socialplatform

PUBLIC PROCUREMENT FOR SOCIAL PROGRESS

A Social Platform guide to the EU Public Procurement Directive

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About us

Social Platform is the largest civil society alliance fighting for social justice and participatory democracy in Europe. Consisting of 48 pan-European networks of NGOs, Social Platform campaigns to ensure that EU policies are developed in partnership with the people they affect, respecting fundamental rights, promoting solidarity and improving lives.

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INTRODUCTION

Public Procurement for Social Progress: a guide to the EU Public Procurement Directive

On 17 April 2014 the new Public Procurement Directive (2014/24/EU) came into force. Member states have until 18 April 2016 to transpose the Directive into national legislation.

Although the Directive provides contracting authorities with a vehicle to achieve social and environmental goals, they are not obliged to pursue those goals. Following the detrimental impact on services of the economic crisis and the ensuing cuts to national budgets, member states must not miss this golden opportunity to reverse the curve on declining quality and frequency of service provision.

This guide is aimed at supporting member state representatives in the transposition of the directive and contracting authorities in its implementation. It also intends to facilitate the understanding of the Directive by social economy enterprises and non-profit social and health service providers.

In order to capitalise on the social advantages the Directive offers, we have focused on the following three areas:

1. "Reserved contracts" for economic operators that promote the social and professional integration of persons with disabilities and disadvantaged persons.
2. "Social considerations" as the silver thread through the procurement process.
3. Putting service users first by designing effective procedures for awarding contracts for social and health services.

KEY MESSAGES

1. **Encourage the evaluation of bids on the basis of the Best Price-Quality Ratio, in particular those concerning social and health services:** value for money does not simply mean financial return – the social and environmental returns are equally important, if not more so.

2. **Member states should include the provision on reserved contracts (article 20) in national legislation:** contracting authorities should then restrict some tendering procedures to sheltered workshops and economic operators whose main aim is work integration of persons with disabilities and disadvantaged persons.

3. **Allow reserved contracts for social services provided by social economy operators:** the European Commission and member states should inform contracting authorities about possibilities to continue successful cooperation with such operators beyond a period of three years.

4. **Develop in all member states support mechanisms, such as the one offered by SAW-B in Belgium,[1] for contracting authorities, social economy enterprises and businesses:** such mechanisms should support them in maximising the sustainable development, social and environmental potential of the Directive.

5. **Contracting authorities, where feasible, should award contracts in the form of separate lots,** in order to facilitate the participation in public procurement of civil society organisations, social economy enterprises and small and medium sized enterprises (article 46).

1. In Belgium, Solidarité des Alternatives Wallonnes (SAW-B), a federation of social economy organisations, has developed several programmes and tools aimed at spreading social clauses in public procurement procedures (namely meetings with public buyers and local social enterprises, a helpdesk service and counselling services for contracting authorities on how to manage the use of social considerations in public procurement).

THE ONGOING ROLE OF THE EU

Although the Directive has reached the transposition stage at national level, the EU's role is far from over. The European Commission should continue providing assistance to member states during this phase, as well as to contracting authorities in the implementation phase. To this end, the European Commission should:

1. Facilitate the involvement of relevant stakeholders in thematic meetings with member state representatives working on the Directive's transposition: this includes civil society organisations, social economy representatives, non-profit service providers and users' representatives.
2. Collect, exchange and disseminate to member states good practices of socially responsible public procurement.
3. Design and implement tailored training programmes for contracting authorities, in partnership with member states and civil society organisations such as social economy enterprises.
4. Design standard forms concerning contract notice, prior information notice and contract award notice in an accessible format, to ensure accessibility of procurement procedures and documents.
5. Update the "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest".

SCOPE OF THE DIRECTIVE

Articles 1 and 4, recitals 6 and 114, and Annex XIV

Article 1 of the Directive defines its scope and subject matter: rules on the procedures for the acquisition by means of a public contract of works, supplies or services of a certain value by contracting authorities from economic operators. Article 4 specifies the thresholds equal or above which the Directive is applicable. Annex XIV lists services subject to simpler and more tailored rules (articles 74-77) compared to services covered by the Directive in its entirety.

Any claim that the Directive creates an incentive to privatise, organise or finance public services is false. This is clearly stated in recitals 5 and 114. Article 1.4 reiterates that member states have the freedom to define, in compliance with EU law, what they consider to be services of general economic interest and how those services should be organised and financed. Similarly, the Directive does not prevent contracting authorities from deciding how to carry out these services, in line with article 14 TFEU and protocol 26 of the Lisbon Treaty.

As article 1.4 mentions only services of general economic interest, this implies that non-economic services of general interest are fully excluded from the scope of the Directive. Recital 6 also confirms that non-economic services of general interest should not fall within its scope.

In addition, article 1.5 and recital 6 specify that the directive does not affect the way in which member states organise their social security systems. Annex XIV lists compulsory social security services among the services to be procured according to articles 74-77. This should be interpreted in the sense that articles 74-77 apply when social security services are organised as services of general economic interest and when they are procured through public contracts.

Public contracts for social services and other specific services listed in Annex XIV whose value is equal to or greater than € 750,000 (the threshold indicated in article 4(d)) are subject to articles 74-77 of the Directive, the so-called "light regime" for social and health services.

It is important to highlight that recital 114 gives member states and contracting authorities freedom to provide services to the person – such as certain social, health and education services – themselves. They can also organise those services without public procurement procedures, for example by mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority. Member states can choose service providers with wide discretion, provided that national procedures ensure transparency and equal treatment of economic operators.

When contracting authorities choose to procure social and health services listed in Annex XIV, and if the amount of the contract is equal or above € 750,000, they must apply the rules set out in articles 74-77 of the Directive.

RESERVED CONTRACTS

Achieving social and professional integration of persons with disabilities and disadvantaged persons

Reserved contracts in public procurement procedures offer concrete opportunities to support the social and professional integration of persons with disabilities and disadvantaged persons.

Some member states already have legislation in place that obliges public and private employers of a particular size to employ a certain percentage of persons with disabilities.[2] However, official statistics[3] show that businesses often prefer to pay penalties instead of complying with such laws, making the integration of persons with disabilities into the labour market extremely difficult. There are currently no similar laws aimed at fostering the professional integration of disadvantaged persons. For these reasons, the transposition of article 20 is of paramount importance.

ARTICLE 20 AND RECITAL 36 – RESERVED CONTRACTS

RECOMMENDATIONS TO MEMBER STATES

Although article 20 is non-mandatory, member states are advised to transpose it. If implemented, this article would allow contracting authorities to restrict some tendering procedures for the purchase of goods, works or services to sheltered workshops and economic operators whose main aim is work integration of persons with disabilities and disadvantaged persons. By doing so, member states and contracting authorities would guarantee more effective and sustainable integration of those persons. At the same time, it would increase the economic performance of sheltered workshops and other economic operators.

The revised Directive includes disadvantaged and disabled persons in the scope of reserved contracts; it now only requires 30% of employees to fall into these two categories, rather than 50% called for by the 2004 version of the Directive.

2. For example, in Italy Legge 12 marzo 1999, no. 68, "Norme per il diritto al lavoro dei disabili"; in France, "Loi du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées".
3. For example, in Italy in 2012 41,304 persons with disabilities have not been employed by companies resulting in an infringement of Law 68/1999. This information refers in particular to companies with more than 50 employees. Source: Camera dei Deputati, "Relazione sullo stato di attuazione della legge recante norme per il diritto al lavoro dei disabili (anni 2012-2013)", p. 44.

Recital 36 exemplifies how "disadvantaged person" should be interpreted: for example, the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups. Member states should interpret this term with wide discretion, to include all categories of people facing social exclusion and adapt it to their national context and needs.

"Sheltered employment" and "sheltered workshops" should not be used as synonyms. Sheltered employment generally means employment in sheltered settings, in which each employee receives a full salary and access to social protection schemes. Sheltered workshop usually means the inclusion of persons with disabilities through work in sheltered settings; in this case workers do not have full employee status and are therefore not covered by the same rules and regulations. Both should nonetheless be interpreted according to the definition given by the European Commission in the General Block Exemptions Regulation: employment in an undertaking where at least 30% of workers are workers with disabilities.[4]

"Sheltered employment programmes" should not be interpreted as "supported employment". Supported employment is a scheme that supports people with disabilities or other disadvantaged groups in obtaining and maintaining paid employment in the open labour market, rather than in sheltered settings. Supportive measures must include assistance to the employee before, during and after obtaining a job as well as support to the employer. Key to this is the job coach function. Supported employment focuses on people's abilities rather than disabilities, with an emphasis on employment and not on activation or subsistence.[5]

RECOMMENDATIONS TO CONTRACTING AUTHORITIES

Article 20 allows contracting authorities to concretely support work and employment opportunities for persons with disabilities and disadvantaged persons living in their communities.

During the verification of conditions for participation of a tenderer, contracting authorities should verify that the integration of persons with disabilities and disadvantaged persons is stated as a primary mission in the statutes or other statutory documents of the applicant organisation. Social economy enterprises fall into this category. While drafting the terms of reference, contracting authorities should include the quality of the social integration project as an essential criterion to be met by the tenderer. This would prevent enterprises that opportunistically employ disabled or disadvantaged persons only during the contracting period from winning contracts.

4. European Commission Regulation no. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of articles 107 and 108 of the Treaty, article 2 (100).

5. European Commission, Study Report "Supported employment for people with disabilities in the EU and EFTA – EEA", May 2011, p. 7.

EXAMPLES OF GOOD PRACTICE

Case 1: Reserved contract concerning cleaning services of municipal buildings in Italy

Country	Italy
Contracting authority	Municipality of Gabicce Mare
Subject matter of the contract	Cleaning services of municipal buildings
Amount	€190,000 (below the EU threshold)
Duration	4 years
Characteristics of the call	Reserved contracts: reference to article 52 on "reserved contracts" of the Italian Legislative Decree 163/2006 and to "B" type social cooperatives that by law must include at least 30% of disadvantaged workers.[6] Social considerations: included in award criteria. Use of MEAT (30% weighting given to the economic offer and 70% weighting given to the technical offer, specified as follows): » 5 points – proven experience in the field » 15 points - proven established relationship in the local area (agreements with local authorities, number of local disadvantaged people included in the labour market) » 15 points - work integration project of disadvantaged persons » 6 points – tenderer's organisational structure » 9 points - organisation, qualification and experience of staff assigned to perform the contract » 16 points - creation of stable workplaces for disadvantaged persons » 4 points - useful additional services and proposals aimed at improving the service

6. Law 8 November 1991, no. 381 on social cooperatives.

Case 2: City Council Decree laying down obligations for contracting bodies concerning responsible public procurement in terms of social and environmental criteria in Spain

Country	Spain
Contracting authority	Barcelona City Council[7]
	With this Decree, Barcelona City Council requires its contracting bodies to make use of reserved contracts and social (and environmental) considerations in award criteria and contract performance clauses.
	The Decree sets out the obligation to organise restricted tendering procedures for certain specified types of contracts for works, goods and services to the following three types of economic operators: "Centres Especials de Treball",[8] work integration social enterprises and non-profit organisations whose purpose is the employment or social integration of people at risk of social exclusion. Reserved contracts to work integration social enterprises and non-profit organisations apply exclusively to minor contracts and/or when the negotiated procedure without prior publication is used. Reserved contracts to "Centres Especials de Treball" may be applied with no amount limit and regardless of the procedure.
	The Decree requires competent contracting bodies to justify the reasons why a contract is deemed to be inadequate for restricting tendering procedures to economic operators that work for the social and professional integration of disadvantaged persons and for the inclusion of social clauses. Therefore the use of reserved contracts and the inclusion of social clauses are considered to be the rule and not the exception.
	This Decree also sets obligations for contracting bodies on the use of social considerations.

7. Barcelona City Council, Decree 15 March 2013; see website.

8. "Centres Especials de Treball" were established by article 42 of the Spanish Law 13/1982. They may be defined as centres, whether publicly or privately owned, whose main objective is to facilitate access to the labour market of persons with disabilities in a protected environment in view of including them afterwards in ordinary companies. At least 70% of employees working in these centres must be persons with disabilities.

SOCIAL CONSIDERATIONS

The silver thread through the procurement process

Procurement procedures can be used by a contracting authority not only to buy what it needs, but also to achieve sustainable development, social and environmental objectives. Social and environmental considerations are an important tool to achieve this.

To give an example of social and environmental considerations, a contracting authority procures bus services and the construction of roads and bridges in order to perform the public function of facilitating public transport. It may also decide that the contractor should employ a certain percentage of workers belonging to ethnic minorities, or that the bus transport service should limit gas emissions to a certain level.

MAIN STAGES OF PROCUREMENT PROCEDURES

» **Defining the subject matter of the contract:** the contracting authority decides what it wants to buy (products or works) or which services it wishes to receive; the contracting authority can also decide if it wants to include social (and environmental) considerations. Social (and environmental) criteria must directly relate to the subject matter of the contract; they cannot, for example, specify criteria for the bidder in general, such as the need to have a certain policy on equal opportunities.

» **Drafting technical specifications:** the contracting authority defines the required characteristics of the product/work/service it wants to buy; offers not complying with all technical specifications are rejected.

» **Defining award criteria:** the new Directive provides for three award criteria: the lowest price, the lowest cost and the Best Price-Quality Ratio (called "most economically advantageous tender – MEAT" in the 2004 Directive). With the latter, a certain "weighting" is given to the different combinations of criteria chosen.

› If the lowest price or the lowest cost are used, only the financial aspects of the contract are taken into account.

› If the "Best Price-Quality Ratio - BPQR" is used instead, social considerations can be included among the different award criteria to be weighed, together with the price or cost and other criteria such as quality and environmental considerations.

» **Defining contract performance clauses:** this final stage is non-compulsory and regards how a contract should be performed. These clauses could include social and environmental considerations.

The most common use of social considerations is in relation to employment of long-term job-seekers and the implementation of training measures for the unemployed or young persons during the course of the contract.

The European Commission's "Buying social" guide[9] provides a non-exhaustive list of social considerations: this includes promoting employment opportunities, ensuring decent work, compliance with social and labour rights including gender equality and non-discrimination, supporting social inclusion and promoting social economy organisations, and guaranteeing accessibility for persons with disabilities and design for all.

ARTICLE 18.2 AND RECITALS 37-40 – THE MANDATORY SOCIAL CLAUSE

According to this article, member states must ensure that economic operators abide by environmental, social and labour legislation established by Union law, national law, and collective agreements or by international agreements - such as the International Labour Organisation Conventions - ratified by all member states, listed in Annex X of the Directive. This sets the stage for socially responsible public procurement.

RECOMMENDATIONS TO MEMBER STATES AND CONTRACTING AUTHORITIES

Article 18.2 is legally binding, and should be read in conjunction with recitals 37-40: obligations that apply at the place where the works are executed or services provided.

The application of the laws encompassed by the mandatory social clause should apply for the duration of a contract's performance. However, this should in no way prevent the application of terms and conditions of employment that are more favourable to workers (recital 37).

Reference to article 18.2 should be made in the "technical specifications" (article 42). Cross-references in award of contracts (article 56), exclusion grounds (article 57 and 59), abnormally low tenders (article 69) and subcontracting (article 71) are also highly recommended.

9. European Commission, "Buying Social - A Guide to Taking Account of Social Considerations in Public Procurement", pp. 7-9.

ARTICLE 42 AND RECITAL 74 – TECHNICAL SPECIFICATIONS

RECOMMENDATIONS TO MEMBER STATES

The only social considerations that can be included in the technical specifications relate to accessibility requirements for persons with disabilities and design for all users.

Design for all is "the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design". [10]

At EU level, a standard is being developed to include design for all in relevant standardisation initiatives, as well as a standard on accessibility of the built environment.[11] Until such EU standards are adopted, a useful source to be taken into account by contracting authorities while drafting technical specifications is provided by the principles of universal design[12] developed by the Centre for Universal Design, North Carolina State University.

In the case of ICT, a European Standard on accessibility requirements for ICT products and services is available,[13] as well as an online toolkit for procurers on how to use it.[14]

Member states should draw up clear guidelines regarding the application of article 42, including specific and narrow parameters for when the Directive's wording "except in duly justified cases" applies. This exception – left undefined in the Directive – should be used only under very exceptional circumstances. Unjustifiable cases include those relating to any product or service designed for use by the general public or staff, and anything refused for financial reasons.

RECOMMENDATIONS TO THE EUROPEAN COMMISSION

The European Commission should monitor the transposition process to ensure that governments issue specific and similar guidelines on what constitutes a "duly justified case". The involvement in this process of civil society organisations representing persons with disabilities is of paramount importance in order to tap into the sector's expertise.

In addition, the European Commission should create a portal with information, resources and a helpdesk, similar to the "Green Public Procurement" website, to help member states to make procurement accessible.

10. The Centre for Universal Design, North Caroline State University.
11. Mandate 473 "Standardisation mandate to CEN, CENELEC and ETSI to include "Design for All" in relevant standardisation initiatives". The standardisation Mandate 420 by the European Commission concerns European accessibility requirements for public procurement in the built environment.
12. The principles of universal design are available on this website.
13. The European standard is available here.
14. The toolkit is available here.

RECOMMENDATIONS TO CONTRACTING AUTHORITIES

Upon receiving an offer the contracting authority should check how the contractor intends to ensure accessibility and design for all requirements, such as by employing appropriately trained staff. Contracting authorities should not wait until the end of a contract to conduct these checks.

The recommendations provided above to member states concerning "design for all" and the EU standard on accessibility requirements for ICT products and services are applicable to contracting authorities as well.

Awareness-raising and training are also important to ensure that procured works, goods and services are accessible and usable in practice.

EXAMPLE OF GOOD PRACTICE

Case: Access to ICT services for disabled persons

People who live with a disability face a constant battle to gain access to information, online services, digital products, manufactured goods and the built environment. Fortunately, there is robust evidence that public procurement rules that require accessibility for persons with disabilities have been instrumental in improving access to many goods and services. Section 508 of the United States Rehabilitation Act concerning ICT products is an example of this.[15]

EXAMPLE OF BAD PRACTICE

Case: Construction code in Belgium

In the Wallonian region of Belgium a construction code for accessibility exists, but it is not consistently respected. In practice, if a house has been built that does not respect the accessibility requirements it is unlikely to be demolished.

This is why checks must be made at the planning stage, well before construction begins, to ensure that accessibility is taken into account. Monitoring mechanisms should be set up in order to ensure the correct application of the rules and their enforcement in case of breach of legislation.

15. For detailed examples see the European Blind Union's response to the European Commission's Green Paper on the modernisation of EU public procurement.

ARTICLE 67 AND RECITALS 97-99 – CONTRACT AWARD CRITERIA

RECOMMENDATIONS TO MEMBER STATES

One of the Directive's greatest achievements is the shift from using the lowest price criterion to assess bids, to the Best Price-Quality Ratio. With BPQR, contracting authorities will be able to integrate quality, social and/or environmental considerations in the award criteria.

Although contracting authorities can still use the lowest price if they wish or use the lowest cost, member states should strongly encourage them not to do so; it is important that contracting authorities consider the wider consequences of their public procurement policies rather than default to the cheapest option.

Member states should abolish the use of the lowest price and lowest cost criteria in some sectors, including social, health and other services provided directly to the person, as specified in article 76 of the Directive.

RECOMMENDATIONS TO CONTRACTING AUTHORITIES

The "life-cycle cost" is a methodology that helps to take into account all different costs associated with the life of a product or service, while using BPQR or the lowest cost. This may include allowing contracting authorities to take into account the social impact of the product, work or service purchased throughout the life-cycle. The social impact could include factors such as job creation, decent work, democratic ownership, social and professional inclusion of persons with disabilities and disadvantaged persons, integration of disadvantaged groups in the democratic process of the enterprise and accessibility of the service (particularly for those living in remote areas).

The award criteria included in BPQR (e.g. quality, functional characteristics and social and environmental considerations) should be linked to the subject matter of the public contract in question. It is important to highlight that contracting authorities are free to define the subject of the contract in any way that meets their needs, as long as they do not distort the level playing field for enterprises throughout the EU, i.e. draw up a contract that unfairly favours a provider.[16]

The fact that contracting authorities may now take into consideration the specific production process in the context of the award criteria (article 67) does allow them to lay down social-related award criteria.

Article 67(4) requires award criteria (including social award criteria) to "[...]be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria". For example, if contracting authorities want to combat long-term unemployment through an award criterion linked to the number of jobs for (former) long-term unemployed people through the performance of the contract concerned, they must, in the procurement documents, specify how they define "long-term unemployed" (e.g. persons having received more than x months of continuous unemployment benefit) and which weighting they attach to this criterion.

For some contracts it is possible to include in the award criterion of "quality" a sub-criterion concerning equal opportunities, such as the balanced composition of the team.[17]

RECOMMENDATIONS TO CIVIL SOCIETY

Effort should be made by stakeholders to encourage contracting authorities at national and regional level to use BPQR by engaging in a regular dialogue and clearly explaining the benefits.

16. For more information about the definition of the subject-matter and some examples please refer to the guide published by the European Commission "Buying Social - A Guide to Taking Account of Social Considerations in Public Procurement", pp. 23-24.

17. Belgian Institute for the Equality of Women and Men, "Equal opportunities for men and women in public procurement contracts. A few recommendations", p. 19.

EXAMPLES OF GOOD PRACTICE

Case 1: Recycling centres in Spain

Country	Spain
Contracting authority	City of Burgos
Subject matter of the contract	Management, control and proper functioning of the recycling centres in the city of Burgos
Amount	€189,830.50 + 18% VAT = €224,000
Duration	2 years
Characteristics of the call	Reserved contracts: not foreseen Social considerations: included in MEAT (50% weighting given to the economic offer and 50% to the technical offer): » 23 points - offer concerning the management of the recycling centres » 22 points - work integration project addressing persons at risk of social exclusion complying with Spanish law definition » 5 points - improvements in quality and environmental management

Case 2: Equal opportunities in recruitment services in Belgium

In Belgium, Selor, an organisation that provides recruitment services for the Belgian public administration, included in certain contracts equal opportunities as an element of the award criteria. For example, in an offer for the development of selection tests, equal opportunities were included as a sub-criterion within the criterion "quality of the test offered". The contracts were screened on the basis of the methodology used in the drafting of tests, and more specifically with regards to the test's gender neutrality.[18]

18. Belgian Institute for the Equality of Women and Men, "Equal opportunities for men and women in public procurement contracts. A few recommendations", p. 19.

ARTICLE 70 AND RECITALS 98-99 – CONDITIONS FOR PERFORMANCE OF CONTRACTS

This article allows contracting authorities to set additional conditions for performance of contracts linked to their subject matter. However, they are not a necessary part of the contract. Contract performance clauses lay down how a contract should be performed; they are additional to the conditions of performance already specified in the call for competition or in the procurement documents.

As was the case with the 2004 version of the Directive, contract performance conditions include social considerations; the new Directive enlarges their scope to also include economic, innovation or employment aspects. In practice, contract performance conditions could include all factors involved in the specific process of production, provision or commercialisation of the subject matter of the contract. They exclude requirements that refer to general corporate policies, such as corporate social responsibility.

RECOMMENDATIONS TO MEMBER STATES

Member states should transpose this article and allow contracting authorities to decide whether to make use of this option.

RECOMMENDATIONS TO CONTRACTING AUTHORITIES

The use of contract performance clauses is an important step towards achieving social policy objectives through procurement, beyond the conditions set by binding legislation. With contract performance conditions, contracting authorities are also free to set adequate quality standards.

Contract performance conditions are most commonly utilised in relation to the employment of long-term job-seekers and the implementation of training measures for formerly unemployed people or young persons in the course of the performance of the contract (recital 98). However, they can also be applied to areas such as gender equality in the labour market, the reconciliation of professional and private life, animal welfare and the environment. They can also be used to comply in substance with fundamental International Labour Organisation (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation" (recital 99). The contracting authority should conduct market research on the feasibility of such contract performance conditions.[19]

To ensure transparency of the procurement process the contract performance conditions should be published in the contract announcement and/or the technical specifications.

Contract performance conditions have no impact on the assessment of tenders – they are solely linked to the execution of actual contracts. The ability of bidders to comply with such clauses is verified during the execution of the contract, not during the tender's assessment. In cases of non-compliance the contract should be terminated and a new procurement procedure initiated, or penalties should be imposed. However, this rarely happens as the termination of a contract is costly and time-consuming. This is why including social considerations in the award criteria is the most effective and efficient way to achieve social policy objectives through procurement.

19. The Belgian Institute for the Equality of Women and Men gives the following example: market research reveals that the situation of the labour market is such that not enough workers of a certain gender are available for particular positions / lines of business, meaning it is impossible for staff of this gender to be deployed for these positions for the contract. The Belgian Institute for the Equality of Women and Men, "Equal opportunities for men and women in public procurement contracts. A few recommendations", p. 23.

EXAMPLES OF GOOD PRACTICE

Case 1: Cleaning of buses in Belgium

Country	Belgium
Contracting authority	TEC Hainaut, a public transport company
Subject matter of the	Cleaning service of bus public transport equipment
Duration	4 years
Characteristics of the call	Reserved contracts: not foreseen
	Social considerations: included in MEAT; 55% weighting given to the technical offer: » 15% - staff performance and cleaning service » 25% - work integration project » 5% - staff training programme » 10% - environmental quality of the cleaning products used
	Social considerations: included in the contract performance clause. In accordance with article 18a § 1 of the Belgian Law of 24 December 1993 on public procurement, the contracting company shall, during the execution of this contract, implement training and work integration measures of unemployed or young people by: » Providing on-site training of trainees to become cleaning technicians » Or by subcontracting a percentage of the total amount - excluding VAT - of the contract to work integration social economy enterprises » Or by ensuring that the contractor is a work integration social economy enterprise itself, as defined in art. 59 of the Act of 26 March 1999. Sanction: in case of violation of this clause without justification that is accepted and provided on time, the contracting authority may apply to the contracting company a penalty of 1% of the original amount of the annual contract.

Case 2: Gender quotas in Italy

In Italy, in the case of public procurement contracts concerning architecture, conditions are imposed regarding the gender of the staff performing the work. As female architects are under-represented, a quota is laid down for the presence of female architects in public procurement contracts.[20]

20. Belgian Institute for the Equality of Women and Men, "Equal opportunities for men and women in public procurement contracts. A few recommendations", p. 23.

PUTTING SOCIAL SERVICE USERS FIRST

Designing specific rules for social and health services

This Directive finally recognises that social, health and other services provided directly to the person have objectives, types of users and characteristics different to other services. These services contribute to social cohesion and inclusion, promote the enjoyment of human rights, and they address everybody - particularly those most in need. Simpler rules tailored to the nature of these services, are the first big achievement for this sector. The increased emphasis on quality rather than price in the criteria used by member states and contracting authorities to award these contracts is especially welcome.

The Directive is a further step towards stopping the "race to the bottom" approach used by contracting authorities to cut the costs of services without considering the impact on the quality of service provision and the working conditions for the workforce.

ARTICLE 74 AND ANNEX XIV – AWARD OF CONTRACTS OF SOCIAL AND OTHER SPECIFIC SERVICES

This article specifies that when contracting authorities procure social services and other services listed in Annex XIV, whose value is equal or above € 750,000, contracts should be awarded according to the rules set out in articles 74-77.

ARTICLE 75 – PUBLICATION OF NOTICES

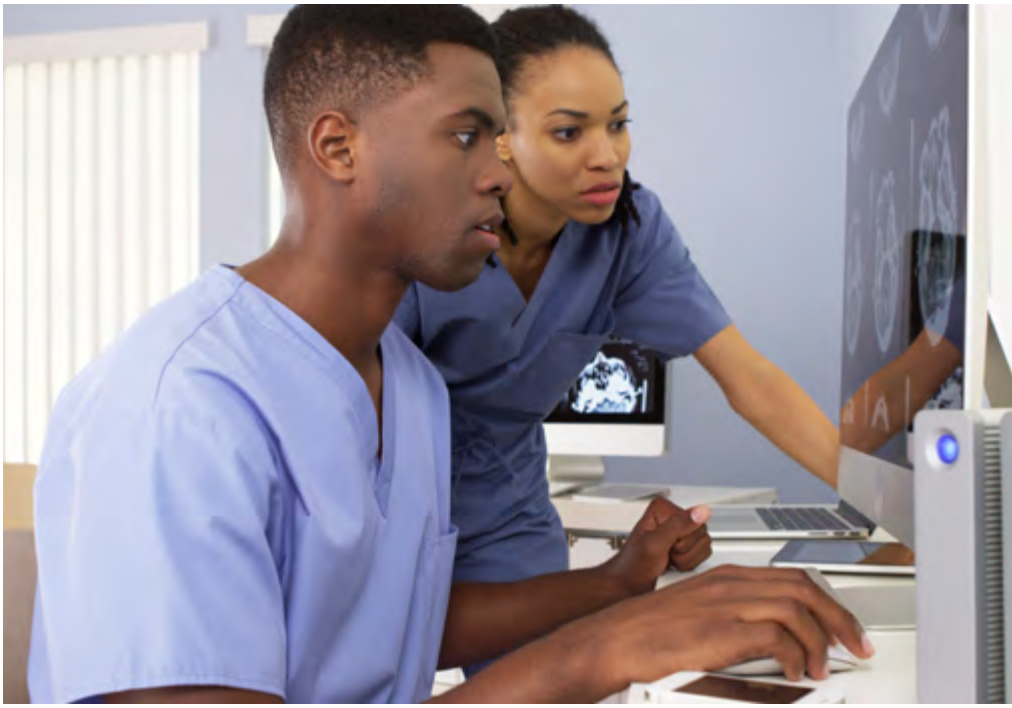
This article specifies how contracting authorities must announce their intention to award a public contract for social services and other services listed in Annex XIV by the means of a contract notice or a prior information notice.

Contracting authorities must share the results of the procurement procedure by means of a contract award notice, which should contain the information referred to in Annex V part J, in accordance with the standard forms referred to in article 51.

RECOMMENDATIONS TO THE EUROPEAN COMMISSION

The European Commission should design standard forms concerning contract notice, prior information notice and contract award notice in an accessible format, to ensure accessibility of procurement procedures and documents (article 75.3).

Below the EU thresholds, the responsibility to do so should fall to member states and contracting authorities.



ARTICLE 76 AND RECITAL 114 – PRINCIPLES OF AWARDING CONTRACTS FOR SOCIAL AND HEALTH SERVICES

RECOMMENDATIONS TO MEMBER STATES

While transposing this article, it is advisable for member states to choose that social and the other services listed in Annex XIV are awarded only on the basis of the Best Price-Quality Ratio – BPQR (previously the "most economically advantageous tender – MEAT") instead of the lowest price or lowest cost.

The use of BPQR gives contracting authorities the opportunity to include specific quality criteria that are essential in the delivery of social and other services provided to the person. Choices cannot be made only on the basis of the cost or price of a service, without taking into consideration certain quality criteria. Experts on the ground testify that due to the difficult economic climate and pressure on public budgets, contracting authorities are increasingly using the lowest cost criterion. This has had a detrimental impact both on the quality of the service available to the end user and the working conditions of the social and health workforce.[21] Neglecting the quality of these services puts contracting authorities at risk of contravening basic social rights endorsed in various international charters.

To ensure that quality becomes an essential component in the awarding of contracts for social and health services, quality should be given a weight of at least 50% compared to other criteria such as price (value for money).

For social and health services, quality is essential for the service to achieve its goal of meeting a need. As opposed to other "network" services of general or public interest (such as water provision), they are not provided by a normal supplier/consumer relationship; rather, they are supplied by an "asymmetric" one due to the vulnerability of the service user and the personal nature of the service. In addition, investing in quality social services – in particular preventive services – often reduces long-term care needs, thereby reducing long-term spending.

If member states prefer to keep the lowest cost criterion for social, health and other specific services provided directly to the person, they should make it mandatory for contracting authorities to include criteria that relate to the quality of the service in the technical specifications.

21. For some concrete examples, view Informal Network of Social Service Providers, "Seminar – Impact of EU legislation on social services", September 2009 (in particular examples 1, 2, 4, 11 and 12)

Award criteria for social services must ensure respect for the key principles listed in article 76.2: quality, continuity, accessibility, affordability, availability and comprehensiveness of services; the specific needs of different categories of users, including disadvantaged and vulnerable groups; innovation; the involvement and empowerment of users.

Member states should also consider allowing "innovation partnerships", which enable contracting authorities to make a call for tender to solve a specific problem without pre-empting the solution, thus leaving room for the contracting authority and the tenderer to come up with innovative solutions together.

RECOMMENDATIONS TO CONTRACTING AUTHORITIES

Contracting authorities should always make use of BPQR and weight quality criteria at a minimum of 50%, with an encouragement to increase this. A minimum reasonable duration for social/health service contracts is above three years in order to ensure maximum impact and successful recovery pathways for service users. Contracts with a duration equal to or below three years should be avoided, in order to ensure continuity of service provision to users, with particular attention to those in vulnerable situations.

Although abolishing the lowest price and lowest cost award criteria is highly recommended, if contracting authorities decide to use them they should include quality criteria in the technical specifications, particularly when no quality standards in social services exist. The Directive recommends the use of the voluntary European Quality Framework for social services published by the EU Social Protection Committee in 2010 to influence the development of quality criteria.[22]

The starting point for discussions on service quality should be service users, and therefore the involvement of service users is a fundamental element of any procurement process. There are various examples of frameworks and methodologies that put the individual at the centre of social service provision and consultation on local social policies.[23] Service users are key stakeholders in the procurement process – through their experience they can guide contracting authorities towards effective service provision.

In order to ensure that services meet the needs on the ground and that quality criteria included in procurement documents are well defined, a competitive procedure with negotiation or a competitive dialogue procedure should generally apply. It is important that contracting authorities consult existing service providers in an open, fair and transparent manner to take into account their expertise, and these procedures can support this.

22. As stated in recital 114 of the 2014 directive. The definition of "quality" in the framework of the Social Protection Committee actually encompasses the different dimensions included in article 76(2), namely: availability, accessibility, affordability, person-centred, comprehensive, continuous and outcome-oriented.

23. For example, FEANTSA's toolkits on participation of users.

EXAMPLES OF GOOD PRACTICE

Case 1: The city of Edinburgh and services for homeless people

In 2011, the city of Edinburgh used 70% quality criteria (and 30% cost) in the tendering of services for homeless people. Despite value for money becoming increasingly important in the current economic climate, wherever possible the city of Edinburgh seeks to ensure that quality has the higher weighting. The city of Edinburgh alternates between 40-60% quality for homelessness services procurement, depending upon the specific service. If quality standards exist for the services tendered, then the weighting will be 40% quality and 60% value for money. With regards to social care provision contracts, the guidance for procurement leans towards 70% quality criteria.[24]

Case 2: Implementation of the European Quality Framework in Estonia

In Estonia, from 2010 to 2014 in the frame of a European Social Fund project, providers of services to persons with disabilities and other disadvantaged persons implemented the European Voluntary Quality Framework for social services in their organisations - private, semi-public and public entities alike. One outcome of the project is that meeting the requirements of the Framework, together with financial considerations, has become one of the criteria for the funding of social services by public authorities in Estonia.

The Framework was implemented through the EQUASS Assurance tool, and saw an increase in the level of quality, efficiency of service governance, promotion of users' rights and their enhanced participation.[25] This practice, which has earned the Ministry and the partner organisations multiple awards, can be replicated through public procurement.

24. FEANTSA, "City of Edinburgh Council delivering the homelessness strategy".

25. Analysis of EQUASS final report, "The quality of social analysis and proposals for the introduction of a comprehensive quality assurance system".

ARTICLE 77 – RESERVED CONTRACTS FOR CERTAIN SERVICES

RECOMMENDATIONS TO MEMBER STATES

The Directive does not oblige member states to foresee the possibility to reserve contracts in their legislation, but it is recommendable to do so. The Directive provides the opportunity to reserve contracts for non-profit organisations and social economy enterprises for a limited period of time. In this way it is possible to value the provision of social and health services by non-profit organisations and social economy enterprises, which in some member states is a long tradition and a feature of the welfare system.

RECOMMENDATIONS TO CONTRACTING AUTHORITIES

Contracting authorities should make use of this article to support social and health service provision from non-profit organisations and social economy enterprises.

In paragraph 2(b) – "where profits are distributed or redistributed, this should be based on participatory considerations" – "redistributed" should be interpreted as being the exception to the rule, as most of the surpluses should be reinvested in the organisation to achieve its social objective. "Participatory considerations" should be understood as "being under democratic control" or "focusing on social justice" and not as "based on capital participation".[26] This criterion should be interpreted broadly, as it takes different forms in different organisations. In cooperatives this goes as far as the control of stakeholders.[27] Other organisations such as diaconal organisations and welfare organisations promote cooperation with their local community and develop the participation of services users, but are usually not run like cooperatives or mutual societies.[28]

The limitation of the contract to three years puts in jeopardy the continuity of service provision. The limitation of the contract refers to the contract itself and not to the organisation; the organisation can have more reserved contracts for different services for the maximum duration of three years.

To overcome this, after the three years the contracting authority has two possibilities. It can launch an open call for tenders, in which the contractor that ran the three-year contract can participate. Alternatively, the contracting authority can use other procedures besides public procurement to select the provider in a way that fulfils the principles of transparency, equal treatment and non-discrimination.

26. This definition reflects the definition of social enterprise given by the European Commission in its Communication on the Social Business Initiative, COM (2011) 682, pp. 2-3.

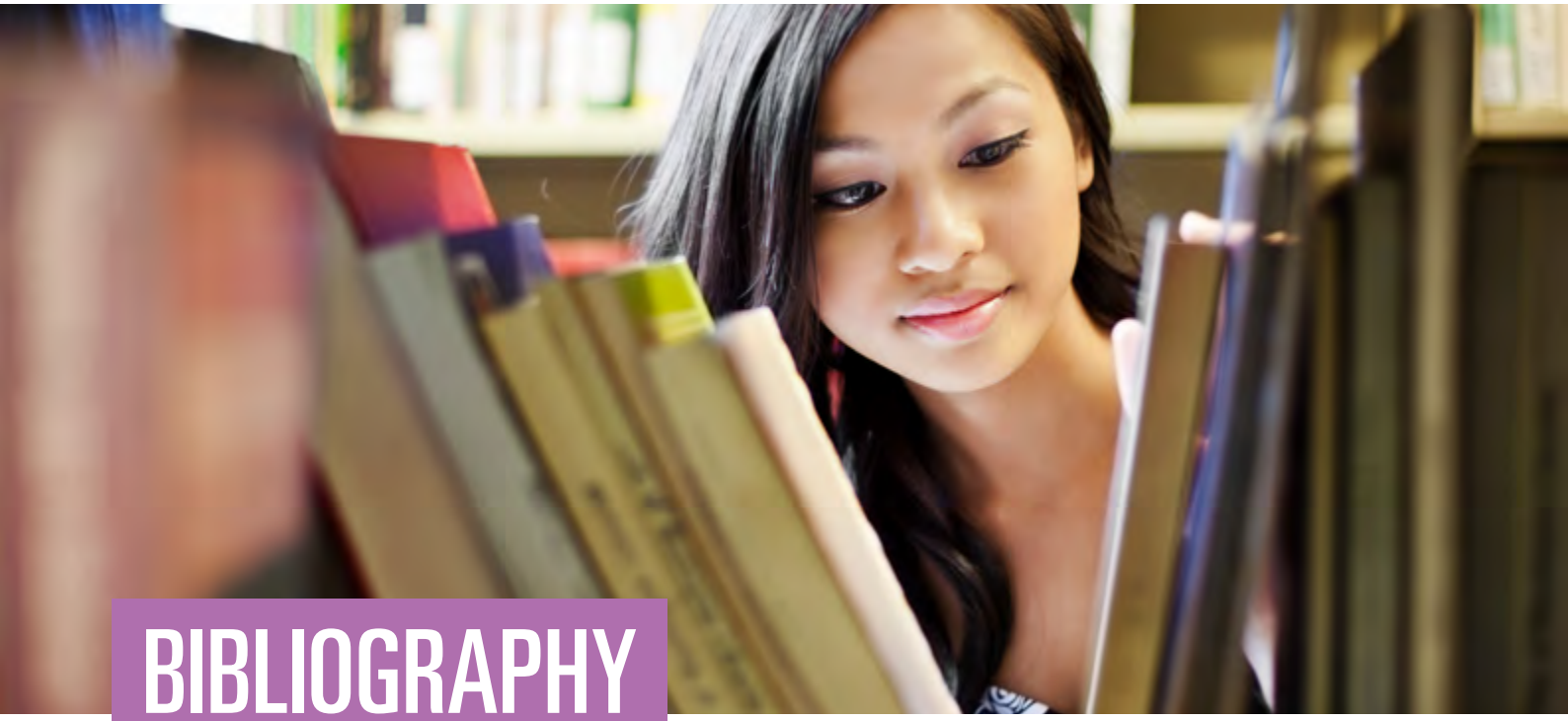
27. Multi-stakeholder cooperatives create synergies between different actors – public authorities, service users, service providers – and in this way guarantee that various interests and resources within a local community are represented and that an adequate answer is provided (read more in "CECOP's position to the EC staff working document on exploiting the employment potential of the personal and household services", p. 2).

28. Eurodiaconia, policy position "Social enterprises for social inclusion", p. 1.

EXAMPLE OF GOOD PRACTICE

Case: Home care services for persons with disabilities in Italy

Country	Italy
Contracting authority	Municipality of Castelfranco Veneto
Subject matter of the contract	Provision of home care services, including services for persons with disabilities
Duration	3 years
Characteristics of the call	Award criteria: MEAT (quality 60%, price 40%)
	Reserved contract: the call targets social cooperatives (type A), their consortia and groupings only



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