Consultation Response

Brussels, 18 April 2011

Subject: Consultation on the modernisation of EU public procurement policy - Towards a more efficient European procurement market

Eurima Response to the European Commission Consultation

62 Do you consider that the rules on technical specifications make sufficient allowance for the introduction of considerations related to other policy objectives?

Yes, but Directive 2004/18/EC on public procurement for works states that technical specifications shall be formulated by reference “to national standards transposing European standards”. Therefore, the introduction of environmental or other considerations in rules regarding the technical specifications should respect the standardisation work being done in the CEN TC 350 (for construction products), and reflecting a full life-cycle approach.

63 Do you share the view that the possibility of defining technical specifications in terms of performance or functional requirements might enable contracting authorities to achieve their policy needs better than defining them in terms of strict detailed technical requirements? If so, would you advocate making performance or functional requirements mandatory under certain conditions?

Performance requirements are a better starting point than technical requirements. However, such requirements can only be set for the final product that is purchased, not for any intermediate product. In the case of thermal insulation, as in many other construction products, the performance would depend completely on a variety of factors (application, installation, type of building, orientation, climatic conditions, etc) that can only be evaluated once the product is installed in the building. Therefore, the building performance should be the criterion and a whole life-cycle approach should be taken into account.

64 By way of example, do you think that contracting authorities make sufficient use of the possibilities offered under Article 23 of Directive 2004/18/EC concerning accessibility criteria for persons with disabilities or design for all users? If not, what needs to be done?

65 Do you think that some of the procedures provided under the current Directives (such as the competitive dialogue, design contests) are particularly suitable for taking into account environmental, social, accessibility and innovation policies?

66 What changes would you suggest to the procedures provided under the current Directives to give the fullest possible consideration to the above policy objectives, whilst safeguarding the respect of the principles of non-discrimination and transparency ensuring a level playing field for European undertakings? Could the use of innovative information and communication technologies specifically help procurers in pursuing Europe 2020 objectives?

Environmental and energy efficiency considerations should be promoted in the public procurement for works (such as building refurbishment), provided that products are asked to declare their environmental contribution to the building performance and that product selection
is based on indicators from LCAs and does not give “a priori” unjustified advantages to any product group.

67. Do you see cases where a restriction to local or regional suppliers could be justified by legitimate and objective reasons that are not based on purely economic considerations?

No.

68. Do you think that allowing the use of the negotiated procedure with prior publication as a standard procedure could help in taking better account of policy-related considerations, such as environmental, social, innovation, etc.? Or would the risk of discrimination and restricting competition be too high?

69. What would you suggest as useful examples of technical competence or other selection criteria aimed at fostering the achievement of objectives such as protection of environment, promotion of social inclusion, improving accessibility for disabled people and enhancing innovation?

The performance of thermal insulation products in their final application (i.e. the building) is essential in order to ensure that the objectives of energy savings and reduction of CO2 emissions are attained. Therefore, the bidders for installation and related works should demonstrate competence for ensuring that the building will be performing in environmental / energy efficiency terms.

70. The criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objectives. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts/ some specific sectors/ in certain circumstances):

70.1.1. to eliminate the criterion of the lowest price only;
70.1.2. to limit the use of the price criterion or the weight which contracting authorities can give to the price;
70.1.3. to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer? If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives more effectively and guarantee a level playing field and fair competition between European undertakings?

Lowest price criterion is important, and must remain as a guiding principle, even more taking into account the budgetary restrictions that public authorities all around the EU will face in the near future. Therefore, it should not be eliminated.

Nevertheless, if the EU seeks to couple this important criterion with other elements that allow attaining the EU objectives in environment and energy policies, it is essential to ensure that a full life-cycle approach is taken (life cycle costing), and that European (draft) standards for environmental performance of construction products are respected. In this respect, the Commission should follow the work developed by CEN TC 350. The CEN TC350 standards will include an economic assessment as part of a sustainability assessment.

71. Do you think that in any event the score attributed to environmental, social or innovative criteria, for example, should be limited to a set maximum, so that the criterion does not become more important than the performance or cost criteria?

The setting of a set maximum could be convenient at a first stage, in an evaluation period, in order to assess the correct use of these requirements in practice.
72 Do you think that the possibility of including environmental or social criteria in the award phase is understood and used? Should it in your view be better spelt out in the Directive?

There is a big risk of misunderstanding and misuse of the ‘environmental criteria’ when it refers to Public procurement. Civil servants in the national, regional and local administrations are often non-experts in what refers to evaluation of environmental or energy performance of the products that they are purchasing. Therefore, it is essential that clear and strict guidelines are provided at this respect from the EU. The promotion of “green” products without basing this “green” consideration on sound science and LCA-approach must be avoided.

73 In your view, should it be mandatory to take life-cycle costs into account when determining the economically most advantageous offer, especially in the case of big projects? In this case, would you consider it necessary/appropriate for the Commission services to develop a methodology for life-cycle costing?

Yes. The application of a life-cycle costing methodology is essential in order to take into account energy savings provided by thermal insulation products in the longer term, including of course the use phase. The deep renovation of EU public buildings, as required by the Energy Efficiency Plan, will require that the EU establishes a common a methodology for life-cycle costing.

74 Contract performance clauses are the most appropriate stage of the procedure at which to include social considerations relating to the employment and labour conditions of the workers involved in the execution of the contract. Do you agree? If not, please suggest what might be the best alternative solution.

In the case of works contracts, the successful bidder should be required to declare that he and all his subcontractors (and their subcontractors) respect labour laws and, if applicable, wage agreements, and dispose of the professional qualifications required by the Member State concerned.

75 What kind of contract performance clauses would be particularly appropriate in your view in terms of taking social, environmental and energy efficiency considerations into account?

In what regards environmental and energy efficiency considerations, it should be taken into account that the performance of some intermediate products (such as thermal insulation or in general other construction products) will only be assessable once they are installed in the final product (the building). Therefore, the bidders should be required to guarantee their competence for the installation of the product in order to get the maximal environmental performance.

76 Should certain general contract performance clauses, in particular those relating to employment and labour conditions of the workers involved in the execution of the contract, be already specified at EU level?

This could be done.

77 Do you think that the current EU public procurement framework should provide for specific solutions to deal with the issue of verification of the requirements throughout the supply chain? If so, which solutions would you propose to tackle this issue?

Verification is important, especially for intermediate products such as mineral wool insulation. Any criteria established for fostering environmental objectives should not only be based on...
sound science and harmonised environmental indicators, but also harmonised assessment methods.

78 How could contracting authorities best be helped to verify the requirements? Would the development of “standardised” conformity assessment schemes and documentation, as well as labels facilitate their work? When adopting such an approach, what can be done to minimise administrative burdens?

Conformity assessment schemes and labels should only be established at the building level, in which the performance of the intermediate products can be assessed.

79 Some stakeholders suggest softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract (this could make it possible to require, for instance, that tenderers have a gender–equal employment policy in place or employ a certain quota of specific categories of people, such as jobseekers, persons with disabilities, etc.). Do you agree with this suggestion? In your view, what could be the advantages or disadvantages of loosening or dropping the link with the subject matter?

In what refers to requirements related to environment or energy efficiency, this should be linked to the subject matter of the contract. Therefore, we do not agree with the softening of this link.

80 If the link with the subject matter is to be loosened, which corrective mechanisms, if any, should be put in place in order to mitigate the risks of creating discrimination and of considerably restricting competition?

We do not agree with the softening of this link.

81 Do you believe that SMEs might have problems complying with the various requirements? If so, how should this issue be dealt with in your view?

82 If you believe that the link with the subject matter should be loosened or eliminated, at which of the successive stages of the procurement process should this occur?

We do not agree with the softening of this link.

82.1 Do you consider that, in defining the technical specifications, there is a case for relaxing the requirement that specifications relating to the process and production methods must be linked to the characteristics of the product, in order to encompass elements that are not reflected in the product's characteristics (such as for example - when buying coffee - requesting the supplier to pay the producers a premium to be invested in activities aimed at fostering the socio-economic development of local communities)?

The procurement for works related to buildings is already subject to many elements difficult to assess, therefore, relaxing the link to the characteristics of the product would not be convenient.

82.2 Do you think that EU public procurement legislation should allow contracting authorities to apply selection criteria based on characteristics of undertakings that are not linked to the subject of the contract (e.g. requiring tenderers to have a gender-equal employment policy in place, or a general policy of employing certain quotas of specific categories of people, such as jobseekers, persons with disabilities, etc.)?

Other requirements in addition to taking into account the life-cycle approach and the respect of standards are not relevant for public procurement of works in buildings.
82.3. Do you consider that the link with the subject matter of the contract should be loosened or eliminated at the award stage in order to take other policy considerations into account (e.g. extra points for tenderers who employ jobseekers or persons with disabilities)?

No

82.3.1. Award criteria other than the lowest price/ the economically most advantageous tender/ criteria not linked to the subject-matter of the contract might separate the application of the EU public procurement rules from that of the State aid rules, in the sense that contracts awarded on the basis of other than economic criteria could entail the award of State aids, potentially problematic under EU State aid rules. Do you share this concern? If so, how should this issue be addressed?

We share this concern. Additional requirements should be avoided.

82.4. Do you think that the EU public procurement legislation should allow contracting authorities to impose contract execution clauses that are not strictly linked to the provision of the goods and services in question (e.g. requiring the contractor to put in place child care services for his employees or requiring them to allocate a certain amount of the remuneration to social projects)?

The public authorities should endeavour to procure the product/service with requirements based on life cycle performance. Additional requirements should be avoided.

83 Do you think that EU level obligations on "what to buy" are a good way to achieve other policy objectives? What would be the main advantages and disadvantages of such an approach? For which specific product or service areas or for which specific policies do you think obligations on "what to buy" would be useful? Please explain your choice. Please give examples of Member State procurement practices that could be replicated at EU level.

Given the political importance attached to energy efficiency and the mandate given by the Energy Efficiency Plan (EEP) for the yearly (deep) renovation of 3% of public buildings, the "what to buy" guidance will be very important in the future at this respect. The forthcoming Directive on Energy Efficiency and savings is expected to establish the legislative framework for making this renovation target mandatory.

Public procurement rules should favour the achievement of greater savings in the public authorities' buildings, while of course respecting a neutral approach in public purchasing. Public procurement measures should ensure that renovations of public buildings are deep enough (in order to bring the building up to the level of the best 10% of the national building stock, as mandated by the EEP). This can only be done by addressing the building envelope. An example is the GPP scheme in the Netherlands, that require a certain energy label (based on EPBD standards) for public buildings.

If environmental performance of products is regarded, only indicators from LCAs carried out according to ISO and forthcoming EN standards provide transparent information for comparison.

The products should declare their environmental contribution to the building performance, and selection should be based on indicators from LCAs and not give “a priori” advantages to any product group.
Do you think that further obligations on "what to buy" at EU level should be enshrined in policy specific legislation (environmental, energy-related, social, accessibility, etc) or be imposed under general EU public procurement legislation instead?

A double approach is needed. On the one hand, EU legislation is already promoting efficient new buildings (the EPBD recast requires new public buildings to be ‘nearly zero energy buildings’ as from 2019). The forthcoming Directive on Energy Efficiency and Savings will also address renovation of public buildings (see above). Public procurement rules should back what the specific legislation establishes. We do not oppose this double approach as long as coherence is maintained.

Do you think that obligations on "what to buy" should be imposed at national level? Do you consider that such national obligations could lead to a potential fragmentation of the internal market? If so, what would be the most appropriate way to mitigate this risk?

If additional obligations are established at national level, they should respect the life-cycle approach and the standardisation work developed by CEN TC 350, establishing a common EU framework for environmental requirements of construction products. Member States already participate in the standards development; therefore it is difficult to imagine that national requirements could go against these requirements.

Do you think that obligations on what to buy should lay down rather obligations for contracting authorities as regards the level of uptake (e.g. of GPP), the characteristics of the goods/services/works they should purchase or specific criteria to be taken into account as one of a number of elements of the tender?

The establishment of level of uptake should be preferred to the establishment of characteristics or specific criteria, provided that the life-cycle approach and the standardisation work by CEN is respected, and should be based on the performance of the final product and not of intermediate products (i.e. building level).

What room for manoeuvre should be left to contracting authorities when making purchasing decisions?

In the case of works (buildings), contracting authorities should be able to procure buildings according to their local characteristics. The EU should only set general horizontal principles to be respected by contracting authorities.

Should mandatory requirements set the minimum level only so the individual contracting authorities could set more ambitious requirements?

We agree with this approach. The role of the EU at this respect should be to fix the general framework for the promotion of broader political goals (energy efficiency, reduction of CO2 emissions) while respecting certain general principles (life-cycle approach, standardisation).

In your view, what would be the best instrument for dealing with technology development in terms of the most advanced technology (for example, tasking an entity to monitor which technology has developed to the most advanced stage, or requiring contracting authorities to take the most advanced technology into account as one of the award criteria, or any other means)?

The use of best available technology is important, but it should be tackled always taking into account the ‘big picture’, and ensuring that technological developments contribute to the final goals (energy efficiency and savings, best performance of buildings).
88. The introduction of mandatory criteria or mandatory targets on what to buy should not lead to the elimination of competition in procurement markets. How could the aim of not eliminating competition be taken into account when setting those criteria or targets?

The best way for not eliminating competition would be the respect of basic elements for all public procurements that will guarantee a level playing field: consideration of the life-cycle approach and life-cycle costing and respect of standards.

89. Do you consider that imposing obligations on "what to buy" would increase the administrative burden, particularly for small businesses? If so, how could this risk be mitigated? What kind of implementation measures and/or guidance should accompany such obligations?

This would depend on the degree of detail of these requirements. If the EU provides general guidance for the fulfilment of broader objectives, administrative burden will not be increased.

113. Are there any other issues which you think should be addressed in a future reform of the EU public procurement Directives? Which issues are these, what are - in your view - the problems to be addressed and what could possible solutions to these problems look like?

Buildings are responsible of 40% the EU's energy consumption, and of 36% of its CO2 emissions. An ambitious and long-term strategy for a drastic decrease of energy use in buildings is much needed. For this to become a reality, action on the existing building stock is essential. Building's life span is approximately 30 years. This means that all buildings existing in 2011 in the EU will be renovated in one way or another by 2050. Eurima, based on numerous studies, strongly believes that undertaking these renovations in a wise way -by deep renovations that guarantee that the whole EU building stock consumes 80% less energy by 2050- is cost-effective, technically feasible, and indispensable for meeting EU's energy and climate challenges.

Public administrations must, in their public procurement, avoid 'cream-skimming building renovations', that -although they might seem ‘cheaper’ in the short term- indeed lock-in significant potential savings for the future. Renovations leading to less than 50% improvement of the building energy performance should be discouraged, as they lock-in significant saving potential (unless the building is re-renovated in a few years time, causing expensive repeated disruption). In its Energy Efficiency Plan, the Commission asks that “emphasis will be placed on ensuring that when buildings are renovated that this is done in a comprehensive manner (i.e. deep renovation) to avoid repeated disruption of buildings.” This should be the guiding principle for public procurement in what regards building renovation.

Deep renovations must therefore address properly (i.e. at an appropriate performance level) the building envelope, where the most ambitious cost-effective savings can be delivered.

All elements in the chain should be adapted to this long-term goal, and public procurement should contribute to this:

- Energy supply obligations for public authorities should be designed to address deep renovations in the existing building stock;
- ESCOs participating in public procurement should be required to consider longer payback-period energy performance contracts leading to greater energy savings;
- The public procurement should ask proper training for all stakeholders in the building refurbishment chain...

EU public procurement can significantly contribute to foster deep renovation of the existing building stock (and therefore attaining EU by promoting long-term contracts that allow and encourage, without any discrimination, deeper renovations to be undertaken.