

Putting the “social” into sustainable procurement

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Overview

- Outline of issues: what is at stake?
- Current legal landscape, including analysis of *North Holland* case.
- Key battles in the revision of the Directive: what is possible?

Improving whose society?

Users

- Accessibility

Workers (throughout the supply chain)

- Working conditions
- Favouring disadvantaged groups

Adjacent communities

- Fair trade
- Participation in decision making
- Livelihoods
- Resource tenure and use rights

At every stage of the procurement process...

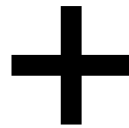
- Technical specifications
 - Minimum requirements
- Award criteria
 - Not a prerequisite
 - Evaluated in the scoring process
- Contract performance clauses
 - Not evaluated upfront
- Selection criteria
 - Relate to the tenderer, not the tender

Current legal landscape - issues

- Social issues 'relegated' to contract performance clauses
- Question marks about using stricter criteria than EU law
- Perceived difference between environmental issues and social issues in public procurement
 - Even when both do not have an impact on the functional qualities or appearance of the end product or service

North Holland case – C-368/10

EKO
organic production



Max Havelaar
fair trade

Technical specifications

‘The province of North Holland uses the Max Havelaar and EKO labels for coffee and tea consumption’

Award criterion

‘If possible the ingredients should comply with the EKO and/or Max Havelaar labels. Max 15 points.’

Can social criteria be linked to the subject matter? YES

‘[C]ontracting 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.’

Paragraph 85

Difference between what can be a tech spec and an award criteria?

According to the Court of Justice:

Technical specifications

- *Organic production*
YES
- *Fair trade* **NO**

Award criteria

- Organic production
YES
- Fair trade **YES**

Why was 'fair trade' not considered a technical specification?

- '[The criteria used for the Max Havelaar label] do not correspond to the definition of the concept of technical specification in [the Directive] given that that definition applies exclusively to the characteristics of the products themselves, their manufacture, packaging or use, and not to the conditions under which the supplier acquired them from the manufacturer.'

But it was ok as an award criterion

‘...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.’

Paragraph 90



Step forward: social criteria as award criteria
No progress: difference in treatment between environmental and social criteria (technical specifications)

Key battles in the revision process

- Consolidation - looking beyond the 'use-phase'
- Ensuring environmental and social criteria are on the same footing
 - Contracting authorities choose where to insert in the process on the basis of 'role, not content'
- Exclusion and selection criteria
 - Previous performance
 - Ability to monitor the supply chain
- Verification
 - Labels and equivalence

Optimal result: sustainable public procurement

- Legitimate to incorporate social and environmental issues at all stages of the procurement process
- Better understanding of link to the subject matter
- Transparency and equal treatment – no further safeguards are needed
 - Precision of description
 - Ability to verify

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