Production Characteristics

Dispelling the ‘invisibility fallacy’ to achieve greater legal clarity and more sustainable procurement
Overview

• Horizontal procurement criteria
• Structure of the procurement process
• Production characteristics of products
  – Why are they important for sustainable procurement?
  – How and where should they be considered in the procurement process?
Horizontal Policies in Public Procurement

• **Functional objectives**: e.g., the function of office desks is to have a surface to work on

• **Horizontal objectives**: used to promote social, environmental, and other societal objectives not necessarily connected with the procured item’s functional objectives
Horizontal Policies in Public Procurement

• Consistent with the Integration Principle

• **Consistent, Efficient**: government should support as *purchaser* the same objectives it supports as *regulator*

• Consistent with **normal market behaviour**: requires market providers to meet consumers’ complex matrix of demands
Production Characteristics:

• Many significant **environmental impacts** of products occur during their **production**.

• **life-cycle** = production + performance + disposal

• **Sustainable Production** includes:
  – Manufacturing processes
  – Whether raw materials have been sustainably harvested / extracted
Structure of the Procurement Process

(1) Definition of the subject matter of the contract
(2) Technical specifications
(3) Selection criteria
(4) Award criteria
(5) Contract performance conditions

Where do production characteristics belong?
Production Characteristics: Where do they belong?

- **Technical Specifications?** **YES**
  - Production characteristics should be considered equivalent to performance characteristics

- **Award Criteria?** **YES**
  - Case law is clear
    - *Concordia Bus* (air pollution externalities of busses)
    - *EVN-Wienstrom* (green vs. grey electricity)

- **Performance Clauses?** **NO**
  - Most products procured are not made-to-order, but provided from warehoused goods or through established supply chains.
The Invisibility Fallacy

- The ‘invisibility fallacy’
  - insists that technical specifications must be apparent from the product itself
    - suggests that some production characteristics (grey electricity) are ‘invisible’ characteristics of the product, and therefore permissible
    - other production characteristics are disallowed
    - no clarity regarding which production characteristics are permissible and which are not
  - wrongly suggests that including production characteristics might break ‘link with the subject matter.’
Dispelling the Invisibility Fallacy

• Production and disposal characteristics should be clearly defined as such, but considered equivalent to performance characteristics with regard to whether technical specifications or award criteria can relate to production characteristics.

• This does not break the link with the subject matter. Production and disposal characteristics are characteristics of the product for the purposes of evaluating its sustainability.

• Where sustainable products are called for, it is important to consider their sustainable production and disposal, as well as their performance.
The Revision of the Procurement Directives: a chance to clarify

Revised Procurement Directives should:

• Dispel the ‘invisibility fallacy’
• Clearly define ‘production characteristics’
• Clarify that production characteristics can and should be included as:
  – Technical specifications
  – Award Criteria