



# Building Environmental Objectives into Tenders

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# Scale of Problem

- Statistics
- Policy targets
- Legislative targets



# Increasing Focus

- Climate change
- Biodiversity and extinction of species
- Loss of habitat
- Plastic waste
- Need to decarbonise and dematerialise





## Recent Media Highlights

- Mass extinction of species is happening in Ireland, NGO says. One-third of groups examined 'are threatened or near-threatened with dying out' (Irish Times, 28 December 2018)
- Global study showed the decline of insects is accelerating at 2.5 per cent a year, suggesting they could vanish within a century (Irish Times, 16 February 2019)
- Relentless pursuit of economic growth twinned with the impact of climate change has put an "unprecedented" one million species at risk of extinction according to a landmark report (Irish Times/ Reuters, 6 May 2019)



# Role of Public Sector

Public sector can play a significant part in the following ways:

- a) Encourage sustainability in the supply chain of economic operators and sub-contractors by designing and specifying selection criteria, award criteria and contract performance conditions in procurement documents
- b) Can incorporate sustainable practices and environmental standards in the public sector, e.g. improving energy performance and efficiency of buildings, switching to renewable energy and electricity, reducing resource materials and waste
- c) Complying with national and EU legislation in specific sectors, e.g. public transport, energy efficiencies in public sector buildings
- d) Giving effect to s.15 of the Climate Action and Low Carbon Development Act 2015
- e) Softer measures such as information and guidance
- f) Exemplar role and moral suasion



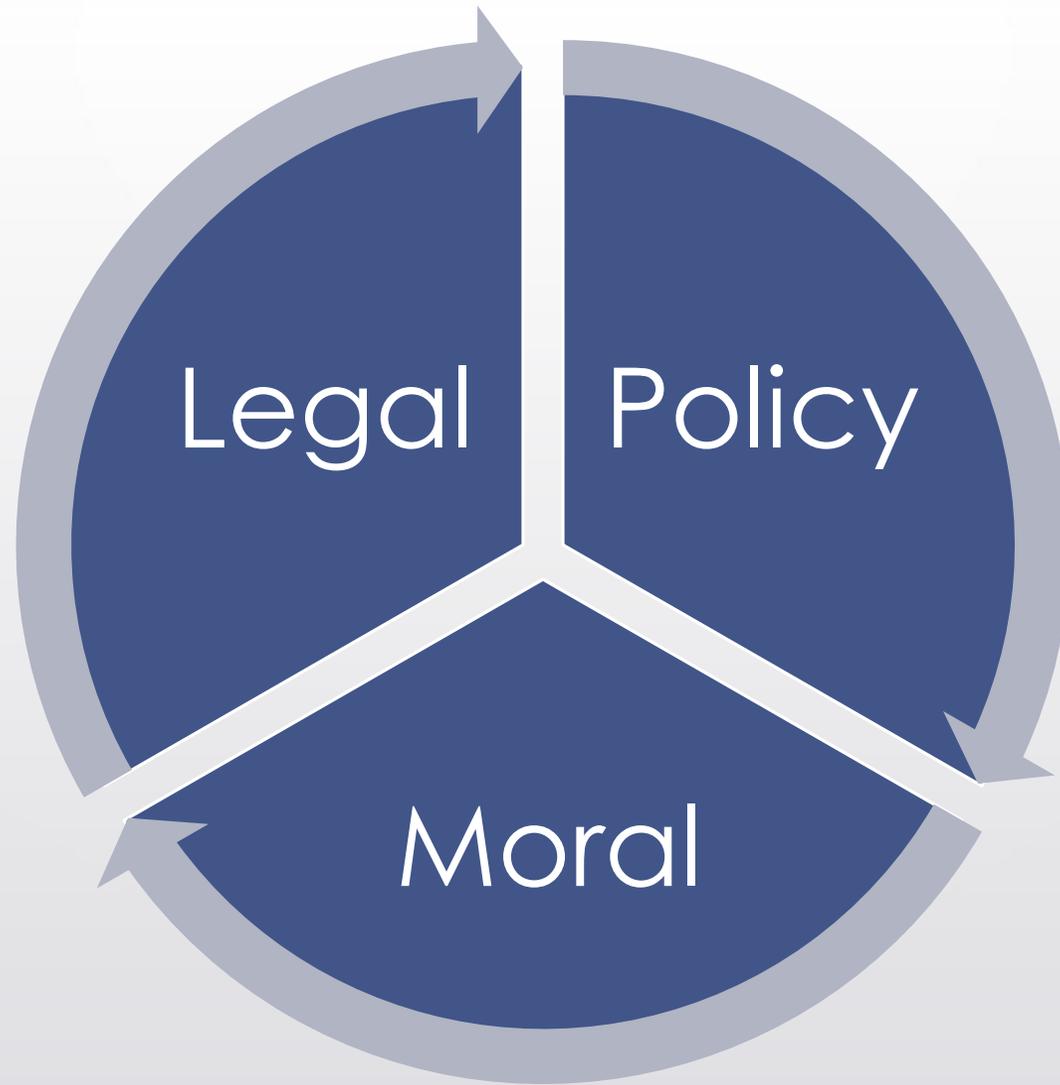
# Objectives of Procurement

- *Primary objective* – delivery of quality goods and services in most cost-effective manner
- Maximisation of the ‘value for money’ criterion
- *Secondary objectives* might include social and environmental goals
- Contracting authorities use their purchasing power to promote sustainability
- Multiplier or ‘ripple’ effect on purchasing and supply chains
- How important is this?
- Critical or discretionary?



# Role of Sustainable Procurement

- What is the role of the public sector in delivering on environmental issues?
- Should environmental issues be incorporated into tenders?
- How secondary of an issue is it?
- Is it a ‘nice to have’ or ‘must have’?



Legal

Policy

Moral



# Why Promote Sustainable Procurement

- Influences policy and commercial activity generally and in specific sectors
- Scope of Government purchasing power
- €15-20 billion market (9-10% of GDP)
- Operators dependant on Government contracts
- Leads to indirect benefits down the supply chain
- Drives innovation



# Policy Goals in Public Sector Directive

- Compliance with principles of free movement in TFEU as well as core principles of procurement:
  - a) Equal treatment;
  - b) Non-discrimination;
  - c) Mutual recognition;
  - d) Proportionality
  - e) Transparency



# Integration of Policies

- Article 11 TFEU requires that environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.
- 2014 Public Sector Directive aims to clarify how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts (Recital 91)



# General Recitals

- Objective of smart, sustainable and inclusive growth and Euro 2020 Strategy (Recital 2)
- Role of environmental, social and innovation procurement (Recital 123)
- Appropriate integration of environmental, social and labour requirements to ensure compliance with legal obligations (Recital 37)
- Complying with environmental law at relevant stages of procurement procedure (Recital 40)
- This includes choice of participants; award of contracts; exclusion criteria and identifying abnormally low tenders



# Stages of Procurement Process

- Pre-competition (training, education, guidance, workshops for SMEs, market consultation)
- Specification in tender (description of product or service to be procured)
- Selection criteria (qualification stage)
- Award criteria
- Contract performance conditions



# Planning Procurement Process

- Consider role of sustainability at outset
- Consider whether sustainability will be specified in specification criteria, award criteria and contract performance conditions
- Consider exclusion grounds
- Why are environmental considerations being incorporated?
- Are they mandated by law or seen as a desirable objective?
- Always consider core principles of Directive and subject matter of contract



# Technical Specifications

- Set out the characteristics required for the works, supplies or services being tendered
- Defined in Annex VII to Directive
- Should be clearly delineated in procurement documents / contract notice
- May refer to specific production process or method of production, e.g. organic agriculture or chlorine-free paper
- Must afford equal access to operators and may not hinder competition or facilitate protectionism



# Formulation of Technical Specifications

- 1) May specify performance or functional requirements provided the parameters are sufficiently precise (see Dutch Coffee case – Case C-368/10)
- 2) May refer to technical specifications and (in order of preference) national standards transposing EU standards, European Technical Assessments, common technical specifications, international standards and other technical reference systems
- 3) Performance or functional requirements by reference to technical standards in (2)
- 4) Technical specifications for certain characteristics and requirements for other characteristics



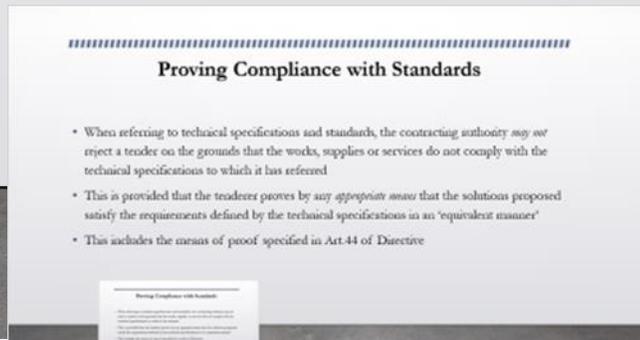
# Proving Compliance with Requirements

- Where a contracting authority formulates technical specifications in terms of performance or functional requirements, it *may not* reject a tender for works, supplies or services which comply with a standard, where those specifications address the performance or functional requirements which it has laid down
- The tenderer must prove by any *appropriate means* that the work, supply or service in compliance with the standard meets the performance or functional requirements
- Does not refer to satisfying in an ‘equivalent manner’



# Proving Compliance with Standards

- When referring to technical specifications and standards, the contracting authority *may not* reject a tender on the grounds that the works, supplies or services do not comply with the technical specifications to which it has referred
- This is provided that the tenderer proves by any *appropriate means* that the solutions proposed satisfy the requirements defined by the technical specifications in an ‘equivalent manner’
- This includes the means of proof specified in Art.44 of Directive





# Avoid Specific References

- Technical specifications cannot refer to:
  - a) A specific make or source (e.g. specific Intel microprocessor chip) or
  - b) A particular process which characterises products or services provided by a specific economic operators or
  - c) Trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or
  - d) Certain products



# Exceptions

- There are two exceptions:
  - a) Where it is justified by the subject matter of the contract and
  - b) Where it is permitted on an *exceptional basis*, i.e. where a precise and intelligible description of the subject matter of the contract is not possible
- If availing of the ‘exceptional basis’, must use the words ‘or equivalent’



# Potential for Confusion

- Reference to technical specifications and standards must be accompanied by the words ‘or equivalent’
- Who decides this? May have differing rules
- No obligation to refer to equivalent means when specifying performance and functional requirements
- Possibly more restricted in scope
- Difficulties in interpreting ‘mixed’ technical specifications



# Labelling

- Contracting authorities that wish to purchase works, supplies and services with specific environmental characteristics can specify a particular label
- However, this is subject to conditions (see Recital 75 and Article 43):
  - a) The requirements for the label must be *linked to the subject matter of the contract* and are appropriate to define the characteristics of the contract
  - b) Requirements are drawn up and adopted on the basis of objectively verifiable and non-discriminatory criteria, i.e. scientific evidence



# Labelling

- c) Stakeholders such as consumers, manufacturers and eNGOs must be able to participate in open and transparent procedure
- d) Label is accessible and available to all interested parties
- e) Should not restrict or stifle research and innovation which is a key feature of the 2014 Directive and is identified as a key driver of smart, sustainable and innovative growth
- f) Label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence



# Labelling

- Where contracting authorities do not require the works, supplies or services to meet all of the label requirements, they must indicate which label requirements are referred to.
- Contracting authorities requiring a specific label must accept all labels that confirm that the works, supplies or services meet equivalent label requirements.
- Where the economic operator cannot obtain the specific label or an equivalent within relevant time limits through no fault of its own, contracting authority must accept other means of proof (including manufacturer technical dossier)



# Labelling

- Where a label sets out requirements that are *not* linked to the subject matter of the contract but satisfies the other criteria, the contracting authority should:
  - a) Not specify the label as a requirement but *may*
  - b) Define the technical specifications by reference to the detailed specifications of the label or the components of the label that are linked to the subject matter of the contract
- Examples of labels include EU Eco-label, Energy Star, Eco-design requirements for products consuming energy (Directive 2005/32/EC)
- See also Regulation (EC) 106/2008 on energy-efficiency labelling for office equipment



## Selection Criteria Stage

- Mandatory and discretionary exclusion grounds (Article 57)
- Discretionary ground of exclusion includes breach of environmental law
- MS may provide for derogation on exceptional basis in order to protect environment
- Selection criteria, including suitability to pursue the activity, economic and financial standing and technical and professional ability (Article 58)
- Proving compliance with selection criteria and confirming that exclusion grounds do not apply can be done through either:
  - a) Electronic self-declaration as preliminary evidence, i.e. ESPD (Article 59)
  - b) Certificates, statements and other means of proof (Article 60)



## Selection Criteria Stage

- Means of proof of technical ability can include an indication of the environmental management measures that the economic operator will be able to apply when performing the contract (Annex XII to 2014 Public Sector Directive)
- Pass / fail criterion
- Contractors can be excluded where they do not comply with policy or legislative obligation, e.g. 40% renewable electricity in a particular organisation, power purchase agreement for renewable electricity, use of recycled waste or holding waste collection permit



# Quality Assurance Standards

- Where a contracting authority requires a certificate from independent body proving compliance with certain quality assurance standards, it *must* refer to quality assurance systems based on relevant EU standards certified by accredited bodies (Article 62)
- Every contracting authority must recognise equivalent certificates from bodies in other Member States
- Must accept other evidence of equivalent measures or standards where the economic operators could not obtain the certificates in time
- How can this be disproven? What evidence must the operator provide?



# Environmental Management Standards

- Contracting authorities should be able to require that environmental management measures or schemes be applied during the performance of a public contract (Recital 88)
- Environmental management schemes can demonstrate that economic operator has technical capability – cannot require compliance with one specific EMS
- Where a contracting authority requires proof that the economic operator complies with certain environmental management systems or standards, it must refer to:
  - a) EMAS (voluntary system developed in 1993) or
  - b) Management systems recognised in Art.45 of Regulation (EC) No.1221/2009 on voluntary participation (EMAS III) which came into effect in January 2010 or
  - c) Other environmental management standards based on the relevant European or international standards by accredited bodies.



## Features of EMAS III

- Revised audit cycles to further improve applicability for SMEs
- Corporate registrations to ease administrative and financial burdens on organisations with several EMAS registered sites
- Environmental core indicators to adequately document environmental performance
- Introduction of EMAS Global to make EMAS accessible to organisations worldwide
- In 2017 Annexes I, II and III of the EMAS Regulation were amended to include the changes associated with the revision of the ISO 14001:2015 standard
- Amended Annex IV since January 9 2019 (Commission Regulation 2018/2026) – update of core indicators and allows organisations report on performance and use the organisation’s EMAS statement for reporting obligations



Performance,  
Credibility,  
Transparency



## Allowing for Equivalent Standards

- Contracting authorities cannot require compliance with one specific quality assurance standard or environmental management system
- Must accept equivalent certificates from bodies established in other Member States
- Contracting authority must also accept other evidence of equivalent environmental management measures where the economic operator can demonstrate that it could not access certificates or obtain them within the relevant time limits though no fault of its own.



# Award Criteria

- Always scope for controversy and interpretation
- Contracting authorities must award contract on the basis of MEAT which is identified on the basis of (a) price; (b) cost-effectiveness; (c) price-quality ratio, taking into account award criteria or (d) quality where cost element is fixed price
- Assessed on the basis of criteria linked to the subject matter of contract
- May include environmental criteria or characteristics
- May not confer unrestricted freedom of choice on contracting authority



# Suggestions for Setting Environmental Award Criteria

- Make sure environmental criteria are (a) linked to the subject matter of the contract; (b) specified in procurement documents; and (c) non-discriminatory
- General statement but may be difficult to interpret
- Do not specify a particular provider of renewable energy or source of renewable energy
- Do not specify a particular target in excess of expected consumption of contracting authority
- Ensure criterion is objectively verifiable



## Acceptable Award Criteria

- Award criterion relating to the level of NO<sub>x</sub> emissions and noise levels was deemed to be acceptable in *Concordia Bus* case (Case C-513/99) as it was linked to the subject matter which was acquisition of urban bus services
- Not necessary that criterion be of direct economic benefit to contracting authority and may be justifiable if benefits other parties or environment in general: see Opinion of AG Mischo
- In Case C-448/01, *EVN* [2003] the court upheld award criterion favouring supply of renewable electricity with 45% weighting



# Life-cycle Costing

- Recital 96 / Article 68 of 2014 Public Sector Directive
- May assess cost-effectiveness over the entire life cycle of product, service or works
- Includes *direct costs* borne by the contracting authority and other users as well as *indirect costs* associated with externalities and which are borne by society
- The contracting authority must indicate (a) the data to be provided by the tenderers and (b) the method which it will use to determine the life cycle costs in procurement documents
- Cannot adopt an LCC method that is not indicated



# Life-cycle Costing

- The method used to assess costs in an LCC method must be:
  - a) Based on objectively verifiable and non-discriminatory criteria and
  - b) Accessible to all interested parties
- The method use also rely on data which can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the Union is bound.
- Possible difficulties in agreeing on standard methods



# Public Transport and Vehicles

- Directive 2009/33/EC (Directive on Clean and Energy-efficient Road Transport Vehicles)
- Requires that operational energy and environmental impacts may be evaluated and monetised over the lifetime of vehicles acquired by public authority
- Transposed on 30 June 2011 (S.I. No.339 of 2011)
- Applies to contract for purchase of road transport vehicles by (a) contracting authorities; (b) contracting entities and (c) public transport operators (within the meaning of s.2 of the Dublin Transport Authority Act 2008), where the contract is estimated to have a value equal to or greater than €422,000.





# General Principles

- Article 18(2) of 2014 Public Sector Directive – applies in performance of contracts
- Member States must take *appropriate measures* to ensure that 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 listed in Annex X to Directive
- Includes ILO Conventions, Vienna Convention on Ozone Layer, Montreal Protocol, Basel Convention on Transboundary Movement of Hazardous Wastes, Stockholm Convention on persistent organic pollutants (POPs)



# Contract Performance

- Conditions for contract performance (Art. 70 of 2014 Directive)
- Recognised in *Beentjes* case in 1988 (Case C-31/87) concerning the hiring of long-term unemployed persons
- In addition to legal requirements, contracting authorities may lay down *special conditions* for contract performance (including environmental and innovation) provided that:
  - a) they are linked to the subject matter of the contract and
  - b) they are specified in the call for competition or procurement documents



# Contract Performance

- Might include licences under *Air Pollution Act 1987* or waste permits or licences under *Waste Management Act 1996* or industrial emissions licence under *Environmental Protection Agency Act 1992*.
- Could specify reporting of energy use / waste produced as a result of contract performance
- What is an appropriate requirement?
- How these should be enforced?
- What happens if the licence lapses or is suspended or revoked during the performance of the contract?



# Promoting Sustainability in Public Sector: Example of NZEB

- European Performance of Buildings Directive (Directive 2010/31/EU)
- Nearly Zero Energy Buildings (“NZEB”) standard will apply to all new buildings occupied after the 31st December 2020. For Public Sector bodies, the standard will apply to all new buildings owned and occupied by the 31st December 2018 (S.I. No.4 of 2017)
- Part L of Building Regulations amended by S.I. No.538 of 2017 which set higher building performance energy standards and requires cost-optimal energy performance for buildings undergoing major renovation commencing on or after 1 January 2019



## Other Examples of Sustainability in Public Sector

- Energy efficiency targets (Directive 2012/27/EU)
- Binding target of 32.5% by 2030 set in June 2018.
- 33% target set for public sector back in 2009 (to be achieved by 2020) –NEEAP 3
- Energy Efficiency Regulations 2014 (S.I. No.426 of 2014) – public sector energy audits
- Renewable energy and electricity
- Minimisation of plastic waste in public sector
- Requiring operators to have sustainable transport / mobility management plans



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