), ISO 14001 (2003), SA 8000 (2005) respectively quality, environment and social responsibility voluntary certifications of system and EPD (2004) environmental voluntary certification of its main service (core business: meal transport). The process of Qualification of Suppliers of Sotral follows the following steps: If the suppliers are not certified for Quality, Environment or Social Responsibility, they must fulfil a qualification survey. If they don't answer to all the questions accordingly to the expectancy of Sotral, they are controlled to check if they can become qualified suppliers for Sotral.

5.12 The information required must be related and proportionate to the subject matter of the contract. This provides ample scope to test candidates' abilities to meet requirements for equality of opportunity and sustainability. For example, authorities might ask for evidence of:

- Complying with equality legislation;
- Meeting the diverse needs of different service users and engaging with the local community;
- Embedding sustainability;
- Managing, motivating and training the workforce.

Example:

UK West Midlands Local Authorities: The West Midlands Common Standard requires service providers to demonstrate that they comply with non-discrimination requirements in employment legislation. The approach adopted distinguished between different contractors based on their size, requiring smaller firms to do less than larger firms.⁵⁶ The levels of the standard become more demanding depending on the number of staff employed by the firm. Firms with fewer than 5 directly employed persons must provide a written assurance that the appropriate level of the Standard will be achieved following any recruitment which increases the size of the firm to 5 or more employees. All firms with between 5 and 49 employees must demonstrate that they comply with four criteria. First, they must provide an equal opportunities policy in respect of race, gender and disability. This policy must cover: recruitment, selection, training, promotion, discipline and dismissal; discrimination, harassment and victimization (making it clear that these are disciplinary offences within the firm); identification of a senior person within the firm with responsibility for the implementation of the policy; and how the policy is communicated to staff in the firm. Second, there must be effective implementation of the policy in the firm's recruitment practices, including the use of open recruitment methods such as the use of job centres, careers service or press advertisements. Third, there must be regular reviews of the policy. Fourth, the firm must conduct regular monitoring of the numbers of job applicants from different gender, disability and ethnic groups.

All firms with 50 or more employees must achieve each of the criteria for firms between 5 and 49, but must also achieve a further six additional criteria. They must provide written instructions to managers and supervisors on equality in recruitment, selection, training, promotion, discipline and dismissal of staff. They must provide equality training for managers and any staff responsible for recruitment and selection. As well as monitoring job *applicants* by gender, disability and ethnicity, firms must also carry out monitoring on the basis of ethnicity, gender and disability for: those in post, those applying for posts, those taking up training and development opportunities, those promoted, those transferred, those disciplined and dismissed, and those leaving employment. If monitoring reveals under-representation of any of these groups, then firms should take steps (including positive action) to address any imbalances. There must be regular reporting and consultation on equality issues within the workforce, and recruitment and publicity literature produced by the firm should mention that equal opportunities practices are in place in the firm.

The West Midlands Forum asks six questions as the basis for obtaining the necessary information from employers. The questions are as follows: 1. Is it your policy as an employer to comply with your statutory obligations to staff and applicants for employment under equality and non-discrimination laws? 2. In the last three years has any finding of unlawful discrimination or other breach of these laws been made against your organisation by any court or [employment] tribunal? 3. In the last three years has your organisation been the subject of formal investigation

⁵⁶ West Midlands Forum, Racial Equality: Common Standards for Council Contracts (July 1998)

by [any of the statutory equality commissions] on grounds of alleged unlawful discrimination? 4. If you answered yes to question 2 or, in relation to question 3 a commission made a finding adverse to your organisation, what steps did you take to address that finding? 5. Is your policy on equal opportunities at work set out: (a) in instructions concerned with recruitment, training and promotion? (b) in documents available to employees, recognised trade unions or other representative group of employees? (c) In recruitment advertisements or other literature? 6. Do you observe as far as possible the equalities and non-discrimination codes of practice [issued by the statutory equality commissions]? These six questions are included within pre-qualification questionnaires used by the West Midlands Forum and associated authorities.

4. Compliance with domestic employment laws

- 5.13 Both procurement Directives make clear that Member States may require those carrying out a public procurement contract to comply with “laws, regulations and collective agreements” that are in force and deal with “employment conditions and safety at work” during the performance of the contract.⁵⁷ Some examples of the way that Member States have approached this issue have been controversial internally in Member States.

Example:

DE German Länder: Eight states of Germany introduced a Compliance with Collective Bargaining Agreements Act (German: *Tariftreugesetze*) after the Federal Parliament (*Bundestag*) had rejected such a law on the federal level. In the states of Schleswig-Holstein and Hamburg these laws had only a limited application period. In the State of North Rhine-Westphalia the respective act was abolished in 2006 after a Study of the *Sozialforschungsstelle Dortmund* (Social Research Unit Dortmund) had evaluated the law for the period of 2004 to 2005. This Study found that that 70 per cent of the districts (German: *Kreise*) and 96 per cent of the municipalities did not review compliance with the law. Moreover, 80 per cent of contracting authorities found it very difficult to differentiate between different types of collective bargaining agreements and 70 per cent informed the researchers that it was difficult to review any calculations and to correctly implement the law. 70 per cent of the construction companies complained about the task of reviewing compliance with the law actually being transferred to the general contractor. As the Federal Parliament rejected a *Tariftreuegesetz*, at least the State of North Rhine-Westphalia has abolished its law, the laws in other states has an ‘expiry date’ and will not be renewed.

- 5.14 This is subject to the usual condition that these measures must themselves comply with EU law, and be *applied* in a way that complies with EU law.

⁵⁷ Recital 34 Public sector; Recital 45 Utilities.

What's not permitted – an example

EU Posted workers: the Rüffert case

The question has arisen as to how far it was consistent with EU law for Member States to require compliance with such rules where the contractor transferred workers from another EU state to carry out the contract. The controversy was over whether the application of such national rules meant that the effect would be to discourage such “posting of workers” from states that had a lower legal standard of employment conditions and safety at work conditions, and would thus discriminate in effect against out of state contractors. 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, lays down “minimum conditions that must be observed by the host country in respect of such posted workers.” In Rüffert, the Court of Justice considered the compatibility of legislation of the State of Lower Saxony on the award of public contracts with EU law. The legislation subject to challenge contained provisions on the award of public contracts in so far as they have a minimum value of EUR 10 000. This provided to that public contracting authorities may award contracts for building works and local public transport services only to undertakings that pay the wage laid down in the collective agreements at the place where the service is provided. The Court held that since the legislation may impose upon service providers established in another Member State, where minimum rates of pay are lower, an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Therefore, a measure such as that at issue in the main proceedings was capable of constituting a restriction within the meaning of Article 49 EC. Nor should the measure be considered to be justified by the objective of ensuring the protection of workers. The Court decided, therefore, that 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, interpreted in the light of Article 49 EC, precluded an authority of a Member State, from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agreed in writing to pay their employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement the minimum wage in force at the place where those services are performed.⁵⁸

- 5.15 The 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.
- 5.16 A contracting authority “may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to ... the employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.”⁵⁹

⁵⁸ Case C-346/06 Rüffert v Land Niedersachsen, Judgment of the Court, 3 April 2008.

⁵⁹ Article 27(1) Public sector; Article 39(1) Utilities.

The European Commission's Interpretative Communication states: "These obligations include respect of national rules deriving from Community directives in the social field. Of particular relevance in the context of public procurement are the directives on the health and safety of workers and the directives on the "transfer of undertakings" and the "posting of workers" (...), as well as recent directives on equality of treatment. Such obligations may also derive from certain Conventions of the International Labour Organisation (ILO). As regards core labour standards recognised at international level, the fundamental principles and rights at the workplace defined by the International Labour Organisation of course apply in their entirety to the Member States. (...)"

- 5.17 A contracting authority that supplies this information "shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions 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 provided." 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.

5. Supply chain management

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

VI. Awarding the contract

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

- 6.1 Candidates that passed the previous stages outlined in earlier chapters can now be invited to submit tenders. The process for handling this phase will depend on which procurement procedure was chosen (and stated in the Notice) – restricted, competitive dialogue or negotiated. The authority uses this phase to examine how well the bidders have responded to the requirements in the specification, including any requirements to promote social standards. Awarding the contract is the last stage in the procurement procedure before the contract comes into operation. At that stage, the contracting authority evaluates the tenders (the offers) and compares them against each other.

Award criteria

- 6.2 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 public 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’ tender, which implies that other award criteria will be taken into account, including the price.
- 6.3 Since the criterion of the ‘economically most advantageous tender’ always consists of two or more sub-criteria, these can include social criteria. Indeed, the non-exclusive list of examples in the directives to allow contracting authorities to determine the most economically advantageous tender 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.

Example:

IT Regione Piemonte: Art. 12 of l.reg. Piemonte, 9 giugno 1994, n. 18, dealing with contracts between procuring entities and social cooperatives rules out the award criterion based on the lowest price. The award is to take place in application of the most advantageous economic offer, taking into account the price, the quality of the activity project, the efficiency in meeting the objectives, and any other element relevant with reference to the specific services at issue. Art. 13 lays down more specific rules for public procurements awarded to social cooperatives having as their objective providing employment opportunities to disadvantaged categories.

- 6.4 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 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 Federal Ministry of Social Affairs and Consumer Protection (German: *Bundesministerium für Soziales and Konsumentenschutz*, abbreviated BMSK): BMSK the Austrian ministry at federal level responsible for a wide array 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 the CSR consideration cannot be taken into account on a general basis but only when due 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 consideration can be taken into account, first, when due 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". 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 take any other voluntary measures of CSR? If yes, which are these (please only list measures which go beyond the legally requirements or requirement 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. (v) Other possible considerations that can be taken into account in this context relevant to the equal treatment of men and women include: Possibilities for part time positions of 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.

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

- they relate 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.⁶⁰ 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.

⁶⁰ See recital 46 of Directive 2004/18/EC and recital 55 of Directive 2004/18/EC.

What's not permitted – examples

- Using award criteria not related 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

6.6 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.

Additional award criteria and equal tenders: Nord-Pas-de-Calais

6.7 In *Commission v France*, the Commission took infringement proceedings against France over the award of school building contracts by the region of Nord-Pas-de-Calais and the Département du Nord. One complaint related to the linkage between the contract and various actions being taken to reduce unemployment. The notices in the Official Journal stated that the tenders would be assessed by taking account of various award criteria, but also included an “additional” criterion related to unemployment. This derived from a Circular of 29 December 1993 “in which the French Government had suggested the use of social criteria in the award of public contracts. This Circular was issued by Ministers holding responsibilities in the field of social policy or procurement.”⁶¹ It “expressly set[] forth as an award criterion ... a condition relating to employment linked to a local project to combat unemployment.” The Commission considered that the French authorities had infringed the Directive’s restrictive terms relating to award criteria. The Court disagreed with the Commission’s view. After describing the provision relating to award criteria, the Court continued: “(...), that provision does not preclude all possibility for the contracting authorities to use as a criterion linked to the campaign against unemployment provided that the condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services.”⁶² In addition, the criterion must be applied in conformity with all the procedural rules, in particular the rules on advertising. It must also be “expressly mentioned in the contract notice so that contractors may become aware of its existence.”⁶³

⁶¹ Joël Arnould, *A Turning Point in the Use of Additional Award Criteria?: The Judgment of the European Court in the French Lycées case*, 2001 10 Public Procurement Law Review NA13-14

⁶² Para 50

⁶³ Para 51

Examples:

FR MIFA if two offers are rated as equal (meat methods), article 53 of “code des marchés publics” provides a right of preference to a cooperative or to an enterprise that hire people with disabilities. If two offers in the evaluation scoring are rated as equal (meat methods), the organization chose the offeror that is a cooperative or an enterprise that hires people with disabilities.

FR MEEDDAT: In case of same price or equivalence between two offers, the “Code des marchés publics” (art 53-IV) authorizes to give priority to the offer of a cooperative of workers, a group of farmers, an artisan or a cooperative of artisans, a cooperative of artists or a firm which employs a majority of persons with disabilities.

In both of the French examples, the possibility that recourse will be had to these provisions must be expressly indicated in the tender documents.

UK Northern Ireland Central Procurement Directorate: A Northern Ireland pilot project, covering 15 procurements, encouraged employers to recruit and train people who had been unemployed for at least 3 months. Bidders for these contracts had to provide an employment plan with proposals on utilising the unemployed and evidence that they could implement their proposals.⁶⁴ In the event of two or more tenders being judged by the contracting authority to be equal, the assessment of the plan would be taken into consideration to decide the award of the contract. It would be a matter for the individual contracting authority to determine the definition of when two bids equal, in order to justify taking the plan into account at the award stage. For guidance purposes, however, where the award criteria for the contract was “most economically advantageous”, it was recommended that this should be deemed to have occurred where one or more tenders are within two points, in the overall scoring matrix (reflecting quality and price scores; scored out of 100) of the tender receiving the highest overall score. Where the award criteria for the contract was “lowest price”, then it would be when one or more tenders are within 1% of the lowest satisfactory tender.

AT Federal Procurement Agency (Austrian Central Purchasing Body): If two offers in the evaluation scoring are rated as equal in accordance with the Most Economically Advantageous Tender (MEAT) methods, the quantity of the women’s quota, apprenticeship training or employment of unemployed people can be taken into account to enable determination of the winner. If doubts concerning employment opportunities occur and the bidder cannot explain the abnormally low tenders, the offer will be rejected.

ES Diputació de Barcelona: If two offers in the evaluation scoring are rated as equal in accordance with the MEAT methods, Decent Work standards are taken into account.

2. Using the award criteria in tender evaluation

- 6.8 The procurement directives (2004/17/EC and 2004/18/EC) explicitly allow social considerations to be included in award criteria. This legislation builds on Court of Justice case-law. The basic rule on social award criteria is derived from Case C-513/99 (Concordia Bus) and from

⁶⁴ Further details can be viewed at www.cpdni.gov.uk or www.equalityni.org.

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.⁶⁵ 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.
- We now consider each of these conditions.

Award criteria must have a link to the subject matter of the contract

6.9 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’,⁶⁶ the Court of Justice provided some further information on how the link with the subject of the contract should be interpreted. 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 related to the subject matter of the contract.

Award criteria must be specific and objectively quantifiable

6.10 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. 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.

⁶⁵ Judgment of the Court of Justice in Case C-513/99.

⁶⁶ Judgment of the Court of Justice in Case C-448/01.

Examples:

FI City of Oulu: the contracting authority considers the situation of unemployed persons (2% of weight compared with other criteria).

SV Swedish Administrative Development Agency, Verva: The criteria relating to promotion of “Accessibility and Design for All” are used, weighted in comparison with other criteria, and they weigh 2%.

Award criteria must have been advertised previously

- 6.11 According to all 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’. In the latter case, the criteria used to identify the economically most advantageous tender shall be mentioned in the notice or, at least in any case, in the tender documents.

Award criteria must respect Community law

- 6.12 Award criteria must comply with all the fundamental principles of Community law. 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.⁶⁷ 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”

- 6.13 Contracting authorities may reject a tender as “abnormally low”. This means that the tender is considered to be in some way aberrant and not to reflect the full cost that the tender should include.
- 6.14 What aspects of the tender may give rise to it being viewed as an abnormally low tender? The Directives specifically link the issue of abnormally low tenders with the issues of employment protection and working conditions. The Public Sector Directive indicates that the tenderer’s 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

⁶⁷ Judgment of the Court of Justice in Case C-513/99.

factor.⁶⁸ Some methods of competition, including ignoring working conditions that are legally required, may be *unfair* competition.

Examples:

FR Ville d'Angers: The Entity noticed that in the cleaning sectors workers have tough work schedules: thus an offer which is economically extremely interesting because proposing a number of workers not appropriate with respect to the surface to be cleaned on the basis of average ratios, will be considered as abnormally low and rejected.

IT Legislation: A focal point for the emergence of breaches to social protection rules is the review of abnormally low offers. Art. 8 of L. 3 agosto 2007, n. 123 amended Art. 86 of the Code for public procurements, adding new provisions stating that procuring entities, when drafting contract documents and checking abnormally low tenders, must make sure that offers are adequate with reference to pay for the workers and cover security measures; moreover, security costs are non negotiable and bidders cannot refer to lower security costs. Under Art. 87(2)(g), to exonerate what on their face appear to be abnormally low tenders, candidates may refer to the tables prepared by the Ministry of social policies basing itself on contracts between associations of employers and trade unions, account being taken of the rules on social contributions

6.15 The Directives provide for procedures that the contracting authority must adopt before the tender is rejected on the ground that it is abnormally low.⁶⁹ 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.

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.

6.16 The Directives provide: "If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant." The details requested from the tenderer may relate "in particular" 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," among other factors.

6.17 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 Directive requires the contracting authority to "verify those constituent elements by consulting the tenderer, taking account of the evidence supplied."

⁶⁸ Article 55(1)(d) Public sector; Article 57(1)(d) Utilities.

⁶⁹ Article 55 Public sector; Article 57 Utilities

4. De-briefing unsuccessful bidders

- 6.18 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.

VII. Contract performance clauses, Contract Management and Compliance Monitoring

1. Contract conditions

- 7.1 Contract conditions set out how the contract should be performed. 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.
- 7.2 It is also permissible to set additional contract conditions, that are separate from the specification, selection and award criteria.⁷⁰ 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 and normally not to the award of the contract and must be stated in the documentation.

Examples:

FR Local Municipalities: Social clauses, and especially social insertion clauses targeted to offer formation and job opportunities to people in need (e.g. uneducated youth, long-term unemployed), are often inserted in many contracts passed by local entities (e.g. Lille, Rouen). This is the case, for instance, with building procurements and with many services contracts, such as cleaning services, maintenance, including that of parks and other green public spaces. If the successful bidder is not itself a social cooperative or an organisation whose aim is social insertion, it may either subcontract part of the contract execution or hire a number of disadvantaged persons whose insertion is sponsored by the social services. In some cases, the clause is systematically inserted in all procurements exceeding a given value and/or a given length (e.g. EUR 150.000 and 3 months respectively for the Agglomeration de Rouen). An interesting instance is provided by the special contract conditions drafted by the municipality of Nantes for cleaning services contracts. The object of the contracts is not limited to the cleaning and includes professional insertion of disadvantaged persons ("L'insertion professionnelle de personnes en difficultés). A social insertion clause has been drafted in application of Art. 14 of the Code des marchés publics. It lists a) the insertion objectives; b) the disadvantaged categories covered (e.g. people with disabilities; unqualified youth; long term unemployed); c) a control mechanism in respect of the clause, including d) a progress report to be established every year ("bilan de l'action d'insertion").

SV 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). 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 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

⁷⁰ Beentjes case, Judgment of the Court of Justice in Case No. 31/87.

that subcontractors abide by the same obligations. A penalty is payable for any breach of against these social obligations of the contractor.

- 7.3 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.⁷¹ They must be advised in advance to all candidates. The winning bidder must carry out the commitments made in his bid for fulfilling the contract conditions.

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 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."⁷²

SV: National Road Administration: The Antidiskrimineringsförordningen (2006:260, amended 2007:1101) is a regulation determined by the Swedish government and regulates compliance with Swedish non-discrimination legislation, forbidding discrimination because of disability, race, religion, ethnic belonging and so on. The regulation obliges 30 national authorities to include non-discrimination clauses in most service and works contracts/ purchases/procurements. According to the regulation, the authority includes such non-discrimination clauses in its contracts.⁷³ There is also a general guidance by the Competition Agency on the implementation of the regulation.⁷⁴ Further to the Anti-discrimination Decree, and model contract provisions provided by the Competition Agency, all construction contracts oblige the contractor to follow salary and employment conditions equal to, or equivalent to, collective bargaining agreements applicable to the sector concerned, to provide an equal treatment plan according to the law on equal treatment of sexes and evidence on work, to prevent discrimination on the basis of ethnic origin or religious faith, and to declare under oath whether the contractor or its employees have been found guilty of breach against any anti-discrimination law. Construction contracts also contain a standard clause obliging contractors to provide reports and evidence proving that the contractor has adhered to the foregoing obligations. A further standard clause makes the contractor liable to pay a penalty for late completion of this reporting duty. Moreover, contractors must pass their obligations on to subcontractors; the obligation is limited to activities in Sweden.

⁷¹ Article 26 of Directive 2004/18/EC and Article 38 of Directive 2004/17/EC.

⁷² EU study, p. 59.

⁷³ For more information see <http://www.riksdagen.se/webbnav/index.aspx?nid=3911&bet=2006:260>

⁷⁴ See the full document in the home page of the Competition Agency, Konkurrensverket, <konkurrensverket@kkv.se>

- 7.4 The recitals in the Public Sector Directive (with minor differences in the Utilities Directive),⁷⁵ set out some further indications of what is envisaged as 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 For instance, mention may be made, amongst other things, of the requirements ... 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 (see annex) 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, and in particular long-term unemployed persons, or to set up training programmes for the unemployed or for young people during the performance of the contract;
- 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)

Examples:

FR MEEDDAT Purchase of clothes: suppliers are asked to comply with ILO fundamental rights.

DE Fire Service of the City of Düsseldorf The Fire Service has a policy not to procure professional clothing from sources using child or slave labour.

IT Sotral SPA: The organization prescribes specific contract conditions relating to standards of working conditions, key international labour standards (N 155) and ILO conventions.

SV City of Goteborg, Traffic and Public Transport Authority: The organization prescribes specific contract conditions relating to standards of working conditions (ILO 155 and other conventions) and promotion of labour rights (ILO 29 and 105. UN child convention, article 32).

- 7.5 The contract conditions must comply with European rules. The conditions must “relate” to the “performance of the contract”. The Recitals state that “[c]ontract performance conditions are

⁷⁵ Recital 33 Public sector; Recital 44 Utilities.

compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents,” concentrating on transparency and discrimination as limits, rather than emphasising any particular degree of nexus between “conditions” and the “subject matter of the contract”.⁷⁶ So, one simple way in which the conditions “relate to” the performance of the contract is by ensuring that the conditions are clearly provided for in the contract documentation, and apply only to the specific contract in question. A contract condition would not relate to the “performance” of the contract if it required, for example, that the contractor hire a proportion of workers with disabilities on another contract.

Example:

DA: In Denmark measures to promote employment should only be integrated as contract conditions in works and services contracts that require a local presence of at least parts of the workforce involved in the execution of the contract. This applies to contracts involving cleaning services, catering services, facility management services, and large waste collection and administrative services. The unemployed are classed in five categories from category 1 of short term unemployed with good employment prospects to category 5 of long term unemployed with almost no employment perspective (for example due to health problems). The categories of ‘special groups’ include unemployed, minorities and immigrants, and those with a “permanent reduction in their work capacity”. The contract conditions (already expressed in the specifications) require the tenderers to recruit a certain percentage of their workforce (normally 5 %, in the City of Aarhus in Jutland 10%) for a certain minimum period of time from the five categories of unemployed. They have to be paid 50 to 75% of their salary by the tenderer with the state paying the remainder of the salary. This creates an incentive for the tenderer since he can save on the salaries of the formerly unemployed. The inherent hope of this system is that the tenderer keeps the formerly unemployed person in his or her employment after the period of funded employment has elapsed. This policy is not directly prescribed by law. However, according to § 62 of the Danish Local Government Act municipalities have to provide a four-year strategy on this policy in their procurement activities. In theory the Act provides for an administrative enforcement of these strategies through ministries but in practice no action is taken. There is anecdotal evidence that the policy has brought many unemployed of the special groups into employment but here are no reliable statistics and no test of the efficiency of the policy in practice.

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

⁷⁶ Art. 33 in Public sector, Art. 44 in Utilities.

Example:

UK Transport for London (TfL) East London Line Extension Project:⁷⁷ 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.⁷⁸ Equality and inclusion were regarded as being at the heart of that programme and integral to it. The first project was known as the East London line extension and this is an extension to the existing East London line. The ELL contracts were valued at £500 million for the provision of the main works and £350m for the rolling stock and train servicing agreement. In terms of the transport benefits, the aim was to create links between East London and the City of London, taking pressure off London Bridge, to stimulate the East End of London. It also aimed to link the Underground with the orbital railway and was a key component in TfL's overall transport plan for the Olympics. In the summer of 2006, Bombardier was awarded the contract for the rolling stock and train services agreement, and in October 2006 a Balfour Beatty-Carillion Joint Venture was awarded the main works construction contract. 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. Four things were to be required from the contractors: to have an equality policy, to have a training plan, to demonstrate how they were going to engage with the communities they were going to be serving, 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 contract conditions for two procurements within the project: the provision of main works, and the rolling stock and train servicing agreement.

- 7.7 Contract clauses should not play a role in determining which tenderer gets the contract, which means that any bidder should, in principle, be able to cope with them. They should not be disguised technical specifications, award or selection criteria. 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.

⁷⁷ 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>

⁷⁸ GLA Economics, Women in London's Economy 2007, 3.5

What's not permitted – examples

- ☒ Although a recital in the Directive give 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.
- ☒ A contract condition attempting to restrict what the contractor is allowed to do on another contract would not be permitted

7.8 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 brings us to the issue of contract management and compliance monitoring.

2. Contract management and compliance monitoring

Performance management regime

7.8 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 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.

Maintaining records on suppliers', contractors' and service providers' performances

7.9 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 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. 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. Further detail in relation to this example can be found at www.cpdni.gov.uk or www.equalityni.org

Partnering culture

- 7.10 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. Evidence points to the best contractors responding well in such relationships, voluntarily taking on additional commitments, such as: basic skills programmes; community engagement; environmental innovation; and supporting small firms within their supply chain.

Example:

ES Diputació de Barcelona: To work with awarded contractors to facilitate their stronger adherence to promotion of Fair Trade the contracting authority organizes meetings with them.

FR: 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 choosed to hire a specialised legal counsel to draft and manage procurement documents with social clauses.

UK Northern Ireland Central Procurement Directorate (CPD): One example would be the development of essential skills with the workforce. In the areas of facilities management, security guarding, and cleaning, up to 25% of the working population are deficient in certain essential skills such as reading. CPD has worked with the Department of Employment and Learning and has got them to discuss with contractors what the contractors can do to develop skills in the workforce, and use whatever subsidies are available. A voluntary approach is seen as more effective because not being compulsory means that those who are being benefited are not specifically identified as such.

Appendix

Guide to further reading:

Commission publications:

The European Commission has published an Interpretative Communication on social issues in procurement:

http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0566en01.pdf

The equivalent guide for environmental purchasing is: European Commission's publication "Buying Green! A handbook on environmental procurement" (2004), available at:

http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf

Guides to social considerations in public procurement produced by national authorities:

The United Kingdom's Office of Government Commerce's (OGC) has produced detailed guidance: 'Social issues in purchasing':

http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf

A shorter introduction has also been produced: Office of Government Commerce, "Buy and Make a Difference: How to address social issues in public procurement (2008)", available at

http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf

The Danish Competition Authority has published guidelines that are available on web site: <http://www.ks.dk/udbud/vejledning/>. This guidelines concern social requirements in EU call for tenders.

A French guide (July 2007) explains how to legally apply criteria for the employment of unemployed people, "Commande publique et accès à l'emploi des personnes qui en sont éloignées" ("Public procurement and access of unemployed people to employment opportunities") drafted under the guidance of the Economic Observatory for Public Procurement (direction of Legal Affairs of the Ministry of Finance) which provides legal assistance and advice to the procuring entities, available at:

http://www.minefe.gouv.fr/directions_services/daj/oeap/documents_ateliers/personnes_e_loignees/guide_commande_publique_acces_emploi_personnes_eloignees.pdf

In the Netherlands, Guides relating to the use of SRPP are available on web site www.senternovem.nl/duurzaaminkopen

In 2007 the Northern Ireland Procurement Board approved a set of Guidelines on sustainability and equality in procurement: "Equality of Opportunity and Sustainable Development in Public Sector Procurement", available at:

http://www.cpdni.gov.uk/equality_of_opportunity_and_sustainable_development_-_full_guidance.pdf. These guidelines provide detailed guidance on how equality of opportunity and sustainable development can be addressed at each stage of the procurement process.

Soziale Kriterien bei der Vergabe öffentlicher Aufträge – Arbeitshilfe für öffentliche Auftraggeber und sozialwirtschaftliche Unternehmen (Entwicklungspartnerschaft “Arbeitsplätze für junge Menschen in der Sozialwirtschaft” / EQUAL)

Sozial verantwortliche Beschaffung der öffentlichen Hand. Überblick über und Bewertung relevanter Sozialstandards unter besonderer Berücksichtigung der ILO-Kernarbeitsnormen (Gutachten der Hamburgisches WeltWirtschaftsinstitut GmbH im Auftrag der Senatskanzlei der Freien und Hansestadt Hamburg)