



## Support for Improvement in Governance and Management

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### Public Procurement

# Incorporating Environmental Considerations into Procurement

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## What are environmental considerations?

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

### Examples of environmental considerations:

- Minimising the impact of a construction project on the environment
- Encouraging environmentally sensitive working practices by economic operators
- Increasing the energy efficiency of buildings
- Reducing wastage of natural resources
- Encouraging the development of alternative energy sources
- Reducing transport costs by sourcing products locally
- Reducing the carbon footprint

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

The key questions from a procurement perspective are:

- (1) Is it legally permitted under the EU *acquis* to incorporate environmental considerations into the procurement process? and
- (2) If it is legally permitted to do so, when and how can this be done?

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

## What does the Directive say about environmental considerations?

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

- **Technical specifications – environmental characteristics:** Technical specifications may be formulated in terms of performance or functional requirements, which may include environmental characteristics. Contracting authorities may also use detailed specifications as defined by European or multinational eco-labels or other eco-labels, but only subject to fulfilling specified conditions.
- **Conditions for performance of contracts:** Contracting authorities may lay down special environmental conditions relating to the performance of the contract provided that:
  - the special conditions are compatible with the EU acquis; and
  - they are indicated in the contract notice or in the specifications

Economic operators that accept the conditions cannot be excluded just because the contracting authority thinks that the economic operator will not meet the conditions.

- **Evidence of an economic operator’s technical abilities - Environmental management measures:** In appropriate cases (where they are related to technical capability), contracting authorities may ask for environmental management measures as evidence of an economic operator’s technical abilities in delivering a public works and public services contract.
- **Environmental characteristics as award criteria:** The Directive sets out a non-exhaustive list of criteria on which a contracting authority may base its award for the most economically advantageous tender. This list refers specifically to “environmental characteristics”. The criteria used must be linked to the subject matter of the contract and must not give the contracting authority an unrestricted freedom of choice.

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

### Preparation

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

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

- key strategic purchasing decisions are made
- the subject matter of the contract is defined
- the contract notice is drafted
- general and technical specifications are prepared
- the contract terms and conditions are drafted

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

### Note on Environmental Impact Assessments:

For certain types of public and private projects it is obligatory to undertake an Environmental Impact Assessment (EIA). This obligation does not derive from the procurement directives but from Directive 85/337/EC “the EIA Directive”. Where a project is of a type that is subject to the EIA Directive, then the contracting authority must carry out an EIA in advance so that the authority has all relevant information enabling it to take a decision in the full knowledge of the environmental impact of that decision. The types of project covered are set out in the EIA Directive and can include, for example, oil refineries, power stations, major infrastructure projects and waste disposal installations.

Where an EIA is produced, this may have an effect on the subject matter of the contract and/or on the performance clauses.

For further information on the EIA Directive, see:

<http://ec.europa.eu/environment/eia/>.

### Advertising – the contract notice

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

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

## Selection

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

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

**Phase 1 - Exclusion:** The Directive sets out grounds on which candidates expressing an interest must be excluded. These mandatory grounds relate to convictions for serious criminal offences. The Directive also sets out grounds on which candidates may be excluded. It is the non-mandatory grounds for exclusion that are most likely to form the basis for exclusion on issues linked to environmental considerations. In practice the opportunities are quite limited.

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

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

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

## Tender evaluation

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

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

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

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

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

## Contract conditions

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

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

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

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

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

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

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

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

Examples of possible contracts with conditions incorporating environmental considerations are:

- A works contract for construction of a new office building, which includes a contract condition requiring the use of re-usable containers to transport materials to a construction site and efforts to reduce waste generation on site

and to increase recycling rates.

- A cleaning contract requiring the use of dosage indicators to ensure that an appropriate quantity of cleaning product is used and obliging the contractor to recycle packaging wherever possible.
- A contract for the supply of photocopier paper requiring delivery in appropriate quantities so as to keep the number of deliveries to a minimum and delivery outside peak times to reduce petrol consumption by the delivery vehicles.

## Contract Management

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

### Utilities

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

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

**What does the Directive say about environmental considerations?** The Directive contains a number of provisions that refer specifically to the incorporation of environmental considerations into the procurement process. These reflect, to a significant extent, the provisions in the public sector Directive. Set out below are some of the key differences.

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

**Grounds for obligatory exclusion:** a utility that is a contracting authority must comply with the provisions requiring mandatory exclusion of found guilty of serious criminal. Utilities that are not contracting authorities are not obliged to do so.

**Grounds for discretionary exclusion:** All utilities may choose to exclude candidates on the discretionary grounds, but they are not obliged to do so. The discretionary grounds include exclusion on the grounds of professional misconduct or grave misconduct which may possibly be used in relation to environmental considerations.

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

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

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

### **Tender evaluation**

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

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

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

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

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

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

### **Further reading:**

[SIGMA Public Procurement Training Manual](#)