

Commissioner Spidla  
Employment, Social Affairs and Equal Opportunities  
European Commission  
200 Rue de la Loi  
B-1040 Brussels

### EU Commission Guide on Socially Responsible Public Procurement

Dear Commissioner Vladimir Spidla

The European Commission is currently preparing a guide on social considerations in public procurement. A consultation on the outline of this guide was organised in the form of a meeting on 6 November 2008. The social partners have, on several occasions, tried to retain more information from the relevant DG Employment Unit on the draft guide. However the Commission services have so far declined to distribute the draft guide. Nevertheless the Commission has asked for a submission from the social partners.

The following comments are based on the oral brief given by the Commission at the meeting on 6 November 2008.

Recent developments, the failure of the financial sector and the crash down of the liberal market economy shows that the internal market cannot and should not be based solely on unrestricted competition. There is, now more than ever, a need for a fair Europe with clear regulations and guidelines on how to interpret and use Community rules and legislation. Public authorities need help to apply a fair and proper purchasing policy, making the best use of and getting the best value out of taxpayers money.

It should be pointed out that we have been waiting for this handbook for 4 years. The European social partners have, for a long time, carried out their own work to create clarity on how social, employment and ethical considerations can be included in contracting processes.

The private security sector (CoESS/UNI-Europa), the contract catering sector (FERCO/EFFAT), the cleaning industry sector (EFCI/UNI-Europa) and the clothing and textiles sector (EURATEX/ETUF-TCL) have published guidelines for companies and public authorities, which select their providers through public tenders. These guidelines were developed in the framework of the European Social Dialogue Committees of the four sectors and with the support of the European Commission. The Commission should recognise this joint effort of the social partners and quote the guides in a correct and appropriate way.

Besides the guidelines a conference was co-organised and financed by the European Commission on 18 April 2008. As a conclusion of the conference a joint declaration of UNI-Europa, EFFAT, ETUF-TCL and CoESS, FERCO, EFCI and EURATEX was adopted ("Towards a responsible awarding of contracts"). The conference gathered more than 200 participants including public contracting authorities and major (semi) state-owned companies as well as high-level representatives from the European Commission.

In the joint statement, the European social partners referred to the necessity to encourage and promote the awarding of contracts not simply on the basis of price but on the "economically and socially most advantageous tender" and that *"taking into account qualitative elements relating to, for example, the skills and capabilities of the provider, the company and contract management, the environmental footprint, the working conditions of workers along the supply chain and the respect of international labour standards, national laws and collective agreements including trade union rights is essential."*

The trade union movement has regularly detected and loudly denounced sales contracts between a user company or public body and a provider of services that put an unbearable pressure on workers or simply do not correspond to any financial reality, but open the door to undeclared work.

Therefore the joint statement also underlined that *"high competitive pressure leads providers to present very tight bids, often to the detriment of the quality of goods and services, working conditions and staff training. The situation can end up in unprofessional or even illegal practices, which are condemned by UNI-Europa, EFFAT, ETUF-TCL, COESS, FERCO, EFCI and EURATEX"* and called upon the European institutions to involve them in future policies on the topic.

It should also be kept in mind that the impact on employment and working conditions is a major concern for the workers of companies that are at risk losing a public contract every two or three years. Workers often feel a great uncertainty when they have to change employers. Especially since the EU legislation regulating the transfer of undertakings is implemented in a very heterogeneous way.

Furthermore, the Ruffert case (C-346/06) should not be used as an excuse to not include a text and guidance about the use of collective agreements in a handbook about social considerations in public procurement. If anything, there is an even greater need for legal clarification of the situation after the European Court of Justice ruling than before. In particular for those Member States that have ratified ILO convention 94.

In the Ruffert case the European Court of Justice interprets the Posting of Workers Directive (POWD) in the light of Article 49 EC (the freedom to provide services)<sup>1</sup>. The Court does not refer to the public procurement directives (2004/17/EC and 2004/18/EC) and no indication is given as to whether their interpretation of the POWD should give rise to a different implementation/use of the rules in the public procurement directives. The Ruffert case should not lead to the conclusion that collective agreements as such can no longer be part of public authorities social conditions/criteria in public procurement.

In fact such an interpretation of the Ruffert case and the Public procurement directives would run counter to the Courts conclusions in the Albany case (C-67/96), according to which competition law does not apply at all on collective agreements provided that these are aimed at improving working conditions. The Court excluded collective agreements from the scope of EU competition law because the objectives of collective agreements would otherwise be seriously undermined. If the use of collective agreements as a social condition/criteria were to be exempted from use in public procurement, the objectives of the public procurement directives

---

<sup>1</sup> C-346-/06 para. 36

would be seriously undermined. Furthermore, the Court has consistently supported the use of social and environmental criteria in public procurement<sup>2</sup>.

Therefore the Guide should underline the right of public authorities to, for example, demand that tendering companies commit themselves to paying wages that are in line with rates already agreed through collective bargaining at the place where the work is done. Environmental and social standards should be an element of the European social model and not seen as a barrier to unlimited freedoms of the market. A strict internal market approach will not provide public authorities with the flexibility they need when they wish to include a social clause in their public procurement tendering. The legal situation should be clarified to support public authorities that want to use social considerations in their tendering procedures. This is of vital importance for the Member States that have ratified ILO convention 94. They are bound by international law to include clauses ensuring the workers concerned terms and conditions of employment, such as wages, which are not less favourable than those established where the work is carried out.

These views and opinions are further developed in the annexed response from EPSU, UNI-Europa, EFFAT, EFBWW and ETUF-TCL.

Yours Sincerely,

Bernadette Ségol  
Regional Secretary

Copy John Monks, ETUC General Secretary

---

<sup>2</sup> C-513/99 and C-448/01

