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Identifying Opportunities for Sustainable Public
Procurement Briefing Series

Briefing No.7: Award Criteria



Table of contents

Key Points	1
1. Introduction	2
2. Background: award criteria	3
2.1. Technical specifications, award criteria and specific conditions: the differences	3
2.2. Selection and award: a distinction	4
2.3. Using award criteria to spur innovation.....	4
2.4. Award Criteria under the Procurement Directive	5
2.4.1. Lowest price or most economically advantageous tender	5
2.4.2. Award criteria relating to externalities.....	6
2.4.2.1. The <i>Concordia Bus</i> case	6
2.4.2.2. The <i>Wienstrom</i> case.....	8
2.4.3. Verification of award criteria.....	9
2.4.3.1. Verification of the accuracy of the claims made in tender	9
2.4.3.2. Verification of whether the procurement criterion serves the horizontal objective	10
3. Existing legal uncertainties and other limitations	10
3.1. Direct economic advantage vs. broad sustainability concerns.....	10
3.2. Weighting of award criteria valuing sustainability	11
3.3. Can the lowest price option ever provide the best value?.....	11
3.4. Can production characteristics only be included as specific conditions?.....	12
3.5. Pre-procurement consultation.....	12
4. Opportunities to implement sustainable public procurement at the award stage	13
4.1. Shifting from the ‘economically most advantageous’ to the ‘most sustainable’ tender	14
4.2. Restricting the price-only option	14
4.3. Clarifying that award criteria can include production characteristics	15
4.4. The role of pre-procurement consultation processes	15
5. Conclusion	15

Key Points

What price horizontal objectives? By choosing to evaluate the 'most economically advantageous' tender rather than simply judging on upfront price alone, contracting authorities can compare the advantages and costs of different characteristics, including those relating to horizontal objectives. Award criteria promoting sustainable development enable contracting authorities to value more sustainable tenders over less sustainable tenders; those who can deliver the functional requirements in a more sustainable way score more highly. This should act as an incentive to the market to innovate - a priority for the pending revision of the EU procurement legislation.

However, there has been some uncertainty over what qualifies as a legitimate award criterion - particularly in respect of environmental and social externalities which, it has been argued, do not contribute to the direct economic advantage of the contracting authority. In key cases, the Court of Justice of the European Union has underscored contracting authorities' discretion to define criteria for determining the most economically advantageous tender and to determine the weighting of such criteria. Furthermore, the Court found that the contracting authority does not have to prove that the criterion serves to achieve the objective pursued.

The revision of the EU procurement legislation is an opportunity to make such conclusions explicit and to restrict when contracting authorities should base their award solely on price to ensure that sustainable development issues are suitably considered. It may be helpful to even change the term 'most economically advantageous tender' to ensure that the importance of including sustainability criteria is clear.

1. Introduction

The use of award criteria relating to horizontal objectives¹ promoting sustainable development enables contracting authorities to value more sustainable tenders over less sustainable tenders, but not at any price. Moreover, by encouraging tenderers to reach beyond already-established sustainability standards, award criteria can play an important role in enabling more sustainable public procurement and, in turn, driving more sustainable markets in a wider context.

The current Procurement Directive² allows the contracting authority to choose between eligible bids on the basis of price alone or on the basis of ‘the most economically advantageous tender.’ If the latter, the tender notice must set forth how award criteria will be evaluated and weighted.

This briefing analyses how the Court of Justice of the European Union (**CJEU**) has interpreted ‘economically most advantageous tender.’ With regard to award criteria relating to externalities arising from the production or use of the procured product or service, this briefing concludes that, in line with existing caselaw, EU legislation should be revised to clarify that award criteria that relate to broad sustainability concerns - and not just factors that directly benefit the contracting authority - are permissible. It further argues that awarding public contracts solely on the basis of price should be restricted and that contracting authorities should instead be required to consider sustainability concerns for all procurement policies, as required by various provisions of the EU Treaties, and in particular the ‘integration principle’, and as called for by numerous EU frameworks and action plans.³ It also considers how pre-procurement consultations can enable the development of more appropriate and ambitious sustainability criteria and advocates provisions which enable the fruitful use of pre-procurement consultations without disqualifying those who contribute to such consultations from the opportunity to bid for the resulting tender.

This briefing begins by setting out the relevant provisions of the current Procurement Directive and caselaw. It then identifies legal uncertainties that persist under the existing framework, as well as other challenges that limit greater use of sustainability considerations within award criteria. Finally, it

¹ Horizontal procurement objectives can be used to promote social, environmental, and other societal objectives that are not necessarily connected with the procured item’s functional objectives. For example, a contracting authority may choose to honour human rights obligations through a policy prohibiting the purchase of supplies produced using child labour, to advance social cohesion by requiring public works contractors to employ ethnic minorities or long-term unemployed persons in the contracted work, or to pursue environmental objectives by requiring publicly procured paper to have a minimum recycled-fibre content. For a discussion of the role of horizontal policies in public procurement, see ClientEarth, Legal Briefing, *Briefing No. 2: Horizontal Objectives in Public Procurement* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L134, 30.4.2004, p.114) (as amended) (the **Procurement Directive**). While this briefing focuses mainly on Directive 2004/18/EC, many of the arguments developed will apply equally to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L134, 30.4.2004, p.1) (as amended).

³ See in particular Article 3(3) of the Treaty on the European Union and Articles 9, 10 and 11 of the Treaty on the Functioning of the European Union. For a further discussion of these topics, see ClientEarth, Legal Briefing, *Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

identifies opportunities presented by the forthcoming revision of the EU procurement legislation to resolve uncertainties and extend the possibilities for sustainable procurement.

2. Background: award criteria

In this section, we first draw some distinctions between technical specifications, award criteria, and contract performance clauses, as well as between award criteria and selection criteria. We then discuss the important role of award criteria in spurring innovation. Finally we set out how, under current EU legislation on public procurement, award criteria have been understood in relation to sustainability concerns.

2.1. Technical specifications, award criteria and specific conditions: the differences

When defining what they want to result from a contract, in most cases contracting authorities will wish to impose requirements that a contractor is not otherwise obliged by law to meet.⁴ If a contracting authority wishes to incorporate such horizontal policy objectives it has a choice of approaches: technical specifications, award criteria or contract performance clauses.

Technical specifications are used to define the subject matter of the contract more specifically. Ability to meet the technical specifications is a prerequisite for being considered a candidate for the contract. Technical specifications can be defined in relation to technical standards or performance/functional requirements.

Award criteria enable the contracting authority to compare the relative advantages of different combinations of criteria. The criteria are weighted and each tender is scored on the basis of its satisfaction of each criterion. Ability to meet all the award criteria is not a prerequisite for being considered a candidate for the contract. Further, a contracting authority may set up the criteria so that it can award extra points to those candidates that go beyond minimum requirements to achieve additional advantages.

Contract performance clauses (also called specific conditions) may be included in the contract to specify how the contract is to be performed. Under current EU legislation, there is no expectation that ability to comply with such clauses will be assessed before the tender is awarded, therefore ability to comply cannot form the basis of advance exclusion.⁵

Although some award criteria may look like technical specifications in terms of what they are assessing, whether a contracting authority opts to incorporate a sustainability consideration into

⁴ It is not likely that award criteria would be used as a means to support compliance with general legal norms since it would be inappropriate to weigh a contractor's compliance with the law overtly against cost and other considerations.

⁵ This issue is further discussed in ClientEarth, Legal Briefing, *Briefing No. 6: Selection Criteria* (October 2011) and ClientEarth, Legal Briefing, *Briefing No. 8: Specific Conditions* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

technical specifications or award criteria is significant.⁶ The ability to meet the technical specifications is a prerequisite for being considered a candidate for the contract, whereas, the contracting authority does not require all award criteria to be met in absolute terms. Rather, award criteria enable a contracting authority to award extra points to those candidates that go beyond minimum requirements to achieve additional advantages. Accordingly, the use of award criteria is sometimes preferred over technical specifications to enable the contracting authority to compare the relative advantages of different combinations of criteria without requiring them all in absolute terms. Specifically, the cost of different horizontal policy objectives can be assessed.

2.2. Selection and award: a distinction

The determination of the winning bid for a procurement procedure is carried out in two stages. During the selection stage, the contracting authority assesses the ability of economic operators to satisfy the requirements of the contract. In the award stage, they examine the offers in order to choose the best one, i.e. the best price or the most economically advantageous tender. The current rules and caselaw emphasise the need to operate a strict distinction between the selection criteria and the award criteria.⁷

Selection criteria relate to the contractor and include aspects such as economic and financial standing as well as professional and technical knowledge.⁸ On the other hand, award criteria relate to the offer. So for example, caselaw shows that criteria such as tenderers' experience, manpower and equipment or their ability to perform the contract by the anticipated deadline are considered as selection criteria and not award criteria.⁹

2.3. Using award criteria to spur innovation

For some procurements, it may be preferable to specify the end result and allow bidders to come up with innovative ways to achieve this rather than assuming rigid technical specifications are the best way to achieve sustainability. Rather than just setting a standard which must be met, use of horizontal policies as award criteria encourages offers which go beyond established market standards and indicators, thereby pushing the market to innovate and improve. For example, award criteria can stimulate tenderers to demonstrate sustainability beyond that demanded by existing sustainability labels or in market sectors for which sustainability indicators have not yet been developed, thereby demonstrating to the relevant market how greater sustainability can be achieved. For contracting authorities who are unsure of the price or market availability of

⁶ Award criteria can consider the same sorts of things as technical specifications. For a discussion of how technical specifications can be used to promote more sustainable public procurement, see ClientEarth, Legal Briefing, *Briefing No. 5: Technical Specifications* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings Contracting authorities may, in some cases, prefer award criteria over technical specifications because award criteria can provide greater flexibility and be construed to drive innovation beyond established market standards.

⁷ Case 31/87 *Gebroeders Beentjes BV v. Netherlands* [1988] ECR 4635 (**Beentjes**); case C-532/06 *Emm G. Lianakis AE v Alexandroupolis* [2008] E.C.R. I-251 (**Lianakis**); case C-199/07 *Commission v Greece* [2009] ECR I-10669.

⁸ For a fuller discussion of the selection stage and how sustainability concerns can be addressed through selection criteria, see ClientEarth, Legal Briefing, *Briefing No. 6: Selection Criteria* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

⁹ *Lianakis*, paragraph 32.

sustainable products or services, this is a risk-free way of indicating a preference for a higher environmental and/or social standard, but not at any cost. The Europe 2020 strategy calls on public procurement to drive innovation and the question of how to stimulate and strengthen innovation is a priority for the pending revision of EU public procurement legislation.¹⁰ The development of more sustainable products not only results in specific benefits under or reduced adverse impact of the particular contract, it also facilitates the development and commercial production of products with desirable social or environmental features.

2.4. Award criteria under the Procurement Directive¹¹

2.4.1. Lowest price or most economically advantageous tender

The Procurement Directive allows the contracting authority to choose between eligible bids on the basis of price alone or on the basis of 'the most economically advantageous tender'. If the latter, the tender notice must set forth how award criteria will be evaluated and weighted.

The most economically advantageous tender (**MEAT**) option represents a more comprehensive approach for assessment of the merits of the tenders than consideration of price alone. It requires the contracting authority to form a view on the elements which would make offers 'economically advantageous' and then weight these in order of importance. This allows the contracting authority to compare tenders that may meet various permutations of the award criteria.

Article 53 of the 2004 Procurement Directive provides in relevant part that

(1) ... the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous *from the point of view of the contracting authority*, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or

(b) the lowest possible price only.¹²

In amending the previous directive to include the language 'from the point of view of the contracting authority,' the Community legislature underscored Member States' discretion to define the criteria

¹⁰ *The Green Paper on the modernisation of EU public procurement policy*. 27 January 2011, COM(2011) 15 final, p. 3 and p.44-46.

¹¹ While this briefing focuses mainly on the Procurement Directive (Directive 2004/18/EC), many of the arguments developed will apply equally to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L134, 30.4.2004, p.1) (as amended).

¹² Article 53 (emphasis added).

by which to determine the tender that it finds most economically advantageous, taking into consideration horizontal as well as functional policy objectives.¹³

2.4.2. Award criteria relating to externalities

The jurisprudence of the CJEU clarifies that discerning the ‘most economically advantageous tender’ can include consideration of environmental externalities arising from the use or production of the products or services being procured that are borne by the general public, in addition to direct economic benefits to the contracting authority. The key cases are *Concordia Bus*¹⁴ and *Wienstrom*.¹⁵

2.4.2.1. The *Concordia Bus* case

In 2002 the CJEU held in *Concordia Bus* that, under the procurement directives in force at the time,¹⁶ a contracting authority organizing a tender procedure for the operation of city bus services could include award criteria that take into account the nitrogen oxide emissions and noise level of the bus fleet offered by parties seeking the tender.

The Court clarified that, for the purposes of incorporating horizontal objectives into public procurement policies,¹⁷ costs generally understood as environmental externalities can be amongst the factors considered to determine the ‘most economically advantageous tender’.¹⁸ In other words, ‘most economically advantageous’ is not limited to those factors which provide a direct economic benefit to the contracting authority.

To fully understand the Court’s reasoning in reaching this ruling, it is helpful to explain the arguments presented by the parties in the case. The applicant (an unsuccessful bidder for the contract) asserted that the criterion relating to bus emissions was impermissible, arguing that, if the objective of the contracting authority is to satisfy environmental or other considerations, recourse should be had to regulatory mechanisms other than a public tender procedure.¹⁹ The defendant contracting

¹³ For discussion of Member States’ discretion to incorporate horizontal objectives such as sustainability considerations into its procurement policies and limitations on EU competence to restrict this discretion, see in particular section 3 of ClientEarth, Legal Briefing, *Briefing No. 2: Horizontal Objectives in Public Procurement* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

¹⁴ Case No. C-513/99, *Concordia Bus Finland v Helsingin Kaupunki*, [2002] ECR I-7123. (**Concordia Bus**).

¹⁵ Case No. C-448/01, *EVN AG and Wienstrom GmbH v Austria*, [2003] ECR I-4527. (**Wienstrom**)

¹⁶ The relevant Community directive, Directive 93/38/EEC, provided in Article 34(1) that:

the criteria on which the contracting entities shall base the award of contracts shall be:

- (a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or
- (b) the lowest price only.

Concordia Bus at paragraph 6, (quoting article 34 of Directive 93/38/EEC of 14 June 1993 Coordinating the procurement procedures of entities operating in the water energy, transport, and telecommunications sectors (OJ 1993 L 199 at 84)).

¹⁷ For a general discussion of how ‘horizontal’ objectives can be incorporated into public procurement policies, see ClientEarth, Legal Briefing, *Briefing No. 2: Horizontal Objectives in Public Procurement* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

¹⁸ *Concordia Bus*, paragraph 69.

¹⁹ *Ibid.* at paragraph 44.

authority, along with Member States submitting observations to the Court, made three arguments in favour of the challenged criterion. First, it is permissible to include environmental criteria in criteria for the award of a public contract, noting that the factors listed in the relevant directive governing public procurement in the transport sector²⁰ were examples only, and not exhaustive of the factors that could be taken into consideration. Second, Article 6 of the Treaty of the European Community (the ‘integration principle’, now expressed in Article 11 TFEU²¹) requires environmental protection to be integrated into the other policies of the Community. Third, previous caselaw had affirmed contracting authorities’ discretion to choose the criteria regarded as relevant for assessing tenders.²² For its part, the European Commission argued²² on the side of the applicant, asserting that award criteria assessing the ‘economically most advantageous tender’ must be of direct economic advantage to the contracting authority.²³

Thus, the question before the Court was *whether a contracting authority could include horizontal procurement criteria promoting environmental policy objectives, even if these criteria did not contribute to the direct economic advantage of the contracting authority, or whether instead such objectives could only be pursued through other regulatory mechanisms.* Citing the ‘integration principle’,²⁴ the Court held that public procurement criteria could include horizontal procurement objectives. Specifically, the contracting authority could take into consideration environmental criteria such as toxin and noise pollution levels of the procured bus services provided that the criteria complied with the general requirements of equal treatment and transparency and did not ‘confer an unrestricted freedom of choice on the authority.’²⁵ The Court further held that where, as in *Concordia Bus*, additional points are awarded to tenders that meet certain specific and objectively quantifiable environmental requirements, this does not confer an unrestricted freedom on the contracting authority.²⁶

The Court went on to articulate its ‘link to the subject matter’ requirement for procurement criteria in *Concordia Bus*, and to apply this requirement to the facts of the case.²⁷ The Court found that ‘criteria relating to the level of nitrogen oxide emissions and the noise level of the buses ... must be regarded as linked to the subject-matter of a contract for the provision of urban bus transport services.’²⁸ This clarifies that being ‘linked to the subject-matter of the contract’ is *not* limited to the functional objectives of the contract (in *Concordia Bus*, the provision of bus services), but can also

²⁰ See, *supra*, note 16.

²¹ For a discussion of the ‘integration principle’, see section 2.2.2 in ClientEarth, Legal Briefing, *Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings.

²² *Concordia Bus* at paragraph 45 (citing *Beentjes, C-324/93 R v. Secretary of State for the Home Department, ex parte Evans Medical and MacFarlan Smith* [1995] ECR I-563 167, 190).

²³ *Ibid.* at paragraph 52.

²⁴ *Ibid.* at paragraph 57. For a fuller discussion of the ‘integration principle’ and sustainable development as an objective of the EU, see ClientEarth, Legal Briefing, *Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings.

²⁵ *Ibid.* at paragraph 64.

²⁶ *Ibid.* at paragraph 66.

²⁷ For more extensive discussion of the ‘link to the subject matter’ requirement for procurement criteria, including an analysis of the *Concordia Bus* case in relation to this requirement, see ClientEarth, Legal Briefing, *Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria*, (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

²⁸ *Concordia Bus* at paragraph 65.

encompass *environmental externalities* arising from the procured goods or services (in *Concordia Bus*, the pollution effects of the procured bus services).²⁹

2.4.2.2. The *Wienstrom* case

In the *Wienstrom* case, the CJEU extended its jurisprudence in *Concordia Bus* to allow award criteria differentiating tenders based upon the production characteristics of supplies procured. The Court held that EU public procurement law³⁰ does not preclude a contracting authority from applying, in the context of a contract for the supply of electricity, an award criterion with a weighting of 45% in favour of electricity produced from renewable energy sources.³¹ Noting that the promotion of electricity produced from renewable energy sources is a high priority for the EU,³² the Court emphasised that the fact that the criterion does not necessarily serve to achieve the functional objective pursued by the procurement is ‘irrelevant’.³³

Wienstrom reconfirmed the Court’s settled jurisprudence on horizontal policies in EU procurement law.³⁴ The Court emphasised a contracting authority’s discretion to define criteria for determining the most economically advantageous tender, and that a criterion chosen by a contracting authority can be struck down only where it is shown to violate the principles of equal treatment, transparency, or proportionality,³⁵ and not merely upon a contention that the contracting authority’s balance between various horizontal and functional policy objectives should be struck differently. In relation to whether it was lawful to give the criterion favouring renewable electricity a weighting of 45%, the Court held that ‘contracting authorities are not only free to choose the criteria for awarding the contract but also to determine the weighting of such criteria,’³⁶ emphasizing that ‘given the discretion enjoyed by the contracting authority in its identification of the most economically advantageous tender, only a weighting which resulted in an unjustified distortion would be unlawful’.³⁷

Specifically, the award criteria at issue in *Wienstrom* assessed tenders on the basis of respective environmental externalities arising from the production of the products and services at issue.³⁸

²⁹ For further discussion of sustainability criteria as ‘linked to the subject matter of the contract’ see ClientEarth, Legal Briefing, *Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable Procurement Criteria*, (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

³⁰ Directive 93/36 of 14 June 1993 co-ordinating procedures for the award of public supply contracts (OJ 1993 L199/1)

³¹ *Wienstrom* at paragraph 30-34.

³² *Ibid.* at paragraphs 40-43.

³³ *Ibid.* at paragraphs 53.

³⁴ See also ClientEarth, Legal Briefing, *Briefing No. 2: Horizontal Objectives in Public Procurement* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

³⁵ For a legal analysis of how these principles have been applied by the CJEU in the procurement context, see ClientEarth, Legal Briefing, *Briefing No. 3: The Guiding Principles of Public Procurement - Transparency, Equal Treatment and Proportionality* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

³⁶ *Wienstrom* at paragraph 39.

³⁷ *Ibid.* at paragraph 36. See also *ibid.* at paragraph 37 (noting further that ‘[i]t must be recalled that according to settled case-law it is open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer’ and citing *Beentjes*, paragraphs 19 and 26; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 36-37; and *Concordia Bus*, paragraphs 59 and 61).

³⁸ As explained in ClientEarth, Legal Briefing, *Briefing No. 4: Clarifying the Link to the Subject Matter for Sustainable*

Enabling Member States to pursue horizontal policies advancing sustainable development objectives is an aim of EU procurement law.³⁹ *Wienstrom* plainly confirms that award criteria can be used to compare the relative sustainability impacts of different production processes, including externalities born by society generally, and not just factors that provide a direct economic benefit (for example, in terms of life-cycle cost savings) to the contracting authority.

2.4.3. Verification of award criteria

In the *Wienstrom* case, the Court clarified EU law governing the concrete application of a criterion favouring tenderers who could provide electricity produced from renewable sources in excess of the amount to be purchased through the tender. Among other things, the Court was asked to assess the fact that a criterion relating to the generation of electricity from renewable resources was not accompanied by requirements which permitted the accuracy of the information to be tested and which may not necessarily serve the stated objective.⁴⁰

2.4.3.1. Verification of the accuracy of the claims made in tender

In assessing how the absence of requirements enabling the accuracy of the information contained in the tenders to be effectively verified bore on the legality of the criterion, the Court reiterated that transparency requires tenderers to be in a position of equality when formulating their tenders and when the contracting authorities assess those tenders.⁴¹ It further found that the impartiality of the procurement procedures must be capable of review.⁴² In turn, the objective and transparent evaluation of the tenders depends on whether the contracting authority, relying on the information and proof provided by the tenderers, is able to verify effectively whether the tenders submitted meet the award criteria. Accordingly, the Court held that, where an award criterion is to be evaluated on the basis of information provided by tenderers, but that information is neither intended to be nor capable of being verified, the principles of equal treatment and transparency are infringed.⁴³ This, of course, is an important limit on the types of criteria that contracting authorities can use when seeking to incorporate horizontal procurement criteria in their procurement processes.

Procurement Criteria, (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings, the Court in fact struck down the specific award criterion at issue in *Wienstrom*, but this was due to the fact that the criteria sought to consider externalities resulting from products and services sold by the tenderer in excess of the amount to be covered under the contract. Thus, the Court reasoned, the criterion was not sufficiently related to the subject matter of the contract. However, the Court took pains to clarify that the problem with the challenged criterion was not due to the fact that it sought to measure externalities rather than direct economic benefits to the contract authority. See *Wienstrom* at paragraph 72.

³⁹ Recital 5 of the Procurement Directive; *The Green Paper on the modernisation of EU public procurement policy*. 27 January 2011, COM(2011) 15 final, p.3.

⁴⁰ *Wienstrom* at paragraphs 28-29.

⁴¹ *Ibid.* at 47-50 (citing *Universale-Bau* at paragraph 91 and *SIAC Construction* at paragraphs 34, 44).

⁴² *Ibid.*

⁴³ *Ibid.* at paragraphs 50-53.

2.4.3.2. Verification of whether the procurement criterion serves the horizontal objective

The Court also observed that the contracting authority did not plan or intend to verify whether the recipient of the award would, in fact, promote the objective to increase the overall energy supplied from renewable sources. It therefore noted that ‘it is possible that the application of the criteria may have no effect on the total amount of electricity produced [from renewable sources].’⁴⁴ The Court underscored, however, that the inability to prove that a criterion serves to achieve the objective pursued is irrelevant to the question of whether the criterion is permissible. Rather, what is important is whether the criterion in question is linked to the subject matter of the contract and complies with the principles of non-discrimination, transparency, and other fundamental principles of EU law.⁴⁵

3. Existing legal uncertainties and other limitations

3.1. Direct economic advantage vs. broad sustainability concerns

In the past the Commission argued that award criteria could only relate to environmental protection where the criteria provided an economic advantage directly to the contracting authority, which was specific to the works, supplies or services in question.⁴⁶ According to that view, production or consumption externalities do not provide any direct economic advantage to the authority and therefore cannot be taken into consideration for the purpose of determining the ‘most economically advantageous tender’. However, the decisions in *Concordia Bus* and *Weinstrom* clearly indicate that the CJEU rejects such a view.

However, notwithstanding this settled caselaw, the continued use of the language ‘most economically advantageous tender’ can perpetuate confusion, implying an emphasis on or limitation to factors that provide direct economic benefit to the contracting authority rather than allowing the contracting authority to also award points in accordance with criteria relating to external costs or benefits impacting on other parties or the public generally.

To more accurately reflect the broader remit of public procurement to pursue broader sustainability objectives⁴⁷ as well as CJEU caselaw acknowledging that award criteria can also weigh the environmental and social externalities of different procurement options, some advocates argue that the ‘economically advantageous’ language should be dropped in favour of a formulation calling more directly for sustainability considerations in public procurement.⁴⁸

⁴⁴ *Ibid.* at paragraph 46.

⁴⁵ *Ibid.* at paragraphs 53 and 72.

⁴⁶ See *supra*, note 23; Kunzlik, ‘The Procurement of ‘Green’ Energy’, p.390 in Sue Arrowsmith and Peter Kunzlik, eds., *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009).

⁴⁷ ClientEarth, Legal Briefing, *Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

⁴⁸ For example, the Network for Sustainable Development in Public Procurement has proposed ‘Sustainably Most Advantageous Rated Tender’ (**SMART**). See the Network’s key demands and messages, available at

3.2. Weighting of award criteria valuing sustainability

Some confusion also persists regarding how heavily award criteria valuing sustainability considerations can be weighted relative to criteria relating to functional criteria and price.

First, it is noted that required functional characteristics can and should be included as technical specifications. As noted in section 2.1 above, ability to meet the technical specifications is a prerequisite for being considered a candidate for the contract. Award criteria, in contrast, provide the opportunity to assess and recognise tenderers who can fulfil all the functional requirements of the contract more sustainably. Therefore, the use of award criteria attaching a high value to sustainability does not need to pit sustainability against function.

Award criteria enable contracting authorities to balance desirable (although not absolutely necessary) features, including greater sustainability, against price. Indeed, use of award criteria is a mechanism for assessing the market price of specific horizontal criteria.⁴⁹

The CJEU reasoned in *Wienstrom* that contracting authorities are not limited with regard to how heavily they can weigh sustainability criteria, so long as such criteria are used to determine what (in the contracting authority's view) is the most economically advantageous tender and do not imbue unrestricted freedom of choice regarding the choice of tenderer.⁵⁰ This is wholly consistent with a contracting authority's discretion to define its procurement criteria.

3.3. Can the lowest price option ever provide the best value?

Some now argue that the option to base the award of public contracts on price alone should be restricted.⁵¹ This is consistent with the provisions of the EU Treaties promoting sustainable development,⁵² which compel contracting authorities to consider sustainability in every case.

By allowing authorities to choose the 'price only' option, and therefore buy the cheapest products or services, current EU public procurement legislation allows them to ignore the best value offer, as the price of a product or service often does not reflect best value, especially in the long term. The quality of a service determines the effectiveness of that service. Moreover, allowing purchases to be based solely on the lowest price often encourages purchases that result in significant negative externalities, including lowering labour standards⁵³ as well as environmental degradation.

http://www.epsu.org/IMG/pdf/key_demands_Green_Paperfinal_EN.pdf

⁴⁹ Arrowsmith, 'A taxonomy of horizontal policies in public procurement', p.144 in Sue Arrowsmith and Peter Kunzlik, eds., *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009).

⁵⁰ *Wienstrom* at paragraph 42 (holding that a 45% weighting in favour of renewable energy over that produced from fossil fuels could be permissible).

⁵¹ H.Rühle, *Report on the Modernisation of Public Procurement*, Committee on the Internal Market and Consumer Protection, paragraph 13; Network for Sustainable Development in Public Procurement's key demands and messages, p.6, available at http://www.epsu.org/IMG/pdf/key_demands_Green_Paperfinal_EN.pdf

⁵² See in particular Article 3(3) of the Treaty on the European Union and Articles 9, 10 and 11 of the Treaty on the Functioning of the European Union. For a discussion of the EU Treaties and the 'integration principle', see section 2.2.2 in ClientEarth, Legal Briefing, *Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

⁵³ Research has demonstrated a clear link between working conditions and quality. For labour intensive services in

3.4. Can production characteristics only be included as specific conditions?

Some have sought to distinguish requirements related to the consumption phase of a product's life-cycle from those requirements that relate to the production phase and which do not so obviously result in different physical composition or performance of the end product. Historically Commission guidance has suggested that requirements relating to the latter, described in this series as 'production characteristics', cannot be technical specifications or award criteria and can only be included as specific conditions. A brief overview of the argument discrediting this distinction is set out here but a detailed analysis can be found in *Briefing No. 5: Technical specifications*.⁵⁴

Whether a product or service has or has not been sustainably produced is one of its characteristics and contributes to any assessment of whether it contributes to or hinders sustainable development objectives. How a product is made, as well as what it is made of, can comprise a significant part of its environmental and social impact. Environmental criteria can concern aspects of the production process, such as emissions to air and water during the production process, which do not necessarily impact on the physical characteristics or functional performance of the end product.⁵⁵ Equally, the employment conditions of those making the product do not necessarily impact on the physical characteristics or function of the end product but are important when considering the sustainability of a product.

It is consistent with the jurisprudence of the CJEU, in particular the *Wienstrom* case, to seek to pursue such horizontal criteria through award criteria or technical specifications. In *Wienstrom*, the court held that EU public procurement law⁵⁶ does not preclude a contracting authority from applying, in the context of a contract for the supply of electricity, an award criterion with a weighting of 45% in favour of electricity produced from renewable energy sources.⁵⁷

3.5. Pre-procurement consultation

It is acknowledged that pre-procurement processes can motivate greater innovation. In the field of sustainability, innovation is to be strongly encouraged. It can be envisaged in particular that engaging

particular, such as social services, quality is very clearly linked to pay and working conditions. See, e.g., Davies, S (2005) School meals, markets and quality, UNISON; Davies, S (2005) Contract cleaning and infection control, UNISON.

⁵⁴ See in particular sections 2.3, 3.1, 3.2 and 4.1 in ClientEarth, Legal Briefing, *Briefing No. 5: Technical specifications* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

⁵⁵ European Commission GPP training toolkit, p.14. See also *Wienstrom*.

⁵⁶ Directive 93/36 provided in Article 26 that:

the criteria on which the contracting authority shall base the award of contracts shall be:

...

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

Wienstrom at paragraph 3 (quoting Article 36 of Directive 93/36 of 14 June 1993 co-ordinating procedures for the award of public supply contracts (OJ 1993 L199/1)).

⁵⁷ *Wienstrom* at paragraph 30-34.

with those in the sector could allow the contracting authority to better understand the scope for incorporating sustainability criteria in the selection process and award criteria.

However, there is current uncertainty around whether those firms involved in pre-procurement processes can go forward to take part in the procurement and this may be discouraging contracting authorities and economic operators from utilising the potential of pre-procurement processes to the full. Ultimately, this is negative for sustainable public procurement.

The uncertainty stems from the finding in the *Fabricom v Belgium* case⁵⁸ that tenderers who have carried out preparatory works may have additional information and therefore an advantage over others when preparing their offers which would infringe the principle of equal treatment.

In *Fabricom*, an undertaking had been forbidden to take part in a procurement procedure by a Belgian rule according to which a bidder who had carried out certain preparatory works for a contract is prohibited from participating in a procedure for the award of that contract. The Court found that the rule prohibiting participation was disproportionate and therefore contrary to EU law. The rationale for this decision was that the economic operator excluded from the procedure was not granted any possibility to demonstrate that there was no problem of equality in the particular case. The Court also positively commented on a process whereby an assessment is made, in each specific case, of whether the fact of carrying out certain preparatory works has conferred on the contractor a competitive advantage over other tenderers.

In the revision of the Procurement Directive it may be useful to include a specific reference to the treatment of tenderers who have participated in the preparatory tasks.

4. Opportunities to implement sustainable public procurement at the award stage

The revision of EU procurement legislation provides an opportunity to set out clearly that:

- Award criteria can include criteria that address broad sustainability concerns and not just factors that provide direct economic benefit to the contracting authority.
- Award criteria can reflect social and well as environmental sustainability concerns.
- It is not necessary to demonstrate that a sustainability criterion will lead to a definite or measurable improvement in sustainability, so long as the criterion is sufficiently linked to the subject matter of the contract and is advertised and assessed in a manner consistent with the general principles of transparency, non-discrimination, and equal protection.
- Contracting authorities should base their award solely on price only where reliance solely on price to distinguish the best value offer is plainly justified.

⁵⁸ Case C-21/03 and C-34/03, *Fabricom v Belgium* [2005] ECR I-1559.

- Production characteristics (defined to include both environmental and social impacts of production choices) have equal status with performance/functional characteristics, and are appropriately considered within technical specifications or award criteria.
- Pre-procurement consultation can be usefully employed to help contracting authorities assess how they should formulate award criteria relating to sustainability objectives, provided that measures are undertaken to ensure respect for the principles of transparency, non-discrimination, and equal treatment.

4.1. Shifting from the ‘economically most advantageous’ to the ‘most sustainable’ tender

To avoid any confusion, revised EU legislation should clearly set out that award criteria can be defined to aim for the most sustainable tender, including criteria that address broad sustainability concerns and not just factors that provide direct economic benefit to the contracting authority. The legislation should further clarify that award criteria can reflect social as well as environmental sustainability concerns.

In addition, the legislation should clarify that contracting authorities do not need to demonstrate that the sustainability criteria set out in the tender will necessarily lead to a definite or measurable improvement in sustainability, so long as the criteria at issue are sufficiently linked to the subject matter of the contract and are advertised and assessed in a manner consistent with the general principles of transparency, non-discrimination, and equal protection. This would be consistent with the CJEU’s holding in *Weinstrom*.⁵⁹

4.2. Restricting the price-only option

The revised EU legislation should restrict contracting authorities basing award decisions on price alone. Requiring public authorities to factor in environmental and social impacts of their purchases encourages policy coherence between public authorities’ purchasing decisions and numerous EU and Member State policies and action plans aimed at promoting sustainable development.⁶⁰

While the choice of what to buy, including horizontal as well as functional procurement objectives, remains the discretion of the contracting authority, EU legislation should encourage public authorities to be leaders in sustainable consumption. This objective is fostered by allowing contracting authorities to base their award solely on price only where reliance solely on price to distinguish the best value offer is plainly justified.

⁵⁹ See discussion at section 2.4.2.2, above. See also ClientEarth, Legal Briefing, *Briefing No. 3: The Guiding Principles of Public Procurement - Transparency, Equal Treatment and Proportionality* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

⁶⁰ ClientEarth, Legal Briefing, *Briefing No. 1: Sustainable Development as a Key Policy Objective of the European Union* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

4.3. Clarifying that award criteria can include production characteristics

As explained in *Briefing No. 5: Technical specifications*,⁶¹ there is no reason to exclude production characteristics from award criteria and technical specifications.

4.4. The role of pre-procurement consultation processes

In *Evropaiki Dynamiki v Commission*,⁶² the General Court considered a case with a factual situation analogous to that in *Fabricom*; the applicant alleged that the omission by the contracting authority of some technical information benefitted tenderers which were previous or current contractors for the contracting authority. In that case the successful tenderer was already the contractor (under a separate contract) developing an IT system which the applicant alleged gave access to information that the applicant did not have, thereby causing a disparity in their respective abilities to submit precise and competitive tenders.⁶³

The Court dealt with the question of the circumstances in which an award decision must be annulled⁶⁴ i.e. it sought to set out the steps to determine whether the principle of equal treatment had been infringed.

The Court's conclusion was that annulment should only occur where any disparity of information relevant for preparation of the tender had adversely affected the outcome of the procedure.⁶⁵ It was also emphasised that the disparity must result from a procedural defect by the contracting authority.

This judgment paves the way for specific rules to be included in the revised EU procurement legislation in relation to the participation of firms who have already been involved in pre-procurement processes or are existing or previous contractors on related contracts.

5. Conclusion

The revision of the EU procurement legislation should be seeking to put in place an enabling framework so that those contracting authorities who wish to can confidently proceed with their sustainable procurement policies. The recognition that sustainability criteria (including social aspects), whether or not they provide direct economic benefit to the contracting authority, can be award criteria is clearly a crucial step in facilitating sustainable procurement policies.

⁶¹ ClientEarth, Legal Briefing, *Briefing No. 5: Technical specifications* (October 2011) accessible at www.clientearth.org/sustainable-public-procurement-briefings

⁶² *Evropaiki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission*, case T-50/05, 19 March 2010, ECR 2008 II-00157. (*'Evropaiki Dynamiki v Commission'*)

⁶³ *Ibid*, paragraphs 44 and 64.

⁶⁴ Z.Petersen, *Principle of equal treatment in IT procurement: Evropaiki Dynamiki v Commission (T-50/05)*, in Public Procurement Law Review, 2011.

⁶⁵ *Evropaiki Dynamiki v Commission*, paragraph 62.

In addition, the forthcoming revision of EU legislation on public procurement provides an opportunity to clarify the circumstances under which those who participated in pre-procurement consultations with the contracting authority can nevertheless remain eligible for the tender as well as how certification schemes and labelling can be lawfully and usefully employed to verify compliance with sustainability criteria.

This briefing is the seventh in a series of ClientEarth briefings entitled *Identifying Opportunities for Sustainable Public Procurement* and has focussed on the award stage of the procurement process. The four introductory briefings in this series discuss cross-cutting ideas. In the remaining briefings, we point to how the EU procurement legislation could be clarified and revised to enable contracting authorities to bring horizontal criteria into each stage of the procurement process. All briefings are accessible at www.clientearth.org/sustainable-public-procurement-briefings

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

As legal experts working in the public interest, we act to strengthen the work of our partner organisations. Our work covers climate change and energy system transformation, protection of oceans, biodiversity and forests, and environmental justice.

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Identifying Opportunities for Sustainable Public Procurement Briefing Series

The European Commission is expected to propose a revision of public procurement legislation¹ by early 2012.² A primary objective of this revision is to allow procurers to make better use of public procurement in support of common societal goals, including protection of the environment, better resource and energy efficiency, combating climate change, promoting innovation and social inclusion, and ensuring the best conditions for the provision of high quality public services.

ClientEarth's briefing series, *Identifying Opportunities for Sustainable Public Procurement* aims to consolidate, clarify, and expand opportunities to use public procurement to contribute to sustainable development objectives. Where appropriate the current legal situation is analysed, focussing on the Procurement Directive.³

The briefings can be found at:

www.clientearth.org/sustainable-public-procurement-briefings

This briefing series seeks to foster the development of new EU procurement legislation that fulfils the following aims:

- *Provide an enabling framework for sustainable public procurement.* To this end, the legal framework should not be limited to the tools, products, and data sets that exist presently. Rather, it should anticipate and provide an enabling framework for the next generation of sustainable public procurement tools and practices to evolve.
- *Ensure legal certainty* as to how sustainability criteria can be brought into each stage of the procurement process.
- *Strive for greater flexibility and simplification* of procurement processes, to enable greater take-up of sustainable public procurement possibilities.
- *Ensure compliance with the principles of transparency, non-discrimination, equal treatment, and proportionality.* While public procurement is increasingly utilized to serve horizontal objectives including sustainable development, the initial aim of the EU procurement legislation—to ensure a transparent and non-discriminatory single market for procurement within the European Union—must also continue to be secured.

The series is comprised of four introductory briefings discussing (1) the sustainable development objectives of the European Union, (2) the concept of horizontal procurement objectives and the scope of the EU's authority to regulate the procurement activities of Member States, (3) how the principles of transparency, equal treatment and proportionality are understood in the context of procurement, and (4) understanding how sustainability criteria are 'linked to the subject matter' of contracts for sustainable goods and services. These are followed by four briefings discussing opportunities for incorporating sustainability objectives into each stage of the procurement process: (5) technical specifications, (6) selection criteria, (7) award criteria and (8) specific conditions (also known as contract performance conditions).

¹ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L134, 30.4.2004, p.1) (as amended) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L134, 30.4.2004, p.114) (as amended).

² *The Green Paper on the modernisation of EU public procurement policy*. 27 January 2011, COM(2011) 15 final, p.3.

³ Many of the arguments developed in the briefings will apply equally to Directive 2004/17/EC.