

# Mainstreaming Sustainable Public Procurement: Guiding principles for revising EU Directives

Public Hearing of the Committee on the  
Internal Market and Consumer Protection

Modernising EU Public Procurement Rules:  
At the service of sustainable growth in lean times

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# EP Objectives for Revising Public Procurement Directives

- strengthen the sustainability dimension of public procurement by allowing it to be integrated at each stage of the procurement process
- improve legal clarity
- simplify the rules and allow more flexibility
- achieve optimal value for citizens:
  - best value for money
  - optimal efficiency in public spending

# Sustainability / Simplification / Clarity / Value

- Simplification and clarity are necessary for better take up of more sustainable procurement policies
- More sustainable public procurement provides better value

# Analytical Framework for Revising the Directives

- Define core principles for EU public procurement rules
- Assess proposed revisions against these core principles
- Strive for simplicity and clarity; avoid 'hair-splitting'

# Core Principles

## (1) *How* to buy, not *what* to buy

- contracting authority can purchase what it wants to buy
- contracting authority can define what it wants to buy
- EU rules ensure transparency, equal protection
- EU rules incorporate integration principle

# Core Principles

(2) Horizontal objectives are equal to functional objectives

double purchasing power:

- *Concordia Bus*: purchase cleaner air as well as city bus services
- *Wienstrom*: purchase reduced GHG emissions as well as electricity supply
- *Fair Trade*: purchase international development, respect for human rights as well as coffee

# Core Principles

## (3) Best value for money

- Integration Principle:

EU's sustainable development objectives *require* the consideration the consideration of sustainability impacts of government purchasing decisions

# Core Principles

- (4) 'Link with the subject matter' rule
  - counter-balances allowing horizontal objectives to be equal to functional objectives
  - prevents 'over-reaching' of horizontal objectives beyond the scope of the procurement contract
  - ECJ: very important rule to maintain, but given a very broad interpretation



# Core Principles

- (5, 6) Transparency, Equal protection
- all conditions and elements of the procurement must be set out such that all reasonably informed and diligent tenderers understand the exact scope and interpret things in the same way
  - able to verify effectively compliance with the elements set out

# Complication of Rules

- Failure to respect, trust, and balance core principles
- Failure to grant horizontal objectives equality with functional objectives
- Failure to trust the 'link with the subject matter' rule to constrain over-reaching
- Failure to give 'link with the subject matter' rule a broad interpretation, in contradiction of ECJ
- Failure to rely on transparency and equal protection principles to guide 'how to buy'

# Hair-splitting: what criteria belong in technical specifications v award criteria

- Art 40: Technical Specifications
  - Acknowledges that technical specifications may incorporate horizontal objectives (e.g., can refer to processes involved in production and other non-use phase of the life cycle of the works, service, or supply)
  - But details of Art 40 appear to limit technical specifications to functional objectives

# Hair-splitting: technical specifications v award criteria

- Recital 41
  - Notes 'link to subject matter' as essential rule for technical specifications and acknowledges that this permits production characteristics
  - But then suggests that various social sustainability aspects of production can be included as award criteria only, not technical specifications

## Technical Specifications v Award Criteria: clear and simple guidance

- The scope of what can be included as either technical specifications or award criteria is defined by the 'link to the subject matter' rule, broadly interpreted.

## Technical Specifications v Award Criteria: clear and simple guidance

- The difference between technical specifications and award criteria is *not* determined by the substance of the criteria, i.e.,
  - whether pertaining to production or use
  - whether contributing to horizontal or functional objectives
  - whether pertaining to social or environmental sustainability

## Technical Specifications v Award Criteria: clear and simple guidance

- The difference between technical specifications and award criteria relates to their respective functions in the procurement decision-making procedure

# Technical Specifications v Award Criteria: clear and simple guidance

- Technical specifications = absolute requirements of the contracting authority
  - if tenderer cannot satisfy tech specs, he cannot compete for tender
  - e.g., electricity must be generated from renewable sources
- Award criteria allow the contracting authority to balance different values against each other
  - e.g., extra points awarded if electricity comes from renewables, this will be balanced against other priorities, including price



# Conclusion

- Proposal revisions should be assessed according to how they fulfil and clarify core principles
- Elements that contradict core principles or lead to 'hair-splitting' rather than greater clarity and simplicity should be refined or purged

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For ClientEarth legla briefings on public procurement, see

[www.clientearth.org/sustainable-public-procurement-briefings](http://www.clientearth.org/sustainable-public-procurement-briefings)

