ANNEX I

Legal and Policy Review of SRPP frameworks in selected EU Member States

Directorate General
for Employment,
Social Affairs and
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Study on Social Considerations in Public Procurement

Country Legal and Policy Review for SRPP in Denmark

Author: Prof. Martin Trybus (University of Birmingham)

Birmingham, 11th June 2008

Note: During a study visit to Denmark on 7-8 May 2008 meetings with the Local Government Denmark (*Kommunernes Landsforening*) Head Office in Copenhagen, the Procurement Office of the Municipality of Copenhagen (*København Kommune*) in Valby, National Public Procurement Ltd. Head Office (*Statens og Kommunernes Indkøbs Service A/S*) in Copenhagen and the State Ministry of Health and Prevention (*Ministeriet for Sundhed og Forebyggelse*) in Copenhagen were held. This report is largely based on the information gathered during these meetings.
I have much benefited from talks with:
Atli Djurholm, Member of Ministry of Health and Prevention,
Rikke Dreyer, Environment Consultant of National Procurement Ltd.,
Jakob Scharff, Member of Local Government Denmark - the Service Organization for Local Authorities in Denmark.

1. Summary

Generally speaking the use of SRPP in Denmark is in a stage of transition. On the one hand there is a **high awareness** of social considerations in the procurement process. Issues of public procurement are deemed important and there is considerable **future potential** for social considerations in the procurement process. On the other hand this is not reflected in the actual implementation of SRPP. Although public guidance on SRPP is available in the form of brochures and websites, especially provided by Local Government Denmark (hereinafter 'KL') and National Public Procurement Ltd (hereinafter 'SKI') **legal guidance is missing**. This resulted in great **legal uncertainty** which has often been named as the biggest obstacle to the further inclusions of social considerations in the procurement process.

Alongside the legal uncertainty, **practical problems** are named as obstacles to an extension of SRPP. Prominent amongst these is the question of **how to include social**

considerations in the procurement process and **how the outcomes can be measured** in order to weigh them against the costs of SRPP.

2. Introduction to the Danish political and economic context

Contracting authorities in Denmark generally have a high awareness of social objectives in the public procurement process. This can be explained by the general economic background in Denmark. **The unemployment rate in Denmark is currently at 1.9%** (March 2008 even low at 1.8% according to June 2008 figures). This has been achieved by **employing more than 38% of the total workforce in public sector jobs**, resulting in the world's highest taxes (The Copenhagen Post, http://jp.dk/uknews/business/ article1292920.ece). On average, a Danish municipality employs about 10% of its population (source: KL), in Copenhagen that is over 60,000 citizens (source: Copenhagen Municipality).

Large parts of the public budget are spent on the services sector, primarily on services such as waste collection, administrative services, cleaning and catering. Despite the high awareness of social considerations, there is a significant level of legal uncertainty which hinders contracting authorities from making more use of SRPP. Further objections are the difficulties concerning the implementation of social objectives in the procurement process and a lack of relevant criteria or documentation to control and monitor the adherence to social standards.

There are essentially two levels of government in Denmark with a central state administration mainly in Copenhagen on the one hand and 90 municipalities (source: KL) on the other hand. 20+ central government bodies are conducting their own procurement activities. The 90 municipalities are also conducting their own procurement activities. However, certain central purchasing activities are conducted with the support of SKI and many policy issues are supported by KL.

3. Legal background

According to Danish law the public procurement directives are directly applicable since they have been implemented *telles quelles* (Governmental Order number 937 of 16 September 2004 Concerning the Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts and Governmental Order number 936 of 16 September 2004 Concerning Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors). For contracts that are not covered by the EC directives the EC-Treaty provisions on free movement and the treaty-based principles of equal treatment, transparency, proportionality and mutual recognition do apply (http://www.ks.dk/english/public-procurement/).

For the public works sector the **Danish Act on Tender Procedures for Public Work Contracts** applies below the EU value thresholds. As a supplementary means, the Competition Authority has issued extensive guidelines on the use of the recent rules (only available in Danish). One of these guidelines deals with the question how to integrate social requirements in EU calls for tender. According to this guideline social requirements like employment opportunities and social inclusion should **always be integrated in call for tenders as contract clauses but never as competition parameters**. It is unlikely that the current government will change the 'guideline-approach' and put SRPP into law (source: Ministry for Health and Prevention). The predominant philosophy is that SRPP is a matter of policy rather than law. Due to this it is likely that the use of contract clauses and soft law will prevail.

Falling within the category of **fair trade** are recent efforts concerning the procurement of legal and sustainable timber. The Danish Ministry for Environment has published guidelines on public purchasing of timber (http://www.skovognatur.dk/Skov/Politik/Indkoeb/Procurement_Sustainable_Timber.htm) which are currently being updated and compiled into a plan of nine points for the purchasing of legal and sustainable timber (http://www.skovognatur.dk/NR/rdonlyres/BED48B01-359E-4EB8-88EF-B3A817441FEE/ 17530/eval9_point_plan1.pdf).

The Centre for Corporate Social Responsibility within the Danish Commerce and Companies Agency, which provides leadership and advice in this field of SRPP, is dealing with corporate social responsibility. This Centre is currently preparing an action plan on corporate social responsibility.

An **inter-ministerial circular on SRRP** is currently in preparation under the leadership of the Ministry of Finance. The result is expected in autumn 2008 (source: Ministry of Health and Prevention.

4. Selected areas of SRPP

4.1 Promotion of employment opportunities

According to the Danish Competition Authority and KL measures to promote employment should be integrated only 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 serices. 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.** The 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 (source: KL). 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.

Due to the **very low unemployment rate** in Denmark it often proves difficult to satisfy those contract clauses concerning the integration of unemployed people. After all the policy was designed a few years ago when the unemployment rate was still at 3%. This artificially raises the transaction costs of contracts and creates a certain reluctance to use social clauses in contracts. They are considered as "too much work". Moreover, due to the low unemployment rate, most people covered by categories 1 to 3 are now employed. People in categories 4 and 5 generally have only a very limited employment perspective and their presence in the company might undermine the entire contract (source: KL and SKI).

4.2 Promotion of decent work

Similar to the promotion of employment opportunities, requirements for decent work conditions are integrated only as a contract condition. Denmark ratified all ILO Conventions dealing with this issue and therefore contractors are bound by these standards by national Danish law. In addition to national law, ILO standards are prescribed in contracts but contracting authorities see the problem that these standards deal with countries rather than companies and that a lack of documentation and missing instruments for the evaluation of existing documentation makes it impossible to control the adherence of contractors to these standards.

4.3 Promotion of SME

SME are defined as companies with less than 250 employees. Those companies are not privileged in the technical specifications but a variety of other initiatives is thought to facilitate their participation in the procurement process. One of the interviewed organisations conducts information meetings with tenderers before the call for tender is opened. The participation of SMEs in these meetings is particularly encouraged.

A further instrument is to split large contracts according to geographical criteria to encourage the participation of SMEs in the procurement process.

The perception of SRPP amongst SME is bifurcated. Whereas some regard social and environmental initiatives as their chance for distinguishing themselves from their competitors (branding) others regard SRPP requirements as a burden.

4.4 Fair and ethical trade

The use of **fair and ethical trade labels** in the procurement process is obstructed by considerable legal uncertainty. Although there is a whish to use these labels the legal possibilities to do so are uncertain. Currently there is a Dutch court case on Max Havelaar fair trade products pending. Depending on the outcome of this case the integration of fair and ethical trade standards could become easier in the future

The use of **granite stones** that were produced or might have been produced in developing countries using **slave and child labour** on works contracts in Copenhagen have created considerable political interest and press coverage (only available in Danish). The most notorious 'scandals' in this category were the construction of the new opera house and works for the TV2 company in Copenhagen. The City of Copenhagen is aiming to be a 'Fair Trade City' by the end of this year (2008) – also in view of a major international conference in 2010. The City aims to buy as many fair trade products as possible. However, the problem is that the requirements of the City with respect to products that have fair trade labels, such as Max Havelear, are limited. Apart form construction material this applies particularly to the considerable purchase of coffee.

However, the efficacy of the implication of those standards in the procurement process is hampered because it is thought to be **against the procurement directives** to prescribe these standards throughout the supply chain of an awarded tender.

As a particular Danish success in this field a framework agreement on timber is frequently mentioned. The relevant contracts contain a clause that obliges the

suppliers to document that the timber is legal.

5. Enforcement and further Problems

In theory it is a competence of the Danish Competition Authority to inspect whether suppliers adhere to the standards they have agreed to comply with. Inspections that find non-compliance can lead to an annulment of the contract or even a close down of the company (ministerial enforcement). However, in practice this does not happen. According to one of the interviewed organisations there is "no enforcement at all".

In addition to the **enforcement difficulties** there are further problems that mainly centre on the practicalities of SRPP. These difficulties crystallise in the question: *how* can SRPP be accommodated in the procurement process. This question touches upon several issues that need to be addressed in order to make SRPP more operable.

First, common standards and systems for monitoring, reporting and documenting are lacking. The inability to determine criteria that are commonly agreed upon has led one of the interviewed organisations to reject a SRPP consideration for one of its contracts. In this case it was unsuccessfully tried to draw up criteria for socially and environmentally sustainable bio-fuel.

Second, due to a lack of unification social requirements concerning employment and social inclusion which are used for service contracts can only be imposed (and enforced) on those contracts which are carried out in Denmark and require local presence (see above).

Third, a considerable lack of legal certainty causes contracting authorities to be very careful in their approach to SRPP.

6. Conclusion

SRP is considered a "hot issue" which is going to gain importance in the immediate future. Especially SME see social considerations or fair and ethical trade as a possibility to distinguish themselves from their competitors and build up a competitive advantage. The importance to provide companies with the possibility to 'play this card' has been realised by procuring entities and shown in several measures to raise awareness for SRPP. These include information websites, guidelines and brochures on the one side and training for procurement officers and an internet dispenser for standardised contract specifications on the other.

It can be said that Denmark is only at the beginning of integrating SRPP in procurement contracts. SRPP considerations of various kinds are used in many of the contracts but a system to control the success of these measures can not yet be found. To successfully follow the path of SRPP into the future systems for monitoring and reporting will have to be developed and the abovementioned problems will have to be addressed.

Study on Social Considerations in Public Procurement

Country Legal and Policy Review for SRPP in France

Author: Prof. Roberto Caranta

Paris, June 2nd, 2008

Lille, June 3rd, 2008

Note: During a study visit to France in 2nd-3rd June 2008 meetings with the Ministry of Ecology, Energy, Sustainable Development and Territorial Development, the Mission Interministérielle France Achats – Ministry of Budget, Public Accounts and Public Service and the City of Lille, Social and Solidarity-based Economy were held. This report is largely based on the information gathered during these meetings. Moreover, questionnaire information from the City of Angers and The Agglomeration Community of Rouen was used for this report.
I have much benefited from talks with:
Rémy Risser, Chef du bureau des productions et consommations, Délégation au développement durable, Ministère de l'écologie, de l'énergie, du développement durable et de l'aménagement du territoire,
Martine Palis, Chef du bureau de la commande publique – DGA - Ministère de l'écologie, de l'énergie, du développement durable et de l'aménagement du territoire,
Gérard Brunaud Chargé de mission Animation interministérielle de la politique d'achats publics socialement responsables - Mission interministérielle France Achats- Agence Centrale des Achats - Ministère de l'Economie, des Finances et de l'Emploi - Ministère du Budget, des Comptes publics et de la Fonction publique,
Christiane Bouchart, Maire Adjonte de la Ville de Lille,
Malika Bohem Monnier, Directrice de l'Economie Sociale et Solidaire et de l'Emploi de Ville de Lille.

1. Summary

This report is based on first hand research in the legal environment and on interviews with officials at procuring entities.

After recalling the people and organisations which contributed with information, the report will sketch the institutional and legal framework for public procurement in France and its influence on how social considerations may be taken into account. This situation will be contrasted with the policy orientation favourable to socially responsible procurements whose pace is indeed growing. Analysis of those

social considerations already incorporated in the relevant – usually general mandatory – legislation will follow. The somewhat uncertain situation as to other "optional" social considerations will come next.

2. Institutional and legal environment

France codified public procurement law already in 2001, a few years before codification took place at Community level. The new Directives 2004/17/CE and 2004/18/CE were implemented through an overall redrafting of the Code by the décret n° 2006-975 du 1er août 2006. The new rules entered into force on September 1 st., 2006 (a general overview of the new rules in A. Ménéménis, *Code des marches publics 2006 : quelques points forts*, AJDA, 2006, 1754).

Specific rules impacting social consideration in public procurements are to be found outside the Code. This is the case, for instance, with Loi n°2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées, which will be discussed in due time.

In principle, French public procurement law is about choosing the best offer combining efficiency with a meaningful use of public money (see Art. 1,II. «Les marchés publics et les accords-cadres soumis au présent code respectent les principes de liberté d'accès à la commande publique, d'égalité de traitement des candidats et de transparence des procédures. Ces principes permettent d'assurer l'efficacité de la commande publique et la bonne utilisation des deniers publics. Ces obligations sont mises en oeuvre conformément aux règles fixées par le présent code» ; see also H. Pongérard-Payet, *Le critère social exprès d'attribution : un cadeau en trompe-l'œil fait aux élus*, AJDA, 2006, 636).

However, a reference to sustainable development pops up in Art. 5,I («La nature et l'étendue des besoins à satisfaire sont déterminées avec précision avant tout appel à la concurrence ou toute négociation non précédée d'un appel à la concurrence en prenant en compte des objectifs de développement durable. Le ou les marchés ou accords-cadres conclus par le pouvoir adjudicateur ont pour objet exclusif de répondre à ces besoins»). There is however a certain tension in the provision. The reference to sustainable development is balanced by the strong reminder that public procurements are to answer the needs of the procuring entity. It is a matter of some debate the extent to which the provisions of Directives 2004/17/CE and 2004/18/CE opening up some room for social consideration in public procurements have found their way in the Code. As we will see, the case law seems to be somewhat restrictive as to the extent social consideration may be taken into account in public procurements.

The possibility to refer to social considerations in public procurement has been hotly discussed and usually dismissed in French administrative law. The leading

case is a Conseil d'Etat decision with reference to a procurement for works passed by the municipality of Graveline. Graveline is a pleasant fortress town in the North of France, not too far from Lille, close to the Belgian Border. Fortresses have long ceased to have a military function and these days may help in attracting visitors. The problems is, in the meantime the moots were as an unregulated dumping ground. The municipality decided to have it cleared of the wastes and the wastes treated; the contract was to be awarded taking into account the overall price offered but also considering the proposals as to the opportunities of job creation and formation advanced by the bidders (so called *mieux disant social*). Two bids were received, both going well beyond the budget available. At that point, the municipality started a negotiated procedure with the two bidders, abandoning the overall pricing method in favour of a complex system based on a maximum price with a system of deductions to be applied if the waste to be removed was less than expected. No bidder presented any proposal as to job creation and formation. The losing bidder challenged the award, complaining that the award criteria had been changed. The President of the Tribunal administratif de Lille quashed the award finding both that the reference to the award criterium linked to the *mieux disant social* and the change of the pricing system were illegal.

On appeal to the Conseil d'Etat, the Commissaire du gouvernement Denis Piveteau devoted most of his conclusions to the *mieux disant social*. He remarked that, even if the criterium as to the opportunities of job creation and formation had played no part in the procurement at hand, no bidder having advanced proposals, its same insertion in the bidding documents could have induced potential bidder not to take part into the procedure (*L'illegalité du critère du "mieux-disant social" dans les marches publics*, concl. s. CE 25 juillet 2001, *Gravelines*, AJDA, 2002, 47: « même si aucun des deux candidats n'a pris la peine de répondre au critère social, la seule présence de ce critère a pu, silencieusement, exclure d'autres entreprises qui ne se sont même pas présentées »).

The Commissaire du gouvernement deduced from some specific national provisions, ruling out the legality of award criteria not linked either to the object of the contract or to the conditions for its implementation, a general principle according which public procurement law is exclusively geared to the best buy principle and secondary policy objectives cannot be legally pursued («principe tout à fait essentiel de la neutralité de la réglementation des marchés publics, c'est-à-dire l'idée selon laquelle la dépense publique qui s'effectue à l'occasion d'un marché ne doit pas être l'instrument d'autre chose que de la réalisation du meilleur achat au meilleur coût» ; otherwise said, the rule «est de s'en tenir à l'offre économiquement la plus avantageuse, compte tenu des contraintes du marché, sans prendre en considération ses éventuels effets collatéraux»).

The idea that the award criteria are to be linked to the object of the contract is read restrictively. The central assumption – quite Cartesian in a certain way – is that any criterium linked to the bidder cannot be also considered to be linked to the object of the contract («Il ne serait en effet pas sérieux de soutenir que le critère « social » introduit par la Commune de Gravelines entretenait un rapport avec l'objet du contrat. Le déblaiement d'une douve et le tri de déchets, qui sont des travaux de main-d'oeuvre, se prêtent peut-être assez bien à des objectifs d'embauche de chômeurs ou de réinsertion professionnelle, mais ils ne les visent pas et ne les impliquent pas nécessairement pour leur exécution»).

The Commissaire du gouvernement was ready to discuss whether the French approach was maybe more restrictive than the one followed by the Court of justice of the European Communities (see also Th. Gliozzo, *L'utilisation de critères additionnels dans la passation des marches publics par appel d'offres*, AJDA, 2002, 1473 ss.). He remarked that that the case law of the Court allowed social considerations to be taken into account, but only providing that they were not discriminatory, which would amount to a "contradiction logique". One could well retort that the discrimination referred to be the Court of justice is specifically the discrimination on the grounds of nationality, not any discrimination – a point that was quite clear in the *Beentjes* decision, seems to elude most French writes – but *tant pis*, the Commissaire du gouvernement concluded anyway that French law may be stricter on this point that Community law. Which is unquestionable.

The conclusions also referred to Art. 14 of the (then) new Code des marchés publics, allowing performance based social clauses, cautioning that they could not be used to limit competition by discriminating among different firms.

The conclusions were fully followed. The reasoning of the Conseil d'Etat was terse as usual – and damning for the *mieux disant social*: «Considérant, en premier lieu, qu'en relevant que le critère additionnel retenu par la commune était sans rapport avec l'objet du contrat ou avec ses conditions d'exécution, le vice-président délégué par le président du tribunal administratif de Lille n'a pas entaché son ordonnance, qui est suffisamment motivée, d'une dénaturation des faits ou d'une erreur de droit ; que la circonstance, à la supposer établie, qu'aucune offre formulée par les soumissionnaires n'aurait pris en compte ce critère est sans incidence sur la possibilité de le faire figurer parmi les critères permettant de comparer les offres» (CE 25 juillet 2001, *Gravelines*, AJDA, 2002, 46, concl. Piveteau).

The strict adherence to the equality principle is also at the roots of an important decision by the Conseil constitutionnel, which followed *Gravelines* after few months. At stake was the legality of a legislative clause reserving a portion of public procurements to social enterprises. The courts struck the legislation down claiming that the infringement of the equality principle was disproportionate to public interest aims pursued (: «Considérant que l'article 12 de la loi déférée prévoit qu' « un quart des lots » des « marchés visés par le code des marchés publics » qui « font l'objet d'un allotissement » et « portent, en tout ou partie », sur des « prestations susceptibles d'être exécutées » par les structures associatives ou coopératives visant notamment à « promouvoir l'esprit d'entreprise indépendante et collective », fait l'objet d'une mise en concurrence entre ces structures ; que ces dispositions, tant par leur ampleur que par leur imprécision, portent au principe d'égalité devant la loi une atteinte disproportionnée par rapport à l'objectif d'intérêt général qui s'attache au développement de l'économie sociale ; que, par suite, il y a lieu de déclarer cet article contraire à la Constitution»).

For similar reasons, the Cour administrative d'appel de Bordeaux struck down a similar provision having the value of secondary law (CAA Bordeaux 4 mars 2003, *Dép. Deux-Sèvres*, AJDA 2003, 895, note J-M. Dreyfus ; here again social considerations are considered not to be strong enough to put a dent into the equality principle).

It may be worth recalling that the strict adherence to the equality principle has led French courts to rule out the legality of environmental criteria which in general seem to be less problematic than those focusing on social consideration (e.g. Cour administrative d'appel de Paris, 20 jullet 2004, *Sté SITA*, AJDA 2005, 95, concl. Victor Haïm; with reference for a procurement for urban waste collection, the court rules out the legality of an award criterium referring to pollution caused by the vehicle used; but maybe the problem here was rather that this criterium was not spelt out with sufficient clarity in the contract documents).

This strict adherence to the equality principle by the French courts had the consequence that many rules passed by both the Parliament and the Government with a view to implement social considerations in public procurements have been quashed. The new Code appears to be a point of some stability in a legislation that has changed more than a few times in the past years (as to the changes, see H. Pongérard-Payet, *Le critère social exprès d'attribution : un cadeau en trompe-l'œil fait aux élus*, AJDA, 2006, 635 ff.).

It is fair to say that the Community provisions incorporating social considerations in public procurements are usually not mandatory, and as such most of them were later transposed into the French legislation. The attention paid to social considerations will therefore vary from procurement procedure to procurement procedure and will in the end rest on the commitment to social policy of each and any procuring entity. If the legislative environment is the same all over France, the competence manage public procurement procedures is very much decentralised. Most public law entities manage their procurements themselves. Some procuring entities have gone a long way in considering social issues when passing their procurements, at the same time complying with the strict requirements of the French case law.

Some social considerations are, moreover, taken into account by general rules outside the Code whose incorporation in the contract specification is normally mandatory. This is the case for instance with reference to the mandatory employment of disadvantaged people, social security and benefits, working hours, sufficient and equal pay, occupational safety and health.

3. Policy orientation

The rigid attitude of French courts against any preferential treatment in the award of public procurements based on social considerations contrasts with policy indication both at central and local level generally quite favourable to socially responsible procurements.

Apart for legislative initiatives, a number of which were already briefly referred to, and more will be discussed in the following sections, a number of policy

initiatives have been taken and/or are in the process of being taken.

An important feature of the French landscape is the overall commitment to sustainable development influencing the legislation and management of public procurement well beyond social issues. Indeed, an intense work and the experience accrued in the field of green procurements has been instrumental in fostering developments with reference to social considerations.

A Strategie nationale du développement durable was launched already in 2003 and has been updated since (http://www.ecologie.gouv.fr/-SNDD-actualisee-.html).

Among the most interesting and recent documents, we may recall here:

- Plan national d'action pour des achats publics durables (http://www.ecologie.gouv.fr/pnaapd.html) of 2007. This documents gives a definition of sustainable procurement also reflecting social considerations: (point 68 : «2° qu'est durable, tout achat public intégrant, à un titre ou à un autre, des exigences, spécifications et critères en faveur de la protection et de la mise en valeur de l'environnement, du progrès social et favorisant le développement économique notamment par la recherche de l'efficacité, de l'amélioration de la qualité des prestations et de l'optimisation complète des coûts (coûts immédiats et différés)». It recalls the provisions in the new (2006) Code des marchés publics which may be relevant for the introduction of social consideration in the procurement process. Its scope however is by no means not limited to the existing legislation. It goes beyond, considering for instance the opportunity to have recourse to fair trade instruments (e.g. point 71).
- Again in 2007, the Observatoire Economique de l'Achat Public, an official institution established in 2005 and working within the Ministry for economics (http://www.minefi.gouv.fr/directions_services/daj/oeap/index.htm) has publishes a guide specifically targeted to procuring entities on « Commande publique et accès à l'emploi des personnes qui en sont éloignées ». The guide analyses in the details the new (2006) provisions in the Code des marches publics which may be used to foster social considerations in procurement processes. The aim is to make it easier for procuring entities, especially local government ones, to adopt a socially responsible approach to public procurements. It expressly recognise it is not a directive, binding for the procuring entities, rather a tool to attain shared goals (point 6).

At present, the French Government is engaged in a major consultation with the social partners – the so-called Grenelle de l'environnement and Grenelle the de l'insertion – involving different actions impacting social integration, including public procurements. 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.

A working group on sustainable procurement ("Achats publics durables") has been established, and produced a report on March 28th, 2008. This report is expected to be translated into a directive of the Prime minister. The document is supplemented with annexes (fiches) covering twenty different procurements procedures ranging from office materials to wood. Social considerations are specially relevant with reference to textile procurements (fiche 6); cleaning (fiche 8); parks and other green public spaces maintenance (fiche 10). Specific actions targeted at the formation of sustainable development conscious procurement officers are also foreseen both in

general terms (fiche 16) and with reference to the legal provisions that will examined in the next sections (fiche 17).

Concerning for instance textile procurements, the objective for 2012 is that 50% of the contracts will comply with two of the following three requirements: a) minimal environmental requirements (with reference to the ECOLABEL); minimal social requirements (including compliance with the eight fundamental ILO conventions); traceability. With reference to parks and other green public spaces maintenance, the objective is to attain with the same date a percentage of 50%of the procurement awarded to social enterprises or enterprises hiring handicapped persons.

Moreover, from a more structural point of view, social considerations are at the heart of the concerns having led to the creation of the *Mission Interministerielle France Achats (MIFA)*, which is going to be transformed into a centralised procuring entities for the State (*Agence des Achats de l'Etat*) on July 1st, 2008.

Similar developments took place at local level at times anticipating and setting the example for actions then started at national level.

4. Mandatory protection of social rights

Provisions mandating form of protection for social rights normally are to be found outside the Code, in specific legal texts. Generally speaking, health and social security provisions are a necessary component in the documents of any public procurement.

One such instance is Loi n°2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées. This statute, in turn amended more than a few times, amended many provisions to be found in the Code du travail, the body of rules on industrial relations and workers' rights, inter alia imposing an obligation on public law entities to hire a certain percentage of **handicapped** people.

Under Art. L323-1, «Tout employeur occupant au moins vingt salariés est tenu d'employer, à temps plein ou à temps partiel, des bénéficiaires de la présente section dans la proportion de 6 p. 100 de l'effectif total de ses salariés». Article L323-2 makes the same provision applicable to public law entities. The breach of the obligation must be compensating by paying given sums to a specific fund (fonds pour l'insertion des personnes handicapées dans la fonction publique) -1 leur sont applicables) whose mission is to facilitate the insertion of handicapped people in the public service (Art. L323-8-6-1 of the Code du travail).

However, 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. Handicapped people employed by contractors are to a given extent (presently 50 %) counted in favour of the procuring entity («Les employeurs mentionnés aux articles L. 323-1 et L. 323-2 peuvent s'acquitter partiellement de l'obligation d'emploi instituée par l'article L. 323-1 en passant des contrats de fournitures de sous-traitance ou de prestations de services avec des entreprises adaptées, des centres de distribution de travail à domicile ou des centres d'aide par le travail. Cette exonération, dont les modalités et les limites sont fixées par voie réglementaire, est proportionnelle au volume de travail fourni à ces ateliers et centres».

More courageous attempts at reserving procurements to social enterprises have been stopped by the Conseil constitutionnel, here again worried about equality (Cons. const. 6 décembre 2001, décis. n° 2001-452 DC, « loi portant mesures urgentes de réformes à caractère économique et financier »).

This mechanism provides procuring entities with a strong incentive to pass procurements with sheltered workshop under the special rules which will be examined in the next section.

Finally, under Art. L216-10 of the Code de l'éducation, supply procurement passed by educational bodies must make sure that the goods supplied were not manufactured in breach of the international convention against **child labour** («Pour les achats de fournitures destinés aux établissements scolaires, les collectivités publiques et établissements concernés veillent à ce que la fabrication des produits achetés n'ait pas requis l'emploi d'une main-d'oeuvre enfantine dans des conditions contraires aux conventions internationales reconnues. Les renseignements correspondants peuvent être demandés à l'appui des candidatures et des offres»). Even if similar clauses are often inserted by procuring entities in their contract documents, it would be of course make much sense to extend this rule beyond the procurements for schools.

Another quite specific situation is grounded on Art. 10 of the Loi n° 2003-710 du 1 août 2003 d'orientation et de programmation pour la ville et la rénovation urbaine. The provision set up a special public law entity, « Agence nationale pour la rénovation urbaine » - ANRU, whose specific mission is to contribute to the renovation of urban area with major social problems. A social inclusion clause is part of all procurement contracts for works financed by the ARNU (this on the basis of the provision according to which « L'Agence nationale pour la rénovation urbaine élabore et adopte, dans les neuf mois suivant sa création, une charte d'insertion qui intègre dans le programme national de rénovation urbaine les exigences d'insertion professionnelle et sociale des habitants des zones urbaines sensibles »).

5. Optional social consideration rules

The possibility to refer to optional social consideration has been fought by the case law. The courts have given an hard look to different attempts to introduce preferential treatment for specific categories of firms in pursuant of social goals. The reason has mainly been a strict adherence to the equality – non discrimination principle,

a principle which is at the heart of French public law (it is enough to recall here the *principes immortels* of the French Revolution: *liberté, égalité* and *fraternité*). It may seem that, with reference to public procurements, the case law makes a greater place to *égalité* somewhat to the detriment of *fraternité*.

Art. 19 of Directive 2004/18/CE on **sheltered workshops**, has been implemented by Art. 15 of the French Code: «Certains marchés ou certains lots d'un marché peuvent être réservés à des entreprises adaptées ou à des établissements et services d'aide par le travail mentionnés aux articles L. 323-31 du code du travail et L. 344-2 du code de l'action sociale et des familles, ou à des structures équivalentes, lorsque la majorité des travailleurs concernés sont des personnes handicapées qui, en raison de la nature ou de la gravité de leurs déficiences, ne peuvent exercer une activité professionnelle dans des conditions normales. L'avis d'appel public à la concurrence fait mention de la présente disposition». The provision follows closely the conditions laid down in the Directive.

Has was remarked in the previous section, the specific measures for the insertion in the workplace of handicapped people by Loi n°2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées provides a strong incentive to procuring entities to have recourse to sheltered workshop.

Other measures for sustainable development have been taken, but they are more problematic.

Concerning **contract performance conditions**, Art. 26 of Directive 2004/18/CE (which has been interpreted by someone as a confirmation to the caution shown by French courts to social clauses in public procurements : H. Pongérard-Payet, *Le critère social exprès d'attribution : un cadeau en trompe-l'œil fait aux élus*, AJDA, 2006, 638 ; the Author refers to the Communication COM(2001) 566 def to remark that the EC Commission itself pointed at performance conditions as the best legal instruments to take into account social considerations), has been implemented by Art. 14 of the Code («Les conditions d'exécution d'un marché ou d'un accord-cadre peuvent comporter des éléments à caractère social ou environnemental qui prennent en compte les objectifs de développement durable en conciliant développement économique, protection et mise en valeur de l'environnement et progrès social).

The provision is clearly linked to Art. 5 of the Code, insisting on sustainable development, which was referred to above. Here again, however, French law makers did not do away completely with their preoccupations concerning equal treatment of all firms. To this effect, the second indent of Art. 14 stipulates that «Ces conditions d'exécution ne peuvent pas avoir d'effet discriminatoire à l'égard des candidats potentiels. Elles sont indiquées dans l'avis d'appel public à la concurrence ou dans les documents de la consultation». While the transparency requirements is well-known and indeed standard in public procurement law, the non-discirmination requirement may entail difficulties in the application of Art. 14.

As we recalled above, the Commissaire du gouvernement Denis Piveteau cautioned against any use of Art. 14 which could lead to discrimination among

potential bidders («Que dit en effet ce nouvel article 14, sinon que l'éventuelle clause sociale doit figurer dans le cahier des charges à titre de condition d'exécution (ce qui permet de penser qu'elle ne peut intervenir que comme une exigence uniforme, imposée à toutes les entreprises concurrentes) et qu'au surplus elle ne peut avoir d'effet discriminatoire à l'égard des candidats, ce qui ramène à la distinction entre la discrimination des offres, qui serait autorisée, et celle des entreprises, qui ne le serait pas»).

According to the information gathered from the questionnaires and during the meetings, 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, and so on. 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 a 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 marches publics. It lists a) the insertion objectives; b) the disadvantaged categories covered* (e.g. handicapped people; unqualified youth; long term unemployed)*; c) control mechanism as to the respect of the clause, including d) a progress report to be established every year* ("bilan de l'action d'insertion").

Most problematic of all is the possibility to refer to **social considerations as award criteria**. Art. 53 of the Code implements the provision with the same number to be found in Directive 2004/18/EC. The French code is not exempt of some terminological confusion: while the Directive distinguishes two award criteria, the lowest price and the most advantageous economic offer, in France they both fall under the "offre économiquement la plus avantageuse", which in turn is divided between "moins-disant" and "mieux-disant" (the latter corresponding to the most advantageous economic offer) (as to this qui pro quo see D. Supplisson, *Critères d'attribution : quelques changements dans la continuité*, AJDA, 2006, 1765).

With this caution, it is plain that Art. 53 of the Code follows closely the Directive: in the application of the mieux-disant, the procuring entities may consider « une pluralité de critères non discriminatoires et liés à l'objet du marché, notamment la qualité, le prix, la valeur technique, le caractère esthétique et fonctionnel, les performances en matière de protection de l'environnement, les performances en matière d'insertion professionnelle des publics en difficulté, le coût global d'utilisation, la rentabilité, le caractère innovant, le service après-vente et l'assistance technique, la date de livraison, le délai de livraison ou d'exécution.

D'autres critères peuvent être pris en compte s'ils sont justifiés par l'objet du marché».

Recalling the tug-of-war having opposed French law-makers and courts on the so-called *mieux-disant social*, this award criterium has been considered as "mort-né au regard du droit interne". Procuring entities have been advised to steer clear from it: «la jurisprudence restrictive du Conseil d'Etat sur la condition liée à l'objet du marché ainsi que l'éventuel effet discriminatoire du critère social devraient inciter les acheteurs publics à renoncer au critère social afin de se préserver de contentieux inutiles» : H. Pongérard-Payet, *Le critère social exprès d'attribution : un cadeau en trompe-l'œil fait aux élus*, AJDA, 2006, 638 ; the Author further remarks : «Sans doute le critère du mieux-disant social n'est-il pas en soi condamné, puisque seule l'absence de rapport avec l'objet du contrat eu ses conditions d'exécution l'est. Néanmoins, cette condition prive ledit critère de toute efficacité réelle. En conséquence, en dehors des marchés à objet social préconisant des actions en matière d'insertion, d'emploi ou de formation professionnelle, l'art. 58 de la loi Borloo risque d'avoir peu d'effets en pratique, d'autant que le critère à objectif social risque de constituer un facteur de discrimination entre les offres» ; otherwise said, «la nécessité de justifier pour l'emploi des critères d'un lien avec l'objet du marché ou ses conditions d'exécution est de nature à limiter fortement les possibilités d'application concrète des critères environnementaux, mais surtout sociaux» : D. Supplisson, *Critères d'attribution : quelques changements dans la continuité*, AJDA, 2006, 1766 ; but this Author thinks that the link with the object of the conctract should be easier to establish under the new rules, even if he voices doubts as to the chances of changes in the case law).

As was already pointed out, different considerations apply with reference to **social inclusion procurements**, i.e. procurements whose main object is precisely social inclusion (E.G. D. Supplisson, *Critères d'attribution : quelques changements dans la continuité*, AJDA, 2006, 1767).

In that case, procuring entities may follow the less stringent rules laid down in Art. 30 of the Code on non priority services. Art. 30 implements Art. 21 of Directive 2004/18/EC. In principle, procurement for non priority services are passed following a specific and lighter procedures laid down in Art. 28 of the Code («I.-Les marchés et les accords-cadres ayant pour objet des prestations de services qui ne sont pas mentionnées à l'article 29 peuvent être passés, quel que soit leur montant, selon une procédure adaptée, dans les conditions prévues par l'article 28).

Art. 28 gives procuring entities ample scope for flexibility. In the end, it is up to each procuring entity to lay down the rules specific to the procurements below the threshold, referring to the more formal procedures as a model or a template in so far as it thinks fit : («Lorsque leur valeur estimée est inférieure aux seuils mentionnés au II de l'article 26, les marchés de fournitures, de services ou de travaux peuvent être passés selon une procédure adaptée, dont les modalités sont librement fixées par le pouvoir adjudicateur en fonction de la nature et des caractéristiques du besoin à satisfaire, du nombre ou de la localisation des opérateurs économiques susceptibles d'y répondre ainsi que des circonstances de l'achat. Pour la détermination de ces modalités, le pouvoir adjudicateur peut s'inspirer des procédures formalisées prévues par le présent code, sans pour autant que les marchés en cause ne soient alors soumis aux règles formelles applicables à ces procédures. En revanche, s'il se

réfère expressément à l'une des procédures formalisées prévues par le présent code, le pouvoir adjudicateur est tenu d'appliquer les modalités prévues par le présent code»). Procuring entities must of course exercise their discretion as to the framing of the procedure according to the general principle of Community law. The point of reference seems to be the Commission's 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), which however does not seems to be very much referred to in this context (while the recent case law, starting from the conclusions in Case C-507/03, *Commission v. Ireland*, is: see A. Ménéménis, *Code des marches publics 2006 : quelques points forts*, AJDA, 2006, 1759.

Based on the specific circumstances of the case, or if the value is very low, or when one of the conditions allowing recourse to negotiated procedures, procuring entities may pass contracts without any formality (last indent of Art. 28 : «Le pouvoir adjudicateur peut décider que le marché sera passé sans publicité ni mise en concurrence préalables si les circonstances le justifient, ou si son montant estimé est inférieur à 4 000 Euros HT, ou dans les situations décrites au II de l'article 35»).

Moreover, for the procurement of non priority services whose value exceed the threshold, technical specification must be drawn according to the general rules and a notice must be issued after the award («II.-Toutefois : 1° Les dispositions des III et IV de l'article 40 ne sont pas applicables ; 2° Lorsque le montant estimé des prestations demandées est égal ou supérieur à 206.000 Euros HT, elles sont définies conformément aux dispositions de l'article 6 et le marché fait l'objet d'un avis d'attribution dans les conditions fixées à l'article 85 […]»).

The Conseil d'Etat has already intervened to stress that the freedom of choice left to the procuring entities has relevant bounds to be deduced from the general principles buttressing the equality between potential bidders. Among these bounds, the Conseil d'Etat recalls the necessity to preventively define the needs of the procuring entity, to advertise the procurement allowing competitive bids, and to chose the best offer submitted: « Considérant, d'autre part, que les marchés passés en application du code des marchés publics sont soumis aux principes qui découlent de l'exigence d'égal accès à la commande publique, rappelés par le deuxième alinéa du I de l'article 1er de ce code […]. Ces principes permettent d'assurer l'efficacité de la commande publique et la bonne utilisation des deniers publics. Ils exigent une définition préalable des besoins de l'acheteur public, le respect des obligations de publicité et de mise en concurrence et le choix de l'offre économiquement la plus avantageuse ; que les formalités de publicité et de mise en concurrence imposées par le code des marchés publics ont pour objet d'assurer le respect de ces principes ; qu'ainsi, les deuxième et troisième alinéas de l'article 30 […] doivent être interprétés comme ne permettant à la personne publique de se dispenser du respect de telles formalités qu'après avoir vérifié si, compte tenu des caractéristiques du marché, notamment de son montant, de son objet, du degré de concurrence entre les prestataires de service concernés et des conditions dans lesquelles il est passé, ces formalités sont manifestement inutiles pour assurer la liberté d'accès à la commande publique, l'égalité de traitement des candidats et la transparence des procédures, ou avoir constaté que de telles formalités sont rendues impossibles par les caractéristiques du marché» : CE 9 août 2006, *Associations des avocats conseils d'entreprises*, AJDA, 2006, 1532).

The 2007 guide on « Commande publique et accès à l'emploi des personnes qui en

sont éloignées »[1], which was recalled earlier, specifies that this provision is only applicable to procurements was object is genuinely and prevalently the social inclusion. This implies that only procuring entities with specific competencies for social matters – mainly local authorities – may pass procurements for social inclusion. Moreover, the application of Art. 30 does not dispense the procuring entity from advertising the procurement and allow the competition of all interested bidders – and not just social inclusion organisations («Il convient d'insister sur la prudence dont il faut faire preuve au moment de la rédaction de l'objet du marché. Ainsi, si l'acheteur public souhaite réaliser un marché d'insertion, cela signifie que l'objet du marché est une action d'insertion sur laquelle peut se greffer la réalisation de travaux ou la prestation de services à titre de support. Le contenu en insertion doit alors être suffisamment important pour éviter une requalification par le juge. Les critères de l'évaluation des prestations ne doivent pas alors porter, du moins en priorité, sur la qualité des travaux ou services réalisés mais bien sur l'objet même du marché, à savoir la qualité de l'insertion : par exemple si les personnes en insertion qui ont été employées ont obtenu de bonnes qualifications. Enfin, l'utilisation de l'article 30, nécessite une mise en concurrence et il ne peut y avoir de démarche de réservation des marchés. Tous les prestataires offrant ce type de service peuvent présenter leur candidature et soumissionner, sans distinction de statut juridique : les associations sont donc habilitées à solliciter l'attribution de ces marchés, et parmi elles tout particulièrement les ateliers et les chantiers d'insertion»).

As was remarked, **preference for specific types of potential contractors** are usually held to be invalid for breach of the equality principle.

A quite general attempt at preferential treatment that was indeed stopped by the Conseil Constitutionnell with the 2001 decision that was already recalled (see note J-M. Dreyfus sous CAA Bordeaux 4 mars 2003, *Dép. Deux-Sèvres*, AJDA 2003, 897).

Art. 53 provides for a very specific and exceptional preference in case of identical bids in favour of workers cooperatives, farmers, artisans and artists: «Lors de la passation d'un marché, un droit de préférence est attribué, à égalité de prix ou à équivalence d'offres, à l'offre présentée par une société coopérative ouvrière de production, par un groupement de producteurs agricoles, par un artisan, une société coopérative d'artisans ou par une société coopérative d'artistes ou par des entreprises adaptées». Procuring entities must decide in the initial stages of the procurement procedures not only whether the preference will apply in the (most unlikely) case of identical offers but also define the lots to which the preference will apply. Predictably, most procuring entities do not bother to go into so much pain for such a remote event.

Of course, the condition of *ex equo* bids is quite rare and moreover, the preference clause has to have been inserted into the contract documents. Given the quite adverse case law, the 2007 guide on « Commande publique et accès à l'emploi des personnes

[1] See: http://www.minefi.gouv.fr/directions_services/daj/oeap/documents_ateliers/personnes_eloignees/pp_contracts_access_employment.pdf

qui en sont éloignées », which was recalled earlier, suggests to refer to Art. 53-I in tandem with social specification under Art. 14.

Preferences for **PMI** as well have been challenged by the case law. Already in the '80 the Conseil d'Etat had ruled out the legality of preferential treatment of PMI in procurement procedures (CE 13 mai 1987, *Sté Wanner Isofi Isolation, Leb.* 171).

A safe way has long be to subdivide procurements into lots to make it easier for PMI to bid (Th. Gliozzo, *L'utilisation de critères additionnels dans la passation des marches publics par appel d'offres*, AJDA, 2002, 1471).

The Code has introduced a number of measures targeted to make it easier for PMI to be awarded public procurements (see generally J-D. Dreyfus, *Code des marches et PME: la choix de la discrimination positive*, AJDA, 2006, 1769). These measures falls short of outright preferential treatment. The most relevant is possibly the indication given to procuring entities by Art. 10 of the Code to subdivide their procurements into lots to make access by PMI easier. It is not an obligation, and it depends on whether the object of the procurement may be so divided («Afin de susciter la plus large concurrence, et sauf si l'objet du marché ne permet pas l'identification de prestations distinctes, le pouvoir adjudicateur passe le marché en lots séparés dans les conditions prévues par le III de l'article 27. A cette fin, il choisit librement le nombre de lots, en tenant notamment compte des caractéristiques techniques des prestations demandées, de la structure du secteur économique en cause et, le cas échéant, des règles applicables à certaines professions. Les candidatures et les offres sont examinées lot par lot […]»).

The Government has given indications to procuring entities strongly recommending the splitting into lots of the procurement they pass. It has however been maintained that it is not incredibly difficult to think of reasons – including economic ones – to act otherwise (J-D. Dreyfus, *Code des marches et PME: la choix de la discrimination positive*, AJDA, 2006, 1771 ; quite recently the Tribunal administratif de Montpellier upheld a decision not to dived in lots a procurement for legal services remarking that those services are difficult to be divided in categories due to the possible need to have a overall vision about the litigation activities of the procuring entity).

Other relevant measures which were introduced with the intent to facilitate PMI participation in procurement procedures include the provision the technical and professional requirements must be proportionate to and must not exceed what is needed considering the object-matter of the procurement (Art. 45-I of the Code); the provision that reference to previous experience may substituted by other means to prove financial and professional qualification (Art. 52-I); the possibility for the procuring entities to ask potential bidders to state the share of the procurement they intend to sub-contract (Art. 48; this provision is however considered to have very little teeth, considering that the bigger or smaller share cannot be regarded – for the reasons discussed with reference to Art. 53 of the Code – as relevant in the award of the contract: J-D. Dreyfus, *Code des marches et PME: la choix de la discrimination positive*, AJDA, 2006, 1770)

Some provisions were also introduced with the view to strenghten the participation of PMI in restricted procedures, for instance setting a quota of PMI which had to be invited to submit a bid (e.g. formerly one could read in Art. 60 «En outre, le pouvoir adjudicateur peut fixer un nombre minimum de petites et

moyennes entreprises, au sens de l'article 48, qui seront admises à présenter une offre, sous réserve que le nombre des petites et moyennes entreprises retenues en application des critères de sélection des candidatures soit suffisant. Cette décision est mentionnée dans l'avis d'appel public à la concurrence»). These provisions were however quashed by the Conseil d'Etat for the usual reason that they discriminated against potential bidders (the intervention of the Conseil d'Etat was somewhat feared : J-D. Dreyfus, *Code des marches et PME: la choix de la discrimination positive*, AJDA, 2006, 1772).

The Code des marchés publics does not contain any express reference to the **ILO standards**. The possibility left open by Cons. 33 of Directive 2004/18/EC has not been embraced at legislative level, even if some of the social considerations embodied by ILO conventions are at times referred to in specific legal texts – such is the case of Art. L216-10 of the Code de l'éducation, which was considered above – and may be taken and are indeed at times taken into account by their own motion by the procuring entities provided they abide to the Code.

As to the voluntary adoption of ILO standards there is no quantitative data available. The municipality of Arles also asks bidders to sign a *clause étique* in supply procurements for goods possibly coming from countries where fundamental social rights are often breached.

6. Conclusions

France is without any doubt one of the countries where the approach to social considerations in public procurements is more developed and structured. The vigilance, at times quite severe, of domestic courts has made sure that social consideration do not go into the way of transparency of the procuring processes and of fair competition among potential bidders. Preferences are avoided and all and every potential bidders to the same constraints, be them of legal origins or depending on procuring entities' choice as to the insertion of social performance clauses.

Another remarkable pattern to be found in France is that both procuring entities and – possibly more relevant – potential bidders are not left alone in drafting and implementing contract clauses fostering social considerations. The different official documents, including guides, aimed at helping procuring entities have already been mentioned (above § 3).

A few words deserves the holistic approach to social policies and public procurements followed by many local procuring entities (such as Lille, Nantes, and Angers, just to mention some of the more active). These entities work hand in hand with other public institutions responsible for social inclusion, such as the *Maison de l'emploi*, which allow coordination and synergies in all the activities that come to compose the *Plan pour l'Insertion et l'Emploi – PLIE*, a document which is reconsidered and redrafted every five years. The public institutions responsible for social inclusion, in turn, are active in many crucial steps of the procuring process: they may promote social awareness in potential bidders through meetings open to the firms; they are

instrumental in the follow up of the implementation of the social clauses of the procurement contracts, quite often providing *facilitatieurs* helping successful bidders in managing the workforce involved in an insertion path, and finally 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 choose to hire a specialised legal counsel to draft an manage procurement documents with social clauses).

At the same time the French example, as much as it is a success story in grafting social considerations in public procurement management and because of it, shows some structural problems that cannot be easily tackled in isolation even by the most social focused procuring entity. Possibly the most relevant problem is posed by the difficulty in tracing and assessing processing patterns in possible violation of internationally acknowledged social standards taking place in countries outside the EU. Quite often during the research, the complaint was the very limited availability of reliable certification schemes covering the social dimension.

Study on Social Considerations in Public Procurement

Country Legal and Policy Review for SRPP in Germany

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Birmingham, 11th June 2008

Note: During a study visit to Germany in 12-13 March 2008 meetings with the North Rhine Westphalia State Ministry for Economy, SME, and Energy (*Landesministerium für Wirtschaft, Mittelstand, und Energie*), the Municipality of Düsseldorf (*Landeshauptstadt Düsseldorf*) in Düsseldorf, and the Federal Ministry of Economy and Technology (*Bundesministerium für Wirtschaft und Energie*) in Berlin were held. This report is largely based on the information gathered during these meetings. Moreover, questionnaire information from the Procurement Office of the Federal Ministry of the Interior (*Beschaffungsamt des Bundesministerium des Innern*) in Bonn, the Federal Office for Economy and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle*), the Federal Agency for External Trade (*Bundesagentur für Aussenwirtschaft*), and the Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales*) was used for this report.
I have benefited from discussions with:
Daniela Hein, Head of the Department of the Federal Ministry of Economy and Technology,
Andreas Machwirth, Head of the Department of the North Rhine Westphalia Ministry for Economy, SME and Energy,
Herr Herbers, Member of the Municipality of Dusseldorf.

1. Summary

Generally speaking in 2008 policy makers and contracting entities in Germany are **opposed to the conclusion of social criteria (SRRP) in the public and utilities procurement process.** SRRP are feared to compromise value for money and transparency, especially regarding contracts above the thresholds of the EC public procurement Directives 2004/17/EC and 2004/18/EC. This situation is remarkably different to the past situation where many social criteria were taken into account (see: Christoph Benedict, *Sekundärzwecke im Vergabeverfahren* [Secondary Policies in Public Procurement], Springer 2000, chapter 1).

An important aspect of this negative attitude is that **public procurement (law) is not considered to be the appropriate instrument to promote social considerations**. German constitutional law (notably equal treatment and freedom of association) tax law, social law, disabled law, employment law (for example on working hours and equal pay), criminal law, child law, and occupational safety and health law are considered more appropriate instruments to enforce social considerations. For reasons that go beyond the aim of this report, only a very small proportion of public contracts are awarded to tenderers outside Germany (especially on the municipal level). Therefore most tenderers are already regulated by these instruments and the respective national agencies can enforce these instruments.

A reservation frequently put forward in the discussion is the difficulty for the already stretched procurement officers, especially in the municipalities, to **implement and enforce such social considerations** in an already highly regulated procurement process.

However, the inclusion of social criteria in the public procurement process is subject to a **fierce political debate** in Germany. The dividing line on the federal, state (regional), and municipal levels is that between the two main political camps. Broadly speaking, the centre-right camp consisting of Christian Democrats (CDU/CSU) and Liberals (FDP) is against the inclusion of (most) social criteria (except SME promotion), whereas the centre-left camp consisting of the Social Democrats (SPD) and Greens is more favourable. The mainly post-communist Left Party is also more favourable. This debate has not been decided yet.

Recently the **prevention of exploitative child and slave labour** on the municipal and state (regional) levels has been the subject of intensive press coverage as well as political and academic debate. This debate is still ongoing.

Workshops for the disabled and (long term) unemployed are often at least partly owned by municipalities who directly award many low value contracts to these establishments. Moreover, there are policies and laws on the federal and state levels to reserve certain contracts to these institutions.

The **promotion of SME is considered a separate issue**, especially on the State (regional) level. Many critics of the inclusion of (other) social criteria support the promotion of SME in the procurement process, also the centre-right parties who define themselves as SME parties.

2. Introduction and legislative background

According to the 2007 Public Procurement Study of the Academic Advisory Committee of the Federal Ministry for Economy and Technology (German: "Gutachten Nr. 2/07 Öffentliches Beschaffungswesen, Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft und Technologie, Berlin , Dezember 2007, www.wissenschaftlicher-beirat.de"), hereinafter '2007 BMWI Study', in 2002 public procurement amounted to 17 per cent of the national GDP or € 360 billion annually. In addition public companies award contract worth € 60 billion annually. **This makes Germany the largest public and utilities procurement market in the EU.** With 7.5 per cent in 2002 the percentage of contracts advertised in the Official Journal of the European Communities is the lowest of all Member States of the EU. This is due to the fragmented structure of public procurement in the country with several federal ministries and bodies, 16 state governments, and thousands of relatively independent municipalities and utilities. **Thus 80 to 90 per cent of all public and utilities procurement contracts in Germany are below the thresholds of the EC procurement directives.**

The German law of public procurement is **complicated**. On the federal level the system of rules regulating public procurement is generally described as a cascade (German: *Kaskadenprinzip*). Part IV of the *Gesetz gegen Wettbewerbsbeschränkungen (GWB)*, the (Federal) Act against Restraints on Competition contains the basic principles of public procurement and most notably the basic rules on the review and remedis system. The details are left to a (federal) regulation the *Vergabeverordnung (VgV)*, the Regulation on Public Procurement. The Regulation refers to the detailled substantive rules in three main procurement orders: the *Verdingungsordnung für Leistungen – Teil A (VOL/A)*, the Order on Tender Procedures for Supplies and Services, the *Vergabeordnung für Bauleistungen – Teil A (VOB/A)*, the Order on Tender Procedures for Public Works, and the *Verdingungsordnung für freiberufliche Leistungen (VOF)*: Order on Tender Procedures for Services by Free-Lancers. This system of (1) the Act against Restraints on Competition referring to (2) the Federal Regulation which in turn refers back to (3) the Procurement Orders is what is described as a cascade. These rules on the federal level – especially the Act against Restraints on Competition and the Procurement Orders also form the legal foundation of procurement on the state (regional) and municipal levels.

On the **state (regional) level** (German: *Länderebene*) there are state acts on public procurement which normally contain thresholds which are below those of the EC directives and federal German law. Examples are the Act on the Procurement of Works Contracts in the Free State of Bavaria (*Gesetz über die Vergabe von Bauaufträgen im Freistaat Bayern)*, the Berlin Procurement Act (*Berliner Vergabegesetz*), the Procurement Act for the State of Bremen (*Vergabegesetz für das Land Bremen*), the State Procurement Act of Lower Saxony (*Landesvergabegesetz*), the Act on the Procurement of Works in Saarland (*Gesetz über die Vergabe von Bauaufträgen im Saarland*), the Act on Procurement of the Free State of Saxony (*Gesetz über die Vergabe von Bauaufträgen im Freistaat Sachsen*), and the Act on the Procurement of Works of the State of Saxony-Anhalt (*Gesetz über die Vergabe öffentlicher Bauaufträge im Land Sachsen-Anhalt*). In addition a number of German states have passed laws on SRRP which shall be discussed below.

On the **municipal level** there are procurement orders which contain a number of special rules reflecting local priorities in addition to the general references to the federal and state laws regulating public procurement, outlined above. These orders and regulations are a reflection of the far reaching local autonomy of municipalities which is guaranteed by federal and state constitutions and regulated by state law. The municipal procurement orders can regulate most or all procurement of a municipality, for example the Public Procurement Order for the Administration of the City of Düsseldorf [German: *Vergabeordung für die Stadtverwaltung Düsseldorf (VergO)*) in North Rhine – Westphalia. Alternatively, municipal procurement orders only regulate certain sections of the municipal administration, for example the Procurement Order for the Municipal Building Management of the City of Bonn (German: *Vergabeordung des städtischen Gebäundemanagments Bonn*) in North Rhine-Westphalia. SRRP can feature as local priorities in these municipal rules.

3. Federal level (German: "Bundesebene")

Due to the federal structure of Germany and the autonomy of its municipalities, there is **less procurement activity** at the Member State (federal) level than in most other Member States. However, the competencies of the federal level still require a substantial procurement budget, most notably for road construction and the armed forces.

While overall the federal level has a **negative attitude towards SRRP** since they are considered to compromise value for money and other essential procurement principles, there a number of relevant rules and practices in place.

First, 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 the disabled. This might even involve large supply and services contracts (Source: Procurement Office of the Federal Ministry of the Interior). Participation in these workshops is limited to disabled workshops (§ 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.

Second, § 3 (3) letter o of Procurement Order VOL/A the restricted procedure can be used outside the field of application of the EC directives when the contracting authority intends to award contracts to **prisons, youth work institutions, vocational training or similar instiutions**.

Third, § 5 of the Procurement Order for Supplies and Services VOL/A represents the main provision for the **promotion of SME** in public procurement. An SME is generally defined as a crafts or industrial undertaking with an annual turnover of € 5 million or up to 65 employees, a retail undertaking with an annual turnover of € 2.5 million, a wholesale undertaking with an annual turnover of up to € 7.5 million, an other trade undertaking of a professional undertaking of an annual turnover of up to € 0.5 million, or associations of undertakings that meet the requirements of any of the previously named categories. According to § 5 paragraph 1 VOL/A wherever economically feasible, contracts should be divided into lots to facilitate the participation of SME. In addition there is a general '**SME Intitiative of the Federal Government**' (*Mittelstandsinitiative der Bundesregierung*) of 2006 which does however not contain specific action in the field of public procurement, although the general objective of reducing paperwork and bureaucracy and to abolish unnecessary regulations also apply in the procurement context.

Two studies containing guidelines for SRRP are available to federal, regional, and municipal contracting authorities:

"*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)

SRRP are seen as making already difficult procurement processes even more difficult thereby undermining the primary objective of meeting the needs of the authority on time (Source: Procurement Office of the Federal Ministry of the Interior). Moreover, budget constraints, little incentives and lack of clarity of the relevant rules are named as main **barriers for SRRP** (Source: Federal Office for Economy and Export Control). Furthermore, difficulties in measuring the benefits are an important obstacle (Sources: Federal Office for Economy and Export Control and Federal Agency for External Trade). The scarcity of tenderes who can meet SRRP requirements is also named as a barrier (Sources: Federal Agency for External Trade and Procurement Office of the Federal Ministry of the Interior).

4. State level

On the State or regional level (German: *Länderebene*) several social considerations are accommodated in public procurement proceedings or have been accommodated until recently. These social considerations include the protection of collective bargaining agreements, the prevention of purchase of supplies produced by

exploitative child or slave labour, and the promotion of SME. The state level is particularly important because it does not only affect the regulation of the considerable procurement activities of the state ministries and public bodies. The German states also have the competence to regulate local government – there is no 'German local government act' but 13 separate state local government acts (Berlin and Hamburg have a double nature as being both States and municipalities and Bremen has only two municipalities).

4.1 Collective bargaining agreements

According to the 2007 BMWI Study in 2002, at page 13, 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 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. Also on the basis of these findings the 2007 BMWI Study argued strongly against the *Tariftreuegesetze*. 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, and as anyway only half of the German states ever had such a law it can be assumed that this kind of law will soon be very rare in Germany.

4.2 *Prevention of exploitative child and slave labour*

Similar to the municipal level discussed below, more recently there have been **moves in some German states to use public procurement as a tool against exploitation in developing countries**. The state parliaments (*Landtage*) of the states of Bavaria and Saarland passed a motion asking their state governments and the parliaments themselves not to procure supplies produced under conditions involving exploitative child labour. In both states the motions were passed with the votes of all political groups, including Christian Democrats and Liberals who have majorities in both state parliaments (Source: Landtag Nordhein-Westfalen, Plenarprotokoll 14/80, 20.12.2007, at 9423).

A motion with the same wording of the Bavarian motion was debated in the state

parliament of North Rhine Westphalia on 20th December 2007. In contrast to the unanimous support it had received in Bavaria and Saarland, the North Rhine-Westphalia parliament was **divided along the usual party lines with the minority Social Democrats and Greens in favour and the ruling Christian Democrats and Liberals against**. The main arguments against the motion were that such a regulation or policy would violate EU and German law and be difficult to implement in practice. The motion was transferred to a Committee of the state parliament and has not been decided yet (Source: Landtag Nordhein-Westfalen, Plenarprotokoll 14/80, 20.12.2007). As the opposing parties have a majority, the motion is likely to be rejected.

4.3 Promotion of SME

While generally there is a strong opposition against the use of social criteria in public procurement procedures, the promotion of SME (German: *Mittelstandsförderung*) is widely seen as a **separate issue**, especially on the state (regional) level. Even the 2007 BMWI Study advocates a carefully supportive position. 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 Hesse (*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 ands 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 tätigern 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 (*Mittelstadnsförderungsgesetz*) 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**.** 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, and § 13 (1) Thuringian SME Act.

Second, contract conditions with main contractors should include a clause 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).

The cabinet of the State of North Rhine Westphalia, for example, intends to introduce amendments to the current state law regulating public procurement **below the thresholds** of the EC public procurement directives. This is currently (March 2008) prepared in the State Ministry for Economy, SME, and Energy (the title of the ministry includes SME!). (1) Generally, the participation is already ensured through the necessary publication when the open and restricted procedures are used. For the negotiated procedures, this should be ensured through a general requirement to consider SME. (2) There should be a requirement to split contracts into smaller lots. (3) There should a requirement for bidders to carry at least 50 per cent of the contract within their own company. (4) Proving qualification should be simplified and bidders be allowed to prove qualification though mandatory qualification lists. (5) Consortia must not have any disadvantages when compared to 'single' bidders. (6) At least 14 days should be allowed for the submission of bids. (7) Tender securities should be abolished and any other securities should be limited to those that are designed to protect the bidders from damage. (8) If central purchasing units are used this needs to be documented and the contracts have to be split into lots to allow SME participation. (9) Electronic tenders have to be accepted. (10) A new and quick – preferably consensual – review procedure will be developed (Source: North Rhine Westphalia State Ministry for Economy, SME, and Energy).

While not all aspects of the current discussion in the State of North Rhine-Westphalia will feature in the other 15 German states, most of these are **also discussed elsewhere in Germany.**

4.4 Promotion of the Employment of Women

The State of Brandenburg appears to be the only German state with a specific law on the promotion of the employment of women. 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 is applicable 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 and there is no information on its operation and performance in practice.

Difficulties in measuring the benefits of SRRP, lack of clarity on how to integrate social issues in the procurement process, and the scarcity of sufficient suppliers and service providers who can meet SRRP requirements are named as the main **barriers to SRRP** at the state (regional) level. Budget constraints and a lack of incentive are also a factor (Source North Rhine-Westphalia Ministry of Economy, Energy, and SME).

5. Municipal level

The municipal level is particularly important as far as public procurement below the thresholds of the EC public procurement directives is concerned. While, as pointed out above, the German states have the competence to regulate local government, the freedom of German districts (German: *Kreise*) and municipalities (German: *Städte und Gemeinden*) is guaranteed by the Federal Constitution. This gives **German municipalities a wide margin of freedom** compared to other Member States of the EU. The English concept of 'local government' is therefore not completely translatable into the German context.

On the municipal level (German : *Kommunalebene*) there is a generally **favourable attitude to the inclusion of social criteria in public procurement**. Most notably the General Committee of the Association of German Municipalities (German: *Deutscher Städtetag*) on 15th February 2002 passed a resolution in favour of the inclusion of social criteria in public procurement. However, this position is not shared by all municipalities. In the current discussion social consideration feature mainly in the context of measure to prevent the purchase of products produced though exploitative child labour and certain low value purchases from workshops for the disabled and the (long term) unemployed.

5.1 Procurement as a tool against exploitation in developing countries

More recently there have been **moves in many municipalities to use public procurement as a tool against exploitation in developing countries**. According to the leading German news magazine *Der Spiegel*, 47/2006, pages 102-104, 55 German municipalities including Munich (Bavaria), Darmstadt (Hesse), Hanover (Lower Saxony), Stuttgart (Baden-Württemberg), Bonn (North Rhine-Westphalia), and Frankfurt on the Main (Hesse) have decided not to procure any building materials which cannot prove beyond any reasonable doubt that they were produced without exploitative child labour. Critics have called this issue a "*Modethema*" (English: fashionable topic or "flavour of the month"). In other words, it is often considered an issue which can be used by municipal politicians to raise their profile and by the press to fill pages and air time, rather than as a serious policy which will be monitored and implemented in practice.

Examples include the following:

- The Procurement Order for the **Municipal Building Management of the City of Bonn** (German: *Vergabeordung des städtischen Gebäundemanagments Bonn*) [North Rhine - Westphalia] of 1st May 2005: " In the context of public contract awards and procurement […] the decision of the City council of 8th March 2004 on compliance with standards preventing exploitative child labour, are to be applied [translation Trybus]."

- **City of Gelsenkirchen** (North Rhine - Westphalia) press notice 14th November 2005: "City does not buy products from exploitative child labour [translation Trybus]."

- **City of Gronau** (North Rhine - Westphalia) web site www.gronau.de: "City of Gronau fully supports the Citizen's Bill – no Exploitation with Tax Money [translation Trybus]."

- **City of Erkrath** (North Rhine - Westphalia): "Erkrath against Child Labour [translation Trybus]" *Neue Rhein Zeitung*, 27th February 2008, also reporting about similar City Council debates in Munich (Bavaria) in 2002 and in Düsseldorf and Neuss (both North Rhine - Westphalia).

- Public Procurement Order for the Administration of the **City of Düsseldorf** in North Rhine-Westphalia [German: *Vergabeordung für die Stadtverwaltung Düsseldorf (VergO)*) Point 7.3.: "Moreover, 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 [translation Trybus]."

- Public Procurement Order (German: *Vergabeordung*) of the **City of Neuss** (North Rhine - Westphalia) § 1 sentence 2 [after sentence 1 listing all European and German legal requirements]: "This includes the ratified international social standards on the prohibition of exploitative child labour [translation Trybus]".

- The "*Feuerwehr*" (English: **Fire Protection Service) of Düsseldorf** (North Rhine – Westphalia) requires the suppliers of their service clothes to prove that these were produced without exploitative child or slave labour (source: city of Düsseldorf).

While there are many reservations against these procurement policies, regulations, and practices, which shall be outlined below, policy makers and practitioners think that they will probably have a **positive effect in practice** with regards to the social objectives they aim to achieve. A tenderer who is known to have supplied goods produced with the use of child or slave labour, for example, will find it difficult – if not impossible – to be awarded a contract by any contracting authority in Germany (Source: North Rhine Westphalia Ministry of Economy, SME and Technology, Federal Ministry of Economy and Technology, and City of Düsseldorf).

However, it is not clear (1) **whether these regulations and practices comply with the requirements of European Community and German procurement law** outlined above and (2) **how they could be enforced** in practice. For example:

- In response to a question of the Green Party group in the City Council of the **City of Wuppertal** (North Rhine – Westphalia), the office of the mayor pointed out in an answer of 21st December 2006, on page 2 that "a declaration required from bidders that their products would comply with certain considerations of general interest (for example with respect to the prohibition of forced labour, discrimination, child labour, etc.) could not be controlled and verified by the City of Wuppertal [translation Trybus]."

- According to the article in *Der Spiegel* mentioned above, the responsible city administrator for construction (German: *Baustadtrat*) in one of the affected district administrations of **Berlin** and his colleagues (German *Bauderzernenten*) in **Darmstadt** (Hesse) and **Cologne** (North Rhine-Westphalia) consider it particularly difficult to find a suitable means to prove that, for example building stones have not been produced with the use of child labour.

Moreover, as mentioned by a member of the administration of the City of Düsseldorf, (3) there are **not that many products procured by municipal contracting entities which could be affected** by exploitative child labour. Relevant products include coffee, construction material, and clothing.

Finally, according to the article in *Der Spiegel* mentioned above, an important consideration is that (4) a bidder who would be rejected because he could not produce a required certificate proving that his products were not produced in violation of certain social standards might be able to **challenge these procurement decisions in the review bodies and be awarded damages** to be paid by (the relatively poor) municipalities.

5.2 Workshops for the disabled

There appears to be a procurement policy in favour of the disabled and the (long-term) unemployed in many municipalities. According to the **City of Düsseldorf** especially low value contracts are directly awarded to workshops for the disabled (German *Behindertenwerkstätten*) or the (long term) unemployed. These workshops are often partly or fully owned by the municipalities who award these contracts.

Difficulties in measuring the benefits of SRRP, lack of clarity on how to integrate social issues in the procurement process, and the scarcity of sufficient suppliers and service providers who can meet SRRP requirements are named as the main **barriers to SRRP** at the municipal level. Budget constraints and a lack of incentive are also a factor (Source: City of Düsseldorf, North Rhine-Westphalia).

6. Utilities

There is no information on the use of social criteria in the procurement procedures conducted for public or privately owned utilities.

7. Conclusions

Generally speaking in 2008 policy makers and contracting entities in Germany are opposed to SRRP as they are feared to compromise value for money and transparency, especially regarding contracts above the thresholds of the EC public procurement Directives. An important aspect of this negative attitude is that public procurement is not considered to be the appropriate instrument to promote social considerations. German constitutional law, tax law, social law, disabled law, employment law, criminal law, child law, and occupational safety and health law are considered more appropriate instruments to enforce social considerations. A reservation frequently put forward in the discussion is the difficulty for the already stretched procurement officers, especially in the municipalities, to implement and enforce such social considerations in an already highly regulated procurement process. However, the inclusion of social criteria in the public procurement process is subject to a fierce political debate in Germany. The dividing line on the federal, state

(regional), and municipal levels is that between the two main political camps.

Recently the prevention of exploitative child and slave labour on the municipal and state (regional) levels has been the subject of intensive press coverage as well as political and academic debate. This debate is still ongoing. Workshops for the disabled and (long term) unemployed are often at least partly owned by municipalities who directly award many low value contracts to these establishments. The promotion of SME is considered a separate issue, especially on the State (regional) level. Many critics of the inclusion of (other) social criteria support the promotion of SME in the procurement process.

Study on Social Considerations in Public Procurement

Country Legal and Policy Review for SRPP in Italy

Author: Prof. Roberto Caranta

Rome, March 20, 2008

Note: During a study visit to Italy on 20 March 2008 meetings with the Vigilance Authority for Public Procurement, the Piedmont Regional Government and the University of Turin were held.

I have benefited from discussions with:

Alessandro Botto, Member of the Vigilance Authority for Public Procurement, Rome, and Filippo Romano, charged with the technical assessment of procurement procedures within the same authority. The Autorità is responsible for the overview of public procurements in Italy and has the status of an independent administrative authority; its members are named by the Presidents of the two Houses of Parliament for five years and chosen among leading experts in the field of public procurements.

Leonardo Comberiati, expert in Public Affaire Management, Giovanni Cairo, Member of the Human Resources Division, Giovanna Botto, Legal Advisor: all services of the Piedmont Regional Government.

Claudia Bonifanti, Member of the Department of Public Assets, University of Turin.

This report is largely based on the information gathered during these meetings.

1. Summary

This report is based on first hand research in the legal environment and on interviews with officials at vigilance authorities and procuring entities.

After mentioning the people and organisations which contributed with information, the report will briefly sketch the institutional and legal framework for public procurement in Italy and its influence on how social considerations may be taken into account. Analysis of those social considerations already incorporated in the relevant – usually general mandatory – legislation will follow. The uncertain situation as to other "optional" social considerations will come next. A few remarks on specific Italian issues will precede the conclusions.

2. Institutional and legal environment

Although not (yet) in the shape of a federal State, Italy is in a process of gradual devolution of competences to the regional and local level.

According to a recent and controversial decision by the Constitutional court, the State has exclusive competence in legislating and regulating public procurement in so far as issues of competition – read in a generous sense – may arise (Corte Cost., 23 novembre 2007, n. 401, nyr).

D.lgs. 12 aprile 2006, n. 163, "Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE" (G.U.R.I. 2 maggio 2006, n. 100 - Supplemento Ordinario n. 107), hereinafter the "Code", has taken the place of various pecies of legislation specific to works, supplies and services procurements. It has already been amended a few times and is the ideal candidate for further reform after oncoming the April 13th and 14th general election. A new statutory instrument is in the pipeline but it may be assumed it will be delayed if not derailed because of policy changes.

The State also has legislative competence with reference to many aspects of the social legislation.

The provisions in Directives 2004/17/CE and 2004/18/CE opening up some room for social consideration in public procurements have found their way in the Codice. Art. 2(2) stipulates that, within the limits prescribed by the Code itself, the best value for money principle may accommodate, social and similar concerns if the contract notice so provides («2. Il principio di economicità può essere subordinato, entro i limiti in cui sia espressamente consentito dalle norme vigenti e dal presente codice, ai criteri, previsti dal bando, ispirati a esigenze sociali, nonché alla tutela della salute e dell'ambiente e alla promozione dello sviluppo sostenibile».

Community provisions incorporating social considerations in public procurements usually are not mandatory, and as such they were transposed into the Italian legislation. The attention paid to social considerations will therefore vary from procurement procedure to procurement procedure and will in the end rest on the commitment to social policy of each and any procuring entity.

Some social considerations are, however, taken into account by general rules outside the Code whose incorporation in the contract specification is normally mandatory. This is the case for instance with reference to the mandatory employment of disadvantaged people, social security and benefits, working hours, sufficient and equal pay, occupational safety and health.

If the legislative environment is more or less the same all over Italy, the competence manage public procurement procedures is very much decentralised. Consip s.p.a. is acting as a central purchasing entity for serial supplies and a few services (its records are shaky at best and were criticised by the Court of auditors: C. conti, Sez. centr. Contr. Stato, 1-7-2003, n. 26/2003/G, in *Foro Amm. CdS*, 2003, 2659, con nota di BALDANZA, *Prime considerazioni della Corte dei conti sul sistema di acquisti centralizzato tramite Consip s.p.a.*). Most public law entities, however, manage their procurements themselves. At times, and is not only the case with the State but also with the Regions and other sub-national entities, specific units within each entity procure autonomously what they need. This is the case in many Regions with the units responsible for health care in any given districts manages their

own procurements, even if a few Regions have created centralised purchasing bodies at times managing e-procurements (e.g. Art. 18 ff. l.reg. Emilia Romagna, 24 maggio 2004, n. 11).

3. Mandatory protection of social rights

Contractors are asked to abide to social and security rules (see Cons. 34 and Art. 27 of directive 2004/18/EC). As elsewhere, in Italy many social considerations have evolved into social rights benefiting from protection at either Constitutional or legislative level.

3.1 Workers' rights, including social contributions

Under Art. 38 of the Code, implementing Art. 27 of EC Directive, 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)* che hanno commesso gravi infrazioni debitamente accertate alle norme in materia di sicurezza e a ogni altro obbligo derivante dai rapporti di lavoro, risultanti dai dati in possesso dell'Osservatorio»; «*i)* che hanno commesso violazioni gravi, definitivamente accertate, alle norme in materia di contributi previdenziali e assistenziali, secondo la legislazione italiana o dello Stato in cui sono stabiliti»; the latter provision is also the implementation of Art. 45(2)(e) of Directive 2004/18/CE; see also Art. 40(4)(d) of the Code, setting up a qualification system for works procurements).

Procuring entities are charged to check that social contribution rules and work security provisions are abided to. Under Art. 9 of the Code, procuring entities may set up a single contact point to inform all potential bidders as to the rules concerning *inter alia* occupational safety (Art. 9(1)(a): «1. Le stazioni appaltanti possono istituire un ufficio, denominato «sportello dei contratti pubblici relativi a lavori, servizi, forniture», con il compito di: *a)* fornire ai candidati e agli offerenti, e ai soggetti che intendono presentare una candidatura o un'offerta, informazioni relative alle norme vigenti nel luogo di affidamento e di esecuzione del contratto, inerenti agli obblighi fiscali, alla tutela dell'ambiente, alle disposizioni in materia di sicurezza e condizioni di lavoro, nonché a tutte le altre norme che devono essere rispettate nell'esecuzione del contratto»; the provision is implementing Art. 27 of EC directive 2004/18/EC).

Moreover, the Osservatorio dei contratti pubblici relativi a lavori, servizi e forniture, a statistical technical unit attached to the Autorità per la vigilanza dei contratti pubblici di lavori, servizi e forniture, is charged with collecting data on, among others, workforce costs and security measures referred to in contract notices all over the Country, in the view of establishing standard performance costs (Art. 7 (4)(a) of the Code: «*a)* provvede alla raccolta e alla elaborazione dei dati informativi concernenti i contratti pubblici su tutto il territorio nazionale e, in particolare, di quelli concernenti i bandi e gli avvisi di gara, le aggiudicazioni e gli affidamenti, le imprese partecipanti,

l'impiego della mano d'opera e le relative norme di sicurezza, i costi e gli scostamenti rispetto a quelli preventivati, i tempi di esecuzione e le modalità di attuazione degli interventi, i ritardi e le disfunzioni»).

It is doubtful that the present system is effective to contrast breaches of social security regulation taking place outside Italy, the less even so when breaches take place outside the EU. Procuring entities will not normally be knowledgeable as to the social regulation in force outside the country. At the same time, they risk imposing Italian standards to forms operating outside Italy.

3.2 Security on the workplace

The all matter of security at the workplace is now in process of being reconsidered in Italy. L. 3 agosto 2007, n. 123 "Misure in tema di tutela della salute e della sicurezza sul lavoro e delega al Governo per il riassetto e la riforma della normativa in materia" (in G.U.R.I. 10 agosto 2007, n. 185), has given the Government the power to introduce new legislation.

Of specific interest here is the instruction to amend public procurements rules with the view to enhance protection of workers' secutiry. More specifically, Art. 2(2)(s), instructs the Government to 1) make sure that subcontractors' employees enjoy optimal security condition; 2) rewrite rules on the lowest price award criteria with the aim to avoid detriment to the security of working conditions; 3) make sure that security costs are predetermined in the contract documents and cannot tampered with («1) migliorare l'efficacia della responsabilità solidale tra appaltante ed appaltatore e il coordinamento degli interventi di prevenzione dei rischi, con particolare riferimento ai subappalti, anche attraverso l'adozione di meccanismi che consentano di valutare l'idoneità tecnico-professionale delle imprese pubbliche e private, considerando il rispetto delle norme relative alla salute e sicurezza dei lavoratori nei luoghi di lavoro quale elemento vincolante per la partecipazione alle gare relative agli appalti e subappalti pubblici e per l'accesso ad agevolazioni, finanziamenti e contributi a carico della finanza pubblica; 2) modificare il sistema di assegnazione degli appalti pubblici al massimo ribasso, al fine di garantire che l'assegnazione non determini la diminuzione del livello di tutela della salute e della sicurezza dei lavoratori; 3) modificare la disciplina del codice dei contratti pubblici relativi a lavori, servizi e forniture, di cui al decreto legislativo 12 aprile 2006, n. 163, prevedendo che i costi relativi alla sicurezza debbano essere specificamente indicati nei bandi di gara e risultare congrui rispetto all'entità e alle caratteristiche dei lavori, dei servizi o delle forniture oggetto di appalto»).

Security measures are particularly strict in works procurements. Indeed, works are carried out in the jurisdiction of the procuring entity, which is in the position to check that all security arrangements are met. Moreover, Italian police and vigilance authorities concur in checking that security rules are respected.

Supply and services are a different matter, since goods may be manufactured and services provided from abroad, possibly outside the EU. Even if the impression is that local firms gets most of the contracts, they are still selling goods and – to a lesser extent services – actually produced somewhere else.

L. 3 agosto 2007, n. 123, has introduced a specific regulation concerning risks in supplies and services procurements. Procuring entities must draft a new document, the Documento unico di valutazione dei rischi (DUVRI), outlining the risks implied in the implementation of the contact due to the fact that the contractor's workers may operate on the premises and/or in contact with the procuring entity's own personnel and/or users served by the procuring entity (so called interference risks). Art. 8 of the new law has amended Art. 86 of the Code, 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 offers cannot lower them («*3-bis.* Nella predisposizione delle gare di appalto e nella valutazione dell'anomalia delle offerte nelle procedure di affidamento di appalti di lavori pubblici, di servizi e di forniture, gli enti aggiudicatori sono tenuti a valutare che il valore economico sia adeguato e sufficiente rispetto al costo del lavoro e al costo relativo alla sicurezza, il quale deve essere specificamente indicato e risultare congruo rispetto all'entità e alle caratteristiche dei lavori, dei servizi o delle forniture. Ai fini del presente comma il costo del lavoro è determinato periodicamente, in apposite tabelle, dal Ministro del lavoro e della previdenza sociale, sulla base dei valori economici previsti dalla contrattazione collettiva stipulata dai sindacati comparativamente più rappresentativi, delle norme in materia previdenziale ed assistenziale, dei diversi settori merceologici e delle differenti aree territoriali. In mancanza di contratto collettivo applicabile, il costo del lavoro è determinato in relazione al contratto collettivo del settore merceologico più vicino a quello preso in considerazione. *3-ter*. Il costo relativo alla sicurezza non può essere comunque soggetto a ribasso d'asta»).

The new provisions are not without difficulties, and the Autorità per la vigilanza dei contratti pubblici di lavori, servizi e forniture, after consultation with the stakeholders, recently drafted an interpretative communication (Determinazione n. 3/2008, March 5, 2008), pointing out that the new document superpose itself and does not substitute the security document each firm has to elaborate with reference to the implementation risks falling under its sphere of responsibility (page 8 f.).

Here again, the law maker is mainly concerned with what is taking place under the direct jurisdiction of the procuring entity and anyway on the national soil. Of course the law maker also refers to circumstances possibly taking place outside Italy.

3.3 Rules on abnormally low offers

A focal point for the emergence of breaches to social protection rules is the review of abnormally low offers. Indeed, abnormally low offers may be precisely due to the breach of some rule concerning the protection of workers. Art. 55(1)(d) of Directive 2004/18/EC simply stipulates that justifications may refer to the respect of working condition, the Italian legislation is by far more specific. Art. 87(2)(e) of the Code is the same as Art. 55(1)(d) of the Directive. However, Art. 87(2) goes much further. 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 («*g)* il costo del lavoro come determinato periodicamente in apposite tabelle dal Ministro del lavoro e

delle politiche sociali, sulla base dei valori economici previsti dalla contrattazione collettiva stipulata dai sindacati comparativamente più rappresentativi, delle norme in materia previdenziale e assistenziale, dei diversi settori merceologici e delle differenti aree territoriali; in mancanza di contratto collettivo applicabile, il costo del lavoro è determinato in relazione al contratto collettivo del settore merceologico più vicino a quello preso in considerazione»).

Art. 87(3) rules out the admissibility of justifications relating to minimum wages («3. Non sono ammesse giustificazioni in relazione a trattamenti salariali minimi inderogabili stabiliti dalla legge o da fonti autorizzate dalla legge»), and Art. 87(4) does the same with reference to security measures relating to contract implementation («4. Non sono ammesse giustificazioni in relazione agli oneri di sicurezza per i quali non sia ammesso ribasso d'asta in conformità all'articolo 131, nonché al piano di sicurezza e coordinamento di cui all'articolo 12, decreto legislativo 14 agosto 1996, n. 494 e alla relativa stima dei costi conforme all'articolo 7, decreto del Presidente della Repubblica 3 luglio 2003, n. 222. In relazione a servizi e forniture, nella valutazione dell'anomalia la stazione appaltante tiene conto dei costi relativi alla sicurezza, che devono essere specificamente indicati nell'offerta e risultare congrui rispetto all'entità e alle caratteristiche dei servizi o delle forniture»).

The problem is how far the procuring entities may go in forcing wages, social and other security costs inevitably calculated against the Italian legislative background on firms coming from other countries, this even the more so if these firms come from EU Member States. Here again, it is much easier to check the respect of workers rights in public procurement for works, since the security legislation applicable to the workers would normally be the Italian one.

Especially when suppliers of goods and services are from the European Union, the desire to protect national firms and workers from social dumping has to be carefully balanced with the need not to set barrier to the free circulation of goods or services. The recent legislative amendments, possibly worried of the dangers facing the Italian social security systems, seem to go a long way in imposing national standards even on goods and services supplied from outside Italy. This way they follow the lead provided by the case law. The *Consiglio di Stato*, Italian highest administrative court, held that a French firm could not exonerate what appeared an abnormally low bid in a procurement for goods by referring to less strict – and onerous – security on the workplace legislation in force where the goods were manufactured (Cons. Stato, Sez. IV, 27 ottobre 2003, n. 6640, in *Giur. it.*, 2004).

It is doubtful whether this ruling is consistent with Community law.

3.4 Social inclusion of handicapped workers

Specific legal rules have been enacted for the social inclusion of handicapped workers. Art. 3 l.12 marzo 1999, n. 68 "Norme per il diritto al lavoro dei disabili" (in G.U.R.I. 23 marzo 1999, n. 68 - Supplemento Ordinario n. 57), mandates compulsory hiring of handicapped workers according for both public and private law entities. According to Art. 17, candidates must show and be ready to prove that they comply with the provisions on mandatory hiring of handicapped workers, otherwise facing exclusion from the procedure («1. Le imprese, sia pubbliche sia private, qualora partecipino a bandi per appalti pubblici o intrattengano rapporti

convenzionali o di concessione con pubbliche amministrazioni, sono tenute a presentare preventivamente alle stesse la dichiarazione del legale rappresentante che attesti di essere in regola con le norme che disciplinano il diritto al lavoro dei disabili, nonché apposita certificazione rilasciata dagli uffici competenti dalla quale risulti l'ottemperanza alle norme della presente legge, pena l'esclusione»; see also Art. 38.

It is unclear how to make sure these high standard of social protection do not lead to a competitive disadvantage for Italian firms in public procurement for goods and services provided from abroad, in so far as state of origins rules are less protective for handicapped workers.

3.5 Accessibility for all

Measures to promote accessibility for all have been part of Italian building legislation since l. 9 gennaio 1989, n. 13 and l. 27 febbraio 1989, n. 62, "Disposizioni per favorire il superamento e l'eliminazione delle barriere architettoniche negli edifici private". These days an extensive regulation is to be found Art. 77 ff. D.P.R. 6 giugno 2001, n. 380, "Testo unico delle disposizioni legislative e regolamentari in materia edilizia" (G.U.R.I. n. 245 del 20 ottobre 2001 - Supplemento Ordinario n. 239). The legislation applies to both private and public buildings. Concerning public procurement for works, all new buildings must conform to accessibility for all standards, to be taken into account when designing the works. Specific funds are set aside to upgrade both private and public buildings to the same standards.

Specific rules have been adopted concerning accessibility to the websites of public law entities and private entities entrusted with the provision of services of general interest (usually economic). L. 9 gennaio 2004, n. 4, Disposizioni per favorire l'accesso dei soggetti disabili agli strumenti informatici. According to Art. 4 (1), in case of equal bids in IT procurements, accessibility requirements are a reason for preference. Under Art. 4 (2), technical requirements in procurements for websites must be drafted taking into account accessibility rules laid down by the Government. The same applies to IT procurements by the private sector and NGOs when they were made possible thanks to public grants. The technical rules were laid down in DPR 1 marzo 2005, n. 75. The CNIPA - Centro Nazionale per Informatica nella Pubblica Amministrazione, provides information on the scheme on its website: www.cnipa.gov.it , but also created a specific website: www.pubbliaccesso.gov.it . It checks that the law is abided to. It adopted a decree listing firms charged with certifying accessibility.

3.6 Protection of workers in case contracts are newly awarded to a different firm

A specific protection is offered to workers of cleaning services firms. According to the general contract conditions passed between trade unions and employers'

associations, the firm having been awarded a procurement has to hire the workers from the incumbent firm. In a way, rules on the transfer of undertakings are made applicable to this specific situation.

4. Optional social consideration rules

The Code does not contain any express reference to the ILO standards. The possibility left open by Cons. 33 of Directive 2004/18/EC has not been embraced at legislative level, even if social consideration may be taken into account by their own motion by the procuring entities provided they abide to the Code (see Art. 2(2), already mentioned).

Concerning contract performance conditions, Art. 26 of Directive 2004/18/CE, has been implemented by Art. 69 of the Code. The Italian provision is just a little bit more talkative than the Community one. What is peculiar is that procuring entities willing to insert performance conditions targeted to social or environmental consideration may ask the advice of the Autorità per la vigilanza dei contratti pubblici di lavori, servizi e furniture, which is given 30 days to respond.

It does not seem there is any general or specific policy indication at State level to encourage the insertion of social consideration and/or to foster CSR in public procurements processes.

However, a specific kind of firms – cooperatives – may benefit in procurement procedures form the special status and the benefits attached they enjoy on a more general level. A well established case law maintains that, while generally participants may not quote work costs below the legal minimum, cooperatives may well show that their members' costs are lower than the legal minimum thanks to more favourable social benefits rules exempting them form certain contributions (e.g. Cons. Stato, Sez. V, 15 giugno 2001, n. 3185, in *Foro amm.*, 2001, 1561).

The difficult question is whether more favourable rules amount to State aids and, if so, whether they are consistent with Community law.

Moreover, specific legislation has been enacted to promote participation to public procurements of entities employing disadvantaged people, NGOs and other civil society organsations

4.1 Social cooperatives

Art. 4 l. 8 novembre 1991, n. 381, amended a few times in the past, lays down the requirements a firm must meet to be considered a social cooperative. Two different kinds of social cooperatives are envisaged: 1) cooperatives operating in health and education, where the social objectives are mainly met by providing services to the most needy sections of the general public; 2) other social cooperatives which instead have as their mission to help disadvantaged people to work. In this case, disadvantaged people must make up for at least 30 per cent of their workforce. The

charitable work of participants is possible and is not bound by the rules on working conditions, different from those relating to social security. Disadvantaged people are defined as handicapped, people formerly committed to psychiatric wards, drug users and alcoholics, minors of at least minimal working age with difficult familiar conditions (Regions may however widen the scope of the provision: see Cass. Lav., 14 marzo 2005, n. 5472).

According to Art. 5, procuring entities may award social cooperatives below the threshold services contracts (services in the social and health and education areas being reserved to specific social cooperatives), following procedures divergent from usual public procurements rules (the under the threshold limit has been stressed in the case law: e.g. Cons. Stato, Sez. V, 30 agosto 2001, n. 4580, in *Foro Amm.*, 2001, 2044; T.A.R. Puglia, Bari, Sez. I, 7 maggio 2002, n. 2265, in *Foro Amm. TAR*, 2002, 1731; T.A.R. Puglia, Bari, Sez. I, 27 maggio 2000, n. 2307, in *Riv. It. Dir. Pubbl. Comunitario*, 2000, 1485; T.A.R. Marche, 7 aprile 2000, n. 521, in *Urbanistica e appalti*, 2000, 6, 674); Art. 5(4) further empowers procuring entity to state in the contract notice that the contract will have to be executed by employing disadvantaged people. Procurement procedures, when recurred to, may even be reserved to the participation of social cooperatives (e.g., with reference to management of kindergartens, Cons. Stato Sez. V, 17 aprile 2002, n. 2010, in *Foro Amm. CDS*, 2002, 929). Regions and local authority, however, may not limit participation to the procurement procedures to social cooperatives having their main office in their jurisdiction (T.A.R. Marche, 14 maggio 1999, n. 565, in *Trib. Amm. Reg.*, 1999, I, 2662); as a matter o principle, social consideration cannot be turned in localism or protectionism.

Apart for the management of kindergartens, social cooperatives are entrusted with janitorial and cleaning services (Cons. Stato, Sez. V, 30 agosto 2001, n. 4580, in *Foro Amm.*, 2001, 2044), nursing services (T.A.R. Veneto, Sez. I, 26 febbraio 2002, n. 957, in *Foro Amm. TAR*, 2002, 425), waste collection (T.A.R. Puglia, Bari, Sez. I, 27 maggio 2000, n. 2307, in *Riv. It. Dir. Pubbl. Comunitario*, 2000, 1485, but in that case the award was struck down because above the threshold).

The work of volunteers may only be partially counted against the costs reimbursed by the procuring entity (T.A.R. Campania, Salerno, Sez. I, 3 luglio 2002, n. 641, *Foro Amm. TAR*, 2002, 2651).

Regions have taken the lead from l. 8 novembre 1991, n. 381, adopting their own statutes on the matter. For instance, l.reg. Piemonte, 9 giugno 1994, n. 18 "Norme di attuazione della legge 8 novembre 1991, n. 381 'Disciplina delle cooperative sociali'" was adopted. According to Art. 7, when programming different social activities, the Region must foresee the specific contributions of social cooperatives, identifying those sectors where these cooperatives may play a relevant role thanks to their mix of public interest, entrepreneurship, and democracy («1. Nell'ambito degli atti di programmazione delle attività sociali, assistenziali, sanitarie ed educative, la Regione prevede le modalità di specifico apporto della cooperazione sociale e individua i settori di intervento nei quali le viene riconosciuto un ruolo particolare in forza delle caratteristiche di finalizzazione all'interesse pubblico, di imprenditorialità e democrazia che la caratterizzano»; similar provisions are found in Art. 8 f., concerning vocational training and employment policies,).

Art. 10 ff. l.reg. Piemonte, 9 giugno 1994, n. 18, deals with contracts between procuring entities and social cooperatives. The Regional government is

given the power to draft standard contracts; in order to avoid interruptions in the service provision, contract duration must extend more than one year, but to ensure proper vigilance, their implementation must be reviewed yearly. Given the type of activities concerned, Art. 12 rules out the award criterium 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. According to Art. 13(1), procuring entities must set aside a percentage of their procurement budget for contracts to be awarded to social cooperatives. Contract documents must foresee how many disadvantaged people are to be hired, with reference to which tasks and for how much time. A specific work project must be drafted with reference to any disadvantaged person. The award criteria must take into account the consistency of the program of social inclusion; the sustainability of the work opportunities offered; the territorial links of both the disadvantaged people and the sphere of intervention of the social cooperatives.
The l.reg. Piemonte, 9 giugno 1994, n. 18, further provides different aids and benefits to the different charitable activities performed by the social cooperatives.

4.2 Sheltered workshops

Art. 52 of the Code implements Art. 19 of directive 2004/18/CE on sheltered workshops, at the same time keeping in force the more generous provisions related to procurement award to other entities employing disadvantaged categories. The point is, sheltered workshop are not know as such in the Italian legislation. A recent interpretative document by the Autorità per la vigilanza dei contratti pubblici di lavori, servizi e forniture, while assessing this circumstance, has tried to shed some light on sheltered workshop and distinguish them from other entities employing persons issuing form many disadvantaged categories and not just handicapped people (Determinazione n. 2/2008, January 23rd, 2008). It is to be assumed that the pre-existing and by far more generous provisions will continue to be applied across the Country, at least in so far as below the threshold procurements are concerned.

4.3 Civil society and NGOs

Other measures have been taken pursuant the horizontal subsidiarity principle now enshrined in Art. 118 of the Italian Constitution. They envisage a deeper involvement of civil society, NGOs included, in the design and delivery of social policies. The leading text at national level is l. 7 dicembre 2000, n. 383, "Disciplina delle associazioni di promozione sociale" (G.U.R.I. 27 dicembre 2000, n. 300). NGOs corresponding to certain characteristics are listed in national and regional registers. They normally operate through the charitable work of their participants,

but they may also hire workers. They enjoy different fiscal benefits and may be rented space for free by the State and other public law entities. Under Art. 30, they may pass agreements with public law entities designing the services they may provide to sections of the general public, forms of control on the provision of the same services by the public law entity concerned, and the ways the NGOs may ask for refund of the costs they have shouldered.

The Government adopted an instruction directed to the Regions and to the local authorities on the procedures to be followed when entrusting social services to NGOs. According to Artt. 4 ff. D.P.C.M. 30 marzo 2001, Atto di indirizzo e coordinamento sui sistemi di affidamento dei servizi alla persona ai sensi dell'art. 5 della legge 8 novembre 2000, n. 328 (G.U.R.I. 14 agosto 2001, n. 188, Serie Generale). Art. 5 and 6 stipulate that public law entities responsible for the provision of social services may both procure the social services from the NGOs or entrust them with the provision of the services. In both cases, the choice of the NGO must follow transparent and competitive procedure. Under Art. 4, the award criteria must refer to the most economically advantageous offer having reference to the candidate's experience in the specific sector.

Here too the Regions have followed the lead of State. We may take for instance l.reg. Piemonte, 8 gennaio 2004, n. 1, "Norme per la realizzazione del sistema regionale integrato di interventi e servizi sociali e riordino della legislazione di riferimento". Art. 31(1) again rules out the lowest price award criterium. The Regional government is given the power to enact instructions to the local authorities with the view to encourage civil society, NGOs, and charities participation in the provision of social services. Concerning the award criteria to be used, Art. 31(4) refers to the need to enhance the project capability of contractors, to take into account the costs foreseen in nation-wide employment contracts, and to asses the quality standards of services provided to the public.

The Regional Government adopted the instructions foreseen by Art. 31 l.reg. Piemonte, 8 gennaio 2004, n. 1, with a decision taken on May 22nd, 2006. First of all it considers the huge variety of civil society organisations recognised by the national and regional legislation. Besides social cooperatives, we shall consider volunteers' organisations and the "associazioni di promozione sociale" recognised under l. 7 dicembre 2000, n. 383, and l.reg. Piemonte 7 febbraio 2006, n. 7 "Disciplina delle associazione di promozione sociale", non profit organisations, and others. Concerning the award of procurement conctracts for services, the instructions refer to the criteria listed in Art. 31 l.reg. Piemonte, 8 gennaio 2004, n. 1, mentioned above, and a preference for restricted and negotiated procedures. Best value for money can be considered a target as important as the quality of services provided to the general public or to specific sections thereof. Minimum wages as agreed upon at national level by trade unions and employers' organisations have to be complied with also in cases relating to workers associated in social cooperatives.

The document is relevant under two respects. On the one hand, it must consider the panoply of different civil society organisation that in the past two decades have found some form of legislative recognition and various benefits. It is suggested that clarity would very much benefit from any initiative aimed at the simplification of this multifarious panorama. On the other hand, it shows that many social services, particularly those targeted to individuals in need, are now provided by NGOs and other organisations following special award procedures where best value for money is

of limited relevance.

The EC Commissions remarks as to the peculiar position of social services in the Communication on Services of general interest, including social services of general interest: a new European commitment (COM(2007) 724 final, at 7 ff.), are reflected in the situation found in Italy. This is especially so when one considers the regional and local level, actually responsible for the provision of these services.

Indeed, NGOs play a relevant role in the provision of many social services. The legal position, however, will probably to have somewhat reassessed following the ECJ decision in Case C-119/06, *Commission v. Italy*. In particular, direct contracting without any transparency and competition is probably to be held inconsistent with Community law but for the very low value services.

At the same time, it is doubtful whether procedures stressing value for money are appropriate for awarding contracts concerning social services.

5. Social considerations in the Italian way

The social situation peculiar to (some parts of) Italy has exerted a not always benign influence on how social considerations may find room in public procurement procedures.

The most relevant case in point are the provisions on subcontracting. Subcontracting is the easiest way for SMEs to take some share of the public procurement market. The Italian legislation, however, has always been and still is very strict on subcontracting.

The first rules were laid down in Art. 18 l. 19 marzo 1990, n. 55 "Nuove disposizioni per la previsione della delinquenza di tipo mafioso e di altre gravi forme di manifestazione di pericolosità sociale". The legislative aim was not so much to protect the subcontractor's workers – just an ancillary preoccupation – but to make sure that firms somehow linked to Mafia-like organisations could not get a share of the public procurement market.

These days, Art. 118 of the Code stipulates that it is up to the procuring entity to indicate in the contract documents whether or not subcontracting will be allowed and for which of the items of the contract. For works procurements, maximum 30 per cent of the works may be subcontracting. For the items the procuring entity is ready to allow subcontracting, candidates must state already in their bids which items they will subcontract to others. The contractor must then send the procuring entity a copy of the contract with the subcontractors, along with certificates showing that the subcontractor has all the necessary requisites to be part of a contract with a procuring entity.

A very special type of "social considerations" are thus behind rules limiting not just subcontracting but also the possibility for the candidates to refer to someone's else technical requirement (Art. 47 of Directive 2004/18/EC). These rules adversely affects SMEs and may well be in conflict with Community law (Commissioner Charlie Mc Creevy sent a letter of formal notice to the Italian Government on January 30, 2008, lamenting *inter alia* the restrictive provisions on subcontracting and on the

possibility to refer to other firms' requirements).

Social considerations of the type discussed in this section have prompted the first advice concerning contract performance conditions given by the Autorità per la vigilanza dei contratti pubblici di lavori, servizi e forniture, under the procedure laid down by Art. 69 of the Code.

The provisional authority ruling the municipality of Pozzuoli, near Naples, whose elected council had been dissolved and mayor removed because of links with the Camorra, the local franchise of Mafia, asked the Authorità which special measures should be taken when awarding the contract. With an advice dated July3, 2007, the Authority suggested the adoption of specific security rules when dealing with the tenders to make sure they are not tampered with nor opened before the jury start its tasks. The Autorità further suggested to insertion of a clause empowering the jury charged with the selection of the best offer to ask the Autorità itself to investigate whether the qualifications of the participants were legally established.

It is doubtful whether any of the given indications were really linked to social consideration relating to the performance of the contract. It is however telling that in the first, and so far only, advice asked to the Autorità, the social considerations had in mind were the ones linked to the specific criminal environment in which the procuring entity finds itself.

6. Conclusions

Directive 2004/18/EC allowed procuring entities some scope in considering social issues when awarding contracts.

The Directive provisions have been transposed, at times almost words by words in the Italian legislation by D.lgs. 12 aprile 2006, n. 163, "Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE" (the "Code").

Entry into force of the Code is too recent to expect procuring entities to have really taken notice of the new possibilities. The high level of litigation in public procurements, which is exasperated by the present less than brilliant economic situation in Italy, may further discourage procuring entities from trying to apply innovative rules which have not yet been tested by experience and judicial scrutiny.

Workers' rights and security on the workplace have however been traditionally protected through social legislation contractors must abide to. The national legislation is now under revision with the aim to make sure that the competition forces working through procuring procedures don't end in menacing the protection of social rights.

Those provisions do not cover all and any working conditions standards, such as for instance freedom of association, collective bargaining, non discrimination an so on and so for. Most of these standards are accepted and protected by the Italian legal order, but public procurement rules are not seen as an instrument in their enforcement. Other, possibly more effective, instruments, including criminal sanctions, do exist, and also cover aspect such as child and forced labour which are

not widespread in Europe.

It is doubtful, however, whether traditional professional requisites and technical requirements are an effective tool in fostering socially sustainable procurements in a globalised world, where goods are no more manufactured under or services provided from the same jurisdiction as the one where the procuring entity is operating. The main issue under consideration by the Italian law maker seems to be avoiding social dumping at the detriment of local workers rather then improving the lot of workers in other places. So far there does not seem to be any initiative to promote "Fair or Ethical Trade"

The law is somewhat slow in taking up the challenges of a rapidly changing society. The same may be said with reference to accessibility and design for all, mainly relevant in relation to building standards (even if it probably plays a wider role in the provisions of services of general economic interest).

A number of legal texts allow the award of public procurements, usually relating to services (normally but not always "priority services" under Directive 2004/18/EC), keeping in mind social considerations such as the promotion of social inclusion, employment opportunities for disadvantaged people, and non profit economy. Normative consistency is not at its best here, and the slowly evolving Community legal framework on services of general economic interest, including social services, could contribute to a more straightforward approach to these issues.

Finally, specific social conditions peculiar to (some parts of) Italy have come in the way of laying down favourable conditions for the continuing development of SMEs, a traditionally strong feature of Italian economy. It will be probably up to the Court of justice to decide whether Italy has overdone its efforts to keep the hands of criminal organisations off from procurement money.

Study on Social Considerations in Public Procurement

Country Legal and Policy Review for SRPP in Northern Ireland

Author: Prof. C. McCrudden
March 2008

Note: During a study visit to Ireland in March 2008 meetings with the Central Procurement Directorate were held.
This report is based on the information gathered during these meetings. I have benefited from discussion with: David Orr, Director of Central Procurement Directorate, Brendan O'Neill, Acting Divisional Director.

1. Summary

This note on current policy and practice relating to the integration of social issues into public procurement in Northern Ireland is based on research based on public documents, supplemented with an extensive interview with representatives of the Central Procurement Directorate, whose central role is discussed below. This note is still in draft form and is prepared to illustrate some issues and approaches that have arisen in the Northern Ireland context. It has not yet been cleared with the Central Procurement Directorate. The note begins with a brief account of the background to current policy, in particular the role of the Review into procurement policy that reported early this century. I then turn to consider the legislative basis for Northern Ireland social issues in procurement, before turning to consider some characteristics of the procurement market and procurement regulation in Northern Ireland. The Note then considers the general principles relating to current procurement policy relating to social issues before turning to consider the detailed outworking of procurement policy between 2004 and 2007 (primarily the period when there was no devolved government in Northern Ireland and there was "direct rule" from London), looking in particular and in detail at the most significant attempt during that period – the pilot unemployment scheme. With the advent of a new period of devolved government beginning in 2007, the Note then considers the current policy developments relating to social issues in procurement, particularly relating to social issues in sustainable procurement and equality of opportunity issues. The Note concludes with a brief assessment of those contextual factors stimulating and depressing the take up of social issues in Northern Ireland procurement policy.

2. Background to current policy: Northern Ireland Public Procurement Review

Emulating equivalent reviews of public procurement policy in Britain, the government commissioned a review of procurement in Northern Ireland at the

end of the 1990s. This review, usually referred to as the Capita report was delivered in December 1999.[1] It found considerable variation in the quality of public procurement processes and recommended significant changes in procurement processes. Perhaps not surprisingly, given the then Government's views, no attention was paid to equality dimensions.

A dramatic shift in policy occurred, however, with the establishment of a devolved administration in Northern Ireland. Public procurement had become a devolved responsibility of the Northern Ireland Executive and Assembly under the Northern Ireland Act. By February 2001, the Programme for Government had committed the Northern Ireland Executive, "to develop [by June 2001] proposals for implementing improvements in public procurement, ensuring that the equality dimension of cross-departmental policy and practice in relation to the procurement of goods and services by the public sector is addressed through equality impact assessment."[2]

A Public Procurement Implementation Team was established by the Minister for Finance and Personnel in February 2001, with specific terms of reference which incorporated equality issues into the review. The terms of reference required the review team, "[h]aving regard to commitments … in the Department of Finance and Personnel's Equality Scheme, to: consider the findings and recommendations of the [Capita Report]; identify the scope to use public procurement in Northern Ireland to further local social and economic objectives within the context of current EC and international law relating to procurement; and make recommendations for implementation to the Minister for submission to the Executive Committee by June 2001, including an assessment of the equality impact of the proposed policy framework for procurement to be adopted by Northern Ireland public bodies."

A report was completed and sent to the Minister in July 2001. This was then considered by the Executive in September 2001 and issued for consultation until January 2002. Over 400 consultees were approached, with the responses demonstrating sufficient support among all stakeholders to reassure Ministers that there would be no substantial opposition to the proposals. A revised report was completed by the Team in January 2002. On the 27th May 2002, the Minister of Finance and Personnel made a Statement to the Assembly on public procurement policy. At that time the revised report was also issued. An equality impact assessment of the proposed policy was agreed by the Executive on the 16th May 2002, and at the same meeting the Executive agreed to a revised public procurement policy, based on the revised report, for all Northern Ireland Departments, their Agencies, non-Departmental Public Bodies and Public Corporations. This paper sets out the policies adopted by the Executive and the organisational structures that have been established to implement them. One of the bodies recommended, the Central Procurement Directorate, was established in April 2002. Another, the Procurement Board, was established in July 2002.

[1] Department of Finance and Personnel, A Strategic Review of Procurement Policy and of Purchasing Arrangements within the Northern Ireland Civil Service Departments, Final Executive Report, December 1999 (Capita Review).
[2] Northern Ireland Executive, Programme for Government (February 2001), para 2.2.1, page 16.

The Procurement Board established in July 2002 was chaired by the Finance Minister. The membership of the Board consisted of the Permanent Secretaries of the eleven Northern Ireland Departments, in order to ensure that there would be "compliance with the agreed policies and procedures in all Departments, their Agencies, NDPBs and public corporations."[3] Other members of the Board included the Treasury Officer of Accounts, two external experts, the head of the Central Procurement Directorate, and a representative of the Comptroller and Auditor General as an observer.

3. Legislative basis for Northern Ireland social issues in procurement

The adoption of these policies and the establishment of these new bodies was accomplished without the need of new legislation being introduced. Indeed, as far as procurement law is concerned, there is little difference in legislation between Northern Ireland and the rest of the United Kingdom. This follows closely the EU procurement directives, which have been implemented into national legislation. There are, however, three pieces of legislation outside the field of procurement law that are seen as being of particular importance for the development of Northern Ireland procurement policy regarding social issues.

3.1 Fair employment and treatment legislation

The first is 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.[4] 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.[5]

Where an employer was in default, the Fair Employment Commission could serve notice on him stating that he was not "qualified". The Commission was required to take all such steps as it considered reasonable to bring the fact that a person was an unqualified person, or had ceased to be an unqualified person, to the attention of public authorities. An application could be made by the person on whom the notice was served to have it revoked, but such an application could not be made sooner than

[3] Para. 13.
[4] 1989 Act, sections 38-43
[5] 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.

six months after the notice was served, or more frequently than at six monthly intervals. The applicant could appeal to the Fair Employment Tribunal against the refusal. Where a public authority entered into a contract either made by the public authority accepting an offer made by any person, being an offer made in response to an invitation by the public authority to submit offers, or falling within a class or description for the time being specified in an order made by the Department, the public authority was required to take all such steps as are reasonable to secure that no work was executed or goods or services supplied for the purposes of the contract by any unqualified person. A public authority could not enter into any such contract with an unqualified person.

These restrictions did not apply to the execution of any work, or the provision of any goods or services, by any person which was certified in writing to be necessary or desirable by the Secretary of State for the purpose of safeguarding national security or protecting public safety or public order, or by the Secretary of State, by the Department of Economic Development or, after consultation with that department, by any other Northern Ireland department (i) for the purpose of securing works, goods or services which could not otherwise be secured without disproportionate expense, or (ii) in the public interest.

Although nothing in these provisions affected the validity of any contract, there were other specific enforcement procedures. The Commission could require any person to give it such information as it specified for the purpose of determining whether a contract of either of the two kinds specified above had been made or was likely to be made, or whether any person had executed any work or supplied any goods or services for the purposes of any such contract, or was likely to do so. The Commission could apply to the High Court for an injunction restraining a public authority from contravening the prohibition on contracting with an unqualified person and, requiring the authority to comply with that prohibition in two circumstances. First, it could take such action if it appeared to the Commission that the public authority had taken any action in contravention of the prohibition stated above or had, in neglecting to take any action, failed to comply with that prohibition, and that, unless an injunction was granted, the authority was likely again to contravene or fail to comply with that section. Second, the Commission could take such action where any public authority proposed to take any action in contravention of the prohibition. In addition, any contravention of or failure to comply with the prohibition was actionable by any person who, in consequence, suffered loss or damage, but the amount recoverable in any such action could not exceed any expenditure reasonably incurred by him before the date of the contravention or failure in question.

The legislation further provided that Northern Ireland departments could refuse to give to any unqualified person specific types of financial assistance or, where it had given or agreed to give such assistance to any unqualified person, refuse or cease to make any payments to him in pursuance of the assistance. This provision applied to any financial assistance by way of grant or otherwise which could be given at the discretion of a Northern Ireland department, if the moneys required for giving the assistance were payable out of the Consolidated Fund of Northern Ireland or were appropriated by Measure of the Northern Ireland Assembly.

3.2 Northern Ireland Act, 1998, section 75

This requires that equality of opportunity should become an integral part of all governmental decision-making in Northern Ireland. This included the integration of equality considerations into public procurement. Section 75 provided that each "public authority" is required, in carrying out its functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity between certain different individuals and groups. The relevant categories between which equality of opportunity is to be promoted are between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without. Without prejudice to these obligations, a public authority in Northern Ireland is also, in carrying out its functions (and these include procurement), to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. Schedule 9 makes detailed provisions for the enforcement of these duties.

All public authorities included within the previous definition of public authority are required to submit an equality scheme to the Equality Commission.[6] Only where a public authority has been notified in writing by the Commission that it does not need to, is it exempted from producing such a scheme. An equality scheme shall show how the public authority proposes to fulfil the duties imposed by section 75 in relation to the relevant functions,[7] and specify a timetable for measures proposed in the scheme.[8] Schedule 9 specifies particular elements that an equality scheme must contain in order to be in compliance, without being exhaustive.[9] It must state the authority's arrangements for assessing its compliance with the duties under section 75.[10] It must state the authority's arrangements for consulting on matters to which a duty under that section is likely to be relevant (including details of the persons to be consulted).[11] It must state the authority's arrangements for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity.[12] It must state the authority's arrangements for monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity.[13] It must state the authority's arrangements for publishing

6 Northern Ireland Act 1998, Schedule 9, para. 2(1).

7 Schedule 9, para. 4(1). "The relevant functions" means the functions of the public authority or, in the case of a scheme submitted in response to a request which specifies particular functions of the public authority, those functions. Schedule 9, para. 4(4).

8 Schedule 9, para. 4(3)(b).

9 Schedule 9, para. 4(2).

10 Schedule 9, para. 4(2)(a).

11 Schedule 9, para. 4(2)(a).

12 Schedule 9, para. 4(2)(b). "Equality of opportunity" means such equality of opportunity as is mentioned in section 75(1). Schedule 9, para. 4(4).

13 Schedule 9, para. 4(2)(c). "Equality of opportunity" means such equality of opportunity as is mentioned in section 75(1). Schedule 9, para. 4(4).

the results of such assessments and such monitoring.[14] It must state the authority's arrangements for training staff.[15] It must state the authority's arrangements for ensuring, and assessing, public access to information and to services provided by the authority.[16] In addition, an equality scheme must conform to any guidelines as to form or content which are issued by the Equality Commission. These guidelines are subject to the approval of the Secretary of State.[17]

3.3 Sustainable development legislative duty

Section 25 of the Northern Ireland (Miscellaneous Provisions) Act 2006 deals with sustainable development. It requires that a "public authority" must, in exercising its functions (which include procurement), act in a way it considers best calculated to contribute to the achievement of sustainable development in Northern Ireland, except to the extent that it considers that any such action is not reasonably practicable in all circumstances of the case. For this purpose a public authority must have regard to any strategy or guidance relating to sustainable development issued by the Department of Environment, and a public authority other than a Northern Ireland department must have regard to any guidance relating to sustainable development issued by a Northern Ireland department other than the Department of the Environment. A "public authority" means a Northern Ireland department, a district council in Northern Ireland, and any other person designated for the purposes of this section by order made by the Office of First Minister and deputy First Minister.

4. Some characteristics of procurement market and procurement regulation in Northern Ireland

4.1 Regulatory institutions

Institutionally, a high level Procurement Board was established following acceptance of the Review recommendations. This is supported by the Central Procurement Directorate (CPD), located in the Department of Finance and Personnel. The Board consists of the Permanent Secretaries of Northern Ireland Departments, the Treasury Officer of Accounts, the Director of the Central Procurement Body, and two outside experts. The Procurement Board is accountable to the Northern Ireland Executive and to the Northern Ireland Assembly and is chaired by the Minister for Finance and Personnel. The roles and responsibilities of the Procurement Board include ensuring that procurement policy "pays due regard to the requirements of the Executive's wider policy commitments, including equality (…)."[18] A Procurement Practitioners' Group (PPG) was established where representatives from the Centres of Expertise and the CPD meet regularly to inform, test and develop policy and, where appropriate, operational issues.

[14] Schedule 9, para. 4(2)(d).

[15] Schedule 9, para. 4(2)(e).

[16] Schedule 9, para. 4(2)(f).

[17] Schedule 9, para. 4(3)(a).

[18] Para. 3.9

4.2 Characteristics of regulation

Since the establishment of the Procurement Board and the Central Procurement Directorate, a principal strategy for developing policy relating to social issues has been the publication of guidance relating to social issues in procurement broadly, and specific social issues in particular. The Procurement Board has approved guidance notes for use throughout the public sector. Several are of particular importance for the incorporation of social issues into Northern Ireland procurement.[19] The Northern Ireland Annex to Green Book establishes the method of assessing cost of inclusion in government contracts. Over 95 percent currently use MEAT. The Procurement Board has recently adopted a policy to ensure that any future awards not by MEAT would be only be explicitly permitted as an exception approved by Department finance officer.

5. Current procurement policy relating to social issues: general principles

5.1 Review Group approach

The recommendations of the Review Team, as accepted by the Executive, were wide ranging. In essence, a compromise was offered between equality and social concerns on the one hand, and efficiency on the other hand. Both were seen as important elements in any set of procurement reforms that would be economically and politically sustainable in the longer term. The recommendations were presented as a balanced package of measures that took forward the reform of public procurement in Northern Ireland, but at the same time addressed the issue of social justice. That balance was likely to be attractive to the Executive; the need to compromise was, after all, the essence of the structure of the devolved government established by the Belfast Agreement. The tricky question was how to deliver this balance legally and bureaucratically. The political compromise would only be acceptable to ministers if it could be justified legally and bureaucratically.

The report acknowledged that the concept of "best value for money" was central to public procurement policy. This was a central element because of the need to be seen to be following Treasury policy. It also made it clear that there was a commitment to promoting efficiency. But the Report argued that the idea was often misunderstood as meaning only effectiveness or efficiency or the lowest price. The Report understood the term in a wider, more encompassing sense as the summation of twelve principles. The twelve principles should be: transparency, integrity, competitive supply, effectiveness, efficiency, fair-dealing, responsiveness, informed decision-making, consistency, legality, integration and accountability. Of these, perhaps the most controversial was the principle of integration, defined as "joined-up government, meaning that procurement should pay due regard to other Northern Ireland government economic and social policies, rather than cut across them."[20] "When a procurement process results in these principles being satisfied to an acceptable extent, we can say that the process has resulted in 'best value for money'."[21] The concept of best value for money was defined as the "optimum combination of whole life cost and

[19] http://www.cpdni.gov.uk/index/guidance-for-purchasers/guidance-notes.htm
[20] Para 2.17
[21] Implementation Report, Para 2.16

quality (or fitness for purpose) to meet the customer's requirement".[22] In a critical comment, the Report continues: "This definition allows for the inclusion, as appropriate, of social, economic and environmental goals within the procurement process."[23] The Team recommended that, *thus defined*, "best value for money … should be the primary objective of procurement policy."[24]

Several of the policy implications of adopting the twelve Principles as the basis for new procurement policy were spelled out, including that "wider economic, social and environmental strategies and initiatives of the devolved administration in Northern Ireland should be more closely integrated into procurement policy" and that "more consultation with the wider community and with other stakeholders in the procurement system, especially members of the public who will be directly affected by the outcomes of the procurement, should become integrated into the procurement process where appropriate."[25] The report continued: "In particular, public bodies should be aware of the implications of the extensive public consultation requirements arising from section 75 of the Northern Ireland Act 1998, and its application to their procurement function."[26]

As regards the thorny question of choosing *how* to introduce economic, social and environmental policies and *which* such policies should be integrated into the process of public procurement, the Report recommended that six considerations should be taken into account to ensuring that the modalities of integration were appropriate: the modalities should be effective in achieving best value for money and delivering this policy; the transparency of the requirement should be ensured; the integration should be selective and targeted; the modalities must be legal; the modalities must make the policies operational and as consistent as possible with the other aspects and values of the procurement process, in particular the principles of transparency, clarity, consistency, integrity, effectiveness and fair dealing; and the modalities should be justifiable.

6. Detailed outworking of procurement policy relating to social issues between 2004 and 2007

6.1 General guidance notes

In 2004, two particularly important Guidance notes were issued. The first related to the integration of social issues into public procurement. Although the procurement legislation, with the exception of the fair employment legislation, do not contain specific provision on the pursuit of social policy goals within the framework of public procurement procedures they do not preclude the pursuit of social objectives. This Guidance Note provides an outline of the range of possibilities for integrating social considerations into public procurement in Northern Ireland under the existing procurement rules.[27] The second guidance note relates to the integration of

[22] Implementation Report, Para 2.16.
[23] Ibid.
[24] Ibid.
[25] Para 2.18
[26] Para 2.18
[27] Guidance Note 03/04: Integration of Social Considerations into Public Procurement, http://www.cpdni.gov.uk/social-integration-03.pdf

environmental issues into public procurement.[28] The purpose of this Guidance Note is to assist contracting authorities to identify the most effective ways of integrating environmental issues within the public procurement process. In both cases, this guidance takes the UK Public Procurement Regulations and EC obligations both under the Treaty and under the Procurement Directives fully into account.

6.2 Stage of incorporation of social issues

We shall see subsequently that the approach adopted in the Fair Employment and Treatment Order, of excluding some tenderersm prior to the award stage on the basis of failure to satisfy social conditions, is relatively unusual in the Northern Ireland context. Information is requested from tenderers relating to any convictions for money laundering, but not, for example, on connections with terrorism. Instead, a system of construction contract monitors has been established to assess the delivery of the contract post hoc to prevent funding terrorist organizations and other issues. The Central Procurement Directorate on behalf of other Government Departments, Agencies, Non-Departmental Public Bodies (NDPBs), local authorities, or other contracting authorities, (including grant recipient) or other public sector organisations has set up a Framework agreement for the provision of Construction Contract Monitoring Service (CCM) to monitor, investigate and report on:- process to prevent payments to criminal groups; compliance with aggregate taxation; compliance with waste disposal and landfill tax payments; inappropriate arrangements for employment of labour. VAT and tax avoidance health, safety and welfare of site operatives, illegal employment of migrant workers and any other inappropriate activity that may be identified or associated with construction projects of any nature that are wholly or partially funded by the Public Sector in Northern Ireland.

Instead, a more common method is the inclusion of social issues in specifications, taken together with the award stage assessing organizations' ability to be able to deliver on the specification, and contract conditions. This appears to be the mutually most acceptable way for it to be done, after consultation with industry, making it clearer what exactly is being required. Social issues are seldom taken into account as tie breaks at the award stage, and it appears to have been taken into account only in the unemployment pilot scheme case. The ability to exclude abnormally low tenders has, apparently, not been used in context of social criteria. Contract conditions follow the specifications. Social conditions will normally be passed down the supply chain issue, as was the case relating to the use of the long term unemployed. Generally, CPD doesn't include obligations which arise directly from existing legal obligations, so if something is already included in national legislation as a legal obligation, then generally won't be included specifically in the tender documents. Major exceptions relate to equality and non discrimination issues.

6.3 Fair Trade and Sustainable Timber

In 2006, two further relevant Guidance notes were issued by the Procurement Board. The first was Procurement Guidance Note 02/06: Procurement of Fair Trade Products, which defines fair and ethical trade, details the range of products currently recognised as fair trade products and provides Contracting Authorities with advice and guidance

[28] Guidance Note 04/04: Integration of Environmental Considerations into Public Procurement

on the action that can be taken, under the EU procurement rules and procurement policy, to achieve fair trade objectives.[29] The second was Procurement Guidance Note 04/06: Procurement of Timber and Wood Products, which provides Contracting Authorities with advice and guidance on how legal and sustainable timber can be purchased in line with EU procurement rules and public procurement policy.[30] Guidance for procurement staff: Training and seminars, particularly. On timber procurement, for example, several seminars organized for staff to brief them on the implications of the Guidance. Lunch time seminars were organised as part of a sustained attempt to brief procurement professionals.

The problem is how to get fair and ethical products. CPD recommends that government departments use a variations approach. Taking the specific example of what CPD does with regard to its own buildings and uses, it distinguishes between, for example, coffee for hospitality purposes, as opposed to coffee being supplied for purchase to its employees in the staff café. So, where CPD is paying for the coffee directly, then it is part of the requirements of the catering contract that fair trade coffee is used. However, as far as the use of fair trade coffee in the café is concerned, where CPD is not paying directly, then the contract will specify that fair trade coffee must be made available as one option for those purchasing. Fair trade labels used. Specification for the catering contract uses CPD guidance as the basis for the specification; in which case it would specify a variation. Condition of the contract were used instead of specification for café contract.

6.4 Social Economy organizations and SMEs

Strategy within Northern Ireland for the development of the social economy, and procurement is one element within that strategy. CPD working with DETI in promoting awareness of the social economy, and in getting that sector up to speed in being able to bid for government contracts. Working with Social Economy Forum and Social Economy Network to develop awareness. Largely at the level of capacity building, and in estimating where the existing capacity is in the social economy sector that might be drawn on in government contracting. Established that it is particularly in the health sector that that capacity already lies. Also in areas of local council procurement, particularly in rural areas, where the social economy providers might be well placed to deliver smaller contracts. No set asides. Work with INI to get the social economy in a business frame of mind, to get business acumen. Pressure is put more on the social economy to get them into a position where they are able to deliver, rather than pressure on the client to get them to use social economy providers.

Pretty much the small strategy for SMEs, working to get the SMEs to know ehat it is that government purchases through "Meet the buyer" events, particularly. About 98% of businesses in Northern Ireland are SMEs. Encouraging a wider supply base. Guidance has been published by the Procurement Board providing information for SMEs seeking to widen their customer base to include the Northern Ireland public sector.[31] A companion guide examines the barriers SMEs might face in participating

[29] Procurement Guidance Note 02/06: Procurement of Fair Trade Products
[30] Procurement Guidance Note 04/06: Procurement of Timber and Wood Products
[31] Guide for SMEs

in public sector tender competitions and suggests measures that purchasers might take to reduce or eliminate these barriers, has also been published.[32]

An internal assessment of the policy was conducted in October 2007 by the Supplies and Services Division (SSD) of CPD. It reported that SSD were working with a number of government and cross-border bodies to educate and increase awareness with local SMEs and Social Economics Enterprises (SEEs) of the opportunities to compete for public sector contracts.

The Tender Support Programme was established over the previous 18 months and involved 107 SME's and Social Economy Businesses. Approximately 20 of these SME's were from the Republic of Ireland, and the rest from Northern Ireland. The programme was part-financed by the European Union through the Interreg IIIA Programme managed for the Special EU Programmes Body by the ICBAN Partnership and further supported by a variety of organisations including Enterprise Ireland, Belfast City Council, Lisburn City Council, Newtownabbey Borough Council, Carrickfergus Borough Council, North Down Borough Council Magherafelt District Council, Coleraine Borough Council and Ballymoney Borough Council.

InterTrade Ireland piloted the Go-Tender Programme 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) under the title 'Go-Tender'. 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

[32] Guide for Purchasers. See generally: http://www.cpdni.gov.uk/index/guidance-for-suppliers/sme_guidance.htm.

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.

6.5 Construction industry: health and safety, and sustainability

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.[33] 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.[34] 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.[35]

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 Plan[36] 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. The 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.[37] 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.

A noteworthy aspect of this programme was that CPD brokered a deal between unions and construction employers so that they have developed their own code of practice on health and safety issues, and industrial relations generally, through the Construction Industry Forum, which is chaired by the head of CPD. These negotiated standards are then used as the basis for the specifications included in the tender. Good example of government using its purchasing power to put pressure on two sides of

[33] http://www.cpdni.gov.uk/index/guidance-for-suppliers/buildsafe.htm
[34] Buildsafe - Government Clients 1st Action Plan; Buildsafe - Government Clients 1st Action Plan - Guidance Note; Buildsafe - Government Clients 2nd Action Plan.
[35] Buildsafe - Contractors Health and Safety Report Template
[36] Sustainability Action Plan
[37] The Guidance Note 5: Considerate Constructors' Scheme

industry to come up with an industry wide agreement.[38]

6.6 Disability issues: accessibility and design for all, and sheltered workshops

Accessibility issues are included in IT purchasing, to enable disabled users to be able to use computers, and included also in the purchasing of buildings. Included in specifications for buildings, across the board. The building specifications are centralized through COPEs. In practice, disability access is one of the main ways in which procurement is used, but this is of course a legal requirement.

A more traditional scheme operates in addition regarding sheltered workshops, under which 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 the Ulster Supported Employment Limited (USEL). USEL is a Non Departmental Public Body which was established under the Disabled Persons (Employment) Act (NI) 1945 to provide sheltered employment for severely disabled people. It merged with Workshops for the Blind in 1980 and acquired charitable status in 1986. USEL is a Non-Departmental Public Body which was established in 1962 to provide sheltered employment for severely disabled people. It merged with the Workshops for the Blind in 1980 and acquired charitable status in 1996. 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.

6.7 Corporate social responsibility

Social policies were not all dealt with in these ways. Some, in particular some aspects of corporate social responsibility, were dealt with using more voluntaristic methods of encouragement. Approach taken is voluntary approach – encouragement rather than compulsion. One example would be the development of essential skills with the workforce. Where, for example, in facilities management, security guarding, cleaning, where up to 25% of the working population would be difficient in certain essential skills such as reading. So CPD has worked with the Department of Employment and Learning and have got them to discuss with contractors what the contractors can do to develop skills in the workforce, and use whatever subsidies are available. Voluntary approach more effective because not being compulsory means that those who are being benefited are not specifically identified as such.

7. A Special Case: The Pilot Unemployment Scheme

Most of the recommendations of the Review Group regarding the integration of social issues, and reflected in the subsequent policy of the Procurement Board were uncontroversial. One particular recommendation was highly controversial: a proposal that a pilot project to assist the unemployed should be instituted. The issue of unemployment had considerable status equality implications in Northern Ireland, given that for many years Catholics/Nationalists were more than twice as likely to be unemployed than Protestants/Unionists. Addressing unemployment came to be regarded, therefore, as part of the broader fair employment agenda. Part of the

[38] Respect for People – RfP Code of Good Working Health and Safety Practices

explanation for why Catholics were proportionately more likely than Protestants to be unemployed law in the concentration of Catholics in particular geographical areas that had greater unemployment. The working out of this scheme is of considerable interest in the context of this study, given their controversial nature, and their eventual success.

7.1 Previous schemes

Strategies had been advocated in the past, therefore, to encourage major construction projects to recruit local labour where the project was sited close to areas of high unemployment, particularly in Belfast.[39] There were proposals, for example, on the use of local labour training and employment schemes in the construction industry.[40] There had been a proliferation of schemes over the previous few years in Belfast. The Odyssey Trust Company encouraged the main contractors to employ local sub-contractors where possible. The Training and Employment Agency established a new pre-employment training scheme to assist the unemployed to compete for job opportunities within the complex. The West Belfast Partnership Board undertook to the local community that, as far as construction was concerned, the Board would encourage successful contractors on the Springvale project to engage with local people regarding local employment. Laganside operated a voluntary scheme requiring the Belfast Corporation and the developer to encourage those involved in development to provide local people with access to any employment opportunities. The developer was required to provide the Corporation with details of an action plan for identifying employment opportunities for the local community.

The biggest scheme, however, was that involving the redevelopment of a large area of central Belfast, the Victoria Square Development. The NI Executive had emphasised the need for the Department for Social Development to secure maximum New TSN and equality benefits from the development. The development brief for the Development issued to developers required that "the project must add value to the local economy by tackling unemployment particularly long-term unemployment, enhancing employability and maximising training opportunities for local people, particularly in areas of greatest social need."[41] It required the developer to make an acceptable proposal to address these issues, not only in relation to the jobs within the developer's control, but also the jobs created by sub-contractors and the retailers who would be the end-users of the new development. The Department further required the developer "to demonstrate how his proposals will promote equality of opportunity and good relations" in relation to the groups covered by section 75, and also to "confirm that his proposals will have no negative impact on equality of opprtunities and good relations."[42] The Department would approve the developer's proposals and incorporate them into a development agreement. In 2006, this aspect of the

[39] Maura Sheehan and Mike Tomlinson, Long-Term Unemployment in West Belfast, in Eithne McLaughlin and Pádraic Quirk, Policy Aspects of Employment Equality in Northern Ireland, Volume iii Employment Equality in Northern Ireland (SACHR), p. 51
[40] Caroline Nolan, Jobs on the Block: The Use of Local Labour training and employment schemes in the construction industry – a proposal for West Belfast (August 1999, West Belfast Economic Forum).
[41] Victoria Square, Development Brief, para 9.3
[42] Para 9.8.

development plan was published, setting out the objectives, actions and targets agreed to.[43]

7.2 Proposal by the Review Group

The pilot project proposed by the Review took a somewhat different approach, but building on what had gone before. The pilot project would involve a condition being included in certain contracts. This condition would require suppliers to implement the plan accepted by the contracting authority on award of the contract for using the unemployed in the work on the contract, including work carried out by sub-contractors. No specific proportion of unemployed to already employed should be specified, either minimum or maximum. The definition of "unemployed" should be carefully considered, in consultation with the Equality Commission, so as not to discriminate against women and should include unemployed from anywhere in the EC (and beyond, in the case of a tenderer from outside the EC). Bidders should be required to produce a clear, specific and concise proposed unemployment utilisation plan showing the bidder's proposals for utilising the unemployed on the contract, and the bidder's technical capacity to implement the proposals. Firms that had recently been recruiting from the unemployed should be able to present their approach as appropriate evidence. Failure to produce such a proposed plan should result in the bid being excluded from further consideration. The tender documentation should specify that the proposed plan should be submitted as part of the bid. The requirements should be clearly included in the bid specifications. When the bid, which included the proposed plan, was accepted, carrying out the plan should become an integral part of the contract, and become a contract condition. Failure to comply with the plan should be subject to an appropriate penalty, and it would be relevant to consider such failure in assessing future contract bids. Adherence to the contract condition should also be taken into account at the award stage, and this should be specified in the tender documentation. The feasibility and quality of the supplier's plan to utilise the unemployed should be taken into account at the award stage where otherwise equivalent tenderers who submit a plan are in competition.

The pilot should contain a critical mass of projects, at least 20, and at least one by each Department. The requirements of the pilot project should be confined for the first two years of operation to works contracts above £3.5m and substantial service contracts (above £0.5m). All Northern Ireland Departments, Agencies, NDPBs and public corporations and the idea was commended to local authorities for their consideration. The Procurement Board should be tasked with drawing up a detailed set of guidance on this for Departments and other public bodies within the first six months of operation. The Board should assess the operation of the unemployment strategy recommended, making recommendations for its greater effectiveness, within 2 years of the Board coming into operation. The requirements of the pilot project should be considered subsequently in light of experience for inclusion in other types of contracts. Where legislation was thought likely to act as a barrier to particular public bodies being able to participate in this, it should be amended.[44]

[43] Multi Development UK and Department for Social Development, People and Place: Victoria Square Scheme – Community and Business Opportunity Plan (May 2006), available from www.dsdni.gov.uk.
[44] Article 20 of the Education and Library Boards (NI) Order 1993 and Article 19 of the Local Government (Miscellaneous Provisions) (NI) Order 1992.

7.3 Executive approval and implementing the pilot schemes

The proposals for the integration of social policy were the most controversial of the proposals, and discussions within and between Departments after the final report was published were intense. In particular, the recommendation for the pilot scheme regarding the unemployed was challenged internally in the Civil Service as unlawful, breaching the value for money principle, and generally lacking in feasibility. Eventually, the Executive reached an agreed position, largely adopting the Review's approach. In its formal policy statement, the Executive announced that it considered that "the pilot scheme is a measured response by the Review Team to its terms of reference". It continued: "The Executive accepts that the pilot scheme is as forward a proposal as can be achieved within the limits of law and practicability and therefore agreed to implement it and test whether the concerns expressed by consultees are real and whether the proposal is worthwhile and workable."[45] The pilot scheme would not proceed, however, "until the details have been agreed with the Procurement Board and prior to bringing forward proposals, there will be discussions with the representatives of the industries affected (namely the construction and service sectors) and the Equality Commission, to ensure that the scheme is workable."[46] The results of the pilot scheme would be reported to the Executive at the end of a two-year pilot period "to determine whether the policy should be mainstreamed."[47]

The role of the Board was crucial in two particular respects, as regards the implementation of the integration elements in the Executive's policy. First, the Board was allocated the role of agreeing to the detailed outworking of the policy that would have to be in place before the pilot schemes could proceed. Second, for the pilot schemes to proceed, departments would have to volunteer projects to be included. If projects were not volunteered, then the pilot scheme would collapse. The Board would be to ensure that Departments did in fact propose appropriate project; the presence of the Permanent Secretaries on the Board would be a significant feature: either they would exert pressure on each other to volunteer schemes, or they would underpin and legitimate further any refusals to participate by Departments. Crucial to the politics of the Board's operation was the fact that the Northern Ireland Executive was suspended during 2003, after the failure of attempts to secure further decommissioning of arms by the IRA, and the refusal of the Ulster Unionist Party to participate in the Executive. The effect of this was to put direct rule back into operation, with the consequent lessening of local political accountability of those operating the policy.

During 2002, these two aspects of the policy, the identification of projects to be included, and the development of detailed guidance, went hand in hand. The response from Departments to the request for suitable contracts for inclusion in the pilot scheme fell considerably short of what was anticipated in the Procurement Review report. Invitations were sent to Departments in July 2002, following the establishment of the Board, to volunteer contracts to be let within the next six to nine

[45] Department of Finance and Personnel, Public Procurement Policy, May 2002, para 23. See also the Statement to the Assembly by Seán Farren, MLA, Minister of Finance and Personnel, 27th May 2002.
[46] Para 23.
[47] Ibid.

months that should be included among the pilots. Departments were invited to nominate projects to the pilot with values above £3.86 million for construction and £0.5 million a year for services. To ensure a comprehensive sample, construction contracts between £1 million and £3.86 million, and service contracts between £0.25 million a year and £0.5 million a year were also to be identified. This invitation resulted in only six contracts being identified by Departments by the beginning of 2003.[48] A meeting of the Procurement Board scheduled for December 2002 was postponed to allow time for alternative approaches to be considered. The Central Procurement Directorate explored how else the integration of social policy in general and assistance to the unemployed in particular might be delivered. One way explored was to adopt a general policy that the Northern Ireland Departments would prefer to enter into contracts with firms that have and implement good social policies and that this would be taken into account when assessing "technical capacity" as part of the selection of contractors to be invited to tender. Consultation with industry representatives and public sector bodies indicated support for such a policy. However, the legal position under the Directives was assessed to be restrictive in the information to be considered in assessing technical capacity. While it might be possible to attach some social dimension, it was considered to carry a high risk of a legal challenge that might be upheld, and that it would be a risky step to take. The Board was presented with a draft scheme to assist contracting authorities to implement the pilot scheme. This was approved by the Board in February 2003; this meeting was chaired by the new direct-rule Minister for Finance. The 2003 Guidance Note on a pilot scheme on the provision of employment opportunities to assist the unemployed into work outlines proposals to encourage employers to recruit and train unemployed people, who have been unemployed for at least 3 months, to work on significant contracts with Government Departments, their NDPBs and Public Corporations.[49] The aim of the pilot was to encourage employers to recruit and train people, who have been unemployed for at least 3 months, to work on contracts with Government Departments, their Agencies, NDPBs and Public Corporations.

7.4 Details of the scheme

The scheme 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". This should contain three broad elements.

The first element required the firm to set out the firm's general social policy in relation to the recruitment, training and retention of employees from the unemployed. This should be a strategic management document signed by the managing director,

[48] See the replies to questions in the Assembly, 13 September 2002 (AQO 60/02), 20 September 2002 (AQO 122/02), 4 October 2002 (AQW 104/02), 11 October 2002 (AQO 235/02, AQO 237/02), 18 October 2002 (AQO 305/02, AQO 306/02, AQO 304/02).
[49] Guidance Note 01/03: Employment Opportunity Scheme - Pilot Scheme

chief executive or senior partner. It should include details of any pre-qualification policy the firm operates regarding sub-contractors, and any requirements imposed upon sub-contractors prior to entering into contract with them. It should outline the company's pension arrangements for all employees and access rights for those employed under the scheme. It should indicate if the firm encourages job sharing or part-time working and the numbers of employees currently doing so. It should indicate whether the firm operates flexible working hours, whether it operates free or subidised transportation between home and place of work, or offers any special arrangements for child minding. It should specify on what basis the remuneration package offered for those under the contract would be calculated, and specify whether employees recruited under the initiative would be employed on a full-time basis or on a short term contract. Firms were expected to indicate whether the firm operated a mandatory probationary period that employees had to complete before particular benefits offered by the employer were available to employees. The firm's training arrangements should be set out, and the firm should indicate whether the firm would facilitate day-release for non-apprentice positions, and what training opportunities would be made available to employees recruited under the initiative. Liaison between the firm and relevant groups and bodies outside the workplace that would be relevant for the unemployment initiative should also be detailed, including examples of relationships developed with community groups, relationships developed with public sector organisations, and details of any employee support mechanisms.

The second element in the unemployed utilisation plan involved the firm setting out a detailed project implementation plan, which would be specific to the contract. This would state the firm's proposals for recruitment and retention of employees from the unemployed for this contract. It would set out the mechanism for the authentication of the previous employment position of employees recruited from the unemployed for the purposes of the contract. It would set out a mechanism for the authentication of the previous employment position of employees recently recruited from the unemployed for the purposes of the contract. It would propose a monitoring and reporting system for informing the contracting authority during the execution of the contract.

The third element related to previous experience. The firm was required to demonstrate its commitment, capability and competence in this area by providing details of any current or previous experience in this field either in partnership with other government departments or private firms or as an initiative operated directly by the firm itself, including the number of any employees recruited and their duration of employment under such initiatives.

Failure to submit an unemployed utilisation plan with the tender would result in the tender being declared void and excluded from further consideration. The plan would be assessed to establish its suitability. A matrix was suggested for assessing the suitability of the proposals of individual tenderers, including a list of the items to be considered and the appropriate weightings for each of these. The overall score for the social policy elements should be 30%, project implementation 50% and experience and capability 20%, although specific requirements of a project might require the contracting authority to review the items included or the weightings suggested.

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.

It would be a condition of the contract that the contractor would implement in full the undertakings set out in the contractors unemployed utilisation plan. Any failure to implement fully the Plan would be reflected in the contractor's performance evaluation at the end of the contract. This evaluation would be taken into account in the assessment of the contractors unemployed utilisation plan in any future bid process with any Northern Ireland public body, and may give rise to a claim for damages. The contractor was required not to cause any current employee of the firm, nor permit any current employee of any sub-contractor, to become unemployed, pursuant to the execution of the unemployed utilisation plan.

After the award of the contract, the successful contractor would be required to satisfy the contracting authority that any persons employed under the scheme complied with the qualification requirements. Tenderers would be required to provide all reasonable assistance to the contracting authority to conduct an appraisal of the policy during or after the execution of the contract. Any employment of an individual of less than 10 working days would not be included as a bona-fide employment for the purposes of assessment of the contractors compliance with the initiative. The successful contractor would be required to use his best endeavours to ensure that any person employed under the scheme would remain employed for the duration of the contract. The curtailment of any contract of employment with any person under the scheme, within the duration of the contract with the contracting authority, would be limited, with safeguards to ensure that the contracting authority is notified. Where the contractor cited the unsuitability of the employee as the reason for cessation of employment, the contractor would be required to supply details of steps taken to assist the employee to adapt to the employment environment. Details of events leading to disciplinary action must be supplied. Where the employment of any person employed under the initiative ceased, the contractor was required to advise the contracting authority of actions being undertaken to replace that person.

EU tendering procedures would be applied to all contracts. Individual Prior Indicative Notices (PIN) and the Procedural Notice to be placed in the Official Journal would incorporate several statements: all bona fide tenders would be required to include a project specific unemployed utilisation plan in a format acceptable to the contracting authority; the contract would contain specific contract provisions that would require the implementation of the unemployed utilisation plan; the unemployed utilisation plan would be considered during the assessment for the award of the contract, but only in the event that two (or more) tenders were judged equal in the evaluation of the economically most advantageous; and the contracting

authority would welcome the opportunity to view the firm's social policy statement if it was returned with the notice of interest, but that it would not be considered for tender short-listing purposes.

7.5 Evaluation

The School of Policy Studies, University of Ulster at Jordanstown prepared the Final Evaluation Report on the pilot.[50] In addition, an internal assessment was conducted by the CPD. Both these appear to demonstrate that the benefits of the scheme were more significant than the costs. The costs appear to have been minimal. There was no challenge to the legality of the schemes. Contractors were reported to be very largely satisfied with the way the scheme operated, and what problems there were arose mostly from the public sector failing to propose schemes. The approach taken in the unemployment pilot scheme regarding compliance monitoring was successful and CPD now feels under pressure from industry to introduce equivalent compliance monitoring when other social/environmental issues introduced in order to ensure that contractors actually deliver. Industry doesn't want the situation to develop where contractors get the contract in part by saying that they will deliver social issues, and then don't do it. Part of the approach that industry wants to see introduced to level the playing field.

8. Equality and Sustainability: key issues for the future

8.1 Programme for Government and Investment Strategy for Northern Ireland

The restoration of devolved government to Northern Ireland during 2007 has given a significant boost to the political impetus behind using procurement to advance social policy. The Draft Programme for Government (PfG), draft Budget, and draft Investment Strategy (ISNI-2), all announced in October 2007 set out an ambitious economic, social and equality agenda but recognized that government was severely constrained in funding to deliver it, and recognized also the need to use whatever instruments of government are available flexibly and smartly. One major tool was as being public procurement which was recognized as 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 Draft PfG said: "Government procurement can play an active and effective role in the process of tackling patterns of socio-economic disadvantage" (p. 12). The Draft Budget continued: " … support will be provided to the wider public sector in taking account of sustainable development principles when procuring works, supplies and services" (p. 78) Procurement issues were particularly prominent in the draft 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" (p. 2). It continued: "We are encouraging departments … to take advantage with

[50] http://www.cpdni.gov.uk/unemployed_in_construction.pdf

contractors in each major procurement opportunity to progress the Executive's wider economic, social and employment objectives" (p. 3).

8.2 Sustainability developments

As with other governments throughout Europe, sustainable development means meeting the needs of the present without compromising the ability of future generations to meet their own needs. It is not solely an environmental agenda. Fulfilling the duty requires an integrated approach to pursuing economic, social and environmental well-being and all three components are central to success.

The Northern Ireland Sustainable Development Strategy, *"First Steps Towards Sustainability"*[51], which was launched in May 2006, sets out the principles which must underpin decision-making processes in order to achieve sustainable development objectives. Following the publication of the Sustainable Development Strategy, a supporting Sustainable Development Implementation Plan[52] received Ministerial approval and was launched in November 2006 setting out in detail the specific targets which Departments should aim to achieve by March 2008. The Implementation Plan also spotlights three key themes to highlight the type of activities and approaches being taking in the Plan. One of these themes is Sustainable Procurement. Underpinning the Implementation Plan is the requirement that each Department has a Sustainable Development Action Plan. Departmental Statements and Action Plans for the most part cite public procurement as an area that will contribute to meeting their strategic objectives. The DFP Plan also tasks CPD with producing a Sustainable Procurement Action Plan by March 2008.The Executive's Programme for Government 2008 – 2011 identifies sustainability as a cross-cutting theme and states that building a sustainable future will be a key requirement for our economic social and environmental policies and programmes. The PSA Annex to the Programme for Government includes an objective (PSA11.4) to support the wider Public Sector in taking account of sustainable development principles when procuring works, supplies and services. CPD is leading on the development of a Sustainable Procurement Action Plan for the Northern Ireland Public Sector, covering the period 1 April 2008 – 31 March 2011. In developing the Action Plan CPD's aim is to create an 'overarching' set of actions that can provide a clear direction for public sector procurers. At the same time the successful delivery of sustainable procurement will be the responsibility of individual CoPEs each of which has its own unique portfolio of goods, works and services contracts and which will be expected to address CoPE specific actions through developing their own operational sustainable procurement plans. The target set for the development of these plans is December 2008.

8.3 Equality and sustainability guidelines

In 2007 the Procurement Board approved a set of Guidelines on sustainability and equality in procurement. This was the result of a co-operative operation by CPD and the Equality Commission for Northern Ireland which acted as the Secretariat for a committee established to draft an agreed set of guidelines in this area. It was composed of representatives of the Procurement Board, the Equality Commission,

[51] http://www.ofmdfmni.gov.uk/sustain-develop.pdf
[52] http://www.ofmdfmni.gov.uk/implementation2_plan_16_11__06.pdf

employer and trade union interests, and representatives of various departments. These guidelines provide detailed guidance on how equality of opportunity and sustainable development can be addressed at each stage of the procurement process. When approved by the Northern Ireland Executive (expected in March 2008), these will be rolled out and are expected to be of considerable importance in setting out how departments and public bodies will integrate equality and sustainability issues into Northern Ireland procurement in the future.

9. Barriers to introducing social issues

The barriers to introducing social issues into Northern Ireland procurement are not thought to lie in any budgetary constraints. Assessments conducted by or on behalf of CPD indicate that it doesn't appear to give rise to significant costs to include such considerations in procurement. The major constraints lie more in inertia in the system rather than budget, getting procurement professionals and clients to focus on social procurement issues. Making a change in the thought processes requires considerable effort. Support from the Assembly and the Executive is now clear, and given a clear steer in the PfG. Political opposition has seemingly been overcome. It may be difficult to measure the benefits, but that isn't a barrier to doing it. Lack of clarity has been a barrier in the past, but this is being addressed by producing extensive guidance. Legal uncertainty has been an issue in the past also but these issues have been worked through thoroughly, and particularly if the issue is included in the subject matter of the contract then legally problems appear to be significantly reduced. The supply base has told CPD that it will do what CPD wants them to do in this regard. CPD considers that it is at the beginning of the learning curve, and that social issues in procurement is still a relatively novel issue for most people, and that together with the problem of inertia in the system is the biggest barrier. The necessary skills appear to be available within the system, established by conducting the Pilot Scheme; what is required is more examples of good practice.

Study on Social Considerations in Public Procurement

Country Legal and Policy Review for SRPP in Sweden

Author: Mr. G. Westring
April, 2008

Note: During a study visit to Sweden, meetings with the National Road Administration and Regional and City Authorities in Gothenburg were held. This report is largely based on the information gathered during these meetings.
I have benefited from discussions with:
Anna Nylen, Procurement Manager in the National Road Administration,
Alf Oskarson, Procurement Manager in the Regional Administration for South-Western,
Christine Lindeberg, Planning Manager in the Gothenburgh City Board.

1. Socially Responsible Public Procurement: Legal Environment

Concerning National Laws, Regulations and Decrees including specific SRPP requirements, I can mention the Law on Public Procurement (2007:1091), the Decree concerning antidiscrimination conditions in procurement contracts (2006:260, amended 2007:1101) and the General guidance by the Competition Agency on the implementation of the decree on antidiscrimination conditions in procurement contracts.

1.1 The Law on Public Procurement

After several revisions of the original law (1992:158), a completely revised new Law (2007:1091) on Public Procurement was promulgated on 2007-11-22, ref. www.notisum.se/Rnp/SLS/LAG/20071091.htm.

This law regulates procurement in the so-called classical sectors.

Another law, 2007:1092, with similar provisions, regulates procurement in the water, energy, transport and postal services sectors. The following provisions in the law include specific SRPP requirements (unofficial translation):

Ch. 1, § 9 Principles of public procurement

Procuring entities shall treat suppliers in an equal and non-discriminatory manner and shall conduct procurement in an open manner. Furthermore the principles of mutual recognition and proportionality shall be observed in procurement.

Ch. 6, § 1 Technical specifications

Technical specifications shall be included in the procurement advertisement, in the solicitation documents or in the supplementing documents. Specifications shall be prepared in accordance with the manner described in §§ 2 and 3.

Whenever possible, specifications shall take into account criteria regarding accessibility for persons with functional handicaps and shall be prepared with due consideration to the needs of all users.

Ch. 6, § 12 (section 1-2) Information about taxation, environmental protection, labour safety and working conditions

A procuring entity may in the solicitation documents indicate which authorities can provide information to candidates and tenderers about the rules concerning taxation, environmental protection, labour safety and working conditions which will apply to the works or services included in the contract.

If the procuring entity provides such indications regarding labour safety and working conditions, it shall request the candidate or tenderer to confirm that the tender has been prepared with respect to those conditions.

Ch. 6, § 13 Special conditions for contract performance

A procuring entity may stipulate special conditions regarding social, environmental and other aspects of contract performance. Such conditions shall be included in the procurement advertisement or in the solicitation documents.

Ch. 12, § 1 Alternative bases for award of contract A procuring entity shall accept either

1. the tender that is economically most advantageous to the entity, or

2. the tender with the lowest price.

In assessing which tender is most advantageous, the entity shall take into account criteria which are linked to the purpose of the contract, such as price, delivery and completion times, environmental qualities, costs of operation, cost efficiency, quality, esthetical, functional or technical qualities, service and technical support.

A procuring entity shall in the advertisement or in the solicitation documents state on which basis the contract will be awarded.

1.2 Decree (2006:260) concerning antidiscrimination conditions in procurement

contracts (amended 2007:1101)

A decree (2006:260) concerning antidiscrimination clauses in procurement contracts, referred to here as the Antidiscrimination Decree, was promulgated by the Government (Ministry of Finance) on 2006-04-06. The purpose of the decree, as stated in its § 2, was to increase awareness of, and respect for, existing laws to prevent discrimination, such as the law (1991:433) on equality of sexes, the law (1999:130) on measures to stop discrimination in the labour market on the grounds of ethnic origin, religion or other faith, the law (1999:132) to prohibit discrimination in the labour market on the grounds of functional handicaps, the law (1999:133) to prohibit discrimination in the labour market on the grounds of sexual inclination, the law (2003:307) on prohibition of discrimination and the law (2001:1286) on equal treatment of academic students.

In conjunction with the entry into effect of the Law on Public Procurement on 2008-01-01, the Antidiscrimination Decree underwent some changes, serving to link the decree with the new law, chiefly with regard to the provision in Chapter 6, § 13 (cited above) on special contract performance conditions.

The decree is binding upon a number of government authorities listed in appendix to the decree, e g the National Road Administration.

The decree instructs authorities to stipulate antidiscrimination conditions in contracts of a longer duration than 8 months and of a value exceeding SEK 750 000 (appx 80 000 €). The conditions must be drafted in such a manner as to make it feasible for the authority to check on compliance. To a suitable extent, conditions should be made applicable to sub-contractors. Sanctions against non-compliance must be included. Checks on compliance must be made at least once a year and at least once if the contract period is less.

1.3 General guidance by the Competition Agency on the implementation of the decree (2006:260) on antidiscrimination conditions in procurement contracts (KKVFS 2007:1)

Since 1 September 2007, the Competition Agency (Konkurrensverket) is the authority charged by the Government with the responsibility to oversee the implementation of the Law on Public Procurement.

On 28 September 2007, the Competition Agency published a document (KKVFS 2007:1) with general guidance to the authorities bound by the Antidiscrimination Decree on the implementation of the decree. The guidance document refers to the principles embodied in the Law on Public Procurement, enumerates laws applicable to

the antidiscrimination decree, describes the purpose and scope of application of the antidiscrimination conditions, provides detailed advice on how to formulate conditions regarding checks on compliance and sanctions, and instructs authorities on how to supervise contract performance.

Attached to the document are draft standard clauses and other models.

The full document is available at the home page of the Competition Agency, Konkurrensverket, 10385 Stockholm, tel. 46-8-7001600, mail address konkurensverket@kkv.se.

2. Socially Responsible Public Procurement (SRPP): Policy Environment

Concerning this area**, the Government proposition to Parliament No. 2006/07:128 (574 pp – not included here but available on the Internet)** can be mentioned**.**

On the issue of including social considerations in public procurement, the proposition, as well as the law subsequently enacted by Parliament, basically rests on EU Directive 2004/18/EG of 31 March 2004, Article 26. (See provision contained in Ch 6, § 12, quoted in Section A under A above).

The issue remains to be finally discussed and settled once Government has received comments from all interested agencies to the proposals contained in the **final report of the Public Procurement Committee (Slutbetänkande av Upphandlingsutredningen 2004, SOU 2006:28, 512 pp – not included here).** The Committee – after some hesitation and subject to certain reservations - proposes that the verb "may" is strengthened to the level of "should" with respect to the possibility of introducing contract performance requirements of a social nature.