

## Sustainable Public Procurement in European Healthcare



*Photo: Worker at a surgical instrument factory in Pakistan during an inspection visit by the Swedish County Council.*

**Sustainable public procurement (SPP) is the gradual and on-going process by which public authorities continually refine and expand the scope of their efforts towards purchasing socially responsible and environmentally sound products and services.**

Within the healthcare sector alone, public authorities purchase large amounts of products and services. Healthcare facilities are major consumers of a wide range of products and materials — everything from electronic devices and surgical instruments to paper towels, hospital gowns, packaging materials and office supplies, to name just a few. About eighty per cent of these products are thrown away after a single use.

New EU legislation now allows for greater commitment to green and social/ethical public procurement in the healthcare sector.

In 2014, the European Union adopted a new Directive on public procurement (2014/24/EU). This creates more opportunities for sustainable procurement, allowing public authorities, hospitals and health systems to use their massive purchasing power to choose socially responsible and environmentally friendly products and services throughout the supply chain. In the sections below a detailed legal analysis of the Directive is provided along with some examples of best practices in ethical and environmental public procurement in European healthcare.

## There is more space for sustainable public procurement under the revised EU rules

In all, the EU has agreed three new Directives laying down the rules for public procurement and these will need to be transposed into national laws before April 2016. The three Directives are: Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, and Directive 2014/23/EU on the award of concession contracts. This factsheet focuses on Directive 2014/24/EU on public procurement, which applies to purchases over a certain value by contracting authorities, and will look at the new developments relating to opportunities to pursue SPP.

The procedural steps in a standard procurement process have not changed. The choice to pursue sustainability objectives still lies with the purchasing authority – the Directive does not require authorities to engage in SPP.

However, the Directive resolves many of the legal uncertainties which have previously confronted contracting authorities seeking to use their purchasing power to promote sustainable development. The new legal text ensures that procurers can make better use of public procurement as a way to support common societal goals. The sections below give an insight into the new opportunities that have been created.

Nonetheless, choices by Member States made during the transposition of the Directive into national laws will have consequences for the exact scope of opportunities.

### Key new concepts relevant to SPP

#### 1. Evaluation phase – a new meaning for ‘most economically advantageous tender’ (Article 67)

Unless the EU country where you operate has decided otherwise, there is a free choice between three ways of choosing the ‘most economically advantageous tender’. This concept used to be an alternative to choosing the winning tender on the basis of price alone. Now it acts as an umbrella term for three different ways of choosing the winning tender:

- Lowest price – the price that is paid to the supplier.
- Lowest cost – this includes the price, but also other costs incurred in running, servicing and disposing of the product (for example, the cost of energy consumed), and, if desired, the costs of environmental externalities.



#### BOX 1

#### Link to the subject matter

A long-running debate is now resolved. It is now clear that a characteristic does not need to be evident in the finished product or service in order to meet the ‘link to the subject matter’ test.

The scope of this concept has now been defined in Article 67(3). The Directive clearly states that factors involved in a specific process at the production or other stage of the life-cycle do not need to ‘form part of the material substance’ of the product or service. This language has been copied from a 2012 judgment of the Court of Justice of the European Union in which the Court decided that the fair trade origin of ingredients could be relevant to determining best value for money in a public contract and therefore could be specified as an award criterion. The Court referred to an earlier Court case’s conclusion that the fact that electricity produced from renewable energy sources could not be distinguished from electricity from other sources did not stop the production method from being relevant to the assessment of value.

Contracting authorities choosing this option will most likely use a life-cycle costing method.

- Best price-quality ratio (BPQR) – this allows you to score a tender against your own award criteria. This list can include environmental and social criteria (which are linked to the subject matter of the contract – see Box 1), but you must include either a price or cost criterion as well.

Note that any BPQR criterion must be formulated in a way that will allow the contracting authority to verify effectively the information provided by the tenderer and to decide how well the tender meets that criterion.

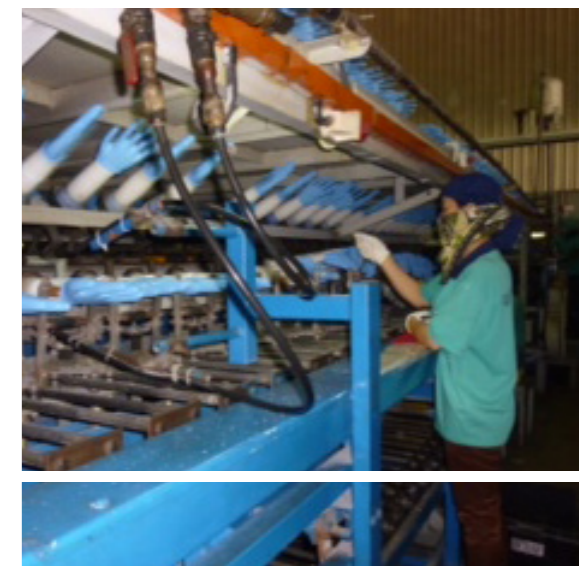
#### 2. Labelling schemes as ‘means of proof’ (Article 43)

When contracting authorities desire specific environmental or social characteristics, the Directive foresees that certification and labelling schemes can play a role. This option is now relevant in the context of both technical specifications and award criteria. However, requiring use of a label depends on fulfilment of five criteria, including whether all of the label’s underlying criteria are linked to the subject matter (see Box 1).

In any event, the role of a label is as means of proof that the specified characteristics are fulfilled. However, if a label is specified, a contracting authority must also accept other ‘equivalent labels’ and, in certain cases, tenderers’ technical dossiers proving fulfilment of the specified characteristics. Contracting authorities will need to set out what they are looking for in enough detail for tenderers who do not already have the specified label to know what they have to prove. In previous judgments the Court of Justice of the European Union has not felt that simply referring to a label provides sufficient clarity for this purpose, instead the Court has required all information to be given in the tender documents produced by the contracting authority. It may be sufficient to copy out the criteria underlying the label in the tender documents. The content and credibility of labels can vary greatly; therefore, if a contracting authority has particular requirements it is in its interests to be as precise as possible when drawing up the tender documents.

*Left photo: Workers at a textile factory in India during a visit by the South Eastern Regional Health Authority of Norway.*

*Below photo: Factory producing inexpensive latex gloves in Malaysia during a visit by the South Eastern Regional Health Authority of Norway.*



### 3. Exclusion criteria - the possibility of 'self-cleaning' (Article 57)

As a matter of public policy, public contracts should not be awarded to economic operators who have been convicted of certain types of offences, such as money laundering, terrorist financing or human trafficking (known as 'mandatory grounds'). The Directive has also widened the list of situations when contracting authorities may deem economic operators 'unreliable' and thus exclude them from consideration, even if they have the technical and economic capacity to perform the contract (known as 'discretionary grounds').

However, exclusion criteria are no longer as black and white as they used to be. The Directive introduces the concept of 'self-cleaning' by allowing an economic operator who meets any of the relevant exclusion criteria to submit evidence demonstrating that it is a reliable counterparty and should not be excluded. Unless the Member State has decreed otherwise, the sole judge of the sufficiency of the evidence (which might relate to payment of compensation and/or concrete steps taken to prevent a recurrence of the offence) is the contracting authority. The only time when this 'self-cleaning' option is not available to a potential tenderer is where it has been excluded from participating in public tenders by the court that issued judgment in relation to the offence.

### 4. Member States' responsibility to ensure that in the performance of public contracts economic operators comply with environmental, social and labour law obligations (Article 18(2))

This new provision places the responsibility for ensuring compliance with the law by successful tenderers squarely onto Member States and requires them to take 'appropriate measures' to achieve this. Member States will have to consider how to achieve this challenging requirement. The Directive suggests that it could be done by making such compliance an obligatory contract performance clause, but is silent on whether this would be sufficient if there are not also regular checks on successful tenderers.

### Can I differentiate between tenderers who know and care about what has happened in their supply chain, and those who don't?

Yes! There is a new addition to the exhaustive list of what a contracting authority can ask for as evidence of the technical abilities of economic operators: 'an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract' (Article 58 and Annex XII).

- This will be relevant particularly where the technical specifications include characteristics that are not evident in the use phase and therefore can only be assured through supply chain tracking, e.g., a factor relating to the production process.



*Above photo: Migrant worker at a latex glove factory in Malaysia during the visit by the South Eastern Regional Health Authority of Norway.*

*Right photo: Factory producing expensive latex surgical gloves in Thailand during the audit by the South Eastern Regional Health Authority of Norway.*

- Selection criteria must be 'related and proportionate to the subject matter of the contract'. Therefore the competent authority cannot ask for general evidence that supply chain tracking is undertaken as a usual practice. However, a substantiated response from the tenderer to this effect may be sufficient evidence to demonstrate their ability to meet the relevant selection criterion.

### Can I use life-cycle costing to choose the best tender?

Yes! Directive 2014/24/EU specifically mentions life-cycle costing as a way of identifying the 'most economically advantageous tender' and goes on to define the parameters of such an approach (Article 68).

- The Directive's definition of life-cycle costing covers both costs borne by the contracting authority and other users, and costs imputed to environmental externalities which are able to be monetised. Examples of such externalities are the costs of pollution caused by the extraction of the raw materials used in the product and climate change mitigation costs.
- The data to be provided and the method they intend to use to determine the life-cycle costs must be indicated in the procurement documents. The data must be such that it can be provided with reasonable effort by normally diligent economic operators and any method to be used must meet minimum criteria.
- If EU legislation has set out a mandatory method for the calculation of life-cycle costs, then this method must be used. So, for example, where Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles applies, the method contained in that Directive must be used.

### Elements of the transposition that could impact on the framework

The Directive also contains possibilities for Member States to limit the discretion of contracting authorities in the following articles:

- Article 67(2) - Potential prohibition of the use of price and/or cost for all or some types of public contract. This would mean that the best price-quality ratio would be automatically the basis of evaluation to choose the winning tender.
- Article 57(4) - Potential compulsion for contracting authorities to apply all or some of the 'discretionary' exclusion grounds.
- Article 71(6)(b) - Potential obligation on contracting authorities to verify whether subcontractors of the main tenderer meet any of the exclusion grounds and require their replacement if they do.

If these opportunities are taken up by Member States, there will be less discretion for contracting authorities and consequently far greater focus on the need to look at sustainability issues.



## Best Practices Across European Healthcare

Many best practices already exist in the European healthcare sector in terms of sustainable public procurement and are worthy of consideration. Some examples are given below of both environmental and social/ethical public procurement. Combining elements of these experiences with the opportunities of Directive 2014/24/EU should contribute to making such best practices the norm across Europe.

### AUSTRIA

For 15 years the city of Vienna has been running the successful environmental programme 'ÖkoKauf Wien' for SPP, mandated by its Mayor. All public institutions (hospitals, schools, etc.) are requested to procure goods and services according to ecological criteria. There are 25 working groups developing procurement criteria that are regularly reviewed and updated. The criteria are publicly available and can also be used by companies or citizens when buying items such as washing powder, office goods or construction materials, etc.

The staff responsible for hygiene measures in the Vienna Hospitals Association have created performance specifications for a number of uses of disinfectants. These specifications - including criteria such as quantity, packaging size, spectrum of activity and absence of aldehydes - were incorporated into the public tender. The proposals received were ranked by price and by ecological and health-related impacts (according to the Wiener Desinfektionsmittel-Datenbank, or WIDES, assessment process, developed under the 'ÖkoKauf Wien' programme - see Box 2). Low-price products with a good ecological and health ranking were identified and a list of recommended disinfectants was created. The Vienna Hospitals Association now takes this list into consideration. Analysis has shown that using the best ranked products for routine disinfection of hands, surfaces and instruments, phases out chemicals with allergenic, toxic, teratogenic, potentially carcinogenic and persistent/very ecotoxic properties (from around 4 tonnes annually in 1997 to almost zero in 2014). The substitution with recommended disinfectants has no impact on the levels of clinical service and patient safety.

### SWEDEN

A remarkable example of ethical public procurement is provided by the Swedish County Councils. In 2010, the 21 councils (whose main responsibilities are healthcare, dental care and public transportation) decided to work strategically on sustainable procurement.

#### BOX 2

### The Austrian WIDES database for disinfectants

The WIDES database is an innovative tool for substitution, allowing procurers to choose the most appropriate disinfectant for a specific application whilst evaluating the health and ecological effects. The WIDES database lists about 200 ingredients and compares products in response to the user's selection of a specific exposure time and spectrum of activity.

It is user-friendly, having been designed and developed in active cooperation with hygienists and OHS professionals and has led to a reduction in the quantities of hazardous substances being used for disinfection in Vienna. The database is available in German and English.

Cooperation created significant synergies: common procedures, one code of conduct for suppliers, sharing the workload of follow-ups and costs for third party audits and sharing of results. In addition, the joint buying-power of the councils, which amounts to 13 billion euros, is greatly increased over that of individual councils and has therefore a greater impact on suppliers.

The national organisation consists of a steering committee, a national coordinator, an expert group having knowledge on human rights risks in the supply chains, and 21 dedicated contact persons in each council.

Social issues are specified as a contract performance condition. All goods and services delivered under the contracts must be supplied under conditions that are compatible with the following:

- The UN Universal Declaration of Human Rights (1948);
- The ILO's eight core conventions on forced labour, child labour, discrimination, equal remuneration, freedom of association and right to organise (Nos. 29, 87, 98, 100, 105, 111, 138 and 182);
- The UN Convention on the Rights of the Child (CRC), Article 32;
- The UN Convention against Corruption (UNCAC);
- The protection of workers and the health and safety legislation applicable in the country of manufacture;
- The labour laws, including rules on conditions of pay and social insurance protection, in place in the country of manufacture;
- The environmental laws applicable in the country of manufacture.

The biggest challenge is in implementing follow-up processes. Therefore the Swedish councils, in conjunction with the Swedish Environmental Management Council, have developed a web-based tool ([www.uppfoljningsportalen.se](http://www.uppfoljningsportalen.se)), used by both procurers and suppliers. In the follow-up process the councils can use this tool to check whether the suppliers have procedures in place to ensure compliance. Those procedures include methods of addressing social responsibilities, an analysis of social risks throughout the supply-chain (which the councils require to extend to subcontractors), a description of how verification is done, compliance with the time schedule and procedures on how to handle any deviations from the provisions of the tender.

The answers are evaluated with assistance from the expert group and in many cases the evaluation leads to on-site audits. Audits commissioned by the councils have been carried out in recent years at seven factories in Pakistan, Malaysia, China and Thailand producing IT and telecommunication equipment, instruments, gloves, clothes and textiles. In one case a contract was ended, in other cases deviations have been rectified. The audit reports and the results are shared among all the county councils and are also made publicly available.



Photo: Cleaning at a Vienna hospital.

## NORWAY

Another example of good procurement practice is the implementation of ethical public procurement in Norwegian hospitals. The South Eastern Regional Health Authority of Norway (Helse Sør-Øst RHF) has been a driving force for both environmental and ethical requirements in public procurement. In 2010, the authority adopted ethical guidelines for purchasing which have to be strictly followed by all its employees. The authority's purchasing power is 8 billion euros per year, used where possible to press for environmental and ethical requirements through the supply chains. Supply chains are often complex, maybe involving several countries or issues such as breaches of human rights. Therefore, a risk assessment is carried out for all purchases above a certain cost. During the contract period, the authority follows up suppliers to ensure that requirements are being met.

A number of stages are included in the follow up process:

- self-declaration forms are issued to the suppliers and their responses analysed;
- more detailed follow up is undertaken on various issues for example on how ethical requirements are being met along the supply chain and on suppliers' own plans to analyse risks;
- discussions and proposals for continuing improvement with the manufacturer may be undertaken; and
- further meetings may take place with suppliers to prepare and implement any necessary improvements in procedures.

After three to four years of setting contract clauses and following up suppliers, the time had come to set stronger demands. Ethical criteria had already been placed into contracts but the first tender which included ethical criteria as part of the selection process came about in January 2013 for the procurement of surgical instruments. Later that year these selection criteria were used in two more tenders.

Currently, the bidder is required to have established a quality assurance system for ethical trade, which must ensure that the bidder is capable of fulfilling contractual obligations with respect to ethical standards. The bidder must therefore comply with the following four sub-requirements:



*Photo: Surgical drapes from Thailand during the audit by the South Eastern Regional Health Authority of Norway.*

### A system for traceability in the supply chain

- The bidder must have a system for traceability that gives an overview at any given time of the suppliers (including agents and/or producers) who directly contribute to the production of the products, and knowledge of the countries in which they are located.

### Guidelines for ethical trade

- The bidder shall have guidelines for ethical trade, often referred to as a Code of Conduct or a Supplier Code of Conduct (CoC), which shall apply to the bidder's supply chain associated with the procurement.

### A system for communication in the supply chain

- The bidder shall have communicated the CoC in writing to or in meetings with those involved in the supply chain, i.e., those who are involved in the system for traceability in the supply chains.

### A system for monitoring the Code of Conduct in the supply chain

- The bidder shall have an adequate system for monitoring the supply chain, in order to ensure that the CoC is complied with in the procurement of the specific product. This system shall cover all steps in the production of the finished product.

At the first tender where these requirements were applied, ten suppliers put in a bid but five of them failed to qualify. The winner was an international company that had never before had a social audit at one of its production facilities. Several meetings were held with the company in the first year and an audit carried out in November 2013. Some problems were found and a first set of improvements was made in January 2014. In this particular case the main problems concerned migrant workers, in particular the absence of contracts and passports and the charging of recruiting fees.

### Changing the industry

An important outcome has been that strict control over production and labour conditions gives suppliers a competitive advantage. The South Eastern Regional Health Authority of Norway has worked closely with supplier organisations and directly with suppliers on the issues of ethical trade. The large volume of the authority's purchasing has made it possible to get the attention of the suppliers on this issue and influence their behaviour. Seminars with suppliers and other meetings have been very useful and several of the suppliers have set up offices in the low cost countries where they buy their products. Suppliers have also engaged with employees on both working conditions and quality issues at production sites.



*Photo: Surgical drapes factory in Thailand during the audit by the South Eastern Regional Health Authority of Norway.*

## ITALY

In Italy, The Ministry of the Environment, which coordinates the National Action Plan (NAP) for sustainable public procurement, has set green and social/ethical criteria that public authorities can include in their contracts. There are thirteen green criteria available for various sectors including furnishings, cleaning services, electric and electronic office appliances, etc. These criteria are published in specific decrees that implement the National Action Plan. Currently, green criteria are being identified for two services and one product for the healthcare sector: cleaning services in hospitals, laundry and textile services, and incontinence pads.

Within the NAP, the Ministry of the Environment has published the 'Guide for the integration of social aspects in public tenders', developed with the support of the NAP Management Committee that participates to the European Working Group on Ethical Public Procurement (EWGEPP – see Box 3). The Guide takes inspiration from the Swedish and Norwegian experiences and foresees ethical criteria for public tenders including decent working conditions, the respect of human rights all along the supply chain, compliance with the eight core ILO Conventions, and other criteria on health and safety, wages and working hours. The Guide also foresees a 'structured dialogue', developed in eight phases, between the contracting authority and the contractor, including information for economic operators, use of follow-up questionnaires, audits and sanctions.

Moreover, the draft of environmental criteria for tenders in the building sector integrates social criteria, including ethical criteria in the supply chain.

The Guide is only voluntary but it is worth noting that a proposal to include compulsory implementation of environmental and social criteria in public tenders is being debated in the Italian Parliament currently.

A few Italian public authorities are engaged in the implementation of the Guide, such as the Italian Revenue Agency in its tender for catering services, and the Central Procurement Authority of the Lombardy Region (ARCA Lombardia) in eight tendering processes. Other authorities are following similar approaches to those detailed in the Guide, such as the Tuscany Region and the Emilia Romagna Region Agency (Intercent-ER) in the development of telematic markets. ARCA Lombardia, the central purchasing authority for 1600 public bodies (including healthcare structures), has engaged economic operators in a survey on ethical criteria. On the basis of the results of the discussion, ARCA Lombardia has integrated the principles of the Guide into eight tenders, four of which are in the healthcare sector (pharmaceutical products, vaccines, flu vaccine and incontinence pads), for a total purchasing amount of over 990 million euros. Currently, the first contracts are being verified.

### BOX 3

#### The European Working Group on Ethical Public Procurement

The European Working Group on Ethical Public Procurement (EWGEPP) is a network of regional and local authorities, governmental bodies and NGOs from European countries, working together to promote ethical public procurement in Europe and to share best practices. The working group counts about 15 members and is active in the following countries: Belgium, Germany, Italy, Norway, Sweden and the UK. The EWGEPP meets twice a year and regularly participates in international public procurement conferences.

## Conclusions and Recommendations

The new Directive on public procurement provides a very good opportunity for European Member States to turn public procurement into a green and ethical procedure. Information provided in this factsheet shows that these opportunities need to be seized. There are already good examples across Europe where green and ethical procurement is in place and these provide a starting point for sharing best practice. Further opportunity to engage beyond national borders on ethical public procurement is given by the European Working Group on Ethical Public Procurement (EWGEPP).

HCWH Europe recommends that Member States are ambitious in implementing the Public Procurement Directive, by demanding contracting authorities to set both environmental and social/ethical criteria as selection criteria in their tendering processes. Procurers must act responsibly in the interest of society at large and integrate green and ethical criteria into their procurement practices in order to effectively contribute to the protection of people's rights and the environment globally.

Photo: Exterior of a factory producing latex examination gloves in Malaysia.





*Photo: Latex glove factory in Malaysia*



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