



23 December 2008

COMMISSION CONSULTATION – SOCIAL CONSIDERATIONS IN PUBLIC PROCUREMENT

BUSINESSEUROPE welcomes the opportunity to submit comments with regard to the Commission consultation on the inclusion of social considerations in public procurement which aims to contribute to the drafting of a guide on socially-responsible public procurement.

We recognise the importance of social policy and accept, to a certain extent, the inclusion of social aspects in public procurement. However, it is imperative that the provisions of the current EU Directives on public procurement (2004/18/EC and 2004/17/EC) are well respected so as not to distort competition in the Internal Market, which would be particularly damaging for SMEs.

In addition, we consider it necessary to highlight that imposing restrictive social conditions in public procurement can lead to higher costs in public purchasing, which is disadvantageous for the taxpayer.

More concretely, BUSINESSEUROPE would like to make the following comments:

1) The existing legal framework for public procurement provides sufficient legal certainty on how to use social criteria

With the adoption of the new public procurement directives in 2004 Member States were bound to implement new public procurement procedures. The use of the "economically most advantageous" award criterion, consistent with relevant case-law from the European Court of Justice (ECJ), leaves room for public purchasers to include social criteria provided that these are directly linked to the object of the contract.

The Commission, in line with its better regulation efforts, should, through the guide, not aim to prescribe policy but instead to produce guidance that would ensure an active collaboration with suppliers to ensure that the proposals are feasible and the outcomes are deliverable.

2) Will Socially Responsible Public Procurement (SRPP) objectives be prioritised or ranked, or will the guide list them as possible criteria for procuring authorities?

We are concerned about the lack of clarity on how the social criteria will be ranked by procuring authorities, and how well this will be communicated to suppliers to ensure appropriate bids are tendered.



The Commission should consult with national procurement bodies or institutions that have overall responsibility for procurement policy and with whom supplier contact is already established. This will enhance the degree to which social criteria are prioritised in a relevant and appropriate way, in accordance with varying national objectives and within contractors' capabilities.

3) Concerns over the Commission's legal basis

The legal basis to take account of social considerations in public procurement is contained within the pertinent directives and the consequent case law as adopted by the ECJ. The Commission should consider the absolute necessity to put any forthcoming proposal on a sound legal footing very seriously.

The Commission's study on this subject, upon which the guide is based, has *inter alia* included the concepts of 'decent work', 'fair/ethical trade' and Corporate Social Responsibility (CSR). It must be noted that these concepts can be interpreted differently and may raise questions of legal certainty.

To expand on some possible social demands that the Commission will have to consider, it should be noted that:

- The application of International Labour Organisation (ILO) conventions is an issue between the ILO and each ratifying country and so the demand for application of ILO core conventions within the EU would entail unnecessary duplication;
- the concept of 'decent work' has no legal meaning in EU law, and therefore is singularly ill suited to be included in contract terms. As mentioned earlier it does not qualify with legal certainty as suitable for use in this context;
- CSR has no legal meaning in EU or international law (the same can be said for 'fair' or 'ethical' trade). CSR consists of voluntary undertakings by individual companies, having no automatic legal consequence.

We hope these comments will be taken into account in the drafting of the Commission's guide. We would like to express concern regarding the lack of transparency by the Commission concerning its intention not to publish the full study upon which the guide is based nor the draft guide itself. We would urge the Commission to circulate the future draft guide before it is finalised in order to be able to further express our views.

Given the significance of this subject for the overall functioning of public procurement in the Internal Market, BUSINESSEUROPE considers it essential for DG MARKT to be involved in the drafting of the guide as well as DG Trade for the trade-related aspects.

BUSINESSEUROPE believes strongly in the importance of public purchasing and consequently that all directives, regulations, communications and other initiatives must be consistent with the smooth functioning of the market, open and transparent, and contribute to the economy and wellbeing of citizens.