

Interpretative Communication on integrating social considerations into public procurement frequently asked questions

Is it possible to adequately take into account social considerations under the public procurement Directives?

Yes. The Communication makes clear that there are numerous possibilities for taking account of social considerations in public procurement under the Directives, provided that the principles of non-discrimination and transparency are respected. Guidance is given about where in the tender process social considerations should be taken into account.

When is it most appropriate to take social considerations into account in the procurement procedure?

It is especially during the execution of the contract, that is, once the contract has been awarded, that public procurement can be used by contracting authorities as a means of encouraging the pursuit of social objectives. Contracting authorities can require the successful tenderer to comply with contractual clauses relating to the manner in which the contract is to be performed, which may include clauses in favour of certain categories of persons and positive actions in the field of employment.

Can a contracting authority take account of the needs of the disabled in its purchasing policy?

Yes. In deciding what you want to purchase, contracting authorities can specify their requirements regarding access for the disabled to certain buildings or public transport (for example, accessibility standards on the width of corridors and doors, adapted toilets, access ramps), or access to certain products or services (for example, in the field of information technology for the visually impaired). In addition, contracting authorities can impose an obligation on a successful tenderer to recruit, for the execution of the contract, a number of disabled persons over and above the minimum number laid down by national legislation.

Can a contracting authority use its procurement policy as a tool to combat unemployment?

Yes. Contracting authorities can require successful tenderers to recruit unemployed persons, and in particular long-term unemployed persons, or to set up training programmes for the unemployed or for young people during the performance of the contract.

Can a contracting authority promote equal opportunities through its purchasing policy?

Yes. Contracting authorities can require successful tenderers to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity.

How can a tenderer be sure that its competitors will not benefit from submitting tenders that do not comply with applicable employment and safety rules?

Tenderers who have not complied with social legislation can be excluded from public procurement procedures, where this is deemed to constitute grave professional misconduct or an offence having a bearing on their professional conduct. In addition, elements relating to non-compliance with rules on safety or employment can, under the current public procurement Directives, be taken into consideration to reject an abnormally low tender.

Can a contracting authority take social considerations into account when awarding a contract?

Yes. Criteria involving social considerations may be used to determine the most economically advantageous tender where they provide an economic advantage for the contracting authority which is linked to the product or service which is the subject-matter of the contract. For example, a criterion that makes it possible to evaluate the quality of a service intended for a given category of disadvantaged persons may be used. In addition, it may also be possible to use a condition related to the combating of unemployment as an additional criterion in respect of two or more economically equivalent tenders, provided it complies with the fundamental principles of Community law [namely? non-discrimination? equal treatment?].

What rules on employment and protection of working conditions are applicable to workers posted to work on a public procurement contract in another Member State?

The Communication explains the relevance to public procurement of Directive 96/71/EC on the posting of workers in connection with the cross-border provision of services. This Directive lays down a common list of rules for minimum protection of workers which employers must observe in respect of workers they post to other Member states. It also guarantees a level playing field for all tenderers in the field of public procurement, and legal clarity as to the elements to be taken into account when preparing tenders.

Can a contracting authority require that a successful tenderer take on the employees of the previous contractor?

Yes. The fact that the transfer of an undertaking, within the meaning of Directive 2001/23/EC on the safeguarding of employees' rights in the event of a transfer of undertaking, takes place following a public procurement procedure does not pose any specific problems as regards application of this Directive. However, contracting authorities have an obligation to inform tenderers in advance of all conditions relating to the performance of a contract, including whether and on what conditions such a transfer of undertaking might take place if the tenderer is awarded the contract, so that tenderers can take them into account when preparing their tenders.