Chapter III: Including Environmental Criteria in Tendering

Green public procurement is certainly possible under the current global trade and EU procurement regimes, as long as the purchasing authorities follow the fundamental rules of free trade. This chapter concentrates on the inclusion of ENVIRONMENTAL criteria. The EU legal framework for including SOCIAL criteria is slightly less clear, although hopefully guidance will soon be provided by the European Commission on this matter.

The aim of this chapter is to illustrate the possibility of inserting environmental criteria into public tendering without contravening existing regulations. The first section looks at the basic principles to be followed when tendering. This is followed by a detailed look at how to incorporate environmental demands in the different tendering stages. The final section of this chapter looks at different information sources to help you in actually developing environmental standards/requirements to include in tenders.

Please note, ready-made purchasing criteria for six products/services, clearly outlining in which of these stages they should be used, are included in Chapter VI.

1 Basic principles when tendering

The awarding of public procurement contracts is strictly regulated by laws that aim to protect both the procurer and the contractor.

In the European Union, the legal framework for procurement in Member States (MS) is defined by the EU Public Procurement Directives from 2004[1], for purchases above a certain amount (threshold), and National procurement law, below these amounts.

However, all MS public entities are obliged to respect the principles of the European Commission Treaty during their procurement no matter what size of contract is to be awarded or which laws govern it (National or European).

The most relevant principles of the EC Treaty for procurement are the following:

- The principle of freedom of movement of goods;
- The principle of freedom to provide services;
- The principle of non-discrimination;
- The principle of equal treatment;
- The principle of proportionality;
- The principle of transparency.

Environmental criteria can be included in tender documents without contravening national legislation, as long as these principles are followed.

2 Sections of a tender document where green criteria can be introduced

The Procurement Directives define very clearly where and how environmental criteria can be introduced in tender documents. Those sections are also defined in most MS national laws and are as follows:

1. The subject mater of the contract;
2. The technical specifications for the product/work/service;
3. The selection criteria for candidates;
4. The contract award criteria;
5. The contract performance clauses.

These stages will be described in more detail in the following sections of this chapter.

2.1. Definition of the subject matter of the contract

The subject matter of a contract is WHAT is going to be purchased by the public authority. Procurement laws define HOW to carry out public procurement but they do not define WHAT to buy (the subject matter), thus allowing freedom to authorities to choose what they wish to procure.

If environmental considerations are to be taken into account in a procurement process, the most direct way of doing so is by stating it in the subject matter. Indeed if you wish to include environmental requirements in your tendering then you need to include this in the subject matter so that the process is completely transparent.

[1] These directives are:
Directive 2004/18/EC of the European Parliament and of the Council on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts.
The text is provided in the attached CD-ROM
Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors .
The text is provided in the attached CD-ROM

The exact environmental requirements will have to be defined in the technical specifications or award criteria but introducing it in the subject-matter of the contract clearly states to potential bidders the intention of the contracting authority to buy green.

The only safeguard that needs to be taken is that the definition of the subject-matter cannot be discriminatory, i.e. goes against the EC Treaty principles.

For example:

You can state that you want to contract *"Catering services which supply organic food"*, but you cannot state *"Catering services which supply local food"* as the definition of local is discriminatory – it does not allow the free movement of goods.

You can state that you want to buy *"energy-efficient computers"*, but you cannot state that you want to buy *"Energy Star certified computers"* as you are discriminating, not giving equal treatment to all proposals because you demand a specific certification.

Examples of correct green contracts:

- *Contract for the supply of recycled paper for writing, printing and copying purposes;*
- *Contract for the design and construction of an energy-efficient building;*
- *Contract for environmental cleaning services including selective waste collection.*

2.2 Drawing up technical specifications

Note:

If you really want to buy more sustainable products, services or works, you should include the environmental demands here, as these criteria are compulsory. If you leave it for the award phase, you cannot guarantee that the more environmentally friendly product/service will be selected (see section 2.4).

Once the subject matter of the contract is defined, the contracting authorities must translate this into measurable technical specifications that the product/service must fulfil. These requirements are compulsory, therefore if an offer does not comply with them it will be automatically rejected.

Technical specifications can be defined in terms of:

a) Environmental technical standards and ecolabel criteria

This is the most common approach. You can use several European or national technical standards or specifications such as the ones developed by the CEN (European Committee for Standardisation). It must be noted that in this case each reference shall be accompanied by the words 'or equivalent', as the procurer cannot reject a tenderer who can prove that their product or service meets the standards mentioned in an equivalent manner.

However you can also use other criteria that are more ambitious than the ones defined in the standards, provided that they are not discriminatory.

As technical specifications you can use the environmental criteria used by ecolabels. However you cannot demand that the product possesses a certain ecolabel (this is considered discriminatory) – only that it complies with the criteria. Ecolabels can also be used to prove compliance but you must always allow other means of demonstration. More information on ecolabels can be found in Section 3.1 below.

For example:

You cannot demand *"certified Blue Angel paper"* – this is discriminatory.

However you can include in your tender documents the criteria used by that ecolabel, e.g.:

The paper must:

- *Contain at least 80% of post-consumer waste recycled paper;*
- *Be totally chlorine free (TCF);*
- *Durability > 100 years, according to ISO 9706, DIN 6738 or equivalent;*
- *Compatibility with machinery: meeting DIN 19309, AFNOR Q11-013 or equivalent.*

Products carrying the Blue Angel label will be deemed to comply, as will other acceptable means of proof.

b) Performance or functional requirements

In this approach, technical specifications do not need to be expressed in too much detail, as you will be giving more scope for market creativity. However, you have to be more careful as the options available can vary considerably and you should make sure that the specifications are clear enough to allow you a proper and justifiable evaluation. An example of such a specification could be the following:

"Indoor air conditions in a building: inside temperature between 18-22°C during winter and 26-28°C during summer and a relative humidity of 50%".

In this case, the bidder may choose any method for achieving the requirement without having to follow very specific technical specification for the heating/cooling systems that will be used.

c) Production and process methods

When purchasing products contracting authorities can also set criteria based on specific materials that should or should not be included in them, as well as the process and production method of the products.

For example, you can demand that:

- Paper is produced without the use of chlorine (TCF);
- Food is organically produced (without the use of chemical pesticides and fertilisers) in compliance with EEC Regulation 2092/91 of 24 June 1991 and 1804/99/EC.;
- Electricity is generated from renewable sources.

d) Use of variants

When the award criterion used is the most economically advantageous offer (see Section 2.4 below), contracting authorities can ask tenderers to submit "variants". These allow the comparison of products meeting different sets of technical specifications, using the same evaluation criteria.

This is a very useful tool, especially if the contracting authorities are not sure whether the services/works/products they want to purchase are available on the market or if they are not sure about their quality or price. The use of variants must be indicated in the published tender.

The contracting authorities can use variants by:

1. Setting the minimum (non-environmental) requirements of the product/service to be bought. This represents Variant 1 - the "neutral" offer;
2. Setting additional environmental specifications (as well as the minimum requirements from Variant 1) for the product/service to be bought in. This represents Variant 2 - the "green" offer.

Only offers that fulfil at least the minimum requirement are taken into consideration. When the bids are opened, the contracting authorities can compare between conventional solutions and environmentally friendly options based on the same set of award criteria.

2.3 Selection criteria for the candidates

When evaluating the different bids submitted following a call for tender, the first stage is to analyse whether the bidders have the capacity and ability to perform the contract they are tendering for. If this is not the case, the offer will be rejected and no further analysis will be carried out.

The selection criteria that a public authority can specify in tenders are threefold: exclusion criteria, technical capacity criteria and financial capacity criteria. However, only in the first two is there room for the inclusion of environmental aspects:

a) Exclusion criteria

In the Directives as well as in most MS procurement laws you can find a list of the exclusion criteria that you can use in your tenders. These can be, for example, if the company is bankrupt or has been wound up, has been found guilty of corruption or of fraud or has not paid taxes or social security contributions.

Companies can also be excluded for environmental reasons. For example, if the company has been condemned for environmental crimes, as long as this is considered by the national law as a reason for incapacity or prohibition to contract with public entities due to grave professional misconduct.

b) Technical capacity criteria

The technical selection criteria focus on the ability of the tenderer to perform the contract. These usually include proof of the experience of the tenderer, a list of relevant projects implemented, a description of technical facilities, etc. An exhaustive list of such criteria is available in the EU Directives, as well as in national laws, and they must always be linked to the subject matter or the execution of the contract at stake.

As far as environmental selection criteria are concerned, these can only be used if specific environmental experience is needed to fulfil the contract. This can only apply to certain service and works contracts, which are felt to have a relatively high potential environmental impact during their delivery – which contracts this applies to must be judged by the tendering authority itself.

For all these criteria, tenderers must submit the relevant proof. This could be a list of similar environmental services carried out by the company.

For example:

If you want to contract the *"design and construction of a bio-climatic building"*, you can evaluate the technical capacity of the bidders by requiring them to provide a list of previous buildings they have constructed using bio-climatic principles.

It is also possible to demand that certain environmental management systems (EMS) are in place – but only if this is relevant for carrying out the contract. As long as the specific management measures required are also covered by a bidder's own EMS (such as EMAS or ISO 14001) this can be used as a simple form of proof. Other forms of proof that these management measures are in place must also be accepted.

For example:

The *"construction of a bridge in a protected area"* will require the establishment of a series of specific management measures aimed at ensuring the effective protection of fauna and flora in the area whilst building the bridge, e.g. control of noise levels, waste collection, etc. In this case, the possession of an EMS for construction sites (but not for other sites such as a factory) can be used as a means of proof that the bidder has the technical capacity to perform the contract accordingly.

2.4. Awarding the contract

The last stage of the procurement procedure is the contract award. In this stage, the contracting authorities evaluate the quality of the offers that complied with the technical specifications in order to choose the most appropriate one.

There are 2 ways of awarding a contract, based on:

a) Lowest price;
b) Most economically advantageous offer.

In the first case, the final decision is based solely upon the price of the bids. Therefore, if no environmental criteria have been defined in previous stages, you will not have the opportunity to include them in this stage. If you choose this option, you should make sure environmental criteria are introduced in the technical specifications.

If the principle of the "most economically advantageous offer" is applied, other award criteria can be taken into account, along with the price. These criteria may concern quality, delivery date, technical merit or environmental characteristics for example. In this case, it is very important that environmental award criteria are:

- related to the subject-matter,
- objectively quantifiable,
- weighted in relation to the other award criteria (arranging them in decreasing order) and,
- clearly defined in the tender documents in order to guarantee transparency.

Note:

The difference between technical specifications and award criteria lies on the fact that the former set the minimum requirements that the product/service MUST fulfil. The award criteria allow the tendering authority to indicate what they would PREFER, but not at any price.

Using the award phase to introduce environmental criteria can be a good idea if you are unsure about the availability or cost of the more environmentally friendly product/service. Introducing environmental award criteria basically says that you prefer "greener" products; however if they are much more expensive they will not be selected. The "weight" you give to the environmental criteria in the evaluation will determine how much extra you are willing to pay.

It is possible to include environmental award criteria even if you have also included environmental minimum standards in the specifications – this provides an opportunity to reward even better performance.

For example, if you are contracting a computer leasing service, you could specify in the technical specifications a certain energy consumption level. In the award criteria you might want to give preference to equipment that consumes even less energy. Therefore you could set up the award criteria as follows:

- for the economic offer: up to 80 points;
- for energy consumption even lower than that defined in the technical specifications: up to 20 points [2].

When considering the economic offer itself, this does not need to be restricted to just the price – it is better to consider the "life-cycle costs" of the product/service you are contracting. This includes not just the purchase price but also the usage costs (such as electricity or water consumption), maintenance costs, and final disposal costs. More information on this approach is included in Chapter IV of this Manual.

[2] You should also present a clear model for how points are allocated, e.g. on a sliding scale with 20 points awarded to the best offer and 0 to the worst offer.

2.5. Defining contract performance clauses

Finally, public authorities can also introduce environmental criteria in the contract performance clauses – i.e. the rules for how a contract must be carried out. These clauses do not have any influence on the awarding of the contract, however they need to be set out explicitly in the call for tender and clearly related to the performance of the contract.

The contract performance clauses can only relate to the manner in which the contract is carried out. This means that they cannot be "disguised" technical specifications, award criteria or selection criteria and all potential bidders should in principle be capable of complying with them. No means of proof can be requested during the tendering phase.

The contractor is obliged to follow these conditions when carrying out the work or supplying the contracts. If they fail to do so, the contracting authority can either set a financial penalty or even seek the cancellation of the contract.

Some examples of contract performance clauses are:

- → Products shall be delivered in bulk instead as individual units;
- → The contractor must use reusable containers when delivering products;
- → The contractor must collect the packaging materials and used products that they supply for recycling or reuse;
- → All products must indicate the dosage that should be used in order to avoid overuse;
- → The services will have to be carried out in compliance with the procedures and criteria fixed in the organisation's EMS.

2.6. Conclusions

In summary, it is possible to introduce environmental criteria in tender documents provided the following basic principles are taken into consideration:

- All environmental criteria are explicitly mentioned in the tender document;
- The wording of the criteria respect the general principles of transparency, non-discrimination and equal treatment;
- The criteria relate to the subject-matter of the contract;
- Criteria have to be objectively quantifiable;
- Any form of appropriate proof of compliance is accepted.

3 Developing environmental specifications

The sections above indicate where you can include environmental demands in public tendering, but one of the most challenging aspects of sustainable procurement is knowing what these demands should be. Most procurers are not environmental experts, and many environmental officers have generally little direct experience with sustainable procurement.

A "green" product/service is one which has a better environmental performance throughout its life-cycle[3] that delivers the same or better function, quality and end-user satisfaction compared to a standard product. To help set appropriate environmental standards the most useful resources are ecolabels and the increasing number of national guidelines available on the topic.

„For many products, eco-labels, such as the German Blue Angel have provided us with the necessary criteria to identify greener products. This is easy to apply and relieves you of the burden to think about all aspects of a product yourself. I wish more labelled products were available on the market"

Roland Schütze, Chief Purchaser, City of Stuttgart, Germany

3.1. Eco-labels:

An ever increasing number of eco-labels now exist on the market to help indicate products which achieve a certain environmental quality standard. Products must meet a set of requirements before they are allowed to display the label.

There are dozens of voluntary eco-labelling schemes worldwide, run by governments, private entities and non-governmental organisations. The majority of eco-labels use multi-dimensional criteria based upon LCAs, however some eco-labels are based on one environmental impact (e.g. Energy Star, an eco-labelling scheme for energy efficiency).

As noted above, eco-labels can be very useful for public procurers. A procurer can use the same environmental requirements as those used by the eco-label. Products carrying the eco-label can then also be assumed to comply with the criteria, saving a potentially long verification process, though other forms of proof must always be allowed (see Section 2.2 above).

[3] *Life-cycle Assessment* (LCA) is a tool developed to implement this approach. According to the definition of the European Commission, LCA is *"a method for assessing the environmental aspects and potential impacts associated with a product, by compiling an inventory of relevant inputs and outputs of the defined system, evaluating the potential environmental impacts associated with these inputs and outputs, and interpreting the results"* (European Commission (2001). Green Paper on Integrated Product Policy COM(2001)68).
This method allows the identification of the most important environmental impacts of a product, quantifies the environmental benefits that can be achieved by improved product design, and compares the environmental acceptability of competing products or processes.

However, if you wish to use eco-label criteria in tendering it is vital to ensure that the labelling body is credible and independent. In some cases, producers may themselves claim their products are green in order to achieve a, perhaps unjustified, competitive advantage. To distinguish an acceptable eco-labelling scheme from the misleading claims, the International Standards Organisation has provided a set of criteria for determining an acceptable eco-labelling scheme – ISO 14024[4]. These key criteria include:

- the reliability of information (i.e. are there adequate procedures in place for validation and compliance monitoring?);
- the transparency of the administrative procedures of the scheme;
- the existence of a formal process of consultation with stakeholders.

According to ISO classification, there are three types of eco-labelling schemes, outlined below. A number of third party schemes found in Europe are listed in Box 1.

Type I labels

This group is perhaps the most useful for public procurers. These label products based on life-cycle environmental impact, the criteria are set by an independent body and monitored through a certification or auditing process. Transparency and credibility is ensured by the third-party certification. Most of the existing official national and multi-national eco-label schemes in Europe belong to this category.

Type II labels

Informative environmental self-declaration claims. These are environmental claims made about goods by their manufacturers, importers or distributors. They are not independently verified, do not use pre-determined and accepted criteria for reference, and are arguably the least informative of the three types of environmental labels.

Type III labels

These labels don't make any judgement on the environmental quality of the product, but simply inform the consumer of its environmental impacts. A "score" is given for the product for certain environmental impacts, based on LCA methods. This environmental score is compiled by a third party certification agency based on a number of performance indicators (EPI), e.g., energy use, air emissions, water emissions, etc. This provides a purchaser with an opportunity to compare the scores of different products and purchase those with the best score, but doesn't provide any guidance on what good performance is.[5]

[4] International Standard Organization, ISO 14024: Environmental Labels & Declarations - Type 1 environmental labelling - Guiding principles and procedures that cover ecological trademarks and ecologos.

[5] Information on EPDs, together with a searchable database of EPDs and product-specific requirements, is available at the website of the Global Type III Environmental Product Declarations Network (GEDNet): www.environdec.com/gednet.

Box 1:
Eco-label schemes in Europe

Type I Eco-Labels

- The EU "Flower" – the EU Eco-Label Scheme: www.eco-label.com
- The Nordic Swan, Scandinavia – www.svanen.nu
- The Blue Angel (Blauer Engel), Germany – www.blauer-engel.de
- Umweltzeichen, Austria – www.umweltzeichen.at
- NF Environment, France – www.marque-nf.com
- Milieukeur, the Netherlands – www.milieukeur.nl
- AENOR, Spain – www.aenor.es
- Energy Star:
  labelling energy efficient office equipment – www.eu-energystar.org
- A list of further eco-labelling schemes can also be obtained at the web site of the Global Eco-labelling Network (GEN) www.gen.gr.jp/product.html

3.2. Guidelines

A number of national governments and NGOs assist purchasers in implementing sustainable procurement by providing guidance on setting environmental requirements in tendering together with other practical advice on green or sustainable procurement.

In addition, some governments and non-governmental organisations maintain databases of green products that contain environmental criteria and links to possible suppliers. Most of this information is freely available and accessible online (see Box 2).

European Commission: The EC has extensive guidance on the implementation of green public procurement (GPP): ec.europa.eu/environment/gpp

Austria: Procurement Service Austria has developed extensive guidelines for several product groups at www.oekoeinkauf.at

Denmark: Green procurement guidelines and more relevant information are available on Greennet (www.ski.dk/greenprocurement), sponsored by the Danish Environmental Protection Agency

Finland: Hymonet (www.hymonet.com) is an internet-based decision support system for environmentally friendly procurement

France: Website on responsible purchasing for public administration.
www.ecoresponsabilite.environnement.gouv.fr.
Platform for public procurement and sustainable development.
www.achatsresponsables.com

Germany: German website containing product specifications:
www.beschaffung-info.de

Japan: The Green Purchasing Network (GPN) maintains guidelines on sustainable procurement, including product criteria and a database of suppliers: www.gpn.jp

Netherlands: Dutch website on GPP: www.senternovem.nl/duurzaaminkopen/English/Index.asp

Norway: The GRIP Foundation for Sustainable Production and Consumption's guidelines on eco-efficient purchasing: www.grip.no/Innkjop/English/Hoved.htm

Sweden: The Swedish instrument for Ecologically Sustainable Procurement: www.eku.nu/eng

The United Kingdom: UK Task Force on sustainable procurement, and sustainable procurement strategy: www.sustainable-development.gov.uk/government/task-forces/procurement/index.htm.
UK Office for Government Commerce, sustainability policy and buying support: www.ogc.gov.uk/index.asp?id=1004338

The USA: The US Environmental Protection Agency (EPA) Database of Environmentally Preferable Products: www.epa.gov/oppt/epp/pubs/about/about.htm

IGPN: The International Green Purchasing Network is an organisation which promotes Green Purchasing around the globe: www.igpn.org

EUROCITIES: Guidelines and best practice on Cities as Responsible Purchasers: www.eurocities.org/carpe-net

UNEP: Website containing background information and a products database www.uneptie.org/pc/sustain/design/green-proc.htm

Box 2:
Online guidance and tools on sustainable procurement