

Green Public Procurement – Strategic Use of Public Procurement – Legal Perspective

Judge Marc Steiner,
Swiss Federal Administrative Court

Transparency on Prior Involvement

Public Hearing

of the Committee on the Internal Market and Consumer Protection

Modernisation of Public Procurement

Tuesday 24 May 2011 from 16.00 to 18.30

European Parliament, Brussels

Room: JAN 6Q2

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)

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 (III)

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).

Swiss Approach on Award Criteria

Art. 21 (1) FAPP: Contracts will be awarded for the economically most advantageous offer (“wirtschaftlich günstigstes Angebot”). In seeking the economically most advantageous offer, a number of criteria will be taken into account, particularly deadlines, quality, price, profitability, operating costs (“Betriebskosten”), customer service, expediency of the service, aesthetics, environmental impact aspects (“Umweltverträglichkeit”) and technical value.

Swiss Approach on Award Criteria

Art. 21 (3) FAPP: Contracts for broadly standardised goods may also be awarded solely on the basis of the lowest price criterion.

EP Resolution “Modernisation of Public Procurement” 25 October 2011

Takes the view that [...] the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender [...] taking into account the entire life-cycle costs of the relevant goods, services or works;

EP Resolution “Modernisation of Public Procurement” 25 October 2011

[...] stresses that this would not exclude the lowest price as a decisive criterion in the case of highly standardised goods or services; [...]; stresses that supporting the criterion of ‘maximum economic benefit’ would foster innovation and efforts to achieve the best quality and value, i.e. to comply with the requirements of the Europe 2020 strategy

EP Resolution “Modernisation of Public Procurement” 25 October 2011

Underlines the fact that whether or not a product or service has been sustainably produced is rightly considered to be a characteristic of the product [...], but at the same time not to weaken the necessary link to the subject matter of the contract; [...]

Relevant legal framework: GPA

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

GPA 1994 – Technical Specifications

Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or **the processes and methods for their production [...]**,

GPA 1994 – Rules on Award Criteria

Art. XIII: [..] the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender [...] is **either** the lowest tender **or** the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.

Revised GPA – Rules on Award Criteria

Art. XV: [..] the entity shall make the award to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notices, has submitted

- a) the most advantageous tender; or
- b) where price is the sole criterion, the lowest price.

GPA 1994 – Rules on Award Criteria

Given the objective of the GPA of laying down minimum standards to be applied, it has opted for flexibility and, in addition to allowing awards on price, also allows other criteria to be taken into account, provided they have been set out in the tender documentation (Peter Trepte).

GPA 1994 and Sustainable Public Procurement

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**.

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). -> **Framing and applying EU law is interpreting the GPA!**

Revised GPA and Sustainability Issues I

Art. X (6) revised GPA

on technical specifications:

For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.

Revised GPA and Sustainability Issues II

Art. X (9) revised GPA

on the tender documentation:

The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery.

Rev. GPA and Sustainability Issues III

Art. XXII (8) revised GPA

(Final Provisions) :

The Committee shall undertake further work to facilitate the implementation of this Agreement and the negotiations provided for in paragraph 7, through the adoption of work programmes for the following items:

(iii) the treatment of sustainable procurement;

Directive 2014/24/EU – Philosophy

Recital 2: Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. [...]

See also recital 17 on buying innovative goods.

Directive 2014/24/EU – Philosophy

Recitals 47 and 95:

Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges.

Communication COM(2008) 400 final

Such a shift (to a greener economy) could also boost the competitiveness of European industry by stimulating innovation in eco-technologies – which have been recognised as a high-growth sector where Europe is already a world leader (p. 2).

Directive 2014/24/EU – Philosophy

Recital 41: Nothing in this Directive should prevent the [...] enforcement of measures necessary to protect ... human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.

Directive 2014/24/EU – Philosophy

Recital 91: Under Article 11 TFEU environmental protection requirements must be integrated into the definition and implementation of the Union policies [...]. This clarifies how the contracting authorities may contribute to the protection of the environment [...] whilst ensuring that they can obtain the best value for money for their contracts.

Directive 2014/24/EU – Philosophy

Recital 95: In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement.

Directive 2014/24/EU – Philosophy

Recital 97: The condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production [...]. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental policy in place.

Directive 2014/24/EU – Technical Specifications

Art. 42 / Recital 74: The technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve objectives of sustainability. [...] performance criteria linked to the life cycle and the sustainability of the **production process** of the works, supplies and services.

Directive 2014/24/EU - Labels

Art. 43 / Recital 74: [...] It should be the responsibility of the economic operator to prove equivalence with the requested label. [...] the requirements for the label are linked to the subject-matter of the contract.

Directive 2014/24/EU – Award Criteria

Art. 67 / Recitals 89-92: “most economically advantageous tender” and “best price-quality ratio” / “social, environmental and innovative characteristics” / including factors involved “in the specific process of production”

Directive 2014/24/EU – Award Criteria

Art. 67 / Recital 92: When assessing the best price-quality ratio contracting authorities should determine the economic and qualitative criteria **linked to the subject-matter of the contract** that they will use for that purpose.

Directive 2014/24/EU – Award Criteria

It is not necessary for each individual award criterion to give an economic advantage to the contracting authority (C-513/99 Helsinki Bus Case; see *Buying green!* 2nd edition 2011, p. 37 s.).

Directive 2014/24/EU – Award Criteria

In a ruling on the purchase of electricity, an award criterion relating to the amount of electricity produced from renewable sources **in excess** of the expected consumption of the contracting authority was ruled inadmissible, as it was not linked to the subject matter of the contract (C-448/01 EVN/Wienstrom).

Directive 2014/24/EU – Award Criteria

Art. 67 (2): Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

Directive 2014/24/EU / Life-cycle costing

Art. 67 / Recital 92: To identify the most economically advantageous tender, the contract award decision should not be based on non-cost criteria only.

[...] cost criterion that could, at the choice of the contracting authority, be either the price or [...] life-cycle costing.

Directive 2014/24/EU / Contract Performance Conditions

Art. 70 / Conditions for performance of contracts: Those conditions may include ... innovation-related, environmental, social or employment-related considerations.

Contact

Swiss Federal Administrative Court

Mr. Marc Steiner

CH-3000 Bern 14

Switzerland

phone: +41 58 705 25 74

E-mail: marc.steiner@bvger.admin.ch