

socialplatform

Social Platform response to the Green Paper on the modernization of EU public procurement policy

Introduction

Social Platform is the alliance of 46 European civil society organisations active in the social sector. Our members include organisations working with or representing the marginalised and socially excluded using services and those working as non profit social service providers. Due to their European and national experience, they therefore are well positioned to contribute to the Commission's work to promote an inclusive and sustainable development.

We welcome this consultation and the opportunity to contribute to the modernization of public procurement. The Social Services of General Interest (SSGI) provided by our members are non profit making and function in the social sphere; some of the services are considered as economic and some of them function in the context of the social economy. Their ultimate aim is social cohesion and social inclusion.

Our response will be limited to the questions on which our members have specific expertise.

Our main recommendations to the Commission are the following:

- To take the opportunity of the revision of public procurement legislation to make public procurement a tool to support the achievement of overall societal goals, in particular the promotion of fundamental rights, social inclusion and sustainable development. Public procurement rules should be used to deliver on the social targets of the Europe 2020 strategy.
- To amend the existing rules in order to recognise in law the specific characteristics of social services of general interest. Procurement rules should be designed to fit with the specific characteristics of social services such as service user choice, quality, sustainability, continuity, personalisation, integration of services, users' involvement and empowerment, partnership with communities and other actors¹.

¹ Social Platform, Nine principles to achieve quality social and health services, 2009; European Commission, Communication Services of general interest, including social services of general interest: a new European commitment, COM (2007) 725

- To adopt a consistent approach with the one shown in the recent Communication "Reform of the EU state aid rules on Services of General Economic Interest"².

CHAPTER I

Questions 4 and 5 on the distinction between A and B services, page 9

In the revision of the public procurement directives, the distinction between A and B services is to be maintained. Social services must continue to follow the regime currently in place for B-services, to subject them to only specific rules of the Directives (those concerning technical specifications and the publication of the results of the procurement procedure) and to the principles of non-discrimination and transparency.

It is very important to maintain the distinction between A and B services not to overburden public authorities (especially small contracting authorities) and social service providers with administrative procedures. Eliminating the existing distinction that provides for a simplified regime for certain services, including social services, would be inconsistent with the principle of applying a diversified and proportionate approach to different kind of services announced by the Commission in the revision of the state aid package to Services of General Economic Interest.

A simplified and flexible approach as to the applicability of public procurement rules to social services, which are often small and local with very little cross border dimension, has been suggested also by Professor Monti in his report "A new strategy for the single market" and is essential to recognize in law the specific characteristics of SSGI which were underlined by the Commission in [Communication \(2007\) 725](#).

Questions 6 on raising the thresholds, page 9

We are in favour of raising the thresholds, especially for contracts for the delivery of social services. With reference to social services, due to the large variety of sub-sectors and the diversity of costs of services in the member states, it is very difficult to indicate a specific threshold which is common to the 27 member states.

CHAPTER II

Question 19 on the negotiated procedure, page 15

Our response to this question is limited to procurement procedures for social services. The negotiated procedure WITH prior publication can be good for contracts for social services, especially when contracts regard new needs or new demands, new services and integrated services.

Question 25 on taking past performance into account, page 18

Public authorities should be allowed to take into account relevant information on the bidders during the selection phase. Candidates or tenderers who have not fulfilled obligations relating to the payment of social security contributions or to the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the contracting authority should be

² The Communication "Reform of the EU state aid rules on Services of General Economic Interest" indicates social services as one example of small-scale public services of a local nature with a limited impact on trade between member states for which the application of state aid rules could be simplified.

excluded from the procedure (now art. 45.2 of directive 2004/18/EC provides that they may be excluded).

Under the current legislation, "grave professional misconduct" may be an exclusion criterion, but this concept is not defined at European level. It would be worth that in the revision of the directives the European Commission gives at least an indication of situations that can lead to it, including some criteria of non-compliance with certain social obligations that can be qualified as "grave professional misconduct".

At the same time, it should be possible for public authorities to be informed on past failures to comply with commitments and with social obligations in other tenders. Suppliers who have shown in previous experiences commitment to social (and other public) policy objectives (i.e. ensuring of decent employment conditions, investment in training and up-skilling, employment of job seekers or of people with disabilities) could be favored at the selection stage of the procurement process.

Question 44 on sub-contracting, page 27

We would recommend restricting subcontracting to a certain share percentage of the contract and allowing public authorities to exert the same control on subcontractors as on contractors, including the possibility of rejecting proposed subcontractors and of providing with contract penalties for failing to deliver on sustainable development objectives in accordance with the criteria set out in the contract.

During the performance of a public contract, subcontractors have to comply with the laws and regulations, at both national and EU level, which are in force in the areas of employment conditions and safety at work, providing that such rules and the way they are applied are compatible with EU law. Subcontractors have also to be subject to the mandatory quality requirements specified in the contract.

CHAPTER IV

Question 62 on technical specifications, page 35

We consider that there is room for improvement of the current rules on technical specifications to better promote the achievement of other EU policy objectives, like:

- the objective of a "social market economy" (art. 3.3 TEU)
- the objective of sustainable development of Europe.

In particular the new rules on technical specifications should clearly allow including social considerations. So far the EC interpretation of the current EU rules allows public authorities to define what products and services they want to buy on the basis of economic or environmental considerations.

In most cases, to assess if a product or a service is sustainable requires consideration if it derives from a production process that is sustainable from the social, environmental and economic point of view. The *Wienstrom* case confirms that technical specifications could include production characteristics. Therefore, it is important to allow social considerations relating to the production process of the product or service at stake in the technical specifications of the tender.

We consider that while the "Guide to the application of the EU rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest" gives more room for the inclusion of social considerations in the technical specifications (paragraph 4.2.4 and 4.2.5), the Handbook "Buying social" promotes a more restricted interpretation.

Question 64 on accessibility criteria for persons with disabilities or design for all users, page 36

Even if article 23 of Directive 2004/18/EC stipulates that technical specifications set out in the contract documentation should address the issue of accessibility for people with disability and design for all users of the works, goods and services which are the subject of the contract, evidence shows that contracting authorities do not take sufficiently into account these fundamental principles.

The development of universally designed goods, services, equipment and facilities is also a legal obligation set out in the UN Convention on the Rights of Persons with Disabilities (art. 4.f and art. 9) which was concluded also by the European Union.

In cases in which it is not possible to define the technical requirements based on accessibility and universal design for all, we recommend that contracting authorities require bidders to include in the procurement file a specific document signed by a competent technician that expressly states that the criteria of accessibility and universal design for all have been taken into account.

Question 67 on restriction to local or regional suppliers, page 36

The area of social services is a key example where a restriction to local or regional suppliers could be justified by legitimate and objective reasons that are not based on purely economic considerations.

As highlighted by the Commission in Communication (2007) 725, the specific characteristics of SSGI are reflected in the way these services are organized, delivered and financed and territorial proximity is essential. In particular, "they often involve a personal relationship between the recipient and the service provider; ...are often rooted in (local) cultural traditions, tailor-made solutions taking into account the particularities of the local situation are chosen, guaranteeing proximity between the service provider and the user while ensuring equal access to services across the territory".

Therefore, in a public procurement procedure the requirement of familiarity with the local context or of prior experience with similar social and economic environments / type of services / type of users would be justified by the particularities of the service as strictly related to the performance of the contract.

Question 69, page 36

Social criteria should play a greater role in the selection process and assessment of the quality of a tender. Contributing to the provision of effective active inclusion approaches, and in particular personalized integrated support towards inclusion and social participation as well as decreasing unemployment especially for those who are the furthest from the labour market (single parents, long-term unemployed, people with disabilities, migrants, ethnic minorities,...) guaranteeing a decent quality of work – including living wages and good working conditions, combating discrimination and promoting equality including gender equality, systematic participation of users in the development and evaluation of the services, contributing to social cohesion and inclusion within the communities concerned.

Question 70, page 37

The criterion of the most economically advantageous tender seems to be the best suited for pursuing other policy objectives, but cannot be enough.

Please see our response to question 97.

Question 73, page 37

In some cases, also in the area of social services, it would be worth promoting a life-cycle approach while assessing cost-effectiveness of different services, in order to better guarantee the sustainability of services. With some services, it's important to look at the life cycle instead of initial costs, because certain initiatives might be more expensive at the beginning but in the long run they make more savings to the community.

For instance in the homelessness sector, for the funder, it is cheaper to finance homeless temporary hostels and emergency shelters in the short run, as opposed to building social housing, with independent units and floating support to house homeless people, which is initially more costly. However, research and evidence have shown that housing people in homelessness status lower the costs to the community in the long term, because they quickly move on to independent living, whilst people living in temporary hostels and emergency shelters rarely do so, thus depend on community support during their entire lives. This policy approach is also much more effective in ensuring social inclusion and ending homelessness.

Question 74 on social considerations relating to the employment and labour conditions, page 38

EU public procurement rules should clearly allow including social considerations throughout the whole public procurement procedure. More flexibility should be ensured to this respect.

The "Guide to the application of EU rules on state aid, public procurement and the internal market to SGEI and in particular to SSGI" expressively gives some examples of how social considerations relating to the employment and labour conditions of the workers involved in the execution of the contract can be included when setting out the technical specifications and the selection criteria. These examples are described as a way to include quality requirements. Therefore, we wonder why this possibility should be questioned in the Green Paper.

In the area of social services, social considerations relating to the employment and labour conditions of the workers can be included in the selection criteria to evaluate the technical capacity of the bidder, by requiring a particular professional experience or staff qualifications³.

They can also be included while setting out the technical specifications: for example, the contracting authority may require specific staff qualifications or a proper level of training or remuneration to ensure that the different and multiple needs of different categories of users of a service are likely to be satisfied⁴.

Limiting the inclusion of social considerations related to employment and labour issues to the contract performance clauses means limiting the capacity of public procurement policy to ensure a high quality of delivery of social services and to achieve other policy objectives, like decent work, gender equality, social cohesion, sustainable development.

We would suggest the European Commission, as already foreseen in the "Buying social" Guide⁵, keep on encouraging public authorities to include, where suitable, in contract performance clauses social considerations intending to promote, for instance, on-site vocational training, the employment of people who are the furthest

³ European Commission, Commission Staff Working Document "Guide to the application of EU rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest", paragraph 4.2.5, page 65

⁴ European Commission, Commission Staff Working Document "Guide to the application of EU rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest", paragraph 4.2.5, page 64

⁵ European Commission, Buying Social – A Guide to taking account of social considerations in public procurement, page 44

from the labour market, the recruitment of long-term job seekers, the compliance with the provisions of the basic International Labour Organisation (ILO) Conventions, to recruit more disabled persons than are required under national legislation (in the countries where quota systems exist).

Questions 79, 82.1, 82.2, 82.3, 82.4 on the link with the subject matter / execution of the contract, page 40-41

The condition that requirements imposed by the contracting authorities must be linked with the subject matter of the contract should be softened or dropped.

This could allow for instance employing unemployed people, people with disabilities, etc.

The advantages of this choice would ensure a more efficient and transparent way in which public procurement achieves other policy objectives and are the most appropriate to contribute to the achievement of the social targets of the Europe 2020 Strategy by fostering the mainstreaming of social inclusion within all the 3 pillars of this Strategy.

If the EU really wants to mainstream the horizontal objectives of a “social market economy” and of sustainable development and make good use of art. 8, 9 and 10 TFEU (equality, social clause, anti-discrimination), it should promote a more flexible approach for these policy objectives to be reached also through public procurement policy.

It is important that public authorities that want to buy sustainable goods and services can state this openly in the subject-matter of the contract. See also our response to question 62.

We consider that EU public procurement legislation should allow contracting authorities to apply selection criteria based on characteristics of providers that are not strictly speaking linked with the subject of the contract (e.g. requiring bidders to have a gender-equal employment policy or to employ certain quotas of jobseekers, persons with disabilities or belonging to a specific minority, etc.).

We recommend a more flexible and proportionate approach by loosening or eliminating the link with the subject matter of the contract throughout the different stages of the procurement procedure to improve the achievement of other policy objectives.

Questions 83, 84, 85, 86 on what to buy to achieve other policy objectives, page 43-44

The EU level obligations on “what to buy” can be improved and that can be a good way to achieve other policy objectives.

Further obligations could be imposed under general EU public procurement legislation to ensure a coordinated approach for the contracting authorities in all the EU Member States on what to buy so as to fully deliver on the headline targets of the Europe 2020 Strategy. For instance, public authorities could be obliged to take social impacts into account in their public procurement decisions. These obligations would be complemented at national level to take into account socio-economic specificities.

Obligations on “what to buy” related to equality between women and men are an example of policy area where EU rules could be useful to achieve a fundamental objective of the EU.

Some good practices in different member states could be used by the Commission to include a criterion of gender equality in public procurement rules: the report from the

Belgian Institute for women and men⁶ shows how it is feasible to integrate the criterion of equal opportunities at every stage of the procurement process. Another useful instrument is the Equality Duty proposed by the United Kingdom⁷.

CHAPTER 4.4 "SOCIAL SERVICES"

Questions 97-97.1-97.1.1, page 48

The recognition of the specific characteristics of SSGI has to be the starting point for amending existing rules.

In the specific area of social services, the criterion of the lowest price only has to be abolished. The way public procurement is often carried out can have a significantly negative impact on the quality of social services, as concluded by several of our members who are social services providers. Our members testify that in the social sector the prices of services have often been decreased mainly by reducing salaries: tendering procedures are having a negative impact on staff training and qualification which affect the capacity of social services to provide quality services⁸. To this tendency which is due to an incorrect way of carrying out public procurement, one has to add the worrying impact that ongoing austerity plans have led to reduce the means available for social services and to measures more directly affecting the workers in the social services sector⁹.

Public procurement rules set out at EU level should take into account that quality is an essential dimension - and not an extra added value - in the provision of social services and should therefore be designed to encourage and motivate public authorities to set up tendering procedures that ensure that high-quality social services are delivered across Europe.

Therefore, while tendering for social services, when the award is made to the most economically advantageous tender, the criterion of quality has to be compulsory and should be given a mandatory weight which is higher than the one that is given to the other criteria (recommendation no. 15 of the Third Forum on SSGI suggests a weight of more than 50%).

Public procurement should become a tool by which to reflect in public contracts compulsory national or regional quality requirements in those countries where relevant legislation is in force and encourage the promotion and implementation of quality criteria in those member states where such legislation does not exist, such as by making use of the Voluntary European Quality Framework for social services.

It is also very important to make a distinction between the existence of laws that impose quality standards and the quality of services as laid out in contracts. The existence of such national laws does not necessarily mean that contracts are designed and performed in a way that quality is ensured.

Question 97.1.2 on reserved contracts, page 48

We consider that the option to reserve contracts shall be maintained.

Reserved contracts have been seen to be a useful tool to facilitate the insertion of people with disabilities in the labor market.

6 Institut pour l'égalité des femmes et des homes, Egalité des femmes et des hommes dans les marchés publics : quelques recommandations, 2007

7 Guidance for Great Britain: procurement, Gender Equality Duty, 2007

8 Informal Network of Social Services Providers, Seminar "Impact of EU legislation on social services", Brussels, September 29, 2009

9 European Commission, Commission Staff Working Document, Second Biennial Report on social services of general interest, page 36

To give an example, reserved contracts reflect a long tradition of promotion of active inclusion policies by the means of public contracts in Italy. Art. 5 of the Italian Law no. 381 of 1991 on social cooperatives provides that public authorities by derogating from the legislation governing public administration contracts, can make agreements with social cooperatives of type B (development of DIFFERENT activities - agriculture, manufacturing, commerce or services – aiming at the job insertion of people defined “disadvantaged” by law) or similar bodies from other member states for the provision of goods and services different from the ones provided by type A cooperatives (social, health and educational services). This applies to contract of an amount that is below the EC threshold. The selection of the provider has anyway to comply with the principles of best value for money, transparency, good administration and non discrimination.

The derogation to the rules governing contracts with public administrations is meant to compensate the disadvantage cooperatives B meet when they deliver a service or sell goods (beside the sale of goods or services which represents the formal object of a contract, cooperatives B also provide the “service” of work placement for disadvantage people). The consequence is that social cooperatives are at a disadvantage compared to other enterprises that in principle can offer the same service or good at a lower price than that offered by social cooperatives, since working with disadvantaged people results in an increase of costs of production.

The transposition of art. 19 of directive 2004/18/EC in the Italian legal order has provided another opportunity for public authorities to reserve contracts to “sheltered workshops” and “sheltered employment programmes”, which under certain conditions can include cooperatives of type B and similar bodies from other member states.

In the revision of the directive, the Commission should consider extending the reserved contracts to other categories other than people with disabilities, such as people furthest from the labour market, including people experiencing poverty and social exclusion.

Question 97.1.3, page 48

Abolishing the lowest price criterion while tendering for social services and reserving contracts to certain types of organizations do not bring at all more costs to the community. On the contrary, it is a saving to the community, because with a procurement procedure you can award a service contract and achieve at the same time social inclusion objectives. If contracts are awarded in a transparent manner according to the most advantageous economical offer, with sub-criteria clearly specified and quality criteria given a higher weight, best value for money is achieved and this is how lowest cost to the community should be perceived. It is a political choice of public authorities to choose the best award criterion to ensure the provision of high-quality social services, which the criterion of the lowest price only does not allow to. If public authorities concentrate just on the lowest price, it is clear that their priority is not quality of social services but cutting public expenditure to the detriment of quality and social service users.

Public procurement has not to be a mean for public authorities to indiscriminately cut public expenditure on essential services for citizens.

Question 97.2, page 48

Thresholds for social services should be increased. See our answer to question no. 6.

PROMOTION OF THE EXISTING ALTERNATIVES TO PUBLIC PROCUREMENT

In the area of social services, the way public procurement is often carried out can have a significantly negative impact on the quality of services, as concluded by several of our members who are social services providers. They published a [report](#)¹⁰ showing that: for example, tendering procedures demand a price bid and an exact definition and description of all services covered and this tends to lead to standardized lists of services; tendering is inappropriate for social services working with people having multiple needs. Integrated and continuous service delivery can be affected (integration of services is affected by the practice of splitting very complex services in different bids; continuity is affected because of a tendency towards short term contracts which can be lost to other providers; personal relationship may be lost). Tendering tends to drive service providers towards traditional service models with little room for innovation.

Social services should be defined, developed and implemented in partnership with all relevant actors, including users and non profit service providers. Social services must be developed in partnership with service users based on their individual needs and aspirations, in line with the provisions of the UN Convention on the Rights for Persons with Disabilities that confirm the right of persons with disabilities to make choices about their lives. In many European countries, indeed, non profit providers are not just providers, but also public authorities' partners that contribute to the definition, planning, implementation and evaluation of social services.

The Third Forum on SSGI called for promoting the alternatives to public procurement for supplying SSGI, as more and more SSGI are confronted with a public procurement logic that does not seem to be the best option when outsourcing / delegating a given service (recommendation no. 13). The discussions held at the 3rd Forum highlighted that there are different ways to select providers but also different forms of service delivery. Other forms of financing allow to a better extent to manage flexibility, personalization of services and innovation, which are essential for quality social services.

Our recommendation to the Commission is therefore to clarify when the existing alternatives to public procurement are allowed, starting from the experience of many member states, insofar these alternatives correspond to the historical and operational specificities of most of SSGI and allow them to fulfil at best their mission of general interest and to ensure the participation of social service users.

Also the Council invited the Commission to clarify and provide more information on existing alternatives to public procurement when member states choose to outsource the provision of social services of general interest.

NEED TO CLARIFY THE CONCEPTS OF "REMUNERATION OF A SPECIFIC SERVICE" AND "FINANCING OF AN ACTIVITY"

We consider that the Commission should provide further clarification on the concepts of "remuneration of a specific service" and "financing of an activity". We do not think that the clarifications contained in the Guide to the application of EU rules on state

¹⁰ Informal Network of Social Services Providers, *Seminar "Impact of EU legislation on social services"*, Brussels, September 29, 2009

aid, public procurement and the internal market to SGEI and SSGI (paragraph 5.2) are enough.

We consider it necessary to bring the definition of "public contract" in the public procurement directive in line with the EUCJ case law, limiting the contracts covered by the directive to purchase contracts.

There are some examples of national legislations in which this distinction is much clearer. For instance in France there are three relevant laws:

1) France instruction fiscale of 28/08/2001, article 1: « les marchés publics sont des contrats conclus à titre onéreux avec des personnes publiques ou privées par des personnes morales de droit public, pour répondre à leurs besoins en matière de travaux, de fournitures ou de services » (code des marchés)

Les subventions constituent une contribution financière de la personne publique à une opération qui a un caractère d'intérêt général, mais qui est initiée et menée par un tiers pour répondre à des besoins que celui-ci a définis. Dans le cas de la subvention, la somme d'argent n'a pas de contrepartie directe pour la personne publique; dans le cas contraire, en présence de contrepartie directe pour la personne publique, il s'agit d'un marché public ».

2) Définition de l'activité économique en droit français:

L'activité économique s'exerce « non pour les besoins personnels de celui qui s'y livre, mais en vue de satisfaire les besoins de tiers exprimés sur un marché »

3) L'instruction fiscale de septembre 98 définit les conditions et critères d'exemption de la fiscalité commerciale pour les organismes à « gestion désintéressée et d'utilité publique ».

Il s'agit de la règle dite des 4 « p »:

Le produit: il vise à satisfaire un besoin qui n'est pas pris en compte par le marché ou qui l'est de façon non satisfaisante.

Le public: sont d'utilité sociale les actes au profit de personnes justifiant l'octroi d'avantages particuliers au vu de leur situation économique et sociale. Ce critère ne doit pas s'entendre des seules situations de détresse physique ou morale.

Le prix: il convient de prendre en compte les efforts faits par l'organisme pour faciliter l'accès du public notamment par un prix nettement inférieur à celui des entreprises du secteur lucratif. Cette condition est respectée lorsque les tarifs de l'organisme sont homologués par décision de l'autorité publique.

La Publicité: Le recours à des pratiques commerciales de publicité est un indice de lucrativité; toutefois une information qui se distingue de la publicité est compatible avec le statut non lucratif.

Question 114 on ranking of the importance of the various issues, page 55

For us the most important issues are the following:

- questions 5 and 6 on the distinction between A and B services
- chapter 4.4 on social services, in particular the issue of quality and the abolishment of the lowest price criterion
- question 113 in which we highlighted the need of clarification on when the existing alternatives to public procurement as regards social service delivery can apply; and the need of clarification of the concepts of "remuneration of a specific service" and of "financing of an activity"
- questions on "how to buy", including technical specifications, award criteria, contract performance clauses and link with the subject matter

- questions on "what to buy".

Contact person for this paper:

Valentina Caimi – Policy Officer

Telephone +32 (0)2 5081636 – email: valentina.caimi@socialplatform.org