



SOLIDAR CONTRIBUTION TO EUROPEAN COMMISSION GUIDE ON SOCIALY-RESPONSIBLE PUBLIC PROCUREMENT

Introduction

SOLIDAR welcomes the invitation by DG EMPL to contribute to the Commission Guide on socially-responsible public procurement (SRPP). SOLIDAR is both a network of NGOs providing personal social services and of NGOs active in the fields of development cooperation, humanitarian aid and lifelong learning.

SOLIDAR considers this as an important and timely initiative for three reasons:

- 1- Given the growing economic importance of public procurement.
- 2- Due to the increased use of this instrument for buying goods or delegating services to third parties, also in the field of social services of general interest.
- 3- Due to our involvement in the promotion of the decent work, decent life agenda in alliance with trade unions (ITUC and ETUC), other NGOs (Global Progressive Forum and Social Alert), and in partnership with the ILO.

SOLIDAR would welcome the possibility to comment on a final draft version of this Guide and offers its expertise in view of becoming involved in follow-up processes once the Commission Guide on SRPP is published.

SOLIDAR's input is structured into three sections:

- 1- Highlights selected issues referring to a feasibility study on the incorporation of social considerations in public procurement. Reflecting both views from our members and building on evidence from the ground, i.e. experiences reported back from them, in particular from a SOLIDAR seminar¹.
- 2- Presents an assessment of selected challenges related to the usage of public procurement in the field of social services. Referring to the above-mentioned Decent Work Decent Life campaign² and to a campaign run by SOLIDAR member Swiss Labour Assistance.
- 3- Comments on the inclusion of social considerations in public procurement related to decent work.

¹ TSEN/CSV/SOLIDAR (eds.): Lessons from Europe. Conference Report. A comparative seminar on Commissioning from the Third Sector in the EU. 13 March 2008, London, see SOLIDAR Weekly Round Up of 7 November 2008. http://www.solidar.org/Page_Generale.asp?DocID=13958&thebloc=19916

² See <http://www.decentwork.org/>

1. Commission Feasibility Study on Incorporation of Social Considerations into Public Procurement

Public procurement markets are currently worth more than one sixth of the EU's GDP, a dimension that makes obvious the need to also shape them around social, ethical or environmental considerations and objectives as defined by governments and public authorities at national, regional and local level. Only this will allow a frequent and comprehensive implementation of policies supportive of the realisation of the shared values of the EU (including dignity, solidarity, justice, equal opportunities) and of the individual and collective rights as enshrined Charter of Fundamental Rights.

SOLIDAR asks the Commission Services to **explicitly list and incorporate in the Guide all categories of social considerations** identified in the feasibility study (and wherever appropriate to boost an extended use to include examples of good practice)³. A limited number of social considerations have been already stipulated in the Directive 2004/EC/18 (those intended to favour on-site vocational training; the employment of people experiencing particular difficulties in achieving integration into the workplace, in particular for persons with disabilities in sheltered workshops; the fight against unemployment and the protection of the environment). **SOLIDAR suggests taking up this list by restating these and by adding additional social criteria safeguarding the realisation of the following objectives:**

- Promote employment opportunities and lifelong learning possibilities for elderly and young people;
- Support social inclusion for disadvantaged persons (e.g. from ethnic minorities) or vulnerable groups (e.g. handicapped persons);
- Improve the accessibility of buildings and the design of services;
- Promote equal opportunities, non-discrimination, gender equality and mainstreaming;
- Promote small and medium-sized enterprises, and the diversity of suppliers to provide for a level playing field for NGOs (as administrative procedures related to the inclusion of social considerations should not overburden small and medium-sized enterprises affecting the overall diversity of suppliers, especially local suppliers);
- Support organisations from the social economy in view of the objectives listed above;
- Promote decent working conditions (e.g. equal pay; non-discrimination in the workplace; realisation of individual and collective labour law; prohibition of forced and child labour);
- Promote fair and ethical trade.

The Guide must be instrumental in providing **more legal clarity on the applicable Community framework related to the usage of social and ethical considerations**. This is a key precondition to **encourage procurement agencies to opt, as a rule, for the economically most advantageous offer**. Our members report that these two deficits have been, as a rule, preventing public authorities that are procuring for goods or services from including social and ethical considerations more often and more comprehensively. SOLIDAR members' experiences add to a large body of evidence from various countries and different economic sectors, in particular construction work and cleaning services, but also social, health and education services, that raise the concern that competent public authorities in most cases retain the offer with the cheapest price (not least due to legal unclarities and fearing legal disputes where unsuccessful bidders launch infringement procedures).

³ Cf. p. 10 and 11 of Study on the incorporation of Social Considerations in Public Procurement in the EU. Proposed Elements for taking account of the Social Considerations in Public Procurement, 21st July 2008, accessed from <http://ec.europa.eu/social/main.jsp?catId=331&langId=en>

The Guide should suggest to public authorities the **setting up of procedures and monitoring and evaluation mechanisms** of the actual implementation of social considerations in public procurement and of their effects in view of the realisation of the policy objectives intended with their inclusion.

SOLIDAR calls upon the Commission to make a clear distinction while drafting the Guide between **social and ethical considerations to be used to safeguard decent working conditions in national, regional and local labour markets in the EU** (the 2008 ECJ rulings Viking, Laval, Rüffert and Luxembourg/Commission urgently highlight the need of a different approach in view of their full recognition), and those other stipulations to promote the **application of core labour standards set by the ILO in developing countries**, e.g. to be included in and to become an integral part of GATS agreements.

2. Selected Challenges when Using Public Procurement in the Field of Personal Social Services - when Social Considerations are Included or Not

In the wake of processes to restructure modalities of organisation, regulation, provision and financing in basically all EU Member States (also influenced and framed by Community law and policies), public procurement has become a key issue for providers of social services of general interest. The **explicit recognition of social considerations** (see bullet points 1-6 under heading 1 above) is expected **to advance the broadly shared aim that the realisation of general interest objectives has to prevail over obligations set by Community rules on competition, state aid, public procurement and internal market**. SOLIDAR is convinced that in doing so, the Guide could be instrumental in supporting the explicit acknowledgement of the specific functions of personal social services, of specific characteristics of their users and of their specific organisation and regulatory modalities.

This could also **help in view of reducing negative consequences on working conditions of qualified staff** linked to the usage of public procurement in the field of social services of general interest. Evidence from the field of labour market placement and professional training services in Germany, for example, shows that following a fall in prices (i.e. prices offered to win public tenders and consequently paid by public authorities to successful tenders, entailing a general downwards spiral) meant that considerably lower wages were paid, the number of precarious and fixed-term contracts strongly increased, and wage schedules (for new contracts or personnel entering the labour market) were downgraded.

Experience from across Europe suggests that **social and ethical considerations are clearly under-utilised**. Unless commissioning procedures also include them, marketisation of personal social services can lead over time to negative consequences for communities, users and providers, such as the demise of small, locally-based suppliers (also entailing a reduction in local social capital). Legal certainty about the possibility to include social considerations (and the political commitment by government and procurement agencies) will become even more important as we witness a **shift towards long-term, large-size and large-scale contracts**, at least in some countries and sectors.

SOLIDAR suggests the explicit mentioning in the Guide of evidence from a large body of analyses, concurring with experiences on the ground by SOLIDAR members, that the **quality of services of general interest**, in particular of personal social services, is as a rule influenced by

the extent to which a service is embedded at local community level (including, where appropriate, the involvement of volunteers).

Building on insights and conclusions from a comparative seminar (cf. fn 2), SOLIDAR underlines that **social considerations allow public bodies to embody in their procurement policies their mission to deliver services of general interest**, entailing a number of advantages:

- Focus on the impact or long-term outcomes of service delivery;
- Achieving multiple aims at the same time, e.g. purchasing services and tackling professional qualifications and employability issues;
- Defining criteria that allow to justify retaining the economically most advantageous offer and giving a high(er) weight to selection and awards criteria related to service quality in the broad sense;
- Getting better and more innovative services: by using social considerations, put service providers with strong social commitments in a better position of winning the tender;
- Returns on money spent: economic benefits and advantages for the society as a whole;
- Strengthening the value-base of decisions as public authorities are supposed to operate on a strong ethical basis. The possibility to promote “public good” in a transparent and non-discriminatory manner.

Concerning the **inclusion of social criteria in public procurement**, SOLIDAR would like to point to the following issues:

- SOLIDAR underlines the need and importance for procurement agencies to work towards a common understanding of social considerations, in particular concerning employment and social inclusion;
- The Guide should highlight the importance of SRPP-related training of personnel working in procurement agencies;
- The Guide should encourage procurement agencies to set up administrative and reporting procedures allowing them to check applicants for their compliance with a set of criteria demonstrating adherence to a SRPP agenda;
- In SOLIDAR’s view, the Guide should include a recommendation to extend all SRPP-related provisions to subcontractors too;
- The Guide should encourage procurement agencies to include social considerations in tender documents (under technical specifications), as contract clauses and as award criteria;
- The Guide should encourage procurement agencies to design contractual arrangements that link social inclusion clauses with measures of labour market inclusion and/or professional training for disadvantaged or vulnerable persons.

3. Comments on the Inclusion of Social Considerations in Public Procurement related to Decent Work

The two elements related to project work linked to decent work, sketched out below, illustrate the **indispensable need and indubitable usefulness of having a broad range of social and ethical considerations explicitly acknowledged and promoted at European level** to legally frame, positively influence and/or support policies at national, regional and local level.

SOLIDAR member Swiss Labour Assistance is running a successful **campaign on fair public procurement** (see <http://www.kehrseite.ch/>). The organisation has prepared information material as well as a guide on fair and ethical public procurement for municipalities (available

both in German and French). An important number of local parliaments and public authorities have been asked to screen their public procurement practices and to legally and contractually oblige all providers of goods and services to apply the ILO core labour standards and relevant national law. They are also requested to report on their strategies and future commitments towards social, ethical, sustainable and green procurement.

The non-inclusion of social and ethical considerations favours a **race-to-the-bottom competition which in turn will increase the number of working poor or those working under precarious conditions** and therefore entail mid- and long-term direct and indirect costs for societies in Europe and across the world (to be finally borne by all taxpayers) that could, and must, be avoided. SOLIDAR is strongly concerned by the impact that the ECJ rulings Viking, Laval, Rüffert and Luxembourg/Commission may have on public procurement policy. These rulings, especially the Rüffert case, which opened the door to a 'competition at all price' entailing a **cheapest offer-based competition** among potential tenderers, and generate general pressure to lower local labour cost and labour security standards, as well as to degrade individual or collective labour rights. They also **discourage the ratification and application of ILO Convention 94** (Labour Clauses in Public Contracts Convention) which stipulates that all tenders apply the best conditions of employment in force at the local level.

SOLIDAR therefore encourages work and legislative initiatives towards the **recognition of a broad range of social considerations including those related to decent working conditions**, not least as a **strengthened reference point when applying the Posting of Workers Directive**. SOLIDAR calls upon the European Commission to reinforce Community public procurement rules, including those based on the Commission Guide on SRPP, as well as:

- Explicitly excluding from public procurements those undertakings which have been sentenced for violation of workers' safety legislation (article 45.1, Directive 2004/18/CE);
- Extending the application of exclusion criteria as per article 45 Directive 2004/18/CE to subcontractors. Subcontractors should be included in the tenderers' offer and present all documents related to labour law legislation in the offer (especially those related to health and safety at work) during the award procedure;
- Reinforcing tenderers' responsibility with respect to subcontractors' violation of social legislation;
- Prohibiting the exclusive application of the 'lowest price' principle as adjudication criteria (as it used to be in Italian legislation);
- Introducing the possibility to use social criteria as award criteria (article 53 of Directive 2004/18/CE), namely those related to job stability.

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SOLIDAR is a European network of 50 NGOs and labour movement organisations working towards all people living in dignity. Working in alliance with trade unions, SOLIDAR promotes equality, solidarity and social justice in the fields of social affairs, international cooperation and education in Europe and worldwide.
For more information visit www.solidar.org