



Smart public procurement : value for money

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The presentation reflects the personal views of the author and is not an official position of the European Commission

What is smart procurement

We need a holistic approach to public procurement:

smart rules

applied in a smart way

to achieve optimal outcome (value for money).

Smart rules

The new public procurement directives were adopted in 2014 (2014/23; 2014/24; 2014/25); by now they are largely transposed by Member States

Some of the main objectives of the reform:

- modernisation of public procurement rules;*
- increased flexibility;*
- reinforced role of strategic public procurement (social and environmental considerations; innovation).*

Modernisation of the rules

The new directives contain provisions to streamline procedures to make them less burdensome for the authorities and bidders alike:

- reduction of documentation requirements;*
- E-procurement;*
- E-invoicing (introduced by Directive 2014/55; e-invoicing standard published in OJ C series in October 2017).*

Flexibility for contracting authorities

The new directives provide more space for contracting authorities to react to changing circumstances:

- Article 27 of Directive 2014/24: negotiated procedure is allowed in the public sector when the complexity of the contract makes it difficult for the contracting authority to precisely define the specifications at the outset;*
- Article 72: new rules on contract modifications that give more legal certainty to contracting authorities when dealing with situations arising during contract performance.*

Strategic public procurement

2014 Directives are a result of an ambitious proposal from the Commission.

Environmental and social considerations can be integrated into all stages of public procurement:

- design of procurement;*
- technical specifications;*
- selection and exclusion criteria;*
- award criteria;*
- contract performance clauses.*

Smart procurement design

Knowing the market is crucial:

- *preliminary market consultation is now expressly allowed and regulated by the EU Directives (Article 40 of Directive 2014/24);*
- *however, contracting authorities are still responsible for ensuring equal treatment of tenderers.*

Sectoral guidance from the Commission:

- *Commission Communication "Against lock-in": how to use specifications in IT procurement in order to avoid lock-in (COM/2013/0455 final)*

Smart award criteria? The upside...

The new directives open up considerable possibilities for contracting authorities to set smart award criteria (Article 67 of Directive 2014/24):

- award criteria can relate to environmental and social aspects;*
- they are considered linked to the subject-matter of the contract*
 - **if the criteria relate to any stage of the life-cycle of the product**
 - **even if they relate to aspects that do not form part of the material substance of the products**
- life-cycle costing is expressly allowed and regulated.*

... and the downside

The EU Directives follow an enabling approach; but this means that:

- contracting authorities remain responsible for their choices, including for respecting basic principles of EU law such as non-discrimination and equal treatment;*
- in the absence of harmonisation it may be difficult to find the right technical solution;*
- there is very little harmonisation in the field of life-cycle costing, i.e. contracting authorities remain responsible for finding the right methodologies.*

How to do it then?

It is probably easier to set environmental criteria than social ones:

- there is a large body of EU secondary environmental law meaning that there are harmonised standards to build on;*
- the extent of harmonisation is much smaller in the social field;*
- however, the case-law of the Court of Justice is giving important indications.*

Guidance from the Commission

Buying Green Handbook

- *contains extensive information on the state of the law and best practices;*
- *covers the entire procurement cycle;*
- *updated in 2016.*

Buy Social guide

- *covers Socially Responsible Public Procurement;*
- *updated in 2011.*

Case-law of the Court of Justice

The case-law of the Court of Justice has given important impetus to the development of smart public procurement in the EU:

- Beentjes case (31/87) – the Court allows social criteria to be taken into account (employing long-time unemployed persons)*
- Concordia Bus Finland case (C-513/99) – Court accepts environmental award criteria*
- Max Havelaar case (C-368/10) – Court accepts that award criteria need not relate to material substance (fair trade)*

Recent developments

C-549/14 Bundesdruckerei: the Court confirms that contracting authorities must respect the Treaty principles

- a contracting authority cannot require bidders to pay the minimal wage applicable at the seat of the authority if the actual service is provided in another Member State;*
- the Court still upholds the Rüffert case (C-346/06) in which the Court stated that it is disproportionate to provide for a minimum wage for workers performing public contracts only, i.e. one that would not be applicable in the public sector, too.*

RegioPost

In RegioPost (C-115/14) the Court narrowed down the application of the Rüffert principle considerably:

- the Court allowed minimum wages that are laid down by legislation but apply only to public contracts;*
- in doing so it emphasised the importance of the provisions of the public procurement directives on contract performance clauses (at the time Article 26 of Directive 2004/18);*
- this approach may empower the public sector to play a leading role in ensuring adequate social protection in public contracts.*

Future outlook

The Commission is following the implementation of the new public procurement directives in the Member States.

It proposes actions in order to make the implementation more effective (new public procurement package).

The Court of Justice continues to be a very important actor especially now that it gradually starts to handle cases that arise under the new directives.