

BRIEFING FOR MEMBERS

"Buying Social- a guide to taking account of social considerations in Public Procurement (2nd edition)"

The European Commission recently published the second edition of the Guide to taking account of social considerations in Public Procurement. The purpose of the document is to raise public buyers' awareness of the potential benefits of Socially Responsible Public Procurement (SRPP) while explaining practically the opportunities offered by the EU legal framework¹. The notice contains five chapters, with each section ending with takeaways. The non-binding document produced primarily for public buyers aims to inspire others involved in procurement - service providers, private buyers, social economy players, including social enterprises or NGOs. Public buyers are significant investors in Europe, currently spending over 14% of the EU's gross domestic product.

The guidance also includes about 30 case studies from EU public buyers, with chapters covering all aspects of the procurement process beyond the tendering procedure itself. In this brief, we look at some of the sections most relevant to Eurodiaconia members.

What is Socially Responsible Public Procurement?

Socially responsible public procurement (SRPP) is an approach to the award and delivery of public contracts which aims to generate positive social outcomes, such as decent living, working standards, social inclusion, and equality. It seeks to address the impact on society of the goods, services, and works purchased by the public sector. It recognises that public buyers are not just interested in purchasing at the lowest price or best value for money but also in ensuring that procurement achieves social benefits.

1. SRPP prevents or mitigates adverse social impacts during the performance of the contract.
2. Public buyers can consider social objectives throughout the entire procurement process, provided these are non-discriminatory and linked to the subject matter of the contract.
3. In the EU, SRPP must be carried out in compliance with the 2014 [Public Procurement Directives](#).
4. SRPP must be within the principles enshrined in the EU Treaty.

¹ Buying Social-a guide to taking account of social considerations in public procurement (2nd edition)
<https://ec.europa.eu/docsroom/documents/45767>

5. It must also comply with the Charter of Fundamental Rights and international agreements, such as the WTO Government Procurement Agreement (GPA).
6. It must also be in line with bilateral Free Trade Agreements procurement chapters.
7. It must be in line with the UN Convention on the Rights of Persons with Disabilities (UNCRPD)

It is the Member State's discretion to determine the procedural rules. But the public buyers must consider the quality, continuity, accessibility, and affordability of the service.

Points of interest in the new 'Buying Social' Guide:

- Provides practical indications to public buyers on how to introduce social considerations in public tenders.
- The document is for public buyers as primary users but accessible for other stakeholders.
- It is not a policy paper, nor a legal interpretation of the rules.
- It covers the whole procurement process.
- Covers SRPP horizontally (any relevant social objective) such as:
 - ✓ Fair employment, social inclusion, and equality
 - ✓ Promoting decent work
 - ✓ Accessibility for all
 - ✓ Respecting human rights
 - ✓ High-quality services
 - ✓ Compliance with social and labour rights
 - ✓ More opportunities for social businesses
 - ✓ Organisational strategy for Buying social
 - ✓ Identifying needs and planning procurement
 - ✓ The procurement procedure
 - ✓ Setting and enforcing contract terms.

Identifying needs and planning procurement

The guidance states that before launching a tender, assessment of needs can be the first stage in the procurement cycle of SRPP. This assessment process will ensure that goods, services, and products purchased meet social requirements, increase social impacts and outcomes, and check whether the procurement offers opportunities to advance relevant social and ethical results. Thus, the procedure can save money and generate social returns, making it a crucial part of pre-procurement. In addition, needs assessment may stimulate a shift away from thinking about the number of units purchased to how to meet needs sustainably and with social outcomes in mind.²

User Consultation

In this regard, not only users of the product, service or work are involved, it may also include other individuals within the same organisation, employees of another public body, or citizens. In addition, the consultation process can identify social issues,

² <https://ec.europa.eu/docsroom/documents/45767> pg 37

ensuring that the tender is designed to make the most of any prospects to achieve positive social impacts.

Information obtained during user consultation could formulate a simple needs statement, which describes the reason for the purchase and account for any alternatives to buying. The needs statement could advance the business case for procurement and inform suppliers during preliminary market consultation and tendering. In addition, key stakeholders, such as service users, citizens, or NGOs, can be asked to review, challenge, and endorse the statement of needs from a social perspective.³

Market Dialogue

The guidance highlights the importance of market dialogue. This involves a process that aims to interact with contracting authorities and suppliers before starting the public procurement procedures. Market dialogue for SRPP will improve the public buyers' understanding of the capacity of potential bidders to meet social aims and ambitions. In addition, it can help establish the conditions required to deliver SRPP both internally within the public buyer and in the market.

The Light Regime

In the 2014 reform of the Public Procurement Directives, it was recognised that separate rules should apply to certain services, in particular services relating to social, health, education, and community activities. These services, by their nature, are generally of limited cross-border interest, and the Member States have different ways of organising them, reflecting diverse cultural traditions. The light regime for social and other specific services sets a higher threshold for applying the EU rules to such services, allowing the Member States to place national laws regarding their award.⁴ The majority of the services under the light regime are services to the person; as such, they impact the wellbeing of the individual receiving it. Reason why national rules for light regime contracts must ensure that public buyers can take into account quality, continuity, accessibility, affordability, availability, and comprehensiveness of the services, as well as the specific needs of different categories of users, including persons from disadvantaged and vulnerable groups.⁵

Further reading on services covered by the light regime can be seen in the Public Procurement Directives of 2014⁶

³ <https://ec.europa.eu/docsroom/documents/45767>

⁴ Title III (Articles 74-77) of Directive 2014/24/EU, Article 91-94 of Directive 2014/25/EU. Article 19 of Directive 2014/23/EU provides that for concessions for social and other specific services, only the rules on publication of a prior information notice, award notice and the rules on remedies apply.

⁵ <https://ec.europa.eu/docsroom/documents/45767> pg 56

⁶ Annex XIV of Directive 2014/24/EU, Annex XVII of Directive 2014/25/EU, Annex IV of Directive 2014/23/EU.

Examples of how the light regime is used in national practices:⁷

Examples of National Law/Guidance on the Light Regime: France and Scotland

In 2019, an updated [guidance on social aspects of procurement](#) was published jointly by three French ministries. This reflects the Public Procurement Directives, as implemented into French law by [decree 2016-360 of 25 March 2016](#).

Amongst many other topics, the Guide looks at the use of the 'adapted procedure', which can be used for social and other specific services, as set out in Articles 27 and 28 of the decree. It suggests ways in which this procedure can be used to achieve social objectives such as insertion into the labour market of unemployed people. For example, variants may be offered by bidders to propose different ways of achieving social objectives.

The Guide also emphasises that the adapted procedure does not allow contracts to be set aside for one particular enterprise but that reservations may be used where appropriate.

The French Direction of Legal Affairs has also published [guidelines](#) on the use of the adapted procedure, emphasising that this should allow greater participation of SMEs and other 'non-traditional' bidders.

In Scotland, specific [guidance](#) has been prepared on the procurement of care and support services under the light regime. This outlines best practices in terms of involving service users and care providers, planning the procurement, including community benefit requirements where appropriate, and managing contracts after their award. It gives examples of how the continuity and quality of services can be protected at each step of the procurement process.

Examples of Contracts Awarded under the Light Regime:⁸

Notices published in the Official Journal of the EU show some of the ways in which the light regime is being used to achieve social objectives. For example, in a contract for 'Community prevention and wellness services', a public buyer chose to use a competitive procedure with negotiation. The objective was to engage in collaborative co-design and subsequent execution of a network of services.

The notice specified expected outcomes from the procurement, including:

- Improved quality of life for individuals and for communities,
- People's overall health and wellbeing from birth throughout their lives is improved, and people are supported to maintain their independence,
- People have choice and control over the services and support they access.

The award criteria focus on social value and other qualitative aspects of the service.

Another example is a framework agreement for the provision of welfare services to older people. This was also awarded on the basis of the competitive procedure with negotiation. Interested providers were asked to submit concepts for the support of fragile people living at home, including the provision of equipment for remote assistance.

The award criteria focused primarily on the quality of the service provided, including the expertise and resources committed, and the methods used to allow recipients to stay at home. A total of four offers were received and the winning bidder was an SME.

⁷ <https://ec.europa.eu/docsroom/documents/45767>

⁸ <https://ec.europa.eu/docsroom/documents/45767> pg 57

Reservations

Reserved contracts in Public Procurement provide opportunities to support the social and professional integration of persons with disabilities and people in disadvantaged situations. Member States under the Public Procurement Directives may reserve the right to participate in procurement procedures for sheltered workshops and economic operators whose main aim is the social and professional integration of persons with disabilities or disadvantaged persons.⁹ To benefit from the reservation, at least 30% of the employees of those workshops, economic operators, or sheltered employment programmes must be persons with disabilities or people in disadvantaged situations.¹⁰ It is worth noting that reservation use is optional, and the maximum duration of contracts awarded under the reservation is three years.

Some good practices:

- Reserving a contract for competition by organisations or programmes with a social purpose can effectively deliver social value through procurement.
- If social enterprises lack the capacity to tender for reserved contracts on their own, consider dividing the contract into lots, or whether partnerships or consortia may be formed to meet the requirements. Keep in mind that it is possible to reserve specific lots within a larger contract for performance by social enterprises.

Accessibility Requirements in Technical Specifications

According to Article 42(1) and Article 60(1) of Directive 2014/25/EU, "For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up to take into account accessibility criteria for persons with disabilities or design for all users".¹¹

As such, it is mandatory for public buyers to provide goods, services and works which are accessible to all users; therefore, they must be referred to in technical specifications. The mandatory accessibility requirements ensure that products and services are designed and produced in such a way as to maximise their foreseeable use by persons with disabilities.

Compliance with Social and Labour Law, and Collective Agreements

The Public Procurement Directives include a social and environmental clause, whereby the Member States need to take appropriate measures to ensure that in the performances of public procurement contracts, economic operators comply with "applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions".¹² National authorities may have specific measures to ensure compliance with the obligations referred to in the social and environmental clause or may rely on public buyers to verify compliance on a case-by-case basis.¹³ Public buyers can therefore ask for evidence of compliance or self-declarations from bidders.

Moreover, national obligations in the field of social and labour law must always be applied consistently with EU law and with the principles of transparency, non-discrimination, and equal treatment.

⁹ <https://ec.europa.eu/docsroom/documents/45767/>

¹⁰ <https://ec.europa.eu/docsroom/documents/45767/>

¹¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0024&rid=2>

¹² https://ec.europa.eu/docsroom/documents/45767/pg_65

¹³ <https://ec.europa.eu/docsroom/documents/45767>

Exclusion and Selection Criteria

Under the Public Procurement Directives, certain operators should not be eligible to win public contracts due to serious criminal or unethical practices. Grounds for exclusion are mandatory (which must be applied in all tenders) and discretionary (which public buyers can use, or which may be made compulsory under national law).¹⁴

On the one hand, exclusion focuses on negative factors that may prevent public buyers from awarding a contract to a bidder. At the same time, selection criteria can help them identify those best placed to deliver social aspects of a contract. Some examples of selection criteria that may contribute to SRPP are:

- Financial standing requirements (e.g. turnover, profitability) are limited to what is necessary to ensure that the bidder is capable of delivering the contract and do not restrict participation by social economy organisations, social enterprises, non-profits and community organisations
- Criteria requiring demonstrable specific experience and expertise of organisations and their teams in dealing with social issues relevant to your contract, e.g. accessibility, gender equality and non-discrimination.¹⁵

Award Criteria

The guidance also touches on the award criteria. According to the EU Public Procurement Directives, contracts covered in the directive are awarded based on the 'Most Economically Advantageous Tender (MEAT), whereby public buyers can apply a wide range of qualitative cost-related criteria. Social aspects are specifically mentioned amongst the factors that can be included in award criteria, accessibility, design for all users, and trading and its conditions.¹⁶ Some examples of social award criteria are stated in the guidance:

- *Methodology for ensuring social inclusion in the delivery of the service.* Bidders must submit a detailed plan to reach each of the target groups specified in the tender documents.
- *Number and quality of apprenticeships/training opportunities created in the delivery of the contract.* Bidders must detail their approach to recruitment and training, provide a sample job specification for apprenticeships and describe the support structures to be put in place
- *Measures to ensure gender equality.* Marks are awarded based on specific criteria to fight discrimination and support gender equality (e.g. training, work/life balance, flexible work schedule, etc....).

The Guide is available in electronic format in **all EU official languages**. You can read and download it on the [Commission website](#).

What can members do?

- You can engage in a regular dialogue with contracting authorities at all levels to spread the information about SRPP good practices, especially on the light regime and quality criteria for social services, social considerations, reserved contracts, pre-market consultations and division of contracts into lots.

¹⁴ <https://ec.europa.eu/docsroom/documents/45767>

¹⁵ <https://ec.europa.eu/docsroom/documents/45767/>

¹⁶ <https://ec.europa.eu/docsroom/documents/45767/pg72>

- Would you please share with the Eurodiaconia secretariat good practices and challenges encountered in implementing the public procurement directive and the proposed solutions to overcome them?

For more information, don't hesitate to get in touch with kewan.mildred@eurodiaconia.org

September 2021