



EASPD Response to the Green Paper on the modernisation of EU public procurement policy
Towards a more efficient European Procurement Market

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Introduction

EASPD is the European Association of Service providers for Persons with Disabilities and promotes the equalisation of opportunities for people with disabilities through effective and high quality service systems in Europe. EASPD represents about 9,000 service providing organisations across Europe and across disability.

EASPD welcomes this consultation and the opportunity to contribute to the discussion on the modernization of public procurement rules in the EU. In replying to this consultation, EASPD would like to stress the fact that there are 2 areas of concerns for social service providers for persons with disabilities: the first one is about social considerations to build in any public procurement process, which should be a tool for social inclusion thanks to practices such as employment of people with disabilities or sound working conditions for staff; the second one is about the public procurement of social services themselves, which should respect the specificities of the sector. EASPD thinks that it is really important to make the distinction between procuring support for vulnerable people and procuring goods, for example. This is why particular considerations must apply in order to make procurement procedures "fit" with social services and their missions and with concepts such as service user choice, control, inclusion, personalisation, sustainability, continuity, partnership between social service providers and users and partnerships between specialized and mainstream services, if the desired social benefit - which is the entire purpose of the service, not just an "extra added value" - is to be delivered.

A further, important consideration that EASPD would like to make is that clear reference to the principles enshrined in the UN Convention on the Rights of Persons with Disabilities should be made, as well as other relevant international covenants, wherever applicable.

Finally, EASPD and its member wish to highlight once more that using public procurement rules in the field of disability is about people and not about products. The core values of human relationships and trust must be paramount when making decisions concerning personal social services (which are often of an intimate nature) for disabled citizens. Changes that impact on an individual's service and hence their independent living (even in terms of new personnel such as a personal assistant) need to be carefully planned and orchestrated around the needs of the person. This person centred approach is

at the core of our thinking and informs our answers to the consultation. It is based on these considerations and on the experience of our members who deal with procurement procedures in their daily work that we would like to point out the fact that there is very little evidence available showing that procurement can bring better quality of services or can ensure a better use of public money. On the contrary, there is evidence of the negative effect it has had on quality and continuity of service provision and of the additional burden, in terms of workload and resources, it has brought both to local authorities and to bidders.

EASPD answers to the Green Paper:

Public contracts:

A/B services:

4. Do you think that the distinction between A and B services should be reviewed?

5. Do you believe that the Public Procurement Directives should apply to all services, possibly on the basis of a more flexible standard regime? If not please indicate which service(s) should continue to follow the regime currently in place for B-services, and the reasons why.

EASPD understands that the distinction between A and B types of services can be difficult to manage and be a source of difficulty for the public authorities applying Directive 2004/18/EC. Nevertheless, we think that this distinction should be maintained, clarified and strengthened, so as to clear any doubt that might arise from the non exhaustive list of services included in annex II B of the Directive.

In the tendering of social services for people with disabilities, a lot of difficulties arise from the obligation that local authorities have in terms of the need to advertise a contract opportunity, as the principles of fairness, transparency, non-discrimination appear to mean that all these opportunities must be openly advertised. This creates a lot of difficulties because local authorities believe that they are simply not allowed to renew or extend an existing contract without advertising it.

The cross-border interest for contracts for this type of services seems to be rather low, given their strong, local nature, generally low economic value and the fact that they are about providing support to vulnerable people. We think that the distinction between A and B types of services should therefore be strengthened, with respect to the nature of the contract and the levels of disruption, unnecessary cost, damage to the market and to the support to vulnerable people which are likely to result from advertising an existing contract.

Thresholds:

6. Would you advocate that the thresholds for the application of the EU Directives should be raised, despite the fact that this would entail at international level the consequences described above?

We are in favour of the threshold of application of the Directive being raised.

**Modernise procedures:
General Procedures:**

15. Do you think that the procedures as set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes? If not: How should the procedures be improved in order to alleviate administrative burdens/reduce transaction costs and duration of the procedures, while at the same time guaranteeing that contracting authorities obtain best value for money?

EASPD thinks that the current procedures as set out in Directive 2004/18/EC do not necessarily allow public authorities to obtain the best possible procurement outcomes. We would suggest that the procedures could be significantly improved in relation to social services for vulnerable people by permitting authorities more latitude in respect of contract renewal and extension, based on evidence of best value, provider performance and above all level of satisfaction of the service users. We would like to stress once more the high levels of risk of disruption and damage that are linked with re-tendering of social care contracts every few years.

16. Can you think of other types of procedures which are not available under the current Directives and which could, in your view, increase the cost-effectiveness of public procurement procedures?

In relation to this question, a procedure which is not addressed in the Directives is that of Individualised Budgets for social care and direct payments to service users, where the authority remains the purchaser on behalf of an individual, and how much such a situation is affected or not by procurement procedures.

More negotiation:

19. Would you be in favour of allowing more negotiation in public procurement procedures and/or generalizing the use of the negotiated procedure with prior publication?

EASPD is in favour of allowing more negotiation in public procurement procedures. This could be particularly valuable in respects of existing contracts for social services, because of the risks of disruption and the importance of continuity and stability of service provision for vulnerable people. In order to ensure the proper functioning of this procedure, it will be necessary to ensure that there are no major performance issues on the part of the incumbent provider. Performance in this respect should be assessed including the point of view of the service users.

This procedure could also be useful for new contract opportunities since it has proven to allow for providing evidence about a provider's ability to implement high quality services, promoting innovation, taking account of user needs and demands.

Innovation has been hindered by the use of procurement procedures for different reasons. On the one hand, local authorities usually tender contracts for "tried and tested" solutions only, something that has a direct and clear impact on the possibility for providers to offer new, innovative types of services. Moreover, the usual timeframe for contracts is of 3 to 5 years, which makes long term developments in the sector difficult because of the short time span of guaranteed operation. Allowing for more negotiation with prior publication would clear at least one of these obstacles.

21. Do you share the view that a generalised use of the negotiated procedure might entail certain risks of abuse/ discrimination? In addition to the safeguards already provided for in the Directives for the

negotiated procedure, would additional safeguards for transparency and non-discrimination be necessary in order to compensate for the higher level of discretion? If so, what could such additional safeguards be?

Transparency and accountability will have to be ensured throughout the process to avoid the risk of abuse and discrimination.

Selection and award:

24. Do you consider that it could be justified in exceptional cases to allow contracting authorities to take into account criteria pertaining to the tenderer himself in the award phase? If so, in which cases, and which additional safeguards would in your view be needed to guarantee the fairness and objectivity of the award decision in such a system?

EASPD would like once more to underline the necessity of understanding the special characteristics of social care services and how service provision and its quality can be impacted by the use of public procurement procedures. We are of the opinion that, when awarding social services contracts, it is absolutely essential to give due consideration to prospective providers' "experience, manpower and equipment", in the broadest sense of the terms. Our members point out that one of the major problems with the application of procurement processes to social care is the inability of the purchasing authority to test capacity of providers to deliver services (and we would like to add of high quality services) in any reasonable way - the consequences of this have been seen in a number of cases in very poor quality of service delivered to vulnerable people. We therefore think that when awarding social care contracts, public authorities as a general rule should be allowed to take into account prospective providers' experience and ability in delivering services.

25. Do you think the Directive should explicitly allow previous experience with one or several bidders to be taken into account? If yes, what safeguards would be needed to prevent discriminatory practices?

We would like to reiterate our answer given to preceding questions, and highlight the fact that, in the provision of social care services to vulnerable members of our communities, it is essential to discriminate between providers who can bring evidence supporting their ability to provide high quality services, and those who cannot.

Furthermore, allowing public authorities to take past performance of bidders into account could also be useful in terms of pursuing social added value – i.e., checking their previous commitments on social considerations, their employment conditions, their level of investment in skills and training, employment of people with disabilities, etc. All these items play a very important role in determining quality of social services, for example, as staff costs are the highest proportion of the costs of running a social service. To this end, public authorities should be allowed the tools to be able to be informed about past record of compliance with social obligations.

Public authorities often don't have the means or resources to actually monitor if the quality of service "promised" within the bid is actually delivered by the service once the contract has been awarded – this is an extra reason why all possible steps should be taken prior to contract award to consider the ability of the provider to deliver high quality services and that performance in this respect should be assessed with the inclusion of service users views.

Specific instruments for small contracting authorities:

A lighter procedural framework for local and regional contracting authorities for the award of contracts above the thresholds of the Directives:

27. Do you think that the full public procurement regime is appropriate or by contrast unsuitable for the needs of smaller contracting authorities? Please explain your answer.

28. If so, would you be in favour of a simplified procurement regime for relatively small contract awards by local and regional authorities? What should be the characteristics of such a simplified regime in your view?

EASPD and its members are of the view that local authorities should not be under the same obligations as large national bodies to advertise contracts for existing social services at expiry, particularly in circumstances where no performance issues are raised in relation to the incumbent provider, because considerations of EU cross-border interest rarely apply in these cases: all that happens is that local competition is artificially stimulated and driven largely by cost considerations, given that 'quality' in social services is extremely difficult to measure as part of a paper exercise, with largely predictable results: disruption, discontinuity, damage to the market, deterioration of quality, lower pay for staff, worse outcomes for service users, and so forth.

Moreover, we think that once a local authority has chosen to tender a social services contract, the procedural rules governing the tender should be much clearer, so that other stakeholders (including providers and service users) can better understand the authority's obligations in respect of procedures to be followed and can challenge them if they are breached. The proposals set forth in the Green Paper (i.e. setting forth less strict publication requirements or allowing for the use of the negotiated procedure) could also be steps in the right direction as small local authorities often don't have the means or the capacity to understand the margin of manoeuvre they have to follow adapted procedures and, fearing a breach of primary law, often follow standard procedures, much more demanding in terms of time and resources.

Ensuring fair and effective competition:

This passage fails to recognise that in a number of member states, public authorities are both contracting authorities and suppliers at the same time: moreover they are frequently (in the terminology) "dominant" suppliers, in the sense that they are often the most expensive supplier yet unwilling to open up their own provision to the competitive challenge that they impose on others.

It would be constructive if the EU could acknowledge the nature of the 'quasi-market' for social services in this context.

"How to buy" in order to achieve the Europe 2020 objectives:

Describing the subject matter of the contract and the technical specifications:

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

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?

EASPD thinks that considerations linked to the production of a product or service are essential to a comprehensive assessment of whether or not they contribute to the achievement of the Europe 2020 strategy, which includes also social and environmental objectives – most relevant to us the eradication of poverty and full employment. In this respect, we advocate for technical considerations that, in the case of social services, could allow for the scrutiny of employment terms and conditions for social services staff to be introduced. Current practices of relegating such criteria to the contract performance phase are insufficient to ensure compliance with the objectives of “sustainable procurement” and also inefficient and costly, since, even if a provider is found to be non-compliant, it would be both difficult and costly to cancel the contract once it has been awarded.

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?

EASPD supports the ideas that through their public procurement practice, authorities, both local and national, should be encouraged to promote “design for all” and accessibility criteria in the provision of goods and services so as to encourage providers to design accessible solutions, thus ensuring greater inclusion at no greater cost. This is in line with the principles of the UN Convention on the Rights of Persons with Disabilities (see articles 4 and 9, for example) that has been concluded by the European Community and has entered into force in the EU on 22 January 2011.

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?

EASPD is in favour of justifying the restriction to local or regional suppliers for the procurement of social services to people with disabilities. This would allow taking into account factors such as territorial proximity, cultural background linguistic and socio-cultural awareness which are all very important elements in the support plans for vulnerable groups. As previously mentioned, good care for people with disabilities means tailor made services, which may also require coordination with services in other areas such as employment, education, transport or housing. Besides, contracts in this field are rarely of such a value as to attract the interest of cross-border providers.

Using the most appropriate award criteria:

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?

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?

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?

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?

We are in agreement with the proposal to abolish the criterion of the lowest price only for the award of contracts in the field of social care. Quality is the most important criterion in terms of the provision of services to people with disabilities and this must be accurately reflected in the award criteria in a meaningful way.

We are therefore in favour of the usage of independently qualified quality criteria for this purpose, be it mandatory quality standards in those countries where such standards have been agreed upon, or common definitions of quality (such as the European Quality Framework for Social Services developed by the Social Protection Committee, for example). EASPD would especially like to underline the importance of adequately capturing the views and needs of service users if any such definition or framework is to be meaningful.

In our experience, contracting authorities do not always properly consider the ramifications for service quality and outcomes of a low-price bid, because of the difficulties in examining what can realistically be afforded within the tender price, particularly in terms of workforce expertise, experience, skills, and so forth.

One solution to this would be for authorities to set requirements for bidders around workforce terms and conditions - therefore our answer to Questions 70, 70.1.1 and 70.1.2 would be "yes", because that will help purchasers to better understand the make-up of the price element of a bid, and further, to influence what a higher price is actually spent on, for example good terms and conditions for the provider workforce (which should enhance service quality) as opposed to, for example, higher rewards for company shareholders (which almost certainly won't).

Link with the subject matter/ with the execution of the contract

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?

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.)?

EASPD is in favour of softening or dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract. This would facilitate the use of procurement procedures to promote social objectives in line with the Europe 2020 strategy, such as promoting the employment of disadvantaged or vulnerable groups. If the EU is serious about reaching the social inclusion objectives of the strategy and about making positive use of articles 8, 9 and 10 TFEU, (promotion of equality, promotion of a high level of employment and combating discrimination) then it should allow contracting authorities to apply selection criteria based on characteristics of providers that are not *strictu sensu* linked with the subject matter of the contract.

Moreover and as mentioned above, EASPD would support the proposal to allow authorities to set requirements for bidders on employment terms and conditions for staff employed in social services. In this sector, the greatest proportion of the costs of running a service (over 80%) is personnel costs. It is therefore clear that any low-price bid has a direct and negative effect on the level and quality of services that can be provided. This is why it is essential for contracting authorities to consider the ramifications for service quality and outcomes of a low-price bid, and to examine closely the reality of what can realistically be afforded within the tender price, particularly in terms of workforce expertise, experience, skills, and so forth.

Social services:

97. Do you consider that the specific features of social services should be taken more fully into account in EU public procurement legislation? If so, how should this be done?

97.1. Do you believe that certain aspects concerning the procurement of social services should be regulated to a greater extent at EU level with the aim of further enhancing the quality of these services? In particular:

97.1.1. Should the Directives prohibit the criterion of lowest price for the award of contracts / limit the use of the price criterion / limit the weight which contracting authorities can give to the price / introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer?

97.1.2. Should the Directives allow the possibility of reserving contracts involving social services to non-profit organisations / should there be other privileges for such organisations in the context of the award of social services contracts?

97.1.3. Loosening the award criteria or reserving contracts to certain types of organisations could prejudice the ability of procurement procedures to ensure acquisition of such services "at least cost to the community" and thus carry the risk of the resulting contracts involving State aid. Do you share these concerns?

97.2. Do you believe that other aspects of the procurement of social services should be less regulated (for instance through higher thresholds or *de minimis* type rules for such services)? What would be the justification for such special treatment of social services?

EASPD believes that social services are entirely distinct from other types of public contract and we feel very strongly that they should be subject to a discrete set of rules that recognise their specific features and do not treat disabled and other vulnerable citizens in effect as 'commodities' whose support can be tendered on the open market in a similar way to office furniture, refuse collection or any number of other public contract opportunities.

Consequently, we think that the recognition of these specific characteristics of social services must be the starting point for the amendment of current public procurement legislation in such a way as to allow social services to operate in their best capacity for the benefit of the people they support and of the communities in which they are embedded.

EASPD promotes the "quality of life approach", according to which service delivery should be designed with the service users and the local community, be built around the choices and preferences of individual service users so as to allow them to enjoy a good quality of life¹.

Social services also contribute to social inclusion, as they are implemented with the involvement of the local community and in partnership with local authorities. Indeed, local communities, people with disabilities and families have often promoted the set up of services thus responding to needs that were not at that time met. This link with the local community and with the objective of general interest is also expressed by the work carried out by volunteers within services, something that enhances their on formal learning and brings added value to the services and their users. The focus of public procurement procedures hinders this role played by the voluntary sector of devising and contributing to build social services in partnership with local authorities and beneficiaries.

In our experience, for profit providers have proven to be the ones who have gained the most out of public procurement procedures, while smaller, non profit and person centred organisations are being driven out of the market because they cannot compete with them. Yet the goal of building a barrier free Europe should not be achieved for businesses only – it should also be achieved for the human sector. Social services for people with disabilities, for example, are not about competition. Rather, they are about choice, autonomy and human relationships.

Long term commitment is another characteristic of social services, especially those aimed at people with disabilities who need support during their entire lives. Additionally, the personal and sometimes intimate nature of many of the services that support independent living for people with disabilities is based on a relationship of trust and familiarity between service users and their care staff, which is built upon time and which can be jeopardised by the re-tendering exercises that have to be done at every contract expiry, and which cause uncertainty for service providers in terms of length of contracts and operating budgets, innovation and also individualized services.

These characteristics of social services have also been recognised by European legislation. The European Commission, in its Communication "Implementing the Community Lisbon programme: Social services of general interest in the European Union"² described social services of general interest as follows:

¹ See, on this topic: EASPD, Memorandum on a European Quality Principles Framework , Brussels, 7th December 2006 and Karin Astegger, Promoting Inclusion and Quality of Life: Quality of Planning Processes and Service Provision, EASPD, Brussels, 11th February 2011.

² COM (2006) 177 final

- They operate on the basis of the solidarity principle, which is required, in particular by the non-selection of risks or the absence, on an individual basis, of equivalence between contributions and benefits;
- They are comprehensive and personalised integrating the response to differing needs in order to guarantee fundamental human rights and protect the most vulnerable;
- They are not for profit and in particular to address the most difficult situations and are often part of a historical legacy;
- They include the participation of voluntary workers, expression of citizenship capacity;
- They are strongly rooted in (local) cultural traditions. This often finds its expression in the proximity between the provider of the service and the beneficiary, enabling the taking into account of the specific needs of the latter;
- An asymmetric relationship between providers and beneficiaries that cannot be assimilated with a 'normal' supplier/consumer relationship and requires the participation of a financing third party.

This is why we consider that:

- Public procurement is not the best financing and organisational procedure for social services for people with disabilities;
- In case social services cannot be excluded from the field of application of public procurement rules, then specific rules should be developed to allow social services to function in the best interest of their users and local communities, in which they are embedded, with the objective of promoting a high quality of life for all vulnerable people that they support. This is one reason why we would be in favour of reserved markets for non profit organisations, of the abolition of the lowest price criterion for the attribution of contracts in this sector; and of considering other important criteria such as quality, continuity, capacity to deliver services, working conditions for staff for the awarding of contracts.³

Concluding questions:

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?

EASPD would like to mention the fact that **alternatives to public procurement in the social sector can and should be promoted**. Promotion of alternative methods to fund and organise social services for people with disabilities can start from the experiences developed in the various Member States. These should draw attention to historical and operational specificities of SSGI and allow SSGI to fulfil their mission of general interest and ensure full participation of service users.

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

³ For further information on the impact of public procurement on social services of general interest in Europe see Informal Network of Social Service Providers, Report of the Seminar "The Impact of EU Legislation on Social Services", Brussels, 29th September 2009

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.

114. Please indicate a ranking of the importance of the various issues raised in this Green Paper and other issues that you consider important. If you had to choose three priority issues to be tackled first, which would you choose? Please explain your choice.

EASPD would like to call for a regime that allows social services for people with disabilities to operate based on the principles of quality of life for service users, quality of services developed in partnership with authorities, local communities and beneficiaries, and of general interest. Social services are rooted in local communities and operate on a principle of social added value rather than for profit.

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