



The new regime ahead

The European conference on public procurement

UNICE, Oslo on September 29 – October 1, 2004

Social and environmental considerations

Connecting with best value for money

October 1, 08.30 – 09.30

Introduction to the subject

Thank you Mr Meyer! I'll do my utmost – being somewhat of a fox in a hen-house – acting as a moderator, not to reveal any of my personal opinions, based on 30 years of experience from the “enemy-side” of the business table. If you don't feel confused by the subject of environmental and social considerations, just wait until I've explained it.

Background

Under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities, in particular to promote sustainable development.

The new Directive on public procurement therefore clearly emphasizes the importance of including and promoting environmental requirements and social considerations in the award criteria, whilst still ensuring the possibility of obtaining the best value for money. In the preamble of the Directive it is stated that the Directives are based on case-law, clarifying the needs of the public as regards environmental and social considerations (i.e. the Concordia case in Finland, a.o.).

It is, however, also accentuated that the basic principles of the Treaty must be respected, deriving in the principles of equal treatment, non-discrimination, mutual recognition, transparency, and – last but not the least in this particular subject – the principle of proportionality.

Contracting authorities may lay down special conditions relating to the performance of a contract (Bentjees, 1987). Such conditions may, in particular, concern social and environmental considerations.

As a general remark, it is stated in the pre-ambule that nothing in the Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular in the view to sustainable development, provided, of course, that these measures are in conformity with the Treaty.

Environmental considerations

Contracting authorities wishing to define environmental requirements for the technical specification may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services.

It is also possible to use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-) national eco-labels or any other eco-label providing the requirements for the label are drawn up and adopted on the basis of “open¹” scientific information. Such eco-labels may be used to indicate proof of compliance.

Social considerations

There are two types of social considerations in the Directives. One is directed towards the possibility to allocate contracts to either sheltered workshops or sheltered employment programmes, or to lay down special conditions to the performance of the contract, e.g. to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration or the fight against unemployment.

Such measures could be to require the recruitment of long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic ILO Conventions, or even to recruit more handicapped persons than are required under national legislation.

The other possibility is to use criteria aiming to meet social requirements, in response in particular to the needs – defined in the specifications of the contract – of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are object of the contract belong.

¹ 1. Appropriate to define the characteristics of the supplies or services that are the object of the contract.

2. Based on scientific information.

3. All stakeholders concerned can participate.

4. Accessible to all interested parties.



Introduction of the panel

Mr Ugo Bassi, Head of Public Procurement Unit, DG Internal Market

Mr Bassi has a genuine legal background, including 7 years with the European Court of Justice, Luxembourg, from 1994 as Referendaire to Advocate General Tesauo. I would like to quote from an Opinion, in a quite different case, where Advocate General Tesauoro paraphrased the words of Advocate General Trabucchi in an Opinion dating from almost 30 years ago:

“If we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of social justice and European integration, not only of the economy but of the people, we cannot fail to live up to what is expected of us.”

Notwithstanding the assumption that Mr Bassi was involved in the statement, I think we will find out during this session if he deems this principle relevant also in public procurement.

In May, 2004, Mr Bassi was appointed Head of Unit D2 of DG Internal Market, with responsibility for a.o. development of public procurement policy and the transposition of the legislative package.

Very welcome to the panel!

Initial statement by Mr Bassi

See separate document



Dr Rudolf Roth, Associate General Counsel, Daimler Chrysler (D)

Herrn Doctor Roth is Associate General Counsel at Daimler-Chrysler AG, was previously occupied with export affairs, competition, patent and trade mark law, but is nowadays engaged in public procurement, including e-commerce, and is engaged in various industry organizations. Dr Roth has also issued a publication on the legal aspects of electronic tendering and procurement.

Very welcome to the panel!

Initial statement by Dr Roth
See separate document

Mr Pedro Fernández, Director, Legal Department, National Confederation of Construction (CNC-CEOE) (E)

Mr Fernández is director of the legal department of the National Builders Confederation in Spain, CNC. CNC is a section of the Spanish Confederation of Employer's Organizations (CEOE).

He is a lawyer, with two masters, MBA and Workers' Health and Safety Technology, and an expert in Public Procurement, Construction law, and labour law, and has published several articles and books in these fields.

Very welcome to the panel!

Initial statement by Mr Fernandez
See separate document

Questions to the panel

Due to time-constraint only one question was asked

To Mr Bassi: According to the pre-amble of the Directives (29) it is allowed to specify “lay down the environmental characteristics, such as a given production method” in the technical specification of a given contract. Does this mean that it is not necessary to comply with the principle of proportionality, e.g. that it would be permissible to consider “global” environmental protection?

Follow-up question to Dr Roth and Mr Fernández: How willing are you to meet requirements aiming at production methods?

The following questions were not asked during the panel session, but were advised to the panel participants in advance

To Mr Bassi: Where is the borderline between relevant (proportional) and not relevant global environmental (and social) requirements? Compared with the Concordia case, when does the relevance “run out”, e.g. the impact on citizens?

To Dr Roth and Mr Fernández: Do emphasized environmental and social requirements have different consequences for the economic actors to public procurement? How?

Follow-up question to Mr Bassi: Is this in line with the opening up of the public procurement to competition?

To Dr Roth and Mr Fernández: Could competition become reduced by means of economic actors considering not submitting tenders, due to unobtainable environmental demands?

Follow-up question to Mr Bassi: Is, then, the contracting authority in breach of the directives? Are they distorting competition? Who is the judge of that?

To Mr Bassi: In the Directive (23.6) it is said that contracting entities “may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-)national eco-labels, or by any other eco-label, etc... Please, clarify whether or not contracting authorities may refer to a complete eco-label, and, if so, under what circumstances.

Follow-up question to Dr Roth and Mr Fernández. Do you comply with any eco-labels? What is your opinion on the issue?

To Mr Bassi: In my frequent discussions with different scientists and experts in the environmental field, I have often been confronted with quite conflicting opinions, regarding the impact and effect of various sustainability initiatives. This makes the evaluation of risks difficult for the contracting authorities, not to say the courts. What is your comment on this?

Follow-up question to Dr Roth and Mr Fernández. Do you participate in any scientific discussions in this area?

To the panel: Where does the incentive for increased environmental and social demands come from, economic actors or contracting authorities? In the contracting authorities, where does the incentive come from, management or civil servants?

To Dr Roth and Mr Fernández: Do you see any contradiction in the combination of interests, namely increased environmental and social criteria versus value for money?

To Dr Roth and Mr Fernández: Is there a discrepancy between small and large economic actors as regards the interest and willingness to meet up with increased environmental and social requirements in public procurement?

To Mr Bassi: Could environmental criteria become less “global” for local suppliers, polluting the environment for the users of the outcome of the public procurement?

To the panel: Could social criteria even be used for protectionist purposes? What risks do you see by implementation of environmental and/or social criteria in public procurement?

Extra questions:

To Mr Bassi: Could you give examples of environmental situations?

To Mr Bassi: Could you give examples of social criteria situations? What is considered as “social criteria”.

To Dr Roth and Mr Fernández: Are your organizations prepared to take social responsibility, by means of social criteria defined by contracting authorities?

Questions from the audience

Due to time constraint no questions were allowed from the audience

Summing up of the session

Some may say, like Mr Meyer in his speech yesterday, that this debate has lead to an increased confusion, however, on a higher level. But as a conclusion it can be summarized that;

All environmental and social criteria specified in public procurement must be proportional, i.e. relevant for the consumer of the subject of the procurement.

However, the relevance must not necessarily be clearly visible for the user of the goods, services or works. This, according to the suppliers represented in this panel, improves a risk of misuse of such criteria.

There are three levels of setting up the criteria:

1. Direct effect criteria
2. Indirect effect criteria
3. Criteria with global effects

This circumstance will certainly provide energy for a forthcoming debate, not to mention analyzing of court judgments.

Notwithstanding this, it is clear that it is a strong political – and citizens – interest that environmental and social demands are put forward in public procurement. Let's all hope that the courts will clarify whatever uncertainty each civil servant is facing when initializing public procurement as soon as possible. Otherwise there will be a risk that the goal “more value for money” will not be met.