



18 April 2011

European Women's Lobby contribution to the EC consultation on the modernisation of EU public procurement policy – Towards a more efficient European procurement market

The European Women's Lobby (EWL), the largest coalition of women's organisations in the European Union (EU), welcomes the green paper of the European Commission on the modernisation of EU public procurement policy.

The EWL, as the European Commission, notes that the crisis brings new challenges in relation to sound management of public finances and spending. The result of this is a need for the most efficient use of public money in a way that also contributes to the values of our societies.

The EWL strongly believes that European **public procurement rules should be renewed so that they can support the achievement of overall societal goals, in particular the promotion of fundamental rights and of social inclusion, including equality between women and men.** Given that public procurement accounts for about 17% of EU gross domestic product, the impact of EU level obligations on what to buy and on whom to buy from would be considerable¹ on areas such as social policy and gender equality. The EWL considers that this green paper and the upcoming changes regarding public procurement procedures are a great opportunity for the European decision-makers to give a strong signal to the women and men living in Europe of their commitment to ensure that public money is used in a way that promotes values and principles that the EU and the EU Member States are committed to, and to implement innovative social measures in parallel to the current economic plans focused on austerity.

To be more effective and ensure the same application in all member states, the EWL would favour a European public procurement legislation on "what to buy" implemented, in order to make sure that the rules apply in the same way for all European countries.

The EWL thinks that EU level rules on what to buy are the best way to guarantee that public procurement can be used to reaching other objectives, in particular to ensure that public procurement is socially responsible and contributes to the fight against -women's- poverty. This is the case also concerning the objective to promote equality between women and men because gender equality is a fundamental value of the EU and because the EU has, according the articles 8 and 19 of the Treaty on the functioning of the European Union, a mission to advance equality between women and men in all its policies. An EU level "what to buy" rule is effective and ensures that the rules apply in all Member States (**question 83**).

The EWL is of the view that a rule on "what to buy" related to equality between women and men should be included specifically in the EU level public procurement rules (**question 84**). Imposing an EU level "what to buy" rule related to gender equality is better option than national level what to buy rules because this could lead to fragmentation of rules and would not achieve advancing gender equality in all EU countries (**question 85**). EU level obligation is also better solution than soft incentives because we want the rules to have an impact (**question 90**).

¹ Guide of the European Commission, "buying social: a guide to taking account of Social Considerations", 2011, introduction <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=978&furtherNews=yes>



Regarding the field of disability, the EU Disability Strategy 2010-2020 specifies that the Commission will propose a “European Accessibility Act” (EAA) by 2012. According to the Strategy, this could include developing specific standards for particular sectors to substantially improve the proper functioning of the internal market for accessible products and services. The EWL together with the European Disability Forum (EDF) are calling for the EAA to take the form of a strong binding legislation that will also enshrine obligations on “what to buy”. However it goes without saying that, in order to be consistent and efficient, these obligations and accessibility requirements must be also included under general EU public procurement legislation.

Equality between women and men as an aspect of Socially Responsible Public Procurement

The EWL recommends that the European Commission in its future legislative proposal enforces socially responsible public procurement, including introducing equality between women and men in European public procurement rules, in order to ensure that public money in all EU Member States will be used in a way that promotes equality between women and men, fundamental rights, and social justice.

According to the definition of the European Commission, socially responsible public procurement (SRPP) means procurement operations that take into account one or more of the following social considerations: “employment opportunities including the promotion of gender balance, decent work including the gender equality and non-discrimination, compliance with social and labour rights including compliance with the principle of equal treatment between women and men and the principle of equal pay for work of equal value, and promotion of gender equality as well as seeking to achieve wider compliance with social standards”.² The EWL considers that the fight against poverty, in particular the feminisation of poverty should be included in the social considerations related to SRPP.

As made clear by the latest report of the European Commission (EC) on social public procurement³, the current legal basis for public procurement in the European Union, Directives 2004/17/EC⁴ and 2004/18/EC⁵ (the ‘Procurement Directives’)⁶ that the Commission now plans to review, already offer scope for taking account of social considerations. However, the EWL with its member organisations thinks that the current directives do not provide a strong enough legal basis for SRPP because of the condition that all requirements imposed by public authorities must be linked to the subject matter of the contract. At every stage of the process - technical specifications, selection/exclusion criteria, award criteria and contract performance clauses- the public authorities, according to the directives, have to ensure the criterion they use is linked to the subject-matter of the contract. Nevertheless, the EWL would favour a softening or in a long-term perspective, dropping of this requirement, given that a gender duty should be considered as a transversal matter and relevant for every subject. According to the EWL, this is in accordance with the gender mainstreaming methods, which require the integration of a gender equality perspective in all areas and policies (**questions 79;**

² Guide of the European Commission, “buying social: a guide to taking account of Social Considerations”, 2011: <http://ec.europa.eu/social/BlobServlet?docId=6457&langId=en>, p.7

³ Guide of the European Commission, “buying social: a guide to taking account of Social Considerations”, 2011: <http://ec.europa.eu/social/BlobServlet?docId=6457&langId=en>

⁴ 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 (hereafter the ‘Directive 2004/17/EC’).

⁵ 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 (hereafter the ‘Directive 2004/18/EC’).

⁶ The Procurement Directives are based on the principles of the Treaty and “in particular the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency”. The provisions of the Procurement Directives should be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty (see Recital 2 of Directive 2004/18/EC and Recital 9 of Directive 2004/17/EC).



82-1; 82-2; 82-3; 82-4). To make this realistic and feasible, the EWL considers that the EU institutions do not have to drop this condition immediately, but should plan a precise schedule to give to the enterprises the opportunity to fully take gender equality issues into account. At a agreed upon and obligatory date, every enterprise possibly concerned by public tenders should be aware that taking account of gender equality in a proven way is an essential condition to get a public contract, regardless of the subject-matter of the contract (**question 80**).

Moreover, concerning the integration of disabled persons and issues of accessibility, in many EU Member States, the Directives are failing to deliver accessibility, due to the wrong transposition of the Directives themselves and due to the voluntary nature of the accessibility criteria. The EWL, together with EDF call for legally binding criteria in the description of the subject matter of the contract and in the technical specifications.

The EWL believes that, considering the social goals of SRPP, it is crucial that public procurement legislation makes sure that public money is not used to support practices that discriminate against women and that on the contrary, public spending promote equality between women and men. The EWL thinks there are two ways to guarantee this.

The first step is that each public authority does not accept bids from enterprises which violate the principle of equality between women and men. Rules of public procurement should enforce authorities to exclude enterprises which for instance discriminate between women and men with relation to pay and to give priority to companies who are not discriminatory. The second step would be to give an advantage to enterprises actively promoting gender equality and women's rights. For instance, if one enterprise has an equal number of women and men in its decision-making structures, has an equal pay plan or uses quotas in its board or in its staff recruitment in order to ensure the equal representation of women and men, proposes an employment of people with disabilities and uses quota system to assure permanent and long-term employment, has a compliance with accessibility criteria and principles of Design For All in order to promote the employment of disabled people and better integrate them, this enterprise could be advantaged to be a contractor for public contracts (**questions 41 and 42**).⁷

For instance, the EWL expects the European Commission to look at the example of Spain, which may constitute a minimum standard to generalise at the European level. According the 2007 Spanish law on equality, it is considered as a benefit element if the future bidder takes measures for equality as equality programme, quota of women recruited, quota of women on boards, etc. The change in the 2007 Spanish law on public procurement (article 102 paragraph 1)⁸ allowed putting in some clauses advantaging candidates with proven gender equality actions; however, this is not compulsory.

Moreover, to ensure that European public procurement legislation will oblige contracting authorities to implement socially responsible public procurement and to take gender equality consideration into account, the EWL calls to move beyond the only and unique criterion of price and include social considerations in the criteria of choice. In order to do so, the concept of the most economically advantageous tender (MEAT)⁹ should be privileged. Bidding with the lowest price as the only or prime factor tends to favour big companies. Experiences from the Swedish members of the EWL show that bidding with the lowest price has led to the

⁷ It is possible to do so, even if gender equality is not considered as linked to the subject-matter, thanks to the additional criterion, which allows authorities to choose the candidate respecting gender equality in order to decide between two equivalent tenders. Cf Guide of the European Commission, "buying social: a guide to taking account of Social Considerations", 2011, p.40: <http://ec.europa.eu/social/BlobServlet?docId=6457&langId=en>

⁸ LEY 30/2007, de 30 de octubre, de Contratos del Sector Público: <http://www.boe.es/boe/dias/2007/10/31/pdfs/A44336-44436.pdf>

⁹ Article 14 of the directive 2004/18/EC



close down of high quality companies. Involving gender equality in procurement processes strengthens small scale entrepreneurs where women are more represented. Procurement with embedded gender equality promotes vital local economies and entrepreneurship.

What is in the current directives on public procurement is that the contracting authority can compare the offers by looking at the cheapest price or at the “best-value tender”. The EWL calls for giving up the too narrow criterion of price and thinks that best value for money should be considered as the most relevant criterion. Best value for money does not necessarily mean accepting the cheapest offer. Best value for money is defined as “the optimum combination of whole-life cost and quality to meet the end-user’s requirements”.¹⁰

Therefore the EWL thinks it should be mandatory to take into account life-cycle costs in order to evaluate properly the value of an offer (**question 73**). The EWL points out that taking into account life-cycle costs in evaluating offers means including social considerations. Indeed, the non-exclusive list of examples in the Procurement Directives¹¹ allowing contracting authorities to determine the most economically advantageous tender include quality and social characteristics. The EWL strongly believes that quality and/or social characteristics should include clearly equal opportunities as well as accessibility and equality between women and men.

If an enterprise offers the lowest price for executing a contract but does not take measures to ensure that equal employment opportunities are given for women as men in its execution, the offer is not economically advantageous for at least three reasons (**questions 70-1-1 and 97-1-1**).

First, there is now strong evidence that bidders respecting equality between women and men run more competitive enterprises.¹² Moreover, examples also show that “gender equal” companies have a more motivated workforce less affected by turn-over and are more representative of the needs and wishes of the whole society.¹³ In addition, an enterprise promoting gender equality gets a better reputation and limits the reputational risk. For all these reasons, it appears clearly that companies promoting gender equality are the best candidates, even if the price they offered is not the lowest one. Given the positive aspects for the whole society of taking equality between women and men and accessibility and integration of disabled people into account, the EWL is of the view that, when evaluating proposals, the importance given to the criterion of equality between women and men should be at least as important as the performance or cost criteria (**question 71**).

Second, through favouring enterprises promoting actively and concretely equality between women and men and non-discrimination, socially responsible public procurement contributes to economic growth and is therefore economically advantageous for the society at large. Research¹⁴ shows that “there is a potential for increased GDP of between 15 and 45% in the EU member states”, if a greater equality between women and men in the labour market is ensured.¹⁵ In order to do so, the EWL strongly advocates for the use of parity rules, quotas and affirmative action.

¹⁰ Guide of the European Commission, “buying social: a guide to taking account of Social Considerations”, 2011, p.19: <http://ec.europa.eu/social/BlobServlet?docId=6457&langId=en>

¹¹ Recital 46 and Article 53 of Directive 2004/18/EC

¹² Gender Equality, economic growth and employment, Åsa Löfström, Department of Economics, Umeå University, Sweden, Female Leadership and Firm Profitability, 2007, study by Finnish Business and Policy Forum EVA; Why women managers shine in a downturn, a study by Michel Ferrary, Professor of management at Ceram Business School, France (2009).

¹³ Guidance for Great Britain: procurement, Gender Equality Duty, June 2007

¹⁴ Gender Equality, economic growth and employment, Åsa Löfström, Department of Economics, Umeå University, Sweden, Female Leadership and Firm Profitability, 2007, study by Finnish Business and Policy Forum EVA; Why women managers shine in a downturn, a study by Michel Ferrary, Professor of management at Ceram Business School, France (2009).

¹⁵ Gender Equality, economic growth and employment, Åsa Löfström, Department of Economics, Umeå University, Sweden.



Third, as suggested in the consultation document, public procurement should be seen as a tool to develop the European economic growth, while ensuring a “smart, sustainable and inclusive economy” as requested in the Europe 2020 Strategy.¹⁶ The EWL notes that one of the 2020 targets of 75% employment rate for women and men cannot be reached without specific focus on increasing women’s labour market participation among other things through eliminating gender gaps and discrimination in the labour market and by using quotas and affirmative action. Public procurement rules that favour enterprises that actively promote gender equality can contribute to achieving this target, as well as to the inclusive and social objectives of the 2020 Strategy.

The European obligation of gender mainstreaming¹⁷ supports increased use of SRPP. Gender mainstreaming is defined by the European Commission as “the integration of the gender perspective into every stage of policy processes – design, implementation, monitoring and evaluation – with a view to promoting equality between women and men”.¹⁸ This definition can be applied to public procurement rules and the EU institutions should ensure the application of gender mainstreaming at each stage of the public procurement process.

A concrete integration of a gender equality perspective at each stage of the process

The Procurement Directives adopted on 31 March 2004 specifically mention ways of incorporating social considerations into each stage of the process: technical specifications, selection criteria, award criteria and contract performance clauses. Concerning the award criteria, which are maybe the most difficult to use and in the same time the most crucial criterion, we request that the European Institutions, especially the EC, better explain and define the possibility of including social criteria, most specifically a gender equality perspective in the award phase. However, the EWL wishes that this possibility could be clearly explained and detailed for each stage of the process. In this view, the document “buying social: a guide to taking account of Social Considerations” is an encouraging first signal (**question 72**).

Putting an SRPP policy into practice requires strategic planning, setting priorities when choosing the contracts most suitable for SRPP. As it is already done by some contracting authorities, the EWL argues in favour of coordinated and holistic approach to integrating social considerations. All stakeholders have to be involved in the process of developing SRPP including civil society. Workshops, seminars and conferences should be organized on the subject of equality between women and men¹⁹ as well as the involvement of women and men with disabilities, accessibility experts, making the selection process accessible, developing training both for contractors and buyers on the acquisition process, represent few steps in the right direction that would contribute to an efficient and fair system of public procurement. Indeed, Member States should be requested to present specific targets for training of staff of public authorities and para-statal organisations involved in implementing public procurement.

As already recommended in the EC document²⁰, the preparatory stage of a call for tenders is the best opportunity to identify which social considerations are relevant and appropriate to be taken into account. For all the previous reasons, the EWL calls the purchasers to consider the goal of gender equality as well as the

¹⁶ Communication of the European Commission, Europe 2020: a strategy for smart, sustainable and inclusive growth: http://eunec.vlor.be/detail_bestanden/doc014%20Europe%202020.pdf

¹⁷ Art. 8 TFEU

¹⁸ European Commission, Definition of Gender Mainstreaming, DG Employment, Social Affairs and Inclusion: <http://ec.europa.eu/social/main.jsp?catId=421&langId=en>

¹⁹ Guide of the European Commission, “buying social: a guide to taking account of Social Considerations”, 2011, p.18: <http://ec.europa.eu/social/BlobServlet?docId=6457&langId=en>

²⁰ Op.Cit., p.20



accessibility for people with disabilities as the most relevant social consideration without establishing any kind of hierarchy between the social considerations. To reduce the administrative burden, the EWL recommends to ask candidates to certify in a self-declaration that they respect and/or support equality between women and men during the selection process, by explaining briefly but concretely how and why they do so. To save time and money, verifications should be done only for the short-listed candidates (**questions 49 and 50**). It is more efficient to take gender equality into consideration from the very beginning of the process, but it should be included at every stage of the process and even combined to be more efficient and effective. Thus, including a gender perspective into the technical consideration can be an interesting starting point, as showed by the following British example:

A government agency is proposing to award a contract to publish a series of leaflets advising members of the public about the agency's services. The agency has taken particular effort to inform tenderers of its gender equality duty. The specification includes only limited requirements regarding the design, although requiring the proposed design to be approved by the agency before a leaflet is published. The specification does state, however, that the leaflets must not contain languages or images that might cause offence to women or girls or capable of being used to cause offence to women or girls.²¹

In addition to this, in the field of accessibility for disabled persons and as already stated in the EU Directive 2004/18/EC, tenders shall include technical specifications related to design for all requirements and accessibility for people with disabilities. These provisions should be strengthened and made compulsory, in line with what is done in other Countries such as the USA.²² These provisions will greatly contribute to changing practices both in the private and public sector with regard to women and men with disabilities and will have a considerable impact also at the economic level

However including social considerations such as gender perspective or accessibility into the technical consideration is not enough to ensure the full integration of a women's rights and gender equality perspective (**question 62**).

In addition, public authorities must deal with the exclusion criteria. In an exhaustive list of cases, the personal situation of a candidate or tenderer may lead to its exclusion from the procurement procedure in the case of a "grave national misconduct" punished by national law²³ (**question 104**). The EWL strongly believes that for example if a candidate has discriminatory practices regarding the equality between women and men or even does not have an equal opportunity policy, that should be considered as a "grave national misconduct" in every EU country. The EWL believes that is essential that the Commission introduces European rules concerning the factors that can conduct to the exclusion of a candidate. The purchasers should also consider the contract performance clauses; it is permissible to set additional conditions of contract, which are separate from the specifications, selection criteria and award criteria.²⁴ There is an opportunity to include social consideration related to gender equality at this stage, even if it is not the only relevant stage (**question 74**). For example, it is feasible to include a contract performance clause to build crèches services for staff's children into a contract.²⁵ This improvement would bring more equality between women and men and facilitate the women's access into the labour market (**question 75**).

²¹ Guidance for Great Britain: procurement, Gender Equality Duty, June 2007, p.23

²² Section 508, 1998, of the Rehabilitation Act

²³ Article 45 of the Directive 2004/18/EC

²⁴ Guide of the European Commission, "buying social: a guide to taking account of Social Considerations", 2011, p. 35 and 43: <http://ec.europa.eu/social/BlobServlet?docId=6457&langId=en>.

²⁵ Guide of the European Commission, "buying social: a guide to taking account of Social Considerations", 2011, p.43: <http://ec.europa.eu/social/BlobServlet?docId=6457&langId=en>



The EWL insists that gender equality can also be taken into account while reviewing a contract. As suggested by the UK example of gender duty²⁶, it will be useful for the authority to review past or current arrangements in the context of gender equality, making sure that the past enterprises were not discriminating against on grounds of gender nor there was no past opportunity to choose an arrangement promoting gender equality (*question 25*).

Existing good practices in EU member states

The EWL would like to emphasize some good practices across the European Union, which can be used by the European Commission to include a criterion of gender equality in the public procurement rules (*question 69*).

The report from the Belgian institute for women and men called: "Egalité des femmes et des hommes dans les marchés publics"²⁷ shows how it is feasible to integrate the criterion of equal opportunities, including gender equality, at every stage of the process. The criterion of quality, including equality, could be considered as an exclusion or selection criteria, it could be an award criteria of the contract and finally it could be included in the contract performances. In Belgium, the law of 2007 on gender mainstreaming states in the article 3, paragraph 3 that each minister « also ensures the inclusion of gender equality and gender mainstreaming in the context of procedures of public procurement and award of grants». SELOR, which is the office of the administration's selection, integrated the criterion of "equal opportunity" in some contracts. Regarding the contract about developing the selection's tests, equal opportunity was included in the award criteria of "quality of the test". This means that future bidders should ensure that enterprises respect some gender equality criteria: the methodology chosen to create the test should be gender neutral (i.e. not creating a disadvantage for male or female candidates) and as a contract performance, gender equality should be respected as well, i.e. by demanding to have a gender-balanced staff, for instance.

In Switzerland, the federal office for equal opportunity put in the national legislation on public procurement the principle of equal pay between women and men. When candidates compete to get a contract, they sign an official declaration stating their enterprises respect the principle of equal work for equal pay²⁸.

The EWL calls the European institutions also to take on board the equality duty proposed by the United Kingdom.²⁹ The Sex Discrimination Act 1975 (SDA) was amended by the Equality Act 2006.³⁰ According to this act, public authorities in England, Scotland and Wales, while carrying out their functions, have to eliminate unlawful discrimination and harassment, and to promote equality of opportunity between men and women. This duty, which is often referred to as the general duty, applies to all public bodies and to all functions of a public authority with effect from 6th April 2007. As explained in the UK report of 2007³¹, "the fact that public authorities are bound by the gender equality duty requires a three-pronged approach to procurement: ensuring generally that when public money is spent it supports the promotion of gender equality, incorporating gender equality requirements into the obligations of contractors, where appropriate to the performance of the contract³², incorporating gender equality into their procurement processes so far as is consistent with EU Rules and UK regulations". Government policy is that all procurement by public authorities

²⁶ Guidance for Great Britain: procurement, Gender Equality Duty, June 2007, p.19

²⁷ Institut pour l'Egalité des Femmes et des Hommes, *Egalité des femmes et des hommes dans les marchés publics : quelques recommandations*, 2007

²⁸ Loi fédérale Suisse sur les marchés publics du 16 décembre 1994, N°172.056.1, article 8 et 11

²⁹ Guidance for Great Britain: procurement, Gender Equality Duty, June 2007

³⁰ Equality Act, United Kingdom, 2006: http://www.legislation.gov.uk/ukpga/2006/3/pdfs/ukpga_20060003_en.pdf

³¹ Guidance for Great Britain: procurement, Gender Equality Duty, June 2007

³² As developed above, the EWL believes that gender duty could be included everywhere.



must be based on “user requirement”, which will include any relevant legal obligations of the contracting authority including, for example, health and safety or gender equality.

Amongst a lot of examples given in the report, showing that gender equality could be included in every kind of contracts, the EWL would like to emphasize three of them as example of good practices which can be useful for the European Institutions:

1) A contract to provide transport services for members of the public not only specifies the provision of vehicles that are suitable and safe for people with babies, small children or disabled people but also requires the contractor to train and supervise their staff to ensure that all passengers are treated with dignity and respect and that parents and carers or disabled people who may have problems in using their transport services and are given prompt and suitable assistance.

2) A contract for the training of newly recruited police constables includes a number of modules on crime prevention and protection of victims. In response to local concerns, and after consultation with members of the local crime and disorder reduction partnership, the chief constable has included in this contract a separate module on domestic violence. The contractor will be required not only to provide information on relevant legal and law enforcement issues but also to ensure that all trainees are sufficiently aware of the impact of domestic violence on victims and have the awareness and skills to provide appropriate support.

3) A contract for the repair and maintenance of street lighting requires the contractor to prioritise inspections and repair/maintenance of street lighting in areas/streets where women’s safety on the street is known to be a concern.³³

To conclude, the EWL would like to underline that the most important issue to be taken into account in the upcoming changes of the rules on public procurement is the inclusion of social goals in the framework of the Europe 2020 Strategy. Amongst these social characteristics, equality between women and men, which is transversal and has an impact on the society as a whole, should be high on the agenda of the public procurement rules’ reform. Public procurement is a very useful tool to achieve equality between women and men in the socio-economic field but also in other fields like violence against women, as shown above by the UK examples (*question 114*).

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The **European Women's Lobby** (EWL) is the largest umbrella organisation of women's associations in the European Union (EU), working to promote women's rights and equality between women and men. EWL membership extends to organisations in all 27 EU Member States and the three candidate countries, as well as to 21 European-wide organisations, representing a total of more than 2500 associations.

³³ Guidance for Great Britain: procurement, Gender Equality Duty, June 2007