

COMMENTARY

A Step in the Right Direction: The EU's revised directives on public procurement

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After many years of toil in advocating that governments seek value-for-money across the asset life cycle when procuring goods, services and infrastructure, **we were delighted to welcome, from the European Union (EU), the revised Directive 2014/24/EU on Public Procurement and the Directive 2014/25/EU on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors. Both Directives come into force on April 18, 2016.**

Having served on the EU Green Public Procurement Experts Group, we are particularly proud of this achievement. Every year, over 250,000 public authorities spend the equivalent of 14 per cent of EU's GDP on the purchase of goods, services and public infrastructure. The public sector is indeed the largest buyer in any economy, especially in sectors such as energy, waste, transport, health, education and social services.

At face value, it seems simple enough. Surely it makes sense for taxpayers' money to be deployed on goods, services and assets that reduce the total-cost-of-ownership, the cheapest option not simply at the point of purchase, but also to own, manage, maintain and dispose of? Such assets also involve lower environmental footprints and bring more social value across their life cycles. In practice however, value-for-money, the most fundamental principle of public procurement, is interpreted as the cheapest price, and tenders are so awarded with

little regard for quality, sustainability or fitness-for-purpose. Sustainable development is thus compromised and taxpayers are short-changed. In addition, the massive purchasing power of the public purse is not positioned as a driver of green innovation. In light of the UN Sustainable Development Goals—all of which are related to the improved delivery of public assets and services—this will be a missed opportunity.

But leadership from the EU is neigh. Both of the above directives come into force on April 18, 2016, and **embedded therein are several provisions to place public procurement much more firmly in the sustainable development driving seat:**

- Environmental requirements can be included in technical specifications (Article 23(3)b).
- Award decisions and specifications can be based on criteria required by eco-labels (Article 23(6)).
- Social and environmental conditions can be included in performance of contracts (Article 26).
- Bidders and their suppliers have to demonstrate compliance with environmental obligations (Article 27).
- Bidders have to show that they can perform a contract in accordance with environmental management measures (Articles 48(2)f and 50).



- Environmental characteristics can be included in award criteria (Article 53).

All of these provisions collectively make it much easier for public procurers to seek value-for-money across the life cycle. **The rationale is, when environmental and social criteria are included in the specifications and/or award criteria, the bar on environmental, social and economic performance is inherently raised and procurers can then proceed to award tenders to the cheapest bidder.** As such, the directives also maintain provisions in the preamble to the effect that public procurement “may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.”¹

To provide for **more sophisticated decision-making**, especially in the tendering of public services works and infrastructure, the **directives also emphasize that award decisions are made on the “most economically advantageous tender” (MEAT).** These requirements **encourage public procurers and policy-makers to consider the life-cycle costs, or the total-cost-of-ownership when planning, designing, structuring, funding and financing public goods, services and assets.** In the case of public services and works, public officials have also had to make investment decisions that will yield value-for-money in the longer term, 20 to 30 years into the future. Infrastructure projects hence need to be prepared and structured based on future revenue streams, the willingness and ability of users to pay for these public assets, changing demographics and patterns of demand, cost of capital today and in the future, internal rates of return pre- and post-construction, and much, much more. **Indeed, implementing MEAT requires that public procurers become dealmakers.**

The EU also prioritizes doing business with small and medium enterprises (SMEs).

Currently, SMEs win 45 per cent of the aggregate contract value above EU thresholds directly or as joint bidders or subcontractors. However, given that there are 21 million SMEs in Europe and they

account for 85 per cent of jobs, the EU seeks to increase their share of aggregate contract value to 58 per cent. To this end, the EU has revised the public procurement threshold values to increase SMEs’ access to public markets. Procurement and pre-qualification procedures have also been streamlined and standard tender documents have been simplified. For example, SMEs now have the option to make a self-declaration to present pre-qualification requirements—full documentary evidence will only be needed if they succeed in winning the tender. Further, the procurement directives encourage tenders and contracts to be divided into lots to make it easier for SMEs to bid and succeed.

A number of other rules and guidelines have been published to accompany the procurement directives. They include the *Guidelines on the Prevention of Corruption*, the *Handbook and Toolkit on Green Public Procurement* and the *Guide to Social Considerations in Public Procurement*. **The latter two resources served as key sources for IISD as we developed the IISD handbooks on sustainable public procurement for Latin America and the Caribbean and thereafter, for Bhutan and the South Asian Association for Regional Cooperation.**

Also noteworthy is the **emphasis on pre-commercial procurement in the EU public procurement strategy.** Pre-commercial procurement—the procurement of designs and prototypes that have hitherto not been commercialized—enables public organizations to share research and development (R&D) and innovation costs and risks with enterprises. Stimulus for pre-commercial procurement is provided through the EU Horizon 2020 competitive grants program, which provides funding for entrepreneurs and public agencies to strike deals on solutions for the future. The objective here is to position public procurement as a driver of innovation and technology entrepreneurship.

As much as we welcome leadership from the EU, we remain concerned about a few caveats, as member states begin implementing the directives in April 2016. For one, we are concerned on how the use of eco-labels may pan out. **While**

¹ The full text of the directive can be consulted at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG



eco-labels will make it much easier for public procurers to identify, specify and award contracts to sustainable products, too much reliance on eco-labels may impede continuous eco-innovation. We question if using the intelligence of eco-labels to develop output-based specifications may prove to be a better solution. This may be particularly true in the case of services and works. Too much standardization in tender decision-making can render public procurement to be a blunt instrument that will neither increase efficiency nor drive sustainable development in the years to come.

We are also of the view that the focus on SMEs needs to be fine-tuned. Increasing SMEs' access to public markets is a laudable intent and we certainly do not dispute the importance providing incentives for R&D incubators and technology start-ups.

Contracting with SMEs has to, however, be efficient for public officials and dividing contracts into lots can greatly increase transaction costs and performance risks for the public sector. Managing public services and works are complex tasks in themselves, and having to deal with multiple contacts can increase the complexity in the delivery of public assets and services and cause expensive losses during construction and operation.

We also question if substantial proportions of SMEs might be maintained in business by virtue of public procurement contracts alone. Are these enterprises sufficiently efficient to be in business on their own commercial merit? Do taxpayers receive value-for-money if public procurement ends up keeping inefficient enterprises in business? **Would there be merit in sharpening SME preferential public procurement programs to tie them into improvements in efficiency and innovation?**

Could we perhaps look to the U.S. federal government's Small Business Innovation Research (SBIR) program for some early leads?²

We also ask if procurers across the EU member states have the expertise to implement the revised directive. **Public procurement is more of an art than a science. Seeking value-for-money across the asset life cycle is less about**

standardization and more about negotiation.

Public procurers need to negotiate the best deal for taxpayers. Indeed, the provisions of the revised directive open additional opportunities for market consultation and contract negotiation, but do procurers have the necessary expertise and incentives to be dealmakers?

All too often, policy-makers and political leaders see procurers as administrators rather than deployers of capital. Most of us picture them housed in dim corridors and poorly decorated offices and busy with dull processes involving piles of paperwork. They are usually the last to be consulted on decisions related to public spending. Procurement itself is seen as a back-office support function rather than a public policy instrument—procurement is, after all, where governments and markets intertwine. It is worthwhile to note that procurers ranked 141st out of 366 roles that are likely to be taken over by robots over the next 20 years. A study conducted by Deloitte and Oxford University, UK, goes on to suggest that roles that require negotiation are the most unlikely to be automated.³

At IISD, as we sharpen our services on sustainable public procurement, rebranding the public procurement function and building the profile and expertise of the public procurement profession will take centre stage.

And just as we welcome leadership from the EU on sustainable public procurement, our next point of advocacy will focus on obtaining political and budget support for procurers to transform laws and policies into action. Only then will sustainable public procurement be a reality.

² The SBIR website can be visited at <https://www.sbir.gov/about/about-sbir>.

³ The full study, entitled *The Future Of Employment: How Susceptible are Jobs to Computerisation?* can be consulted at the following link: http://www.oxfordmartin.ox.ac.uk/downloads/academic/The_Future_of_Employment.pdf

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