

**COMMENTS of PU Europe
on the
Green Paper on the modernisation of EU public procurement policy
Towards a more efficient European Procurement Market**

PU Europe replies on a limited number of questions mainly related to the “greening” of public procurement.

Question 2:

Do you consider the current structure of the material scope, with its division into works, supplies and services contracts, appropriate? If not, which alternative structure would you propose?

PU Europe: Works contracts should be kept separate from supply and service contracts. Due to their complexity, the contractual value and the life span of the object, it must remain possible to apply specific rules. The award of works contracts can take account of a number of “soft” criteria such as design and comfort, which is not necessarily the case for service contracts. PU Europe urges the decision makers to delete the possibility to award works contracts to the lowest initial price. Award should always be based on the economically most advantageous tender looking at the whole life cycle of the works. Derogations for small repair work could be defined.

Question 44:

Do you think that contracting authorities should have more possibilities to exert influence on subcontracting by the successful tenderer? If yes, which instruments would you propose?

PU Europe: Yes. In the case of works contracts, the successful bidder should declare that all subcontractors (and their subcontractors) respect labour laws and, if applicable, wage agreements, and dispose of the professional qualifications required by the Member State concerned. This is required, as all new public buildings must have an energy demand close to zero from 2019 onwards (as defined by directive 2010/31/EU on the Energy performance of buildings). Workmanship therefore becomes a decisive factor. As a matter of example, according to a new German standard, the contractor is responsible for achieving the air tightness of the building envelope. This is technically demanding and requires a well-skilled workforce.

Question 62:

Do you consider that the rules on technical specifications make sufficient allowance for the introduction of considerations related to other policy objectives?

PU Europe: Yes.

Question 63:

Do you share the view that the possibility of defining technical specifications in terms of performance or functional requirements might enable contracting authorities to achieve their policy needs better than defining them in terms of strict detailed technical requirements? If so, would you advocate making performance or functional requirements mandatory under certain conditions?

PU Europe: With regard to works, we would support this approach. Most construction works are very complex and the contracting authority does usually not dispose of the knowledge to define

detailed technical requirements and, thus, make the right choices. This is especially true for life cycle considerations (service life, life cycle environmental performance, anticipated maintenance and repair requirements).

On the other hand, performance and functional requirements (energy demand, indoor air quality, accessibility in the case of buildings) provide clear guidelines for bidders and ensure that the authority obtains what they were asking for. It must be ensured that such requirements look at the whole life cycle and, in the case of construction products, at the whole building performance.

Hence, we do believe that defining technical specifications in terms of performance or functional requirements offers advantages if certain conditions are respected.

Question 64:

By way of example, do you think that contracting authorities make sufficient use of the possibilities offered under Article 23 of Directive 2004/18/EC concerning accessibility¹ criteria for persons with disabilities or design for all users? If not, what needs to be done?

PU Europe: The social pillar of the standards developed by CEN/TC350 (Sustainability of construction works) includes accessibility as one of the indicators. Reference by public authorities to the TC350 standards would contribute to solving current shortcomings.

Question 67:

Do you see cases where a restriction to local or regional suppliers could be justified by legitimate and objective reasons that are not based on purely economic considerations?

PU Europe: Not for works. Environmental product declarations have been developed for most construction products based on the TC350 standards. They demonstrate that, generally, transport costs represent a negligible part of the products' overall environmental impact. In addition, the environmental impact of making and transporting construction products accounts for only about 20% of the building's overall environmental footprint over its whole life cycle. The specifier must be able to choose the product offering the best life cycle performance in a specific end-use design.

Question 68:

Do you think that allowing the use of the negotiated procedure with prior publication as a standard procedure could help in taking better account of policy-related considerations, such as environmental, social, innovation, etc.? Or would the risk of discrimination and restricting competition be too high?

PU Europe: We do not believe that the negotiated procedure should become a standard procedure. A clear description in the technical specifications should be sufficient to provide an adequate offer. In the case of works (buildings), the specifications should define performance parameters such as expected life time, energy demand, on-site energy generation, accessibility, indoor air quality, etc.

Question 69:

What would you suggest as useful examples of technical competence or other selection criteria aimed at fostering the achievement of objectives such as protection of environment, promotion of social inclusion, improving accessibility for disabled people and enhancing innovation?

PU Europe: In the case of works (buildings), it must be ensured that all supply chain members meet the qualification requirements of the Member State concerned. The bidder must provide evidence that he is able to assess the life cycle performance of the building in terms of environmental impacts and costs, possibly by using CEN/TC350 standards or equivalent tools.

¹ Accessibility in this context means accessibility by persons with functional limitations (disabilities).

Question 70:

The criterion of the most economically advantageous tender (EMAT) seems to be best suited for pursuing other policy objectives. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts/ some specific sectors/ in certain circumstances)?

PU Europe: Yes (see below).

70.1.1

to eliminate the criterion of the lowest price only;

PU Europe: For works contracts, the criterion of the lowest price only should be eliminated as it prevents the contracting authority from obtaining best value for money in terms of life cycle costs, environmental performance and social requirements. Derogations could be defined for simple repair works. In the case of buildings, about 70% of the life cycle costs (including energy use) are linked to its use phase. It is paramount that this is duly taken into account.

70.1.2

to limit the use of the price criterion or the weight which contracting authorities can give to the price;

PU Europe: See above.

70.1.3

to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer? If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives more effectively and guarantee a level playing field and fair competition between European undertakings?

PU Europe: Introducing a third possibility would be confusing for works contracts. If properly used, the EMAT option allows defining the cost-optimum between initial investment costs and life time performance including social requirements (for example accessibility) and environmental performance (indoor air quality, environmental footprint).

Question 71:

Do you think that in any event the score attributed to environmental, social or innovative criteria, for example, should be limited to a set maximum, so that the criterion does not become more important than the performance or cost criteria?

PU Europe: Setting a limit that would be appropriate for all contracts and all situations appears to be a difficult exercise. The contracting authority should be free to weigh the award criteria according to its priorities.

Question 72:

Do you think that the possibility of including environmental or social criteria in the award phase is understood and used? Should it in your view be better spelt out in the Directive?

PU Europe: It could be spelt out in the directive provided that a holistic approach is observed particularly in the case of works. This means that all criteria must be life cycle based and, regarding the environmental performance, all indicators developed by CEN/TC350 must be covered.

Question 73:

In your view, should it be mandatory to take life-cycle costs into account when determining the economically most advantageous offer, especially in the case of big projects? In this case, would you consider it necessary/appropriate for the Commission services to develop a methodology for life-cycle costing?

PU Europe: Yes, it should be mandatory at least for works contracts. In the case of buildings, about 70% of the life cycle costs (including energy and water use, repair, maintenance, replacement) are

linked to its use phase. It would be impossible to define the “economically most advantageous tender” without looking at the main cost items over the building’s life cycle.

As regards works, the Commission would not be required to develop an LCC methodology. DG ENTR already agreed on a method together with the construction sector and national regulators (Task Group 4 : Life Cycle Costs in Construction, Version 29 October 2003, for details contact Antonio.paparella@ec.europa.eu) and CEN/TC350 is currently developing a set of standards in this area (prEN 15643-4 Sustainability of construction works — Sustainability assessment of buildings — Part 4: Framework for the assessment of economic performance).

Question 74:

Contract performance clauses are the most appropriate stage of the procedure at which to include social considerations relating to the employment and labour conditions of the workers involved in the execution of the contract. Do you agree? If not, please suggest what might be the best alternative solution.

PU Europe: We agree. In the case of works contracts, the successful bidder should be required to declare that he and all his subcontractors (and their subcontractors) respect labour laws and, if applicable, wage agreements, and dispose of the professional qualifications required by the Member State concerned.

Question 75:

What kind of contract performance clauses would be particularly appropriate in your view in terms of taking social, environmental and energy efficiency considerations into account?

PU Europe: See above.

Question 76:

Should certain general contract performance clauses, in particular those relating to employment and labour conditions of the workers involved in the execution of the contract, be already specified at EU level?

PU Europe: We would not be opposed to this idea.

Question 79:

Some stakeholders suggest softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract (this could make it possible to require, for instance, that tenderers have a gender-equal employment policy in place or employ a certain quota of specific categories of people, such as jobseekers, persons with disabilities, etc.). Do you agree with this suggestion? In your view, what could be the advantages or disadvantages of loosening or dropping the link with the subject matter?

PU Europe: The requirements must remain linked to the subject matter of the contract. As rightly outlined in the introduction to these questions, dropping this requirement would lead to confusion in the market, numerous new certification schemes, additional costs and, as a consequence, the exclusion of smaller enterprises. Numerous European and national rules are in place to address social and environmental criteria not linked to the subject matter. They should be used to obtain changes in corporate policy. Public procurement is not the appropriate tool.

All environmental impacts during the production process are incorporated in the Environmental Product Declarations developed through the TC350 standards. A proper life cycle analysis for buildings (based on TC350 standards) will allow comparisons between different construction products at the building level so that the best solution can be identified. Hence, there is no need for additional environmental requirements not linked to the subject matter.

Question 80:

If the link with the subject matter is to be loosened, which corrective mechanisms, if any, should be put in place in order to mitigate the risks of creating discrimination and of considerably restricting competition?

PU Europe: See above.

Question 81:

Do you believe that SMEs might have problems complying with the various requirements? If so, how should this issue be dealt with in your view?

PU Europe: Yes, they would face problems and, hence, no additional requirements should be added.

Question 82:

If you believe that the link with the subject matter should be loosened or eliminated, at which of the successive stages of the procurement process should this occur?

PU Europe: The link should not be loosened.

82.1

Do you consider that, in defining the technical specifications, there is a case for relaxing the requirement that specifications relating to the process and production methods must be linked to the characteristics of the product, in order to encompass elements that are not reflected in the product's characteristics (such as for example - when buying coffee - requesting the supplier to pay the producers a premium to be invested in activities aimed at fostering the socio-economic development of local communities)?

PU Europe: With regard to works, and in particular buildings, the specifications must be linked to the subject matter (the building). Adding other requirements would again lead to significant confusion, additional certification and excessive costs. Each contracting authority might ask for something else requiring bidders and their suppliers to comply with all of them. Furthermore, questions would arise as to whether the contracting authorities fulfil themselves all the requirements they want to impose on others.

82.2

Do you think that EU public procurement legislation should allow contracting authorities to apply selection criteria based on characteristics of undertakings that are not linked to the subject of the contract (e.g. requiring tenderers to have a gender-equal employment policy in place, or a general policy of employing certain quotas of specific categories of people, such as jobseekers, persons with disabilities, etc.)?

PU Europe: The public authorities should endeavour to procure the product / service with the best life cycle performance. Additional requirements should be avoided. Furthermore, questions would arise as to whether the contracting authorities fulfil themselves all the requirements they want to impose on others.

82.3

Do you consider that the link with the subject matter of the contract should be loosened or eliminated at the award stage in order to take other policy considerations into account (e.g. extra points for tenderers who employ jobseekers or persons with disabilities)?

PU Europe: No. This is not the aim of public procurement and would discriminate against SMEs. Furthermore, questions would arise as to whether the contracting authorities fulfil themselves all the requirements they want to impose on others.

82.4

Do you think that the EU public procurement legislation should allow contracting authorities to impose contract execution clauses that are not strictly linked to the provision of the goods and

services in question (e.g. requiring the contractor to put in place child care services for the his employees or requiring them to allocate a certain amount of the remuneration to social projects)?

PU Europe: No. This is not the aim of public procurement and would discriminate against SMEs. Furthermore, questions would arise as to whether the contracting authorities fulfil themselves all the requirements they want to impose on others.

Question 83:

Do you think that EU level obligations on "what to buy" are a good way to achieve other policy objectives? What would be the main advantages and disadvantages of such an approach? For which specific product or service areas or for which specific policies do you think obligations on "what to buy" would be useful? Please explain your choice. Please give examples of Member State procurement practices that could be replicated at EU level.

PU Europe: We do not consider this as the best way forward. As regards works (buildings), the Energy performance of buildings directive requires all new buildings to have a “nearly zero energy” demand from 2019 onwards. The new Energy efficiency plan stipulates that Member States should increase the renovation rate of public buildings to 3% p.a. with a view to drastically reducing energy waste in the existing building stock. The legislator has focused on energy efficiency measures, as the building use phase accounts for about 70% of a building’s life cycle cost and 80% of its environmental impact. Most of this is linked to energy use. EU obligations on “what to buy” should not be imposed with the public procurement directives in order to avoid duplication.

Question 84:

Do you think that further obligations on "what to buy" at EU level should be enshrined in policy specific legislation (environmental, energy-related, social, accessibility, etc) or be imposed under general EU public procurement legislation instead?

PU Europe: Energy-related requirements are already defined at EU level (see above). Environmental and social (including accessibility) obligations could be determined at EU level, but only as general horizontal principles. In the case of works (buildings) each country has different building design solutions, climatic conditions and material choices. The EU can therefore not impose certain environmental thresholds or product-related characteristics, but require material neutrality and a holistic life cycle approach for building / renovation projects. In other words, all performance indicators must be set at the building level. The EU should ban all “green” claims of construction products which are not based on generally recognised methods such as those provided by CEN/TC350.

Question 85:

Do you think that obligations on "what to buy" should be imposed at national level? Do you consider that such national obligations could lead to a potential fragmentation of the internal market? If so, what would be the most appropriate way to mitigate this risk?

PU Europe: In the case of works (buildings), national obligations introducing new / additional indicators and assessment methods to those agreed in the horizontal EU principles must be avoided. Otherwise, industry would face significant additional costs without any benefit for society. A holistic approach must be guaranteed, i.e. assessing the whole building performance instead of setting construction product requirements (see CEN/TC350).

Question 86:

Do you think that obligations on what to buy should lay down rather obligations for contracting authorities as regards the level of uptake (e.g. of GPP), the characteristics of the goods/services/works they should purchase or specific criteria to be taken into account as one of a number of elements of the tender?

PU Europe: The EU could determine the level of uptake and general horizontal principles as outlined above (holistic life cycle approach, assessment of the whole building performance etc.). It would not be advisable to fix more details relating to the characteristics of works at EU level due to different building traditions / practices / materials and requirements and different climatic conditions.

86.1

What room for manoeuvre should be left to contracting authorities when making purchasing decisions?

PU Europe: In the case of works (buildings), contracting authorities should be able to procure buildings according to their local characteristics. The EU should only set general horizontal principles (see above) to be respected by contracting authorities.

86.2

Should mandatory requirements set the minimum level only so the individual contracting authorities could set more ambitious requirements?

PU Europe: With regard to works (buildings), the minimum efficiency requirements are already set for new buildings and certain requirements were introduced for existing buildings. As to the other building performance characteristics, the EU should only define certain general horizontal principles (see above). It would be impossible to define detailed minimum requirements for all types of works (town halls, kindergartens, hospitals, roads, bridges, etc.).

Question 87:

In your view, what would be the best instrument for dealing with technology development in terms of the most advanced technology (for example, tasking an entity to monitor which technology has developed to the most advanced stage, or requiring contracting authorities to take the most advanced technology into account as one of the award criteria, or any other means)?

PU Europe: In the case of works (buildings), mature and cost-effective technologies are already available to meet highest energy efficiency requirements while guaranteeing a healthy indoor environment and a low life cycle environmental impact. It should first be ensured that these existing technologies are picked up. The EU building efficiency requirements should have a positive impact.

Question 88:

The introduction of mandatory criteria or mandatory targets on what to buy should not lead to the elimination of competition in procurement markets. How could the aim of not eliminating competition be taken into account when setting those criteria or targets?

PU Europe: In the case of buildings, the EU should only set general horizontal principles as described above.

Question 89:

Do you consider that imposing obligations on "what to buy" would increase the administrative burden, particularly for small businesses? If so, how could this risk be mitigated? What kind of implementation measures and/or guidance should accompany such obligations?

PU Europe: There would be a real risk if such obligations were leading to new certification requirements. Furthermore, there could be a risk of discrimination, if obligations were not based on a holistic life cycle approach as outlined above.

Question 90:

If you are not in favour of obligations on "what to buy", would you consider any other instruments (e.g. recommendations or other incentives) to be appropriate?

PU Europe: As outlined in our answers to questions 83 and 84, the EU has already set requirements for the efficiency of new public buildings and is preparing certain measures for existing public buildings.

Question 113:

Are there any other issues which you think should be addressed in a future reform of the EU public procurement Directives? Which issues are these, what are - in your view - the problems to be addressed and what could possible solutions to these problems look like?

PU Europe: Integrated supply chains are set up as a tool for increasing the quality of construction services by establishing collaborative approaches between general contractors, subcontractors, architects, suppliers etc. DG ENTER financed a study aimed at assessing the benefits of specific types of collaborative approaches to project delivery and their compatibility with EU policies and legislations (public procurement, competition rules, SMEs policy, etc.). No particular issues were identified. The revised public procurement directives should explicitly authorise the participation of supply teams in tenders for public works contracts and, if required, define certain conditions. More details at http://ec.europa.eu/enterprise/sectors/construction/competitiveness/voluntary-arrangements_en.htm.

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