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### Public Procurement

# Incorporating Social Considerations into Procurement

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## What are social considerations?

There is no fixed definition of what a social consideration is. The concept is most easily understood by way of examples:

### Examples of social considerations:

- Reducing unemployment
- Preventing the use of child labour
- Preventing discrimination on the grounds of race, religion, disability, sex or sexual orientation
- Encouraging good employment practice
- Reducing local unemployment
- Reducing social exclusion
- Promoting training opportunities for the young or disadvantaged
- Encouraging access to work for people with disabilities

Contracting authorities have often used public procurement to further these types of broader policy objectives. Some of the ways in which contracting authorities try to incorporate social considerations into procurement processes (including some of the examples above) are not legally permitted under the EU acquis. Others are permitted provided that certain conditions are met. Some are specifically permitted in the Directive.

The key questions from a procurement perspective are:

(1) Is it legally permitted under the EU acquis to incorporate social considerations into the procurement process? and

(2) If it is legally permitted to do so, when and how can this be done?

The answers are not straightforward and sometimes there is a conflict between general policy and what is achievable under the EU acquis. When considering the incorporation of social considerations, it is always necessary to consider whether the proposed approach is in compliance with the fundamental Treaty principles. This is the case even where there are specific provisions in the Directive permitting the use of these considerations. The Directive makes this clear, as does the case law and guidance.

## Local preferences, price preferences and offer-back provisions – not permitted under the EU acquis

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

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

Procurement methods supporting national industrial policies vary but most commonly these take the form of:

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

These types of measures create direct discrimination and are in breach of the EC Treaty. EU Member States are not permitted to use these types of measures.

## What does the Directive say about social considerations?

The Directive contains a number of key provisions that refer specifically to the incorporation of social considerations into the procurement process.

- **Contracts reserved for sheltered workshops or sheltered employment programmes for people with disabilities:** EU Member states are permitted to have “reserved contracts”. These are contracts to be performed by sheltered workshops and sheltered employment programmes where most of the employ-

ees concerned are handicapped persons who, by reason of the nature or seriousness of their disabilities, cannot exercise occupations under normal conditions.

The contracting authority is still required to advertise in the Official Journal of the European Union by publishing a contract notice and to follow the usual competitive procedures, but it may reserve the right to participate in the competition to sheltered workshops and sheltered employment programmes.

- **Technical specifications – accessibility criteria for people with disabilities:** contracting authorities should, whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users.
- **Conditions for performance of contracts:** Contracting authorities may lay down special social conditions relating to the performance of the contract provided that:
  - the special conditions are compatible with EU acquis; and
  - they are indicated in the contract notice or in the specifications; andeconomic operators that accept the conditions cannot be excluded just because the contracting authority thinks that the economic operator will not meet the conditions.
- **Social characteristics as award criteria:** The Directive sets out a non-exhaustive list of criteria on which a contracting authority may base its award for the most economically advantageous tender. This list does not refer specifically to social characteristics as award criteria but it is clear that these can be incorporated provided that they are linked to the subject matter of the contract and do not give the contracting authority an unrestricted freedom of choice.

## How can we incorporate social considerations into the procurement process?

### Preparation

There is very little in the Directive specifically covering the conduct of the pre-advertisement stage. The Directive's focus is on the conduct of the competitive procurement process.

In practice, the preparation stage provides significant opportunities for the inclusion of social considerations that will impact on the entirety of the procurement process. This is because it is at the preparation stage that:

- key strategic purchasing decisions are made
- the subject matter of the contract is defined
- the contract notice is drafted
- general and technical specifications are prepared – the Directive requires contracting authorities, whenever possible, when considering technical specifications to define these specifications so as to take into account accessibility criteria for people with disabilities or to design them for all users.
- the contract terms and conditions are drafted

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

### Advertising – the contract notice

It is important for the contracting authority to identify in advance whether and how social considerations are to be incorporated into the process. In some cases, if the contracting authority wishes to use such considerations it must refer to them in advance in the contract notice. If it fails to do so, then it may not be able to incorporate those considerations at a later stage. For example:

- If the contract is reserved to sheltered workshops or sheltered employment programmes, then this must be indicated in the contract notice.
- The contract opportunity must be clearly and accurately described and so if, for example, a contracting authority requires a road with tunnels rather than a road that is cut out of the hillside, this should be in the description of the contract so that economic operators are clear about the requirement.
- If the contracting authority requires variants – which could relate to environment-friendly alternatives – then this needs to be provided for in the contract notice.
- Minimum specifications that tenders have to meet must be clearly indicated in the contract notice or in the specification.
- Special contract conditions must be specified in the contract notice or in the specification.
- If the contracting authority is using permitted social issues as award criteria, then the award criteria must be specified in the contract notice or in contract documents.

### Selection

Following publication of the contract notice, the contracting authority will receive requests from economic operators that wish to participate in the process and tender. The contracting authority will undertake a process in which it selects economic operators that it will then invite to tender. The selection stage is broken down into two distinct phases:

- Phase 1 which relates to excluding candidates from the process altogether;
- Phase 2 which relates to assessing the suitability of the remaining candidates and selection of those that will then move forward in the process.

**Phase 1 - Exclusion:** The Directive sets out grounds on which candidates expressing an interest must be excluded. These mandatory grounds relate to convictions for serious criminal offences. The Directive also sets out grounds on which candidates may be

excluded. It is the non-mandatory grounds for exclusion that are most likely to form the basis for exclusion on issues linked to social considerations. In practice the opportunities are quite limited.

**Phase 2 - Selection of suitable tenderers:** The Directive sets out an exhaustive list of selection criteria that can be used by the contracting authority to select candidates to which an invitation to tender (or invitation to negotiate) will be issued. There are limits on the extent to which social selection criteria can be used. The Directive and case law confirm that:

- the list of selection criteria is exhaustive - it cannot be expanded;
- this limited list of criteria is narrowly constrained, with little room for interpretation or manoeuvre;
- the assessment can only relate to the candidate's ability to deliver the particular contract that is the subject matter of the procurement.

It is very unlikely that social considerations can be incorporated into consideration of a candidate's "economic and financial standing". This means that in most cases the only way in which social considerations can be used as grounds for not selecting a candidate is if they can be regarded as affecting the candidate's "technical knowledge and/or professional ability".

## Tender evaluation

Once the economic operators have been selected, the contracting authority moves on to invite tenders from the shortlisted economic operators. The contracting authority evaluates tenders received and awards the contract.

The contracting authority will have decided at the procurement planning stage whether it will award the contract on the basis of (1) lowest price only; or (2) the most economically advantageous tender. The basis for the award must be stated in the contract notice.

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

Where a contracting authority proposes to award a contract on the basis of the most economically advantageous tender, there are more opportunities to incorporate social considerations. The Directive sets out a non exhaustive illustrative list of tender evaluation criteria. This list does not include a specific reference to social characteristics but it is clear that the contracting authority has discretion in choosing the criteria to be applied, including criteria relating to social considerations. However, this discretion is not unrestricted and has some limitations. All award criteria relating to social considerations and used for assessing the most economically advantageous tender must meet four conditions:

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

## Contract conditions

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

The Directive specifically states that "contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing performance of a contract may, in particular, concern social and environmental considerations".

Social considerations can therefore be included as contract conditions provided that they:

- relate to the performance of the contract;
- are published in the contract notice or contract documents; and
- comply with Community law.

### Restrictions on the use of these conditions during the procurement process:

Contract conditions should not be disguised technical specifications, selection criteria or evaluation criteria; they should be able to be met by whoever is awarded the tender as from the time that the contract starts. Contract conditions do still need to be set out clearly so that economic operators that are tendering are aware of all of the obligations in the contract and are able to price accordingly.

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

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

Examples of possible contracts with conditions incorporating social considerations are:

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

## Contract Management

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

## Utilities

To a large extent the same legal rules apply under the Public Sector Directive 2004/18/EC and the Utilities Directive 2004/17/EC. These directives have many similar or parallel provisions. The European Court of Justice (ECJ) has tended to apply the same interpretation to both public sector contracting authorities and utilities.

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

**What does the Directive say about social considerations?** The Directive contains a number of provisions that refer specifically to the incorporation of social considerations into the procurement process. These reflect, to a significant extent, the provisions in the public sector Directive and include the provisions relating to reserved contracts for sheltered workshops and sheltered employment programmes. Set out below are some of the key differences.

**Selection – Phase 1: Exclusion:** This is one of the main areas where the legal provisions in the Directive applying to utilities are different to the public sector Directive. There is also a distinction between utilities that are public sector contracting authorities and those that are not.

- **Grounds for obligatory exclusion:** a utility that is a contracting authority must comply with the provisions requiring mandatory exclusion of found guilty of serious criminal. Utilities that are not contracting authorities are not obliged to do so.
- **Grounds for discretionary exclusion:** All utilities may choose to exclude candidates on the discretionary grounds, but they are not obliged to do so. The discretionary grounds include exclusion on the grounds of professional misconduct or grave misconduct which may possibly be used in relation to social considerations.

**Selection – Phase 2: Selection of tenderers:** The Utilities Directive does not set out an exhaustive list of the criteria to be used for the selection of tenderers. This is very different to the position under Directive 2004/18/EC, where there is a detailed and exhaustive list of the criteria that can be used and the information that can be requested.

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

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



## Tender evaluation

Once the economic operators have been selected, the utility moves on to invite tenders from the shortlisted economic operators. The utility evaluates tenders received and awards the contract.

The utility will have decided at the procurement planning stage whether it would award the contract on the basis of (1) lowest price only or (2) the most economically advantageous tender. The basis for the award must be stated in the contract notice.

It is possible to include social considerations in tenders to be awarded on the basis of lowest price by incorporating the relevant requirements into the technical specifications and contract conditions.

Where a utility proposes to award a contract on the basis of the most economically advantageous tender, then there are more opportunities to incorporate social considerations and to include those considerations as award criteria.

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

The same principles apply to the setting of award criteria for utilities tender evaluations.

## Further reading:

[SIGMA Public Procurement Training Manual](#)