

Environmental Considerations in Public Procurement

1. Introduction

The purpose of this note is to provide guidance and clarification for public bodies on how environmental considerations may be taken into account and promoted in the public procurement process under current rules. In July 2001 the EU Commission published an interpretative communication¹ on the possibilities for integrating environmental considerations into public procurement under present law. This document reflects some of the important possibilities outlined in that communication.

2. Environment Policy Context

Sustaining Progress the Social Partnership Agreement 2003 – 2005, states that the objectives of policy on the environment are to promote sustainable development through ensuring the necessary balance between environmental, economic and social aspects of development and to maintain a high quality environment as a source of competitive advantage. The Department of the Environment, Heritage and Local Government, which has primary responsibility in this area, has published a number of documents on environmental policy².

2.1 Environmental policy can be promoted by public bodies through measures such as

- prevention or minimisation of waste
- use of recycled products and recycling facilities
- energy conservation in buildings and use of equipment
- avoiding over ordering of quantities to avoid stock build-up, minimising storage requirements and reducing possible obsolescence
- where possible, specifying environmentally-friendly products in tenders, etc.
- using environmentally-friendly products in the management of parks / recreational grounds and for weed control on roads and kerbsides

¹ “Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement” [available at http://europa.eu.int/comm/internal_market/en/publproc/general/com274en.pdf.]

² “Sustainable Development : a Strategy for Ireland” [1997], “Policy Statement on Waste Management - Changing Our Ways” [1998], “Making Ireland's Development Sustainable”, “Preventing and Recycling Waste: Delivering Change”, “National Climate Change Strategy”. These are available on the Department's website - www.environ.ie

- providing alternatives to one-use disposable products, such as non-refillable pens and paper / Styrofoam cups
- using fuel efficient vehicles in vehicle fleets, minimising the release of greenhouse gases and other toxic emissions.

3. Public Procurement

3.1 The basis of the public procurement regime is primarily economic, requiring public purchasers to obtain best value for public money. However, the concepts of promoting and maintaining an acceptable level of environmental standards and achieving value for money in public procurement are not incompatible. While issues such as identifying economic advantage and observing procurement rules may occasionally give rise to tensions, the issue should not be seen as one of conflict between securing best value and promoting the environment, but rather recognising the synergies that can exist between the two.

Value for money requires taking into account whole life costs to the greatest extent possible. That includes all aspects of cost, such as running and maintenance costs, disposal cost and other indirect costs as well as the initial purchase price. There are clear examples of where economic and environmental interests converge. For example, specifying vehicles, plant or equipment with high energy efficiency keeps down operating costs, helps to conserve finite energy resources and reduces harmful emissions. However, public purchasers will occasionally face situations which are less precise and it is unclear to what extent environmental considerations are compatible with the existing EU legislation on public procurement.

3.2 Present EU public procurement Directives do not make explicit reference to environmental protection. However, since the adoption of the Directives, policies and actions on environmental matters have evolved in the Community and in Member States. The Amsterdam Treaty reinforced the principle of integration of environmental considerations into other policy areas, recognising its key role in promoting sustainable development. Amended public procurement Directives will be published shortly which will include environmental characteristics among the criteria which may be used in assessing economic advantage.

4. Procurement Process

Before any procurement is undertaken a need must be established and the most appropriate means of meeting it determined. For instance, a contracting authority may require new or additional accommodation. Before embarking on a process of procuring new premises, it will normally consider whether a facility already exists that can meet its needs. This, of course, is imperative on economic grounds but it also has environmental impacts. If a procurement is deemed necessary, it will generally include stages that are governed by certain rules. It involves:

- defining the subject matter of the contract,
- the selection of the candidates according to objective requirements,
- the award of the contract on the basis of objective criteria and
- the execution of the contract in accordance with certain conditions.

Each stage offers opportunities to take environmental issues into account.

4.1 Defining the subject of a contract

Public bodies specify what they need to meet their requirements. In defining their needs they may take account of their own or Government's objectives on environmental matters and choose an environmentally sound product or service. Public purchasers should be wary of unsubstantiated claims and environmental marks which have no formal recognition. General descriptions purporting to suggest environmental soundness, such as "environmentally friendly" and "comes from managed forests", are meaningless if unexplained.

The possibilities for taking environmental considerations into account at the definition stage can differ according to the different types of contracts: works, services and supply.

Work contracts. These cover not only the final product, but also the design and execution of the works³. The best opportunities for contracting authorities to take into consideration environmental concerns are to be found at the design stage. Contracting authorities could give clear instructions to architects and / or engineers to design for example, a sustainable development, a low-energy consuming administrative building, taking account of insulation standards, the use of specific construction materials, and the installation of energy efficient heating and lighting systems.

³Some projects may be subject, under EU planning or environmental legislation to an Environmental Impact Study which may specify conditions relating to the environment which must be complied with.

Contracting authorities are also entitled to define the requirements for the execution of the works. This offers a number of possibilities for taking into account environmental considerations, through, for instance, requirements relating to energy and water use or waste management and disposal on and around the construction site.

Service contracts. Environmental considerations may be taken into account in the mode of performing service contracts. A specific method of cleaning buildings, using only products that are least harmful to the environment may be prescribed. Segregation in the collection of household waste for re-cycling or efficient disposal may be prescribed. It can be required that, for instance, public transport services are to be carried out by energy efficient vehicles.

Supply contracts. The public procurement Directives do not prescribe in any way what contracting authorities should buy and are consequently neutral as far as the subject matter of a contract is concerned. Environmental awareness can influence this choice. For example, rather than purchasing new printers for every desk, a contracting authority might consider a contract for shared printing facilities incorporating up-to-date energy and paper saving features.

4.2 Environmental performance and technical specifications

The technical specifications of a contract requirement can be used to achieve environmental objectives. Community legislation or national legislation compatible with Community law may require observance of certain conditions related to, for instance, health and safety, insulation, thermal or ventilation standards of buildings. National laws, compatible with Community law, can prohibit the use of specific substances which national authorities consider to be harmful to the environment, or can require the observance of specific minimum level of environmental performance.

4.2.1 Prescribing basic or primary materials

The EU interpretative document outlines the possibilities for prescribing materials to be used in performing a contract to promote environmental aims. It indicates that the concept of “technical specification” includes the possibility of prescribing the basic or primary materials to be used, if this contributes to the characteristics of the product or service in such a manner that it fulfils the use for which it is intended by the contracting authority. As long as these prescriptions observe Community law and are, in particular, non-discriminatory, contracting authorities may prescribe the materials which are to be

used for a specific contract. For example, there could be a requirement that the window frames of an office building are to be made of wood or that recycled glass or other recycled materials be used⁴.

4.2.2 Use of a specific production process

The definition of technical specifications in the Directives does not explicitly refer to production processes. However, the interpretative documents indicates that, provided it does not reserve the market to certain undertakings, the use of a particular production process may be specified by contracting authorities. For example a product that differs from similar products in terms of its manufacture or production (whether the differences are visible or not) because an environmentally-sound production process has been used, e.g. organically grown foodstuffs or “green” electricity, may be specified.

Contracting authorities must be careful that the prescription of a specific production process is not discriminatory. For instance, they may not prescribe that green electricity is generated by wind-energy, to the exclusion of hydro or solar generated energy. The technical prescription should relate to electricity produced from renewable energy sources.

4.2.3 Reference to Eco-labels

Eco-labels are used to indicate products that are deemed to be more environmentally sound than similar products in the same product group. Different labels exist at national and European levels and there are also private Eco-labels. Application for and award of such labels is voluntary and Eco-labelled products often represent a very limited part of particular markets.

Where contracting authorities require a particular level of environmental performance they can define the technical specifications related to the environmental performances in line with Eco-label criteria and may indicate that products having these Eco-label certificates are deemed to comply with the technical specifications of the contract.

However contracting authorities have to be careful not to limit the means of proof to Eco-label certificates. They must provide for equivalence and accept other means of proof, for example test reports. This is of particular relevance in the case of national and private Eco-labels, to ensure that the specification and the means to assess the conformity with

⁴ The D/EH&LG Policy Statement on Waste Management *Changing Our Ways*, sets targets for recycling 50% of construction and demolition waste by 2003 with a progressive increase to over 85% over a further ten years.

the specification would not result in the reservation of the contract to national or local companies⁵.

5. Selection of Candidates

5.1 Selection Criteria

The public procurement Directives set out rules whereby contracting authorities may invite to submit tenders only candidates who meet certain qualifying criteria. These rules relate to a candidate's position in relation to :

- (i)** professional conduct, tax and social security compliance, conviction for offences, bankruptcy etc
- (ii)** technical capacity and
- (iii)** economic and financial capacity.

Environmental considerations can arise in examining candidates' suitability in relation to **(i)** and **(ii)**.

(i) In the context of pre – qualifying candidates, a record of serious breaches of environmental rules or convictions for offences under environmental law may be grounds for exclusion from the tendering process. However, care should be taken to ensure that decisions to reject candidates are proportionate to the offence and that the candidate is given an opportunity to indicate corrective measures or efforts they might have taken to prevent recurrence. Care should also be taken to ensure that candidates are treated equally.

(ii) The objective of the selection phase is to identify those candidates, which are considered by the contracting authority to have the capacity and competency to perform the contract. Therefore, the requirements specified must have a direct link to the subject matter or to the performance of the contract concerned.

If the contract needs specific expertise in the field of the environment, specific experience is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of candidates and may therefore be required (e.g. the construction of a waste treatment plant).

⁵ Article 8 of Directive 93/36/EEC sets out provisions in relation to use of technical specifications.

5.1.1 Environmental management schemes (ISO 14001 and EMAS)

Environmental management systems are in place which certify that companies operate to certain levels of environmental standards and awareness. Companies can obtain certification for their environmental management systems under ISO 14001 or the Eco-Management and Audit Scheme (EMAS).

EMAS and ISO 14001 are voluntary schemes. As with Eco-labels, making certification obligatory would unduly restrict the market and would likely breach EU procurement Directives. Where certain environmental standards, *relevant to the subject of the contract*, are required as part of candidates' technical capacity, appropriate ISO 14001, or in the case of works or services contracts, EMAS registration, may be accepted as proof in this regard. At the same time, contracting authorities must not exclude other means of proof; other certificates or confirmation by other methods should also be accepted.

6. Award of the Contract

6.1 Public bodies award contracts on the basis of lowest price or most economically advantage tender based on criteria established in advance. Economic advantage is assessed under various criteria notified to tenderers on the basis of which they submit their costed tenders. As already indicated, amended public procurement Directives will include environmental characteristics among the criteria which may be used in assessing economic advantage.

The (non – exhaustive) criteria for evaluating economic advantage listed in the procurement Directives include 'functional and aesthetic characteristics' of goods and services. The Commission's interpretative document suggests that environmental characteristics are entitled to be considered on an equal footing to such characteristics.

6.2 The Commission's interpretative document indicates that costs incurred during the life cycle of a product which will be born by the contracting authority may be taken into account for the assessment of the most economically advantageous tender. Such costs might include direct running costs (energy, water and other resources used during the lifetime of the product); spending to save (for example, investing in higher levels of insulation to save energy and thus money in the future) as well as the costs of maintenance or recycling of the product. In evaluating tenders, a contracting authority can also take account of costs of treatment of waste or re-cycling.

6.3 In regard to whether each criterion must have an economic advantage which directly benefits the contracting authority there are some relevant pointers in Directives and in recent case law of the European Court of Justice.

The European Court of Justice⁶, in a case concerning the use of ecological criteria in the award of an urban transport contract for Helsinki, ruled that the provisions of the services Directive

'must be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination'.

7.0 Execution of the contract

Contracting authorities may stipulate conditions to be observed in the execution of the contract. These must not be discriminatory in that any tenderer awarded the contract must be in a position to execute these conditions. In the interests of transparency, they should be made known to all applicants in advance.

Contracting authorities have a broad range of possibilities for defining contract clauses having as their object the protection of the environment. The following are examples of specific additional conditions, which have a bearing on the performance or execution of the contract and which ultimately meet general environmental objectives, which are sufficiently specific, observe Community law principles and are in conformity with the Directives:

- delivery / packaging of goods in bulk rather than by single unit
- recovery or re-use of packaging material and the used products by the supplier
- delivery of goods in re-usable containers
- collection, recycling or re-use of waste produced during or after use or consumption of a product by the supplier
- transport and delivery of chemicals (like cleaning products) in concentrate and dilution at the place of use.

⁶ Case C-513/99, Concordia Buses / Helsinki transport service contract

8. Conclusion

8.1. In summary, public procurement rules prohibit the use of technical specifications, selection and award criteria etc., that unfairly restrict access or discriminate against potential tenderers on the grounds of nationality. Criteria and specifications which promote environmental policies may be chosen provided they respect these principles and relate to the subject of the contract. In some instances, use of such specifications and criteria may be obligatory under EU environmental law or national law compatible with EU law.

8.2. Contracting authorities should not seek to use their purchasing power to pursue wider environmental ends. Factors which go beyond the scope of the contract, or do not relate to the contract requirement, such as a contractor's general environment policy, should not be taken into account. For example, it cannot be a requirement that recycled paper be used in a supplier's or service provider's offices or that specific waste disposal methods are used on the contractor's premises.

8.3. In cases where it is not clear that economic advantage accrues to the contracting authority in furthering environmental aims, care is needed to ensure that an appropriate balance between value for money and promoting environmental objectives is maintained. Ultimately, public purchasers are subject to audit and scrutiny in their procurement practices and are publicly accountable for expenditure incurred.

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