

The new Directive: are we progressing from Green to Sustainable Public Procurement?

Presentation by: Catherine Weller

Date: 2 October 2013



GPP vs SPP: what's the difference?

- Green public procurement
- Sustainable public procurement

Why has SPP received less attention?

- **Social considerations**
 - restricted to contract performance clauses
- **Concerns**
 - Ability to use
 - non-economic factors to decide which is the best tender
 - link to the subject matter
 - verification

Will things be any clearer under the new regime?

Stated aim of the revision:

“... to enable procurers to make better use of public procurement in support of common societal goals”

Recital 2

Game changer...

May 2012, CJEU decision in Commission v Kingdom of the Netherlands (Case C-368/10)

“It must therefore be accepted that contracting authorities are also authorised to choose the award criteria *based on considerations of a social nature*, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons.”

Game changer...

‘...there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say *something which forms part of the material substance thereof.*’

But the basics principles
of equal treatment and
transparency still apply...

The principle of transparency requires that all conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner ...

So that...



all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way



the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.



The new regime – tech specs

Recital 27

“The technical specifications drawn up by public purchasers need to allow public procurement to be open to competition *as well as to achieve objectives of sustainability*”

Recital 41(b)

“In technical specifications contracting authorities can provide such *social* requirements which directly characterise the product or service in question [...]”

The new regime – tech specs

Annex VIII – defines technical specifications in respect of public supply or service contracts

“Required characteristics of a product or service, *such as...*”

Article 40

“Those characteristics may also refer to the specific process or method of production [...] *even where such factors do not form part of their material substance [...]*”

The new regime – award criteria

The best price-quality ratio “shall be assessed on the basis of criteria including qualitative environmental and/or social aspects linked to the subject matter of the public contract in question” Article 66(2)

The new regime – award criteria

“Award criteria shall be considered to be linked to the subject matter where they relate to the works, supplies or services to be provided [...] *in any respect* [...] including factors involved [in the specific process of production or another stage of their life cycle] *even where such factors do not form part of their material substance*” Article 66(3)

Other obstacles to the take up of both SPP and GPP

- Price
- Political will
- Verification

Thank you!

Catherine Weller

Lawyer

ClientEarth

cweller@clientearth.org

www.clientearth.org

www.facebook.co.uk/ClientEarth

@ClientEarth

