

Sustainability and Public Procurement – Legal Background

Judge Marc Steiner,
Swiss Federal Administrative Court

Report on new developments in public procurement A7-0151/2010

Whilst many initiatives have been taken ... in the area of ecologically responsible ... procurement, [the same is not true regarding] socially responsible procurement (p. 16).

Green Paper COM(2011)15 final (I)

The **first** objective [of public procurement] is to increase the efficiency of public spending (**best value for money**; p. 4).

Green Paper COM(2011)15 final (II)

Given the key role of public procurement in coping with today's challenges, the existing tools and methods should be modernised in order to make them better suited to deal with the evolving political, social and economic context (p. 4).

Green Paper COM(2011)15 final (III)

Another **complementary** objective is to allow procurers to make better use of public procurement in support of common societal goals: These include protection of the environment ... and combating climate change, promoting innovation and social inclusion (p. 5).

Green Paper COM(2011)15 final (IV)

This view of the Commission is relatively new and especially due to some landmark decisions of the Court of Justice of the European Union such as C-513/99 Helsinki Bus Case and C-448/01 EVN/Wienstrom Case.

Single Market Act COM(2011)206 final

Key action: Revised and modernised public procurement legislative framework, with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works (p. 19).

Relevant legal framework (I)

The WTO Government Procurement Agreement (GPA) is as relevant as the Directives 2004/17/EC and 2008/18/EC.

Relevant legal framework (II)

The contracting authorities ... which apply [this Directive] ... should therefore be in conformity with the [Government Procurement] Agreement (Recital 7 Directive 2004/18/EC).

GPA 1994: Basic principles (I)

Two non-discrimination pillars:

- national treatment
- most favoured nation obligation

Article III:2(b): "... entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good ..."

GPA 1994: Basic principles (II)

These prohibitions (Art. I.3 and III GPA) affect, most notably, secondary policies directed at supporting non-competitive domestic industries (Arrowsmith, Government Procurement in the WTO, The Hague 2003, p. 328).

GPA 1994 and Sustainable Public Procurement (I)

Sustainable Public Procurement is not by definition directed at supporting non-competitive domestic industries, but there is a potential for abuse.

GPA 1994 and Sustainable Public Procurement (II)

Thirteen years ago the dominant view could be described as very sceptical concerning the integration of secondary/horizontal policy goals from a WTO perspective. But interestingly enough no one complained about Art. 26 of the Directive 2004/18/EC. So there must be a **mindset change**.

Art. VI GPA – Technical specifications

Technical specifications laying down the characteristics of the products ... to be procured, such as quality ... or **the processes and methods of their production ...**

Horizontal Policies in the EU context (I)

Secondary policies / Legal basis

Art. 26 Directive 2004/18/EC:

Conditions for performance of contracts

Horizontal Policies in the EU context (II)

Contracting authorities may lay down special conditions relating to the performance of a contract. ... The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

Trade and Labour in the EU context

For instance, mention may be made, ... of the requirements ... to comply in substance with the provisions of the basic ILO Conventions, assuming that such provisions have not been implemented in national law (Recital 33 Directive 2004/18/EC).

Legal coherence: Limitations on secondary policy criteria

Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents.

(Recital 33 Directive 2004/18/EC).

Interplay GPA and EU Directives

The contracting authorities ... which apply [this Directive] ... should therefore be in conformity with the [Government Procurement] Agreement (Recital 7 Directive 2004/18/EC). -> **Applying EU law is interpreting the GPA!**

Secondary policies / purity principle

According to the purity principle one purpose of public procurement regulation would be to establish a system that reduces as far as possible the insertion of non-economic criteria into the procurement process (definition by Sue Arrow-smith / Christopher McCrudden discussing the GPA).

Art. VIII GPA – Qualification of Suppliers

Art. VIII(b): Any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capacity to fulfil the contract in question.

Art. VIII GPA – Qualification of Suppliers

Art. VIII(h): Nothing in subparagraphs (a) through (g) shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

Secondary Conditions

However, it is arguable that the rules on qualification criteria do not allow suppliers to be excluded because they cannot comply with requirements unconnected with contract performance (Sue Arrowsmith, *Government Procurement in the WTO*, p. 336 s.).

This is not a problem when minimum standards like ILO Core Labour Standards are at stake.

Art. XXIII GPA: Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of ... unjustifiable discrimination ..., nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures ... relating to the products or services of handicapped persons ...

Swiss finish (federal level; since 2010)

If the subject of the contract is a task to be performed abroad, the bidder has to assure at least the respect of the ILO Core Labour Standards (Swiss Federal Ordinance on Public Procurement [Ordonnance sur les marchés publics OMP; RS 172.056.11])

Swiss finish (federal level; since 2010)

The procuring entity requires that subcontractors and suppliers also comply with the ILO Core Labour Standards. This is assured by a contractual transfer of this obligation from the bidder to important suppliers and subcontractors (Recommendations on Sustainable Procurement).

Swiss finish (federal level; since 2010)

Recommendations (publication details):

<http://www.bbl.admin.ch/bkb/02617/02632/index.html?lang=de>

Swiss Federal Procurement Commission,
Sustainable procurement –
Recommendations for the federal
procurement offices, 2010

Treaty on the Functioning of the EU

Article 7

The Union shall ensure **consistency between its policies** and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Coherence / WTO / Government Procurement Agreement

The existing conflicts between sustainability concerns and trade law need to be resolved if international law is “to provide a reliable and credible system of norms” (cf. *mutatis mutandis* Christine Kaufmann, *Globalisation and Labour Rights*).

Main references

Sue Arrowsmith/Peter Kunzlik (ed.):
Social and Environmental Policies in
EC Procurement Law – New Directives
and New Directions, Cambridge 2009

Robert Anderson/Sue Arrowsmith (ed.):
The WTO Regime on Government
Procurement: Challenge and Reform
(forthcoming)

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