European Commission
DIRECTORATE-GENERAL Employment, Social Affairs and Inclusion

Awareness raising and networking activities on the Guide for Social Consideration in Public Procurement

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Presentation

Buying Social – A guide to Taking Account of Social Considerations in Public Procurement

Introduction

- Public spending around 17 % of EUs GDP
- Purpose of the guide
- Legal frame:
  - The TFEU principles free movement of goods, the freedom of establishment and freedom to provide services
  - The principles of equal treatment, transparency, non-discrimination, proportionality and mutual recognition

Buying Social – Key issues

- Socially responsible public procurement SRPP
- Non exhaustive list of examples in the guide
  - Employment opportunities
  - Promoting ”decent work”
  - Compliance with social and labour rights
  - Supporting ”social inclusion”
  - Promoting ”accessibility and design for all”
  - Take into account ”ethical trade”
  - Protection against human rights abuse
  - Promoting SMEs

The legal and policy approach

- The Procurement Directives of 2004
  - Specifically mention ways of incorporating social considerations as technical specifications, selection criteria, award criteria and contract performance clauses.
  - Contracts not or partly covered by the Directives – internal market principles also apply

Benefits of SRPP

- Compliance with social and labour law
- Stimulate socially conscious markets
- Demonstrating socially responsive governance
- Stimulating integration
- Ensuring more effective public expenditures

The legal and policy approach to SRPP

- EU Social Agenda
- EU legislation
- COM interpretative document 2001
- ECJ cases
- Procurement Directives, adopted 2004
- TFEU internal market rules and principles

Procurement process – including SRPP

- ”Acting fairly”
  - Follow the principles of the internal market

- Best value for money

Different approaches to SRPP

- Four basic approaches to include social issues:
  1. Defining the subject matter of the contract
  2. Select the tenderer
  3. Award the contract
  4. Performance during the contract
- The approaches are not alternatives, they can be combined in the same procurement procedure

Identify the needs

- Assess the actual needs
  - Actively seek out opportunities to promote social standards by involving users, decision makers, stakeholders etc
  - Build in flexibility for changes during contract
- Defining the subject matter
  - Great freedom to choose what to buy, including products that meet social standards, provided they are linked to the subject matter and comply with the TFEU principles

- Examples:
  - Accessibility standards for persons with disabilities can be part of the subject-matter of a works contract for building a school, as they can be part of the description of the works the contracting authority wants to buy and linked to them.
  - On the other hand, the labour conditions of the workers building the school cannot be part of the subject-matter of the contract, as they are not linked to the object of the contract, but only to the way in which the procurement contract will be performed.
  - In contracts for services, the contracting authority can specify in the subject-matter that the services provided must meet the needs of all categories of users, including the socially disadvantaged or excluded.

Planning Procurement

- **What to buy** – defining the subject matter of the contract
  - Possibility to reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes (art.19 – Directive 2004/18)
- Conditions:

  Such reservation must be provided by national law and may not be adopted ad hoc by public bodies,
  - 50% rule (applicable to both sheltered workshops and sheltered employment programmes)

Better access to procurement

- Positive actions allowed – but not positive discrimination
  - Not possible to reserve performance of contracts to particular firms, or firms already having an office in a certain area
  - Sheltered workshops/ employment programmes excepted
- Positive actions can be:
  - ”Meet the buyer”, guidance, transparancy on up coming purhasing activitities, dividing contracts into lots

Technical specifications (I)

- Detailed and clear description, so tenders can be verified against these requirements
- Must be linked to the subject matter and comply with the TFEU principles
  - Ergonomic features – a link
  - Safety measures in a works contract – a link
  - How a company is managed – not a link
  - Labels of social standards – not a link

Technical specifications (II)

- Freedom to choose between technical standards or performance / functional requirements (art 23 (3), Directive 2004/18)
- The latter :
  - allow larger scope for innovation/market creativity
  - but, need to be clear enough to make a proper and justifiable evalution

Technical specifications (III)

- Specifications can also include requirements on **production and process methods**
- *Examples:*
  - security measures on a construction site;
  - but production processes do not cover labour conditions, which are not technical specifications in the sense of the directives

Technical specifications (IV)

- Whenever possible, need to take account of **accessibility criteria** for disabled persons/design for all (art. 23 – Directive 2004/18)
- *Examples*:
  - access to public buildings /built environment
  - access to information and communication technologies

Technical specifications (V)

- Allow bidders to submit socially responsible **variants**, permitting comparison with standard solutions

  (art 24; Directive 2004/18)

  - Need to be indicated in advance
  - Specify minimum technical (social) specifications
  - Both will be evaluated on the same award criteria

Technical specifications (VI)

- **Labels:**
  - Prohibition to refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products

    (art.23(8) of the Directive 2004/18/EC)
  - Therefore, not possible to require a specific label, such as a social or ethical trade label

Technical specifications (VII)

- Contracting authorities that wish to buy **ethical trade** products:
  - shall indicate in the tender documents and at the appropriate stage of the procedure, their specific social/ethical requirements
  - may stipulate which labels fulfil the tender's social/ethical requirements, but must always allow other means of proof

Selecting suppliers (I)

- **Exclusion criteria**: exhaustive list of cases when a tenderer may get excluded from the procurement procedure

  (art 45(2), Directive 2004/18)

- *Examples*:
  - failure to pay social contributions
  - offence concerning the professional conduct convicted by judgment (art. 45(2)(c)), eg. clandestine employment, health and safety rules)
  - Grave professional misconduct (proven by any means, Art. 45(d)(e), e.g. child labour & equal opportunity plan)

Selecting suppliers (II)

- **Selection criteria** (technical capacity):
  - Address the tenderers ability to deliver the requirements specified in the contract
  - Need to comply with the TFEU principles
  - Must be linked to the subject/contract (social requirements may be included in the selection criteria, only if the contract requires specific ”know-how” in the social field (eg. need to have trained personnel in a contract for social services)
  - Evidence - exhaustive means in the Directives

    (art 48, Directive 2004/18)

Awarding the contract (I)

- **Award criteria**, including those of a social nature one must:

  (Recital 46, Art 53, Directive 2004/18)

  - Be linked to the subject matter of the contract
  - Not confer unrestricted freedom of choice on the contracting authority
  - Be expressly mentioned in the contract notice and in the tender documents
  - Comply with fundamental principles of EU Law (transparency, non-discrimination, etc.)

Awarding the contract (II)

- **Two options**:
  - Either compare the offers on the basis of price alone or
  - The most economically advantageous tender (MEAT)
    - These can include social criteria, provided link
    - Better than a minimum level can be granted extra
    - Determine the best value for money
    - Derives from CJEU case law

Awarding the contract (III)

- Possibility to exclude **abnormally low tenders** (art. 55 of Directive 2004/18), can be related to non-compliance with the provisions relating to employment protection and working conditions
  - CA must ask the concerned bidder for explanation before it may reject the bid
  - Possibility to ask additional information from third parties, such as trade unions

Contract performance (I)

- Contract performance clauses are generally **the most appropriate stage** of the procedure to include social considerations relating to employment and labour conditions of the workers involved in performance of the contract

Contract performance (II)

- **Contract clauses** set out how the contract should be performed, e g social objectives (art. 26 of Directive 2004/18)
  - Must be accepted by the successful tenderer
  - Contract clauses should not be disguised technical specifications, nor have a role in the selection or award phase
  - Compliance with contract performance clauses may be verified only during the execution of the contract

Contract performance (III)

- The contract performance clauses must:
  - Be linked to the performance of the contract (i.e. concern only the personnel involved in the performance of the contract and not the whole social policy of the contractor)
  - Be published in the contract notice or the tender documents
  - Comply with EU law (including fundamental principles)

Contract performance (IV)

- Contract performance clauses - *Examples*
  - minimum salary for the workers involved in the performance of the contract,
  - obligation to recruit for the performance of the contract a certain number of unemployed persons or
  - to respect the ILO conventions during the performance of the contract
- See also examples in recitals 33 and 44 of Directive 2004/18/EC

Contract performance (V)

- The laws, regulations and collective agreements, at both national and EU level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing such rules, and the way they are applied, comply with EU law.
  - Example, the Rüffert case
  - Information about national law in tender documents

Contract performance (VI)

- **Supply chain management**: contract performance clauses may also concern subcontractors
- *Examples*:
  - prohibition of child labour, minimum wages , ”decent work” throughout the supply chain
  - Obligation of the main contractor to provide proof of compliance

Contract performance (VII)

- Contract management/monitoring
- Terms for assessing performance
  - Measurable targets
  - Rewarding suppliers or address underperformance
  - Payment conditions (specified in contract)
  - Financial disincentives for poor performance and incentives for exceeding basic targets

Thank you
for your attention !